**27 January 2010**

# Welcome to TT Talk

**No. 125 in the series**

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### 1. US ‘10+2’ Rule - fully enforced per 26 January 2010

The US '10+2' Rule (‘Importer Security Filing and Additional Carrier Requirements’) requires the US importer to submit electronically 10 data elements of advance cargo information to the US Customs and Border Protection (CBP). In addition, the ocean carrier must provide 2 message sets. The '10+2' Rule applies to cargo arriving in the US by ocean vessel, but bulk cargo, unless placed in containers, is excluded from the ‘10+2’ filing requirement.

Importers (or their ‘filing agents’) must submit the following 10 data elements:
(1) Seller;
(2) Buyer;
(3) Importer of record number / FTZ applicant identification number;
(4) Consignee number(s);
(5) Manufacturer (or supplier);
(6) Ship to party;
(7) Country of origin;
(8) Commodity Harmonized Tariff Schedule of the United States (HTSUS) number;
(9) Container stuffing location; and
(10) Consolidator.
Data elements (1) - (8) must be submitted no later than 24 hours before the cargo is loaded aboard a vessel destined to the United States, data elements (9) and (10) are to be submitted ‘as early as possible’, but no later than 24 hours before the ship’s arrival at a US port. Other criteria apply to in-bond shipments or to ‘foreign cargo remaining on board’ (FROB) shipments.

Ocean carriers have to provide the following 2 message sets:
(1) Stow plan (data elements: vessel name, vessel operator, voyage number, container operator, equipments number, equipment size and type, stow position, hazmat code (if applicable), port of load, port of discharge); the stow plan must be submitted no later than 48 hours after the vessel departs from the last foreign port.
(2) Container status messages (data elements: event code being reported, container number, date and time of event, status of the container (full or empty), event location, vessel identification); container status messages must be sent within 24 hours of entry into the Ocean carrier’s tracking system.

For the precise details of the required information, please use the following web link to the US Federal Register (chapter 'III. Carrier and Importer Requirements', in particular pages 71731-71732 for carriers and page 71734 for importers):
http://edocket.access.gpo.gov/2008/pdf/E8-27048.pdf

The website of US Customs and Border Protection (CBP) provides guidance on the application in practice of the '10+2' Rule:
- US CBP start page for 'Security Filing 10+2':
http://www.cbp.gov/xp/cgov/trade/cargo_security/carriers/security_filing/
- Leaflet 'Importer security filing and additional carrier requirements' (version August 2009):
http://www.cbp.gov/linkhandler/cgov/newsroom/publications/trade/import_sf_carry.ctt/import_sf_carry.pdf
- Importer security filing '10+2' program - frequently asked questions (last updated 30 Sept 2009):
http://www.cbp.gov/linkhandler/cgov/trade/cargo_security/carriers/security_filing/10_2faq.ctt/10_2faq.doc

The '10+2' Rule took effect on 26 January 2009, but during the first twelve months CBP has 'shown restraint' in enforcing the rule. The CBP 'Frequently asked questions' document (web link above) confirms (at page 39) that **this flexible enforcement period has ended on 26 January 2010**:

'1. The flexible enforcement period ends on January 26, 2010. Will CBP begin assessing liquidated damages for ISF violations for cargo that is arriving within the limits of a port in the United States by January 26, 2010, or is it for cargo that is laden foreign on January 26, 2010?

Pursuant to new 19 CFR 149.2(g), ISF Importers must comply with the ISF requirements on and after January 26, 2010. Therefore, CBP may assess liquidated damages for ISFs that are required to be submitted on January 26, 2010, for ISFs that are not complete, accurate, and/or timely. For example, for goods that are to be laden at 12:01 A.M. on January 27, 2010, the ISF must be submitted no later than 12:01 A.M. on January 26, 2010.'

The Importer has the option to delegate its filing obligations under '10+2' to a 'filing agent'. The CBP 'Frequently asked questions' document expressly confirms (at page 6) that non-US freight forwarders can also act as 'filing agents' for the US importer. Any TT Club Member (whether US based or not) who acts as a 'filing agent' should inform its TT Club underwriter and will want to ensure that its liability as a 'filing agent' to its client is subject to contractual liability limits.

**2. Rejection of claims which are not in electronic form?**

A few days ago, A TT Club Member received the following (automatically generated) message from a large airline:

'To further improve the processing time of your claims, we will discontinue the acceptance of claims submitted via mail, fax and courier drop off. Effective 01 March, 2010, claims and preliminary claims that are submitted via postal mail, fax and courier drop off will no longer be accepted. Please see the attached document for details. Thank you for your continued support!'

The use of electronic means of communication may cut costs, and TT Club Members who sue airlines could find that submitting claims electronically is cost-effective for them also.

However, airlines have no right to reject claims against them simply because such claims are not in electronic form. Readers will be aware that the international air carriage conventions require notification of claims to the air carrier in writing, see Article 26(3) of the Warsaw/ Hague Rules 1955 and Article 31(3) of the Montreal Convention 1999. Owing to the mandatory force of law of

these conventions, airlines are in no position to bar claimants from using traditional paper means for the required 'written' notification.

### 3. New edition of COA Recommended Code of Practice for Flexitanks

Bill Brassington of ETS Consulting has drawn attention to the recent publication by the Container Owners Association of the second edition of the Recommended Code of Practice for Flexitanks. He writes:

'For many years the carriage of bulk liquid containers has been undertaken in various forms. All types of liquid cargo, including dangerous goods, have been carried in the traditional tank container, but in the last ten years the need to minimise the transport cost and the unavailability of tank containers has drawn shippers increasingly to consider an alternative. Flexible bladders up to 24,000 litres in capacity, known as flexitanks, have been fabricated to carry non dangerous liquid cargoes within the 20ft general purpose container. When the flexitank originally entered the shipping market in the 1980s it was used for the transport of food stuffs, such as wine, or simple non hazardous cargoes such as latex. At the turn of the century shipments were limited to less than 10,000 per year, but by 2008 the global flexitank market was estimated to have exceeded 200,000 shipments. The flexitank industry is now a considerable contributor to the bulk logistics sector and the general freight market.

The freight container industry has a very mixed view of flexitanks, some perceive that the carriage of flexitanks in dry freight containers is a disaster waiting to happen; while others consider that they are a cost effective and efficient means of transporting bulk liquids. While the number of incidents of partial or total loss of the cargo is less than 1%, the perception of risk is often significant.

There are two factors that adversely affect the shipping lines' perception, firstly the damage to the container while carrying a loaded flexitank, often resulting in the serious outward and permanent deformation of the side walls of the container, secondly the consequences of the flexitank failure. Failure often results in the total contents of the flexitank being released and leaking out of the container. Depending on the nature of the cargo, there may be major disruption to service and/or high costs associated with the cleaning up of the leaked material. Viscous substances such as latex can block ships' bilge pumps and shore based drainage systems, necessitating major and expensive cleaning operations. The potential risk of these most damaging leaks has coloured the freight container industry's perception of the flexitank.

This risk perceived by the shipping lines and terminal operators has resulted in a number of major flexitank manufacturers collaborating with the Container Owners Association to develop standards and a code of practice for the manufacture, testing and operation of flexitanks. The revised second edition of the Recommended Code of Practice for Flexitanks was published on 1 Jan 2010. This code covers the selection of containers that are suitable for carrying loaded flexitanks (including condition criteria), specification for tests of the flexitank / container combination (including rail impact tests) - which demonstrate the manufacturers' commitment to improving the performance of their products and the subsequent reduction of failure. The code also requires unique and permanent marks on the flexitank that can be traced back to the manufacturer and that the flexitank operator is responsible for marking the container with flexitank information. It further covers incident management, insurance and training.

There is no date of implementation and it may be useful if the shipping lines who carry flexitanks in freight containers declare a date after which all such shipments should comply with the Code. Setting a date is important in order to drive improvements in manufacturing standards and use by flexitank operators of compliant equipment. This new code is welcome and can be found on the Container Owners Association website: Here is the link for the COA site
http://www.containerownersassociation.org/resources/COA+Flexitank+CoP+1Jan2010.pdf

## 4. Text of new IATA air waybill conditions of contract

TT Talk Editions 123 and 124 reported that IATA was adjusting its air waybill conditions of contract, which are based on IATA Resolution 600b, to the new Montreal Convention 1999 liability limit of 19 SDR per kg.

An IATA Memorandum of 21 December 2009 has revealed that IATA adopted these amendments through CSC (Cargo Services Conference) mail vote S067 and that the United States Department of Transportation (DOT) granted these changes antitrust immunity. Please find here the web link the IATA Resolution 600b as effective from 30 December 2009: http://www.iata.org/whatwedo/cargo/resolution600b.htm

This IATA Resolution 600b updates the previous version of 17 March 2008. The new liability limit under the Montreal Convention 1999 of 19 SDR per kg necessitated changes to the 'NOTICE CONERNING CARRIERS' LIMITATION OF LIABILITY' and to clause 4, both of which appear on the reverse side of the IATA air waybill.

However, it is possible that IATA Resolution 600b will be amended again before long. The explanatory text on the IATA website (see the web link above) reveals that the United States Department of Transport (DOT) has suggested that IATA Resolution 600b 'should be further amended to simplify the international cargo business by conforming all applicable liability to MC99 levels'. This appears to suggest extending the liability limit of 19 SDR per kg beyond the scope of the Montreal Convention 1999. Consideration for this proposal has been placed on the agenda for the meeting of the IATA Cargo Services Conference in March 2010.

How do these changes concern Transport operators (freight forwarders) who assume liability as contracting air carriers under their own house air waybills? As already stated in TT Talk Edition 123, the TT Club recommends:
(1) Use of the IATA air waybill form based on the latest IATA Resolution 600b (as discussed above);
(2) Inclusion on the IATA air waybill back of the following FIATA recommended 'Note':
'If this air waybill is used by a forwarder in a capacity as contracting carrier for air transportation, any transportation or other service which is not subject to an international air carriage convention will not be subject to the terms and conditions of this air waybill but will instead be subject to the forwarder's general conditions as have already been provided to you.'; and
(3) Valid incorporation of the Transport Operator's general conditions to which the FIATA 'Note' (cited in (2) above) refers.

## 5. Responsibility for accurate weight declaration in containers

Peregrine Storrs-Fox, the TT Club's Risk Management Director, comments on weight misdeclaration in containers:

'The issue of weight misdeclaration in containerised trade reared its head again in Lloyd's List on three occasions between 11 and 13 Jan 2010; the Club welcomes this focus on a subject that has not been resolved and has exercised many over the years. The Club last wrote on this in TT Talk Edition 121 (item 2) of 29 July 2009: http://www.ttclub.com/ttclub/public.nsf/html/MGRY-6VLLXA?OpenDocument

There is the small number of high-profile cases that have been investigated by maritime administrations - notably the UK's MAIB (Marine Accident Investigation Branch). 'MSC Napoli' provided a unique opportunity to validate the weight declaration of the deck load and, on this issue, the MAIB reported that 20% of the deck stow (alone) differed by more than 3 tonnes from

the declared weight and that the deadload was about 1,250 tonnes - the equivalent of say 60 laden TEU - on departure from the load port, concluding that this element 'erodes or eliminates the safety margins' concerning the stability of the ship.

The two other MAIB investigations of note are 'Annabella' and 'Husky Trader', both of which have observed slightly different issues concerning the flow of information - particularly when it is amended - in relation respectively to container strength and cargo weight. And it is the response to the initial findings on 'Husky Trader' that has generated the latest media interest, reporting that Maersk Line is developing software by which it will be able to compare declared weight for a particular shipment against the average for the declared commodity. A mismatch will prompt the line to check the box in question and not load it if there is significant difference.

The article in Lloyd's List on 13 Jan 2010 profiled another smart innovation, which the Club has been monitoring for four years as it has progressed from 'bench trials' to full service use in a small number of marine terminal operations around the world. The load sensing technology, developed by Lemantec International, appears in one sweep to have the capability to answer a number of issues that have troubled risk managers. The patented twistlock system, which can be installed in any terminal handling equipment, precisely measures that total weight as well as the weight on each twistlock, including for twinlift and tandem handling operations. It has the capability to assist in identifying misdeclared containers and show load eccentricity - that may also indicate improper cargo stowage. It confirms whether all twistlocks are engaged, and will detect if the container is snagged in the cell guides or still secured on a road or rail chassis, amongst other things. All in all, this could be analogous to be the 'seat belt' safety advance in road vehicles and may become standard within the next decade.

It has proved easy to confuse misdeclaration with the application of health and safety rules in the port area. An overweight box, i.e. one that is loaded beyond its safe working load (SWL), is a separate and serious issue. Whilst even twin lift operations are unlikely to compromise the capability of port equipment, the freight container itself is vulnerable to such overloads. However, the misdeclarations previously referred to involved weights that were well below the SWL of the container (e.g. 10 tonnes declared, actual weight 12 tonnes). In both instances, however, correct declaration is what is needed and required. Evidence of actual weight could be required, where such facilities exist, or the terminal, in collaboration with its shipping company customers, could arrange to check weight. **However, the continuing concern that the Club would focus on is that the essential responsibility of the shipper to declare cargo is being blurred by suggesting that nodal points in the supply chain, such as terminals assume this responsibility, whereas they can only provide a check on the truth of what is declared.** It is perplexing that carriers - who after all earn their crust essentially on weight and cube - seem reluctant to enforce their rights under carriage contracts when the shipper fails to comply with one of his core international convention obligations. It is at heart an issue of basic honesty as to what is in the box.

Apart from major incidents such as those mentioned above, it only takes one misdeclared, poorly stowed or secured container to kill some hapless pedestrian as the road rig unexpectedly rolls over on a corner, or where the floor falls out during rail carriage and causes a derailment. Focus is - rightly - on major maritime accidents, where the 20% discrepancy could easily cause instability or grounding, but the impact is more frequently just one by one. Is the dream of 100% accuracy too much to ask? The shipper knows what he loads in the container - he should expect to take the consequence where there is a discrepancy. This is the contractual responsibility and liner operators should take concerted action to enforce their rights. And then they - the lines - can expect terminal operators to step up to help enforce.'

## 6. Conclusion

We hope that you will have found the above items interesting. If you would like to have further information about any of them, or have any comments you would like to make, please email the editor at tt.talk@ttclub.com. We look forward to hearing from you.

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for the TT Club

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