

CLM 2016 Boston Conference  
July 14-15, 2016 in Boston, MA

**Weight Watchers for Containers? What Shippers, Intermediaries,  
Motor Carriers, Vessel Operators, and Terminal Operators Need to  
Know About the New SOLAS Weight Requirements for Containers**

**I. The International Maritime Organization (IMO)**

**A. Introduction to the IMO**

The IMO is a United Nations specialized agency with responsibility for the safety and securing of shipping and the prevention of maritime pollution by ships.<sup>1</sup> As a specialized agency of the United Nations, the IMO is the global standard-setting authority for the safety, security, and the environmental performance of international shipping. Its main role is to create a regulatory framework for the shipping industry that is fair and effective, universally adopted, and universally implemented. To put it differently, the IMO tries to create a level playing field so that ship operators cannot cut corners or compromise on safety, security, or environmental in order to enhance their financial status.

The activities and regulations of the IMO deal with all aspects of international shipping, including ship design, construction, equipment, manning, operation, and disposal.

**B. Members**

The IMO currently has 171 member states and three associate members. Nongovernmental international organizations that have the capability to make a contribution to the work of the IMO may be granted consultative status by the governing council with the approval of the full assembly of the members. Such organizations have to demonstrate considerable expertise, as well as a capacity to contribute within their field of competence to the work of the IMO. Such organizations must show that they have no means of access to the work of the IMO through other organizations already in consultative status, and that they are truly international in their memberships.

---

<sup>1</sup>The IMO has an excellent website at [IMO.org](http://IMO.org).

### **C. Structure of the IMO**

The organization of the IMO is structured as follows:

- An Assembly which consists of all member states meeting in regular sessions two times a year. It is responsible for approving the work program, voting the budget, and determining the financial arrangements of the organization. It is the highest governing body of the organization and elects the Council.
- The Council is elected by the Assembly for two-year terms and serves as the executive organ of the IMO, supervising the work of the organization.
- Five main committees, including the Maritime Safety Committee and the Marine Environment Protection Committee, both assisted by various subcommittees; the Legal Committee; the Technical Cooperation Committee; and the Facilitation Committee.
- The Secretariat, which consists of the Secretary General and some three hundred international personnel based at the IMO headquarters in London.

## **II. The International Convention for the Safety of Life at Sea (SOLAS)**

### **A. Brief History of SOLAS**

The International Convention for the Safety of Life at Sea (SOLAS), 1974, was adopted in 1974 and came into force in 1980. The first version was adopted in 1914 in response to the *Titanic* disaster, with subsequent versions in 1929, 1948, and 1960. The main objective of the SOLAS Convention is to specify minimum standards for the construction, equipment, and operation of ships compatible with their safety. Enforcement of the SOLAS requirements is the responsibility of flag states (the states in which ocean vessels are registered), and the requirements also allow contracting governments to inspect the ships of other contracting states under the procedure known as “port state control.”

### **B. Provisions of SOLAS**

The current SOLAS Convention includes Articles which specify the general obligations, amendment procedure, and other technical issues, including an Annex divided into fourteen chapters, as follows:

- Chapter I – General Provisions;
- Chapter II-1 – Construction – Subdivision and stability, machinery and electrical installations;
- Chapter II-2 – Fire protection, fire detection and fire extinction;
- Chapter III – Life-saving appliances and arrangements;
- Chapter IV – Radiocommunications;
- Chapter V – Safety of navigation;
- Chapter VI – Carriage of Cargoes;
- Chapter VII – Carriage of dangerous goods;
- Chapter VIII – Nuclear ships;
- Chapter IX – Management for the Safe Operation of Ships;

- Chapter X – Safety measures for high-speed craft;
- Chapter XI-1 – Special measures to enhance maritime safety;
- Chapter XI-2 – Special measures to enhance maritime security;
- Chapter XII – Additional safety measures for bulk carriers;
- Chapter XIII – Verification of compliance; and
- Chapter XIV – Safety measures for ships operating in polar waters.

The 1974 Convention has been amended many times to keep it current with developments in the maritime industry.

### III. Development of the New SOLAS Requirements

#### A. Brief History of the IMO Effort to Improve Container Safety

##### 1. The Ineffectiveness of Prior Law

Previous SOLAS regulations required the shipper of containerized cargo to provide the ship's master or his representative with the gross mass of the container prior to loading on the ship, confirmed in writing and by appropriate shipping documents. There was no effective enforcement of that requirement. Container vessels did not have the capability to weigh the containers loaded onto the vessels, such that an effective verification process must be obtained onshore and provided to the vessel and the port terminal facility prior to the vessel-loading process.<sup>2</sup>

#### B. New SOLAS Regulations Added to SOLAS Chapter VI

##### 1. The Additions

The new requirement for container weight verification is actually an addition to SOLAS Chapter VI: "CARRIAGE OF CARGOES AND OIL FUELS," Part A, and reads as follows:

##### **Regulation 2 – Cargo information**

The following new paragraphs 4 to 6 are added after existing paragraph 3:

"4 In the case of cargo carried in a container\*, except for containers carried on a chassis or a trailer when such containers are driven on or off a ro-ro ship engaged in short international voyages as defined in regulation III/3, the gross mass according to paragraph 2.1 of this regulation shall be verified by the shipper, either by:

- .1 weighing the packed container using calibrated and certified equipment;
- or

---

<sup>2</sup>See annex to the report of the Sub-Committee on Dangerous Goods, Solid Cargoes and Containers, 17<sup>th</sup> Session, Agenda Item 7, DSC 17/INF.5, 27 July 2012, for examples of incidents, including misdeclared container weights.

.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 shipper of a container shall ensure the verified gross mass\*\* is stated in the shipping document. The shipping document shall be:

.1 signed by a person duly authorized by the shipper;

.2 submitted to the master or his representative and to the terminal representative sufficiently in advance, as required by the master or his representative, to be used in the preparation of the ship stowage plan\*\*\*.

6 If the shipping document, with regard to a packed container, does not provide the verified gross mass and the master or his representative and the terminal representative have not obtained the verified gross mass of the packed container, it shall not be loaded on to the ship.”

## **2. Basic Principles under the SOLAS Requirements**

The basic principles of the SOLAS requirements may be summarized as follows:

1. To obtain an accurate gross weight of packed containers that are moved through the supply chain prior to loading aboard the ship.

2. The responsibility for obtaining and documenting the verified gross weight of a packed container lies with the shipper.<sup>3</sup>

3. Verified container weights are to be used by the terminal operator and the vessel operator in ship stowage planning.

4. A container packed with packages and cargo items shall not be loaded onto a ship to which the SOLAS amendments apply unless the vessel master or his representative and the terminal representative have obtained, in advance of vessel loading, the verified gross weight of the container.<sup>4</sup> Availability to both the terminal representative and to the master or his representative of the verified gross mass of a packed container sufficiently in advance to be used in the ship stowage plan is a prerequisite for the container to be loaded onto a ship to which the SOLAS regulations apply.<sup>5</sup>

5. If a packed container is received at a port facility for export without a verified gross weight, it shall not be loaded on a vessel until a verified gross weight is obtained. The measures that may be taken to obtain such a verified weight for such a container are for the commercial parties to determine. Any costs incurred by the vessel operator or

---

<sup>3</sup>SOLAS Chapter VI, Regulation 2; IMO Guidelines, paragraph 4.1.

<sup>4</sup>SOLAS Chapter VI, Regulation 2, paragraph 6; IMO Guidelines, paragraph 4.2.

<sup>5</sup>IMO Guidelines, paragraph 14.1.

terminal operator for obtaining a verified gross weight if a shipper has failed to provide one in a timely manner and any recovery of those costs are also commercial matters for the parties to determine.<sup>6</sup>

6. The gross weight of a packed inbound container being delivered by a SOLAS vessel to a port facility (i.e., an import or transhipped [sic] container) will be the verified container weight used by the vessel operator and port facility at the vessel's loading port. A port facility and a vessel operator do not need to re-weigh a packed inbound container that is to be transhipped if that container has been delivered by a SOLAS vessel with a verified weight from the previous leg of the voyage.<sup>7</sup>

There are two methods by which a shipper may determine the verified gross mass of a packed container:

Method No. 1:

The shipper may weigh, or have arranged that a third party weigh, the packed container after the packing and sealing of a container using calibrated and certified equipment.

Method No. 2:

The shipper or a designated third party may weigh all packages and cargo items, including the mass of pallets, dunnage and other packing and securing material to be packed in the container, and add the tare mass of the container to the sum of the single masses of the container's contents.

It must be emphasized that, regardless of the method chosen, the shipper named in the ocean carrier's bill of lading is the party responsible for providing the packed container's verified gross mass. The carrier and terminal operator may rely on a shipper's signed container weight verification to be accurate. However, if there is any doubt as to the accuracy of the verified weight recorded on the ocean bill of lading, a carrier or terminal operator may take steps it deems necessary and appropriate to determine what the accurate weight actually is.<sup>8</sup>

Obviously, while SOLAS assigns specific responsibilities with regard to container weight verification to the shipper, carrier, and terminal operator, such information must be shared in a meaningful and efficient way, with the parties working together to make sure the requirement is followed.<sup>9</sup> Documentation is important and should be provided along with the shipping instructions to the shipping company.

---

<sup>6</sup>*IMO Guidelines, paragraph 13.1.*

<sup>7</sup>*IMO Guidelines, paragraph 8.1.2.*

<sup>8</sup>The World Shipping Council has issued a publication entitled "Guidelines for Improving Safety and Implementing the SOLAS Container Weight Verification Requirements – July 1, 2015," which provides good technical detail for compliance with the new requirements.

<sup>9</sup>The IMO has issued "Guidelines Regarding the Verified Gross Mass of a Container Carrying Cargo." MSC.1/Circ.1475, 9 June 2014. The guidelines are contained in an annex to the SOLAS Convention.

#### **IV. Issues Raised by the New SOLAS Requirements**

##### **A. Issues for Shippers, Transportation Intermediaries, Motor Carriers, Vessel Operators, and Terminal Operators**

###### **1. SOLAS Defines “Shipper” Broadly**

As referenced above, one significant way by which the SOLAS amendment changes the responsibilities of the parties in an ocean transportation transaction is by having the “shipper” on the ocean bill of lading be responsible for the verified gross mass. Traditionally, even though appearing as the “shipper” on an ocean bill of lading, a Non-Vessel Operating Common Carrier (NVOCC) functioned as a classic intermediary, with the actual shipper responsible for providing information on a shipment’s particulars. However, after the July 1, 2016, effective date, an NVOCC is itself responsible to the ocean carrier for supplying the verified gross mass (VGM), either by itself having the container weighed, or by relying on the VGM certifications supplied by the actual shippers. Under the IMO Guidelines, a shipper is defined as “a legal entity or person named on the bill of lading or sea waybill . . . as shipper.”<sup>10</sup> Thus, unlike in past practice, the NVOCC may itself bear actual responsibility for any problem that might arise in connection with the container and its VGM once it arrives at the port, irrespective of “fault.” It could also face liability with respect to “certifying” the weight of ocean carrier owned or leased equipment, over which it has no control and where informal studies have concluded that printed TARE weights are not always accurate on certain containers due to disparate factors, such as repair work, floor material substitution, etc.

###### **2. The U.S. Coast Guard Doesn’t Regulate Shippers**

The “flag state” authority responsible for enforcing SOLAS in the U.S. is the United States Coast Guard. The problem, as the Coast Guard has strenuously pointed out, is that it, as a federal agency, has no jurisdiction over “shippers,” only over ships and terminal operators. Accordingly, with a mandate simply not to load a container that has no VGM attached to it, the ocean carriers will be themselves “enforcing” the VGM rule by way of their commercial dealings with parties tendering them the containerized cargo; i.e., the actual shippers and NVOCCs. This will be accomplished by contractual bill-of-lading terms and conditions and/or other contracts, pushing risk downstream to the party or parties supplying the VGM. If this happens to be an NVOCC, that party (to the extent it is not weighing the cargo itself, but is instead relying on a VGM supplied to it) would have to also limit its liability via contract, beefing up the actual shipper’s VGM-related warranties and indemnities.

In addition, the Coast Guard has added additional uncertainty to what acceptable VGM procedures might be by, as of mid-March, 2016, giving its imprimatur to a “split” VGM concept, where the shipper would merely certify the actual cargo weight; the carrier would certify the weight of the equipment. Even though proposals such as these are constructive in terms of finding a workable solution for U.S. exporters and intermediaries, given the pending deadline, they also contribute to uncertainty within industry as to what the “right” VGM methodology will be as of July 1, 2016.

---

<sup>10</sup>IMO Guidelines, Section 2.1.12.

### **3. Availability of “Certified and Calibrated” Scales**

While the shipper is obligated under different U.S. regulations to provide an accurate cargo weight, based on how ocean carriage rates are structured, there is little apparent economic incentive, per se, to underreport cargo weight. Nor has it in the past been a part of the typical course of dealings for shippers to obtain ocean cargo weight, for safety regulatory purposes, using “calibrated and certified equipment.” This will impose hardship on U.S. exporters and intermediaries. Under the IMO Guidelines document, “calibrated and certified equipment” is defined as a “device, capable of determining the gross mass of a packed container or . . . cargo . . . that meets the accuracy standards and requirements of the State in which the equipment is being used.”<sup>11</sup> Some states may have differing standards, though many have adopted the National Institute of Standards and Technology Handbook 44 weights and measures standards. Shippers and NVOCCs could face difficulty (and also incur added expense) in locating, transporting their cargo to, and using appropriately sized, certified and calibrated scales, as availability may vary to a great extent from state to state, or—worse—may be unavailable locally.

### **4. Possibility of Additional Charges and Fees**

As noted above, if a container is tendered to the port terminal without a VGM, or if, due to circumstances outside the control of an intermediary or SOLAS “shipper,” a reweigh is necessary, there likely will be additional fees in connection with obtaining or amending the VGM in order to get the cargo aboard ship.<sup>12</sup> All parties involved in the tendering of containers for transport should be aware of the possibility of extra fees being imposed for excess equipment rental, demurrage, intra-port transportation, container repositioning, etc., in the event of any problems with obtaining of the VGM or timely transmission of the VGM to the port or carrier.

### **5. Operational Challenges**

Parties to ocean transportation transactions, including terminal operators, will likely have to make changes to their documentary flow in order to ensure the VGM is properly transmitted to the port or the ocean carriers. There currently is no standard methodology. Because VGM certification can be made via physical shipping documents or by Electronic Data Interchange (EDI), and because each party has differing business models, all will have to examine their data transmission practices and make necessary changes to ensure timely transmission of the VGM.<sup>13</sup> On the carrier side, timeliness will be the critical issue, as the VGM must be received by the carrier with sufficient time for the vessel stow plan to be completed.<sup>14</sup> Actual shippers and NVOCCs will have to be aware of possible individual carrier adjustments to “cutoff” times to account for this need. Further, all parties must be prepared for the impact of possibly earlier cutoff times on their own expectations of how late shipments can arrive at the port in order to make a particular sailing.

## **B. Issues Facing Beneficial Cargo Owners, Transportation Intermediaries, and Cargo or Transportation Liability Insurers**

---

<sup>11</sup>IMO Guidelines, Section 2.1.2.

<sup>12</sup>IMO Guidelines, Section 9.2, 13.1.

<sup>13</sup>IMO Guidelines, Section 6.1, 6.3.

<sup>14</sup>IMO Guidelines, Section 6.3.2.

**1. The SOLAS Verified Gross Mass Rule Is Not Law, and Lack of Unified Implementation Has Created Confusion.**

Given the mixed messages that the U.S. Coast Guard has sent regarding its role in enforcement and the interpretation by some stakeholders that noncompliance of the SOLAS Verified Gross Mass (VGM) rule has little or no consequence, a concern by some is that noncompliance and any resulting bodily injury, physical damage, or financial loss will not be recoverable by insurance. Most ports and steamship lines are eager to accept the VGM rules, as they are the main drivers behind the creation of the rule, but apprehension lies with those parties that may seek to exploit the lack of enforcement and those parties that fail to understand the consequences of noncompliance. Beneficial Cargo Owners (BCOs) and Transportation Intermediaries, along with their employees, tasked with VGM compliance may not have adequate incentive to follow the VGM rules for the following reasons:

- a) Smaller and mid-sized BCOs and Transportation Intermediaries may simply lack the manpower, guidance, or expertise to follow new export rules and regulations. As with many industries, exporters are making due with less manpower, while the number of import and export regulations has increased. “Regulatory Overload” may be overwhelming companies of this size, and rules like the SOLAS VGM are simply not understood.<sup>15</sup>
- b) BCOs shipping heavy cargo may be motivated to continue to load and ship overweight containers to save money on freight or keep certain shipments unitized into fewer containers.
- c) Transportation Intermediaries may be complicit in the BCO’s noncompliance of the VGM rule for fear that the BCO may seek an alternate transportation provider if VGM Compliance is questioned.
- d) The industries’ focus on the transmission of a VGM “document” and the process of data transmission may undermine the intent of the rule.
- e) Management within BCOs and Transportation Intermediaries may view the VGM rules solely as a compliance task and fail to recognize the liability to shareholders.

**2. The SOLAS VGM Rule Has Focused Safety Issues on Ports, Vessel Stability, and the International Leg of Container Transport. However, the Visibility of the Issue Will Likely Create Additional Focus on Overweight Containers Following Accidents Involving Trucks and Freight Trains.**

Should overweight containers be the cause of an accident, it is likely that investigators and those representing injured parties will climb the ladder of responsibility, and both BCOs and

---

<sup>15</sup>Richard Williams and Mark Adams of the Mercatus Center, George Mason University, discuss the impacts of too many regulations on companies that simply cannot properly comply with all of the regulations they are supposed to follow. See *Regulatory Overload* – Mercatus on Policy, No. 103, February 2012, [http://mercatus.org/sites/default/files/Regulatory\\_Overload\\_WilliamsAdams\\_MOP103.pdf](http://mercatus.org/sites/default/files/Regulatory_Overload_WilliamsAdams_MOP103.pdf).



Transportation Intermediaries will be included in such claims. A wrongful death suit in 2010 involving an overweight import container did include the importer (BCO), the customs broker, the owner of the customs exam site, and the trucking company as defendants, with plaintiff's counsel arguing that each of the defendants had a duty to advise the next defendant of the weight of the container.<sup>16</sup>

### **3. Noncompliance to the SOLAS VGM Could Lead to Uncovered Claims for BCOs and Transportation Intermediaries**

While not law, intentional deviation from SOLAS VGM compliance may be viewed as a dishonest, knowingly wrongful, fraudulent, and possibly malicious act, and, as a result, most insurance policies could deny coverage using any one of these exclusions.

Under a Commercial General Liability (CGL) policy, a Bodily Injury (BI) or Property Damage (PD) loss stemming from misdeclared container weights would likely not be considered "expected or intended," but there could be argument as to whether intentional container weight misdeclaration would be considered a covered "occurrence."

Coverage A of the insuring agreement of the CGL requires that BI or PD be caused by an "occurrence," and case law indicates some degree of fortuity must be established to constitute an occurrence.

For those courts that may decide the "act" must be the fortuitous event, would the act of misdeclaring container weights be considered fortuitous and unintentional, or intentional? Or for those courts that take the view of the result being the "fortuitous event," would the result of the misdeclaration be considered?

The following scenarios are possible areas in which the BCO or Transportation Intermediary may find themselves exposed with no protection via insurance.

- a) The BCO misstates VGM on an export and transmits a false VGM which is less than actual VGM. The container is involved in a bodily injury or property damage claim, and the BCO's general liability insurer denies coverage, citing that the claim was not a fortuitous occurrence.
- b) The BCO, acting as an importer, knowingly accepts overweight containers from its overseas supplier, and one such container is involved in a bodily injury or property damage claim. The BCO's general liability insurer denies coverage, citing that the claim was not a fortuitous occurrence.
- c) The Transportation Intermediary knowingly accepts incorrect VGM documentation, and an overweight container is involved in a bodily injury or property damage claim. The Transportation Intermediary's general liability insurer denies coverage, citing that the claim was not a fortuitous occurrence.

---

<sup>16</sup><http://www.vanbloislaw.com/case-results/1650000-settlement-truck-plunges-off-bay-bridge-at-s-curve/>

- d) A third-party BCO seeks to recover consequential losses from an NVOCC who consolidated individual BCO shipments into an overweight container and knowingly transmitted inaccurate VGM. The Transportation Intermediary's Professional Liability Insurance and/or Cargo Liability Insurance would likely deny the claim, citing an exclusion similar to one of these, which has been extracted from the most common Professional Liability and Cargo Liability Insurance forms in the U.S. market. Example 1: Exclusions. This policy does not apply to any claim arising out of dishonest, criminal, fraudulent, malicious, or knowingly wrongful acts of any insured or willful violation of any ordinance. Example 2: Exclusions. This insurance does not cover: Losses due to infidelity, conversion, or dishonest acts of the Assured, or the Assureds' employees.
- e) A BCO seeks to recover a loss via their cargo insurer following a container/truck overturn or container floor collapse, with a container the BCO loaded. The cargo insurer may try and deny the claim, citing improper packing or willful misconduct.
- f) If fines and penalties become part of SOLAS VGM enforcement, most intermediary policies will not cover fines and penalties if they are assessed directly against the transportation intermediary. Depending upon the circumstances, fines and penalties imposed upon a shipper for negligent actions caused by the intermediary would likely be covered under the intermediary's professional liability policy.

#### **4. Best Practices for BCOs and Transportation Intermediaries**

Both BCOs and Transportation Intermediaries must take their responsibilities for SOLAS VGM compliance seriously and be able to evidence a process that places accountability on the individuals responsible for this task. BCOs and Transportation Intermediaries have a shared responsibility and are co-dependent on each other for full compliance, so there should be full transparency as to the responsibilities of each entity.

Some considerations:

- a) Transportation Intermediaries should broaden BCO indemnification agreements in their Terms and Conditions of Service to address SOLAS VGM, and BCOs may want to consider incorporating SOLAS VGM compliance in their own Master Service Agreements. Insurers must be more diligent at reviewing TI Terms and Conditions as part of their underwriting process, as this will serve to help insurer and insured minimize losses.
- b) The traditional silos of risk management and trade compliance need to come together on SOLAS VGM to ensure that all parties understand their responsibilities and the possible consequences of less than complete compliance.
- c) Risk management within BCO and Intermediary companies needs to reinforce the importance of taking a risk vs. reward view on activities within the company to avoid the price, and price-only, decision of freight and logistics vendor selection.

#### **V. Conclusion**

This paper was prepared prior to the enforcement date for the new SOLAS regulations. There will undoubtedly be further developments between the writing of this paper and its presentation which will highlight any difficulties and experiences with the implementation of the requirements. The authors will look forward to updating the conference attendees with the most current developments at the conference presentation.