

RUSTED STEEL CARGO: HOW TO AVOID RECEIVERS' CLAIMS



The carriage of steel is a major part of global trade, and significant to Members in the Bulk and General Cargo vessel markets.

In this article, we address the manner in which owners/members can protect themselves against receivers' claims for the delivery of steel cargoes that have suffered rust damage prior to loading.

BACKGROUND

The steel trade is one of the backbones of global commerce, and almost every bulk cargo vessel of a certain size will, at some point carry a cargo of steel products. For General cargo vessels, this is just a usual cargo in any event.

Today, the world population uses 1.6 billion tons of steel for construction purposes each year. That's enough to build 100,000 Panamax class vessels annually. Yet, this otherwise remarkably durable and strong material is susceptible to rust and corrosion over short periods of time when exposed to the elements.

STARTING POINT – THE LOAD PORT – WHICH SAFEGUARDS CAN BE EMPLOYED?

Before a vessel loads a steel product cargo anywhere in the world, P&I clubs generally recommend a pre-loading steel survey (PLSS). This is carried out by a surveyor nominated by the club and his task is to provide an accurate and extensive report on the state of the steel cargo before shipment. Extensive details are reported as to the exact state of rust damage (light/moderate/severe) to the steel products, and if more severe damage is observed (including damage referred to as “pitting” – where small holes appear in the steel) photographs are taken to show the extent of this damage.

The PLSS is then passed to the owners, charterers, shippers, and the club for review before any bill of lading is issued to the shippers. The purpose of this is to allow the master and owners to consider whether the damage is substantial and whether it would be inappropriate to issue a “clean on board” bill of lading for the steel cargo to be loaded.

Unfortunately there is no exact and binding authority applicable across the board on what level of rust or other damage is acceptable to a steel cargo even though it is very difficult to avoid there being some imperfections in the cargo before or during shipment. Industry standards vary from country to country, and as between shippers and receivers. *As such the decision as to whether the steel cargo has a degree of rust or other damage so as to compel the master clause the cargo document is always subjective to a particular cargo.*

The general rule therefore remains that for an owner to be afforded the protection of the law – he must clause the bills of lading (and before, the mate's receipts) with remarks about the rust damage that has been reported in the PLSS. This is usually done by endorsing the front of the bill with a comment such as *“Steel cargo partially/moderately/severely rusted – refer to PLSS for full details”*. It may at times be necessary, however, to be more detailed – especially if the destination country of the cargo requires very precise clausing to be shown on the face of the bill, in order for it to be effective.



If cargo laden is not “clean” then mate's receipts and bills of lading should be cloused accordingly.

Once this is done and the receivers' agent sees the bills of lading issued by the owners at the load port and passes it on to the receiver at the discharge port, all parties will be aware that the steel cargo has been loaded in a "non-clean" or even a damaged condition (to some degree or other) and no claims should be made against the owners after discharge of the cargo, as the bill clearly stated the condition of the cargo when it was loaded on board the vessel.

This is the procedure that is envisaged by the law and provides protection to an owner against frivolous claims from receivers who may claim that the cargo was damaged in transit by an owners' failure to properly care for the steel cargo.

IT'S NOT QUITE AS SIMPLE AS THAT THOUGH, IS IT?

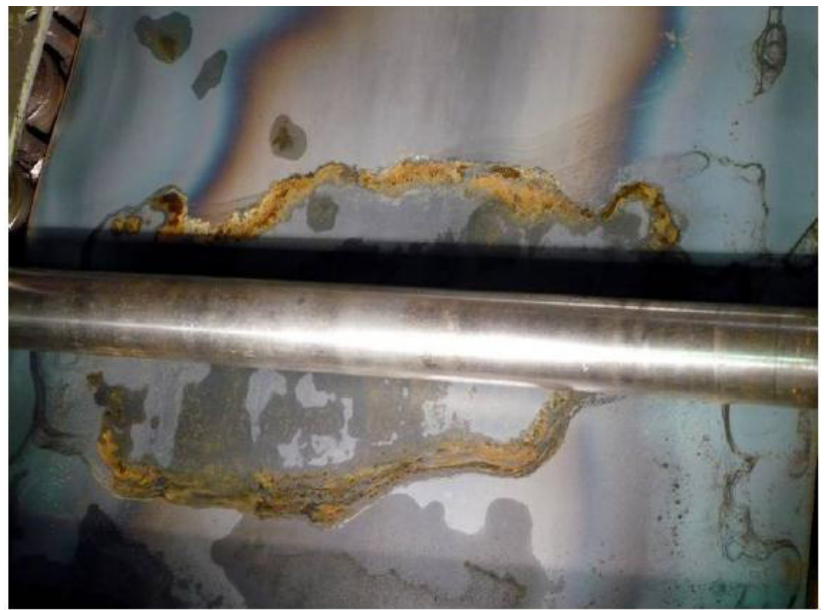
As owners are aware, many shippers will not accept a claused bill of lading even if there is moderate or severe rust damage to the steel cargo they seek to trade. The reason being that a claused bill may breach the terms of the letter of credit provided by the banks which finance the purchase of the steel cargo.

Hence, shippers demand a clean bill from the owners with no clausings or remarks of any kind; but, in accepting that there is damage to their steel products, the shippers / charterers will usually issue a letter of Indemnity (LOI) to the owners stating that any losses to the owners that result from issuing this clean bill will be indemnified to them by the shippers.

For the avoidance of doubt – under English law – this action is wrongful.

Whilst such "clean bill" LOI's are used daily throughout the world, they are not recognized in the English courts as they subvert the representational aspect of the bill which is to ensure that it contains a true and accurate reflection of the condition of the cargo on loading; and thereby allows the receiver to know what he has bought from the shipper. A bill with a knowing or suspected wrong statement can amount to a fraudulent misrepresentation and would be treated by the law and its courts accordingly.

The reality is, however, if an owner wants to keep good relations with a steel shipper and secure repeat business, his hand is usually forced and he takes the risk, against the LOI, of issuing a bill that does not accurately reflect the condition of the steel.



Some "damage" may only be revealed when the cargo is sent for further processing. Here an uncoiled steel cargo shows marks inside the coil which would not have been apparent from external examination on shipment.

Depending on the extent of the rust damage to the steel, on delivery the owner will be met by a receiver who either (a) refuses to accept the cargo all together, or (b) is forced to employ chemical treatment to remove the rust; either way a claim will be made against the owners and their P&I club.

It needs to be borne in mind, however, that :

- it is a requirement of P&I cover that bills of lading accurately state the condition of the cargo on loading;
- a Letter of Indemnity for a clean bill may not be legally enforceable under English law absent a legitimate dispute as to the condition of the cargo on loading (*Brown Jenkinson vs Percy Dalton [1957] 2 QB 621*)

A WAY TO AVOID THE RISK - THE SAGA EXPLORER [2012] EWHC 3124 (COMM)

The case involved the determination of a clause that was printed on the front of a bill of lading and read as follows:-

"The term apparent good order and condition, when used in this bill of lading with reference to iron, steel, and metal products [-] does not mean that the goods received were free of visible rust or moisture

If the shipper so requests, a substitute bill of lading will be issued omitting the above definition and setting forth any notations which may appear in the mates' or tally clerks' receipts"

This clause had been used before, and appeared before the 9th Circuit of the US Court in 1970 in the case of *Tokio Marine and Fire Insurance Co. Ltd v Retla Steamship Co* – and consequently takes its name from the case – the RETLA clause

In that case, the 9th Circuit accepted the validity of the RETLA clause on the bill of lading and held that when read as a whole, the Bill stated that the apparent good order and condition of the cargo was qualified by the clause which defined the term specifically in respect of iron, steel, or metals. The 9th Circuit effectively accepted that metal cargoes will invariably suffer rust damage which cannot in anyway be prevented by an owner and therefore that the RETLA clause afforded the owner suitable protection. General US maritime law today still applies the decision of the 9th Circuit and the RETLA clause remains valid in that jurisdiction (USA).

In the MV SAGA EXPLORER, however, Mr. Justice Simon refused to accept that the bill of lading could be read as a whole and incorporate the RETLA clause. He found that the clause breached article III rule 8 of the Hague Visby Rules which state that a carrier cannot introduce clauses into bills of lading which would limit his liability for losses or damage to the cargo whilst in his care; and he further went on to find that the owners agent had fraudulently issued clean bills of lading (albeit with a RETLA clause endorsed on the front page) knowing that the cargo was rust damaged.



Rust damaged cargo coil.

Most importantly, Simon J's judgment departed from the previous decision of the Privy Council and the 9th Circuit which found that RETLA could operate without subverting the apparent good order and condition term of the bill of lading.

The owners failed in their defence of the cargo claim.

Subsequently, whilst leave to appeal to the court of Appeal was granted, the matter was not pursued and hence, at this moment in time, the English Courts consider the addition of RETLA on a bill of lading to be ineffective.

WHAT DOES THIS NOW MEAN FOR OWNERS AND CARGO INTERESTS?

Put simply, if an owner is carrying a cargo of steel products which are slightly/moderately/severely rusted and has issued a clean bill of lading to the shipper for this cargo (whether or not in exchange for an LOL); and his bill includes a RETLA clause – if the bill is subject to English law and jurisdiction then the owner will not be afforded any protection for claims against him from receivers/cargo underwriters for loss of value to the steel cargo due to rust damage.

The RETLA clause is presently not recognized by the English Courts therefore it will be considered a nullity with no legal effect and afford the owners no protection.

Conversely, if the owners carry out exactly the same actions as above, but instead of English law and jurisdiction – he substitutes the General Maritime Law of the United States of America and the jurisdiction of the Californian courts then he will be afforded the full protection of the RETLA Clause which is has been recognized in the United States courts since 1970.



Investigations can reveal whether damage is due to salt water, fresh water or otherwise caused.

HOT TIPS

Cargo interests will be aware of the development and the standard form bills of lading in worldwide circulation today usually adopt English Law and Jurisdiction by default.

When shipping steel therefore, it is important to look at the jurisdiction clause particularly if the owner intends to include a RETLA clause. Cargo interests will know that the RETLA clause is not recognized by the English courts and will not afford the owner any protection whatsoever.

Accordingly, when agreeing to load a steel cargo, and during the pre-fixture negotiations, an owner should make it a clear and express terms that the bills of lading which will be issued must incorporate a RETLA clause and be subject to the law and jurisdiction of the United States – if the shipper insists on a clean bill of lading regardless of the state of the cargo.

Alternatively, the owner can be traditional, omit the RETLA clause altogether and clause the bill of lading with full remarks about the damage/rust that the steel cargo has suffered as per the findings of the PLSS.

The alternative is to take the risk of the owner being exposed to a potentially uninsured cargo claim, and being left with the recourse under the Letter of Indemnity, which itself may not be legally enforceable.

CREDITS

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