

Verification of Container Weights-The Shipper's Responsibilities

Introduction

New rules agreed by the International Maritime Organization place new responsibilities on the shipper to verify the actual gross mass of the container, including the goods, packing and stowing materials, pallets and the tare weight of the container. The rules apply to export containers and the responsibility therefore rests with the shipper to verify the gross mass weight of the container and goods. The new rules enter into effect from 1 July 2016.

Identifying the actual shipper responsible for verifying the gross can be confusing as this can vary according to the terms of the sales contract and the functions performed by the various parties in the maritime supply chain including, for example, the exporter, importer, Freight forwarder and NVOCC operator. This briefing note seeks to clarify which party as the shipper has responsibility for verification of the gross mass to the shipowner or his representative including the terminal operator.

Who is the Shipper?

The definition of a shipper in the IMO Guidelines on Verification of the Gross Mass of a Container Carrying Cargo is as follows:

“Shipper: means a legal entity or person named on the bill of lading or seawaybill or equivalent multimodal transport document (e.g. a “through bill of lading”) as the shipper and/or who (or in whose name or on whose behalf) a contract of carriage has been concluded with a shipping company. The shipper may also be known as the sender”.

This best guide focuses on identifying in practice and law exactly who the shipper is in regard to the application of the container weight verification rules.

The Traditional Shipper

In the general course of business in traditional sea transportation the exporter, who is obliged under a sales contract with an overseas buyer to arrange the carriage of goods by sea to the place of destination, is the shipper. Under these circumstances, he has to conclude a contract of carriage with a shipowner to carry the goods to the overseas port of destination. This contract is known as a contract of carriage by sea (or contract of affreightment). The shipowner (carrier) will issue a bill of lading or seawaybill setting out the terms of contract. The shipper will be named as the “shipper” on the bill of lading, seawaybill or other transport document

Accordingly, for the purposes of the container weight verification rules the shipper will be the party that is named on the bill of lading, seawaybill and other relevant transport document. In other words, the shipper is the person or party that enters into a contract of carriage with the shipowner. The “traditional shipper” can sometimes referred to as the “sender”, “actual shipper”, “physical shipper”, manufacturer, consignor or cargo owner.

The Traditional Shipper's arrangements with the Freight Forwarder as an Agent

In many cases the shipper as defined above, in practice, will instruct a freight forwarder to obtain a space allocation from the shipowner, ascertain sailing times and options, and arrange collection and delivery to the shipowner on his behalf. The freight forwarder may perform certain customs brokerage services, including customs entries and other services. The forwarder may even pay the freight up-front to the shipowner on behalf of the shipper. Under the new container weight verification rules the shipper may ask the forwarder to pack and secure the container, have the goods and container weighed, and make the container weight declarations to the shipowner on his behalf, effectively under power of attorney.

Under these arrangements, the forwarder is acting as an agent of the shipper and not as a principal. Accordingly, the shipper will consequently enter into the contract of carriage with the shipowner and will be the named shipper on the bill of lading, seawaybill or relevant transport document. The shipper will therefore be responsible for verifying the gross mass of the goods, packing and securing materials and tare weight of the container to the shipowner or the shipowner's terminal representative in accordance with the container weight verification rules. This may be different if the freight forwarder acts as a principle, see below.

Where the freight forwarder acts as a shipper's agent, his duty is to procure or arrange freight services with due diligence with those who perform the carriage, storage, packing and handling of the goods, including if the forwarder performs those functions himself.

Best practice advice: Nevertheless, it may be necessary and advisable for the shipper in every individual case to ascertain in which legal capacity the forwarder has acted.

Where the forwarder performs container handling, packing and stowage services, including weighing the container and goods on behalf of the shipper, it is recommended that the shipper enters into a clear contractual agreement with the forwarder. This is important because where the forwarder carries out services for the shipper as an intermediary, the shipper also enters into direct contractual relations with the other parties that perform those services. Also, in the absence of a specific contractual agreement between the shipper and the forwarder, the forwarder will be entitled to procure freight services and pack and stow goods in accordance with the forwarder's terms and conditions.

In regard to the provision of container weight verification services provided by the forwarder, it is therefore recommended that the shipper exercises due diligence to ensure that the forwarder undertakes accurate weight verification in accordance with the container weight verification rules. The shipper is ultimately responsible for the provision of an accurate verified gross mass weight for each packed container to the carrier or its terminal representative regardless of who packs the container.

The Shipper's Position When the Forwarder Acts as a Principal Rather than an Agent

The capacity of the forwarder can be difficult to determine when he is instructed to arrange the *carriage of goods*. The determining factor is whether the forwarder has acted as a carrier, i.e. as principal, or as a forwarding agent whose duty was only to procure freight on behalf of the customer-the shipper.

In modern container shipping it is common for freight forwarders/NVOCC operators to offer container shipping services as providers of ocean shipping services to shippers. Freight forwarders purchase slots from the shipowner and market their own sea freight services independently to shippers. They provide their own “house” bills of lading, seawaybills or other relevant transport documents in their own name. Under these circumstances, the forwarding agent is acting as a principal, rather than an agent. The forwarding agent will therefore enter into a contract of carriage by sea with the shipowner. The freight forwarder consequently is offering his services as a principal rather than as a freight forwarder and as such becomes the shipper and the forwarder’s name will appear on the shipowner’s master bill of lading, seawaybill or other relevant transport document as the shipper. As a result, the forwarding agent, as the contracting and legal shipper with the shipowner, is responsible for verifying the gross mass of the loaded container to the shipowner or his terminal representative.

It is increasingly common for shippers to enter into separate contractual agreements with forwarders and ocean carriers. With regard to the latter, the shipper typically negotiates volume contract rates and other terms with the shipowner. As a result, the shipper directly contracts with the shipowner. He enters into a contract of carriage of goods by sea when he ships the goods and his name appears on the carrier’s bill of lading, seawaybill or other relevant transport document. In this case, the shipper is responsible for verifying the gross mass weight to the shipowner or his terminal representative.

The shipper’s contract with the freight forwarder is a separate agreement, and often covers performance of the shipper’s contract with the shipowner, including booking space, inland haulage, warehousing, measuring the carrier’s performance and other logistics services. As set out above, if the shipper as part of this agreement specifies that the forwarder should undertake responsibility for weighing the goods and container on his behalf within the terms of the logistics contract with the forwarder, it remains the shipper’s legal responsibility to verify the gross mass of the loaded container to the shipowner or his terminal representative.

As set out earlier, the test is whether the shipper is contracting with the freight forwarder as an agent or a principal. Where the forwarder is the principal and enters into a contract for the carriage of goods by sea with the shipowner and the forwarder’s name appears on the bill of lading, seawaybill or relevant transport document, it is the forwarder’s responsibility to verify the gross mass to the shipowner or his terminal representative.

It is recommended that the shipper exercises due diligence in determining the role of the forwarder, i.e. whether the forwarder is acting as an agent or a principal. That will determine who is responsible for verifying the gross mass of the loaded container to the shipowner. As indicated above, where the forwarder undertakes container weighing services on behalf of the shipper as an agent it is recommended that the shipper undertakes due diligence to ensure that the forwarder fulfils these activities in compliance with the container weight verification rules.

It is further recommended that shippers open up discussions with their forwarders to ensure that the responsibilities of the parties are fully understood.

The position of Ex Works, FOB, FCA and FAS shippers

The container weight verification rules present particular challenges for consignees/importers who under a contract of sale with the seller/exporter at the country of origin assume the role of the shipper. For example, where under FOB, FCA and FAS contracts the consignee/importer enters into a contract of carriage with the shipowner and their name appears on the shipowner’s master bill of

lading, seawaybill or other relevant transport document the importer/consignee will be responsible for verifying the gross mass of the container and goods at the port of origin.

In practice, however, under most traditional FOB, FCA, FAS sales contract arrangements the consignor/exporter is responsible for presenting the goods to the carrier for shipment. Accordingly, the exporter/consignees name appears on the bill of lading, seawaybill or other relevant transport document. The exporter/consignee therefore becomes the shipper will be responsible for verifying the gross mass of the loaded container to the shipowner and his terminal representative.

As described above however, in some circumstances the importer/consignee under FOB, FCA and FAC sales contract arrangements can be responsible for arranging shipment from the country and port of origin. If they enter into the contract of carriage with the shipowner at the port of origin and their name appears on the carrier's bill of lading, seawaybill or other relevant transport document the importer/consignee becomes the shipper and will therefore be responsible for verification of the gross mass of the loaded container in accordance with the container verification rules determined by the competent national maritime administration in the country of origin.

In practice this is likely to present practical logistical difficulties for the importer/consignee. In such circumstances it is usual for importers/consignees to contract with freight forwarders and third party logistics providers to make the necessary shipping arrangements. As described above, responsibility for verification of the gross mass of the loaded container will depend on whether the forwarder or third party logistics provider is acting as a principal or an agent, who enters into the contract of carriage with the shipowner and whose name appears in the carrier's bill of lading, seawaybill or relevant transport document. Where the forwarder or third party logistics provider acts as an agent of the importer/consignee and the importer's/consignee's name appears on the master bill of lading, seawaybill or relevant transport document, the importer/exporter becomes the shipper and is responsible for verification of the mass of the loaded container.

If, as above, the importer/consignee is relying on the seller or his forwarding agent/logistics provider to provide weight verification services or to make weight verification declarations to the shipowner on his behalf, it is strongly recommended that the importer/consignee as the shipper undertakes due diligence to ensure that these parties are doing so in compliance with the IMO container weight verification rules and the administrative and enforcement regime of the competent State maritime authority.