



Overloaded Containers – Is this a matter of the past?

The new SOLAS-requirements regarding the verification

von Rechtsanwalt Dr. Jan-Erik Pötschke*

Introduction:

It is a common phenomenon that the actual weight of a container is usually different from the declared weight. Overloaded containers are a well-known risk in shipping and had been a contributing factor to marine casualties in the past. This is why the impact should not be underestimated. It has been reported that in some cases the actual weight is three times higher than declared. With the growing size of modern container vessels, the consequences on the safety of the ship become more severe if containerised cargo is misdeclared by a few tons. Wrong container mass results in incorrect stowage decisions which can cause the collapse of container stacks, the loss of containers overboard or even affect the vessels hull structure which in the worst case may result in a total loss of the ship.

The Maritime Safety Committee (MSC) of the IMO adopted on 21 November 2014 in the Resolution MSC.380 (94), inter alia, amendments to the International Convention For Safety Of Life At Sea (SOLAS) 1974 Chapter VI Part A, regulation 2¹ in respect of cargo information in order to supplement the requirement to provide the gross mass of cargo. The changes to the SOLAS Convention are applicable since 1 July 2016. The IMO-Guidelines of 9 June 2014² shall establish a common approach for the implementation and enforcement of the SOLAS-requirements. This article will focus on the legal implications of the amendment to SOLAS from the German-law-point-of-view for the carrier, shipper and terminal operator.

What is new or has been known before?

The IMO-Guidelines determine the main principle for obtaining and documenting the gross mass of a packed container. It is and has been a duty of the shipper even before the SOLAS-amendments to provide the carrier

with such information relating to the goods as is required for their carriage. He is the party who – in relation to the carrier – knows the details and characteristics of the goods and therefore should provide the carrier with the information in text form covering the quantity, number or weight of the goods as well as the leading marks and the nature of the goods (Section 482 (1) HGB).³ This provision is based on Art. III para 4 and Art. IV para 6 of the Hague Rules 1924⁴ and shall protect the carrier from the shipment of goods which may affect the seaworthiness of the ship. Although the SOLAS-amendments did not change the main principles, a new mandatory verification of the gross mass of a packed container is introduced. In the following two approved methods for verifying the gross mass are described:

(1) weighing the packed container using calibrated and certified equipment; or

(2) weighing all packages and cargo items, including the mass of pallets, dunnage, and other securing material to be packed in the container and adding the tare mass of the container to the sum of the single masses, using a certified method approved by the competent authority of the State in which packing of the container was completed.⁵

The information so obtained and verified by the shipper is the Verified Gross Mass ("VGM"). In Germany the BG-Verkehr has published on its website a non-binding sample for a procedure to verify the gross mass in accordance with method no 2.⁶ The VGM has to be entered into the shipping documents and communicated sufficiently in advance to be used for the preparation of the ship's stowage plan. The shipper is now bound to follow a certain procedure and to provide the carrier sufficiently in advance of the voyage with the VGM together with the shipping instructions or in a separate communication.

¹ Resolution MSC.380 (94/21/Add.1), www.imo.org/en/Publications

² Guidelines Regarding The Verified Gross Mass Of A Container Carrying Cargo, MSC.1/Circ. 1475, 9 June 2014

³ HGB = German Commercial Code

⁴ International Convention for the Unification of Certain Rules of Law relating to Bills of Lading (Hague Rules) Brussels 25 August 1924.

⁵ Regulation 2, para 4 of Chapter VI Part A SOLAS.

⁶ www.deutsche-flagge.de



Such document must clearly highlight that the gross mass provided is the VGM.

Who is responsible for verifying the gross mass?

The shipper is the responsible party for the provision of the VGM. Wherever a shipper delegates the verification procedure to a third party, *i.e.* a terminal operator, he is not relieved from his primary duty towards the carrier for the VGM. The terminal operator would, in the absence of other specific arrangements with the carrier, be considered as the servant of the shipper in that respect. The carrier, having a contract with the same terminal operator, would not become responsible for obtaining the VGM. This would require an additional agreement whereby the carrier agreed to take over the obligation to obtain the VGM of a container packed with cargo. However, this would be *contra* the main principles of the IMO-Guidelines but not prohibited under German law, although certainly not advisable for the carrier's legal point of view.

German law knows the documentary shipper ("*Ablader*" in German), a person who delivers the goods to the carrier for carriage and who has been designated by the (contractual) shipper as such for the purpose of being recorded in the bill of lading (Section 513 para 2 HGB). As the "*Ablader*" is considered to be under the directions of the shipper, he would be a person who could become responsible for the physical provision of the VGM. This however does not change the main principle that the (contractual) shipper is responsible for the provision of cargo information, including the VGM, to the carrier as he is the party of the contract of carriage and not the "*Ablader*".

What are the consequences for the shipper, the carrier and the terminal operator?

The shipper has to produce a VGM document for the container packed with cargo. If he fails to do so, the container should not be loaded onto the ship. The VGM has become a prerequisite for the container to be loaded on board of a ship. A carrier accordingly can deny shipment of containers without the VGM but the ultimate decision, whether a container is loaded or not, remains with the master of the vessel. The SOLAS-amendment does not change this principle, in particular it does not contain an entitlement of the shipper that its container must be loaded with a verified gross mass certificate (14 IMO-Guidelines).

The IMO-Guidelines contain provisions to safeguard the exchange of information between the shipper, the terminal operator and the carrier. The parties are encouraged to use electronic means (6.3 IMO-Guidelines). It remains

the carrier's responsibility to assure that the shipper is aware of the deadline for submitting the information about the VGM (6.3.2 IMO-Guidelines).

In the event that there is no VGM available at the time the containers arrive at the terminal or thereafter prior to loading, the IMO-Guidelines allow the master, his representative or the terminal representative to obtain the VGM of the packed container on behalf of the shipper (13.1 IMO-Guidelines). By this provision, an option – no obligation – is granted to avoid a backlog in the movement of such containers. However, in the absence of an agreement between the parties, this procedure does not shift the responsibility to provide the VGM from the shipper to the carrier or the terminal operator. Both would only be acting for and on behalf of the shipper. The agency of the master and the terminal operator to obtain the VGM on behalf of the shipper is to be assumed because of the principle interest of a shipper in a continued and efficient onward movement of the container.

If a container without VGM is nevertheless stowed on board, the consequences can be severe, factually and legally. Such action could be considered as an acceptance by the carrier of a container without a VGM, *i.e.* a case of a known misdeclared container. The carrier risks that he may not be able to defend its liability in cases of cargo damages caused by the misdeclared container. The liability principle of the Hague-Visby-Rules, as it is also stipulated in Section 498 HGB, provides for a general liability of the carrier for cargo damages during the period where the goods are in its custody, however, not in those cases where the loss of or damage to the goods was due to circumstances which could not have been avoided by a prudent sea carrier exercising due care. It would be very difficult to argue that the carrier acted with the duty of a prudent carrier when he accepted containers on board without the VGM. Such carrier would likely be considered having acted negligently by accepting such a container. Should this particular container cause damages to the ship and the other cargo due to its overweight, there would be no defence left for the carrier on the basis of duty of care. The carrier would be liable in the first instance and could (if at all) seek recovery from the responsible shipper, however taking into account a contributory negligence of the carrier.

The District Court of Hamburg has decided in respect of the MV "MOL COMFORT"⁷ that a carrier cannot rely on Section 498 (2) 2 HGB to be relieved from its liability when the ship's command commences a voyage with a vessel despite its knowledge that the draught of the vessel is not in compliance with the loading calculation and

⁷LG Hamburg RDTW 2016, S. 187



the calculated hogging condition of the ship. The conclusion of the judge was that the vessel was not in a seaworthy condition and this was or could have been discovered by the master. When a carrier accepts containers without the VGM, the situation would be comparable if it can be established during the investigations that the containers without VGM were overloaded and caused damages to the other cargo. The judge would ascertain that the damage could have been avoided by a prudent sea carrier exercising due care by not accepting containers without a VGM as it is explicitly provided for in the SOLAS-amendments and the IMO-Guidelines.

Summary:

Although the plague of overloaded containers may probably not be entirely a matter of the past, the carrier has now a stronger position to reject containers without a VGM. The carrier is well advised to make use of its right of refusal to load such containers as otherwise he risks to be liable for cargo damages caused by overloaded containers. With the new SOLAS-requirements an instrument is provided which, if used as intended, will have an impact on the safety of the ships and will hopefully reduce the risks caused by overloaded containers.

Disclaimer

The content of our jusletters has been researched thoroughly. However, the general presentation of the legal situation cannot account for the specifics of an individual case. The jusletters do not provide legal advice or legal opinions on any particular matter or case; they are not intended to serve as a substitute for consultation with appropriate legal professionals. No reader should act or refrain from acting on the basis of any information contained herein without seeking appropriate legal or other professional advice on the specific legal issues, concerns and conditions at issue. Should you have any further questions, please do not hesitate to contact us.

This and other jusletters can be found on our website www.ahlers-vogel.de.

***Dr. Jan-Erik Pötschke** is a partner in our shipping group in Hamburg working principally for Owners, Shipyards, P&I Clubs, Ship Managers and Brokers. His international training includes work with maritime law firms in Bombay in Singapore. He has extensive experience in charter party, sale and purchase and bills of lading disputes either in the commercial courts or by arbitration (Hamburg, London or international) and gained particular expertise in areas of shipbuilding, offshore supply contracts and financial restructurings for German issuing houses. He is a member of the German Association for International Maritime Law (Deutscher Verein für Internationales Seerecht), the German Association for Transport Law (Deutsche Gesellschaft für Transportrecht e.V.) and the German/Singapore Legal Association (Deutsch-Singapurische Juristenvereinigung e.V.).

Contact Shipping Group:

Prof. Dr. Rolf Herber
Dr. Bernd Laudien
Hartmuth Sager
Philipp Landers
Dr. Jan-Erik Pötschke
Martin Rosenzweig, LL.M. (Southampton)
Gregor Harbs, LL.M. (Cape Town)
Dr. Wilm Steingröver
Ingo Krökel
Katharina Oechsle
Dr. Anne-Kathrin Drettmann, LL.M. (Bristol)
Constance Emmerich

Ahlers & Vogel _ Hamburg
Schaarsteinwegsbrücke 2 _ 20459 Hamburg
Telephone +49 (40) 37 85 88-0
Telefax +49 (40) 37 85 88-88
E-Mail hamburg@ahlers-vogel.de

Dr. Tobias Eckardt
Hendrikje Herrmann

Ahlers & Vogel _ Leer
Königstraße 32 _ 26789 Leer (Ostfriesland)
Telephone +49 (0491) 45 45 229-0
Telefax +49 (0491) 45 45 229-99
E-Mail leer@ahlers-vogel.de