

Legal liability for container security

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Received 14 November 2018
Revised 14 February 2019
Accepted 3 April 2019

Abstract

Purpose – It is commonly known that numerous incidents of container security failure are detected on a daily basis for which nobody is held legally liable. This state of affairs is essentially due to the shippers providing erroneous information, either inadvertently or by design. However, none of the stakeholders such as the carrier, the port operator, the inland transporter or the dry port operator are saddled with the legal responsibility of verifying the correctness of the information provided by the shippers or moving against them legally for misrepresentation of facts.

Design/methodology/approach – This paper discusses the issue of container security from a legal perspective with a specific focus on the liability for security failure. While discussing the reasons for non-development of a globally standardized legal regime for container security, this paper also endeavors to suggest possible solutions for the abysmal state of affairs.

Findings – This state of affairs persists despite the shipper being saddled with the additional responsibility of providing documentary evidence of verified gross mass of the cargo stuffed in the container by International Maritime Organization.

Originality/value – There is apparently no visible legal action that appears to have been taken against the culprit responsible for the security failure. Thus, the loopholes in the existing legal regime are exploited by all concerned for commercial reasons.

Keywords Container liability, Container security, Verified gross mass

Paper type Research paper

1. Introduction

The world of transport has changed considerably over the past few decades. International transportation of goods is increasingly carried in containers on a door-to-door basis, involving more than one mode of transportation under a single contract. The increasing use of containers, together with technological developments improving the system for transferring cargo between different modes, has also considerably facilitated the development of containerization (UNCTAD, 2003).

However, this kind of transportation process signifies the involvement of multiple service providers in addition to the ocean carrier such as rail transport operator, road haulers and inland container freight station operators and so on. Such involvement of multiple stakeholders leads to difficulty in affixing precise responsibility for loss or damage to goods (Hawkes, 1989).

Furthermore, such transportation process is covered by different national multi-modal transportation laws or contract law governing transportation of goods (Closs and McGarell, 2004). All such laws specify the liabilities of the transporter for loss or damage to goods caused when the goods were in the custody of the transporter but is largely silent about the



liability of the shipper for mis-declaration of cargo details such as weight, number and quality of cargoes stuffed in the container ([The USA Intermodal Safe Container Transportation Act, 1992](#)). Such mis-declaration results in the mismatch between cargo found stuffed inside the container and the details of the same mentioned in the shipping documents such as bills of lading and the shipping manifests submitted to various stakeholders. This mismatch can be considered as failure of container security.

In addition to the various arguments stated above in the paper, there are a few more listed here under, which will further enhance the general standards of container security if the inland container transportation laws are amended. For instance, it will definitely help in identification of precise risks carried by the specific stakeholders at the time where failure of container security is breached. Furthermore, it will go a long way in increasing the transparency of the entire transportation process. In addition, it will also assist in the enforcement of due diligence responsibility of the carrier strictly. Furthermore, it will help in the reduction of ambiguity in identification of risk holder jurisdiction. Apart from this, it will also assist in apportioning of the blame for the container security risk failure and share of compensation payable. Finally, It will also clarify as to who should prosecute the shipper for misinformation provided if any. Thus, it will also help in resolving the legal implications for resolving the legal implications.

The concept of container security assumed greater importance after the terrorist attacks on 9/11 in the USA. As a result of which the USA formulated various laws and regulations to prevent reoccurrence of such a tragedy. A large number of such regulations focused on the transportation of illegal goods and contraband in ocean containers to the USA. Such laws and regulations were also subsequently legislated in other countries. However, in the interest of simplicity and clarity, this paper focuses only on the US legal regime governing container security.

2. Importance of container security

Container security has yet to find a universally accepted definition. The concept is subjective and has been indirectly defined by International Container Standards Organization as “*retention of safety and security of the containerized cargo, as declared in the cargo manifest (in terms of value, quantity and quality) by maintaining the integrity of the container seal or security device (CSD) and non-causal of third party damage*” ([World Shipping Council, 2006](#)).

The above definition signifies the importance of the following aspects ([Marlow, 2010](#)):

- Integrity of container seals is paramount to determining the breach of container security. In other words, if the seals were intact, it would be the onus of the claimant to prove failure of container security.
- The cargo details stated in the cargo manifest are critical in proving breach of container security. In short, it would not be possible to prove failure of container security, until and unless the details of cargo stuffed in the container do not match with those stated in the manifest ([Williams et al., 2008](#)).
- It would be left to the prudence and judgment of the customs officer on the site to decide whether or not the container security has been breached, unless the claimant can provide evidence to prove otherwise.
- Neither the container nor the cargo has caused third party damage, even if the seals are found intact and there is absence of discrepancy with regards to cargo details declared in the manifest.

- Container security would be considered to have failed on the occurrence of any one or all of the three mentioned events namely tampering of seals, discrepancy in cargo stuffed and manifests and directly causing third party damage.

3. Necessity for an effective legal regulatory regime

According to [McNicholas \(2007\)](#), “mis-declaration of cargo in manifests filed by carriers with respective Customs is a worrisome problem that offers an illegitimate means to transport illegal/illicit cargoes”. The International Maritime Organization’s (IMO) cargo committee inspects approximately 15,000 containers annually and finds a substantial percentage of containers with mis-declared contents. The US Customs have pegged this figure at 32 per cent after conducting a yearlong audit of containers in seven countries.

The mis-declaration could be a noninvasive mismatch due to an inadvertent or deliberate error in packing, stuffing and reporting of the contents by the consignor to avoid customs duty or freight or smuggle prohibited goods or an invasive mismatch due to theft from container or cargo substitution in a container, having same weight to evade detection by weighment.

Generally, Customs assume that if the door handle seal is intact, the cargo inside the container has not been tampered with, despite considerable empirical evidence to the contrary. Hence, unless the container seals are found to be broken, the mismatch of cargo found after opening the container is not considered by the Customs as a trespass. In such circumstances, the Customs hold the carrier who has filed the manifest liable and may levy penalties for short landing of cargo and loss of revenue. It may also allow amendment of manifest in certain circumstances.

However, as far as the Customs are concerned, the onus of correct declaration is on the carrier who is transporting the containers. However, due to commercial and time constraints, the carrier is unable to examine the contents of the cargo stuffed inside the container and is necessarily to trust the information provided by the consignor/shipper.

Since the September 11, 2001 terrorist attacks on the World Trade Center in New York, the focus has been on minimizing security risks associated with the international flow of goods and services. Although the security of ports and sea lanes was beefed up worldwide in the aftermath of 9/11, maritime transportation remained a “weak link” due to the ease of concealment within a ship and the assured freedom of navigation at sea ([Bichou, 2011](#)). The growing containerization of trade has compounded the problem of such illicit transfers.

Hence, several initiatives and regulations such as Container Security Initiative (CSI) Customs Trade Partnership against Terrorism (CT-PAT) and 24-Hour Rule were formulated by the USA for strengthening security in the international supply chain. These initiatives were subsequently adopted by most other national governments such as the European Union, Japan, Canada, China and Australia amongst others. These are essentially cooperative efforts between the various national Customs Services and private sector firms to deter illegal activities such as drug trafficking, wildlife and flora smuggling, money laundering and the illegal import and export of prohibited items. After 9/11, the program shifted its primary focus from the prevention of the movement of narcotics to counter-terrorism, although the former remains an important program objective. Its objective is to increase supply chain security through an accreditation process for all private sector stakeholders in the international supply chain, including importers and exporters, brokers, forwarders independent of transport mode, e.g. air, sea, land and terminals ([Rowbotham, 2014](#)).

The responsibilities of the carrier for ensuring container security during the sea leg of the international transit have been clearly defined by The Hague Visby Rules. However, the clarity is lost during the land transportation process due to involvement of multiple stakeholders such as port authorities, inland transporters and dry port operators who transport and handle the container to the final destination.

To resolve this conundrum and establish a uniform legal regime to facilitate development and standardization, efforts were made. The process was commenced by the International Institute for the Unification of Private Law about eight decades ago. Subsequently, the Comité Maritime International and a “Convention on Combined Transport – Tokyo Rules” (The Tokyo Rules) were drafted in 1969. The International Chamber of Commerce also assisted in the process by drafting the Combined Transport Document. However, it was not until the late 1980s that the United Nations Convention on International Multimodal Transport of Goods was adopted (hereinafter referred to as the MT Convention). However, the MT Convention has not entered into force as yet (Szyliowicz, 2014).

To resolve the issue of liability involving multimodal transport, two different approaches have been developed: the first is uniform liability approach while the second is the network liability approach. Under the uniform liability approach, a single liability regime is applicable to all transporters involved irrespective of the leg in which the loss/damage occurred (Hancock, 2009). On the other hand, under the network liability approach, different rules, depending on the leg, mode of transport used and the applicable law involved is taken into consideration depending on when the loss or damage occurred (Ulfbeck, 2011). Each system has its own advantages and disadvantages. However, the former approach has become more popular due to its simplicity (Faghfour, 2010).

The UNCTAD/ICC. (1992) Rules and the Tokyo Rules also entered into force in 1992. Both these Rules form a foundation for liability laws involving the multimodal transporter in case of loss/damage sustained by the goods. This is done by providing for a network system in terms of liability and which has found wide acceptability in the industry (Xerri, 2009).

As regards the liability of the shipper/carrier for erroneous declaration of containerized goods, it becomes apparent and critical to understand the *mens rea* of the stakeholder on one hand and the liability his act of erroneous declaration has given rise to on the other. Perhaps, considering the potential of damage caused by the liability in question, the time has arrived to look beyond the co-relationship coefficients between the freight earned and the compensation payable. This argument also indicates a necessity for re-visiting the limitation clauses in the various sea transportation legislations. Eventually, it may force the carrier to discharge/exercise its due diligence responsibilities more effectively.

Many of the above mentioned security initiatives are essentially certification programs based on the principle that the customs authorities in a country enter into partnership with companies and offer them reduction in security controls in return for which the companies voluntarily agree to undertake to follow the prescribed security drills. In a study undertaken in 2006, the Cross Border Research Association in Lausanne presented a framework for analysis of security initiatives for the supply chain that all security measures work towards five different goals:

- (1) facility management, securing premises where goods are handled, stored and loaded;
- (2) cargo management, protecting the goods during all stages of their transportation;
- (3) human resources management, ensuring that the background of all personnel is checked and that they are reliable and aware of risks;

- (4) information and communication management, protecting important data and using information as a tool for tracing illegal activities and shortcomings in security; and
- (5) business network and company management systems, including security in the internal and external structure of the organization and in the company's business systems.

4. Amendments to the Safety of Life at Sea

Despite the enactment and implementation of various national and international regulations such as CSI, CT-PAT and 24-Hour Advance Manifest Rule, it has been noticed that, there still exist in a significant number of cases a mismatch between the actual contents found in a container and those that have been declared in the shipping manifest submitted to the Customs by the carrier.

Furthermore, it should also be noted that the manifest itself is prepared by the carrier based on the information provided by the shipper himself in writing. Yet the Customs, Ports and other authorities supervising the process of stuffing, inland transportation and loading of the container on a vessel have found it almost impossible to hold anybody responsible for this mismatch. In addition, the complexity of the global supply chains also makes it difficult for the authorities to precisely identify the particular shipper who has provided the necessary information in writing in the first place.

Furthermore, to rectify this situation, the Maritime Safety Committee of the IMO has recently recommended amendments to the International Convention for the Safety of Life at Sea (SOLAS) regulations relating to declared verified gross mass (VGM) of the container. This amendment has taken effect on July 1, 2016. Under the new amendment, it is mandatory for the shipper to declare in writing the VGM of the contents of the container. However, it still leaves the question as to how the declaration of VGM submitted by the shipper can be re-verified and if so by whom and at what stage. Furthermore, what variations in findings of the re-verified gross mass will be considered acceptable and if found to be incorrect, what action should be initiated against the shipper for inaccurate declaration by whom and under what law and which jurisdiction. It also leaves the question of liability of the shipper for erroneous declaration. In addition, to assist all stakeholders involved in adhering to the new Rules, the IMO has also published specific guidelines.

According to Rule 2.1 of the guidelines, the person responsible for submitting a VGM in a specified format is the shipper. However, the guidelines are silent about the definition of the shipper. The VGM too is expected to be signed by the shipper himself or his duly authorized representative.

In this context, the question about the identity of the shipper also assumes importance, as in a significant number of cases there are more than one shipper and several intermediaries such as consolidators, forwarders, slot charterers present between the shipper and the final carrier. In addition, in a significant number of cases, the cargoes are deconsolidated and reconsolidated before they reach the final destination. This makes it increasingly difficult to identify the specific shipper who should be held responsible for mis-declaration. In addition, there is also the question of factory stuffed containers where containers are stuffed and sealed at the premises of the shipper in the presence of Customs officials.

One of the major leading case on this topic is the case concerning a major fire and explosion on board the container ship ACONCAGUA on December 30, 1998, resulting in extensive damage to the vessel and cargoes on board. The source of the explosion was immediately identified to be a container loaded with 334 kegs of calcium hypochlorite

(declared to be UN1748). Mr Justice Clarke found the shipper liable to the carrier under the bill of lading contract for shipping dangerous goods in breach of Article IV (6) of The Hague Rules, with an initial judgment amount in the sum of USD 27.75 million, and further extensive quantum issues still to be dealt with. Mr Justice Clarke found that this suggested poor quality control (*CSAV v. Sinochem Tianjin Limited* [2009]).

After having taken into consideration all the above mentioned facts, it is obvious that the critical importance of container security has been recognized globally and several measures have been adopted and implemented by various national and international organizations, either fully or partially. However, some questions remain unanswered such as the specific responsibilities of the carrier, port operator, inland transporter and dry port operator with regard to container security particularly to the third party.

During our research, it was observed that the application of the liability principle varied in different countries. In some countries, the shipping lines are held responsible, while in others, the consignees have been held responsible and penalized. According to anecdotal evidence, the beneficiary of the mis-declaration is in principle considered liable for the mis-declaration and loss of customs revenue. However, this argument fails to hold water in the absence of appropriate evidence.

5. Conclusions

The responsibility of a carrier for the carriage of a container commences from the time the cargo is stuffed inside the container and the container is sealed by the carrier until the time the container is de-stuffed and the cargo is delivered to the consignee. This responsibility of the carrier is governed by the terms and conditions stated in The Hague/Hague Visby Rules as the case may be. The carriage contract between the shipper and the carrier is evidenced by the bill of lading.

According to these Rules, the carrier is responsible for the safe carriage of goods rendered in his custody by the shipper and hence he is liable to the holder of the B/L for loss or damage which is however limited to a certain amount mentioned in the limitation of liability clause stated in The Hague/Hague Visby Rules.

It should be mentioned here that the cargo details stated in the Bs/L are precisely those which have been provided by the shipper in writing. However according to The Hague/Hague Visby Rules the carrier is not legally obliged to verify the contents of the cargo whose details are stated in the B/L. The carrier invariably mentions under the column "Cargo Details" either said to contain [...] or shipper's load stow and count. By using these words, the carrier disowns any liability for the contents of the container if the container seal is not tampered with and is intact.

Furthermore, though there are numerous instances of the shipper claiming against the carrier for shortage/damage to the goods, it is uncommon for a carrier claiming against a shipper for excess or heavier cargo found at the destination. It is also not common for a carrier filing a suit against a shipper for failing to declare accurate details. This is because Art III (3)(a-c) and (5) of The Hague Rules are silent about the duty of the carrier to verify the contents of the cargo rendered into his custody for onward transportation, except the quantity, the external condition and the leading marks of the goods.

Even the latest amendment to SOLAS, regulations requiring the shipper to declare the VGM is silent about the obligation of the carrier to re-verify the weight at a government-authorized weighbridge. Furthermore, the amendments are also silent about the responsibility and liability of the authorized weighbridge for their acts of negligence and errors.

As regard to seaports, it can be unequivocally stated that neither the Federal Seaports Act nor the ISPS Code or the CSI regulations impose any obligation for ensuring the container security at the port. This is because the port is legally considered as a Bailee of the cargo in its custody and hence is just providing a sea-land interface. Its duty is limited to ensuring that the container is discharged from the vessel with its seal intact and is eventually delivered to the inland transporter or consignee with similar intact seals. The port does not even handle the shipping documents and as such is unaware of the contents of the container. Hence, the port does not play any role in enhancing/maintaining container security. It should also be noted in passing that the contract between the carrier and the port is silent about the port towards the maintenance of container security.

With regard to the compromising of the ISPS code, it is obvious that the breach of container security also results in the vessel becoming unseaworthy. However, the consignee becomes aware of this factor only after the container reaches destination and is de-stuffed, i.e. after the voyage is complete. As such, it becomes rather fruitless to terminate the contract of carriage. However, in several cases the consignees have refused to accept the consignment due to the contents not matching with the description in the manifest and thus terminating the contract of carriage. Apart from the above, we feel there are also some additional advantages such as it has the potential to reduce misuse of the unknown clause by carrier as provided for by the Hague-Visby rules. It is a widely known fact that in several cases the shippers are essentially subsidizing the empty container repositioning costs of carrier; hence, carriers are not too keen in prosecuting them for erroneous information provided by them.

In the absence of the appropriate laws, different modes of inland transporters are governed by different laws and different procedures too. This might help in standardization of such issues. Such a state of affairs creates confusion and delay, and the culprit escapes responsibility and somebody suffers injustice without redress. Furthermore, the Hague Visby rules are silent about third party liability, and associated risks are inadequately covered.

There is no gain saying by stating the fact that the entire transportation process is governed by multiple laws, some which are civil in nature while some of them are administrative. The objectives and purposes of every such law are different. As such, a single research paper cannot attempt to cover the entire gamut of laws governing the entire transportation process. Nor is this paper attempting to do so. However, this paper is focusing on the simple counterfactual, i.e. ratification of the Rotterdam Rules and its probable impact on the aspect of container security. We are purposely ignoring the other probable impacts of ratification of the Rotterdam Rules as we consider them beyond the purview of this paper.

As regard to the responsibility of the Multi-Modal Transporter (MTO), his duty is limited to transportation of the container to the inland destination from the seaport or other way around and is discharged from all obligations if the container is delivered with its seal intact. The MTO enters into a contract of transportation with the carrier/shipper as the case may be and that contract is governed by C.O.T.I.F or C.M.R depending on the mode of transport. He also does not handle the documents and purely acts as an agent of the carrier/shipper/forwarder. As such, the MTO too is unable to accept responsibility for container security failure.

The duties and responsibilities of the Dry Port Operator (DPO) are governed by the guidelines of the Department of Commerce's and Customs and Border Patrol (CBP) under which it is set up and operates. Its operations too are subject to review by CBP. It essentially acts as a facilitator for conducting stuffing/de-stuffing operations by providing labor,

equipment and temporary storage facility. The DPO also organizes the presence of Customs officials on the dry port premises to conduct examination of EXIM cargoes. However, his contractual obligations with the carrier are limited to providing services which are meant to be supervised by CBP and the carrier or his agents. As such the DPO's obligations to ensuring container security is limited to ensuring integrity of container seals and does not extend to examining of cargo contents stuffed inside the container.

In conclusion, it can be said that the responsibility for providing accurate details of the cargo stuffed in the container lies fully and squarely on the shipper. However, the current provisions of the legal regime, i.e. The Hague/Hague Visby and the Hamburg Rules, are silent about the responsibilities of the stakeholders involved in the transportation process about *verifying* the cargo declaration of the shipper and the legal procedure that should be taken if the declaration is found to be erroneous.

The guidelines on submission of VGM by the shipper to are not without lacunae such as absence of deadlines for submission of VGM, the charges for the Master to weigh any unverified containers etc. The sea carriage contracts, charter parties and the Bills of lading too are silent about the importance of the VGM and need to be reviewed from this perspective. This will provide desired clarity in resolving future disputes involving the rightful responsibility of the shipper.

6. Recommendations

It would be beneficial for the enhancement of the container security if the Rotterdam Rules are ratified by all states and brought into force. This will render the MTO and DPO into Maritime Performing Party responsible for exercising due diligence by discharging their duties. It will also bring the multimodal transport document on par with the B/L.

The weighment certificate provided by the authorized weighbridge should also be considered a legal document which would make the weighbridge operator liable for erroneous document or negligence.

The Customs supervise the entire container stuffing process, as well as sealing the container before the commencement of the transportation process. However, they are never held responsible or liable for the failure of container security. This is in spite of the fact that they control all the powers for permitting of cargo stuffing and transport. It would go a long way if the Customs were made answerable for security failure.

Finally, the carrier should be obliged to re-verify the cargo details provided by the shipper. If he chooses not to do so then he should be held liable for container security failure.

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Further reading

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