

PAPERLESS TRADING (ELECTRONIC BILLS OF LADING)

Frequently asked questions (“FAQs”)

A number of Members have contacted the Club with queries regarding the use of electronic bills of lading and any potential consequences for P&I cover. These FAQs may be of assistance in addressing such queries.

Members requiring further information should direct them to their usual contact at the Club or to Alan Mackinnon at alan.mackinnon@thomasmiller.com or telephone +44 20 7204 2408

1. What is the position of the P&I Clubs within the International Group with regard to paperless trading?

The position is set out in a 2013 circular, sent out by each Club, entitled “Electronic (Paperless) Trading Systems – Electronic Shipping Solutions and Bolero International Ltd – updated ESSDSUA Version 2013.1”. A copy is attached to these FAQs.

The circular reflects the concern of the P&I Clubs that some systems which use electronic bills of lading may not be universally recognised as satisfactorily performing the three functions of a bill of lading which customarily underpin P&I cover, namely: as a receipt, as a document of title, and as a contract of carriage which incorporates the Hague or Hague-Visby Rules.

2. In the light of this circular, do I have P&I cover in general for liabilities arising under any electronic bills of lading?

(a) Yes, cover is available for typical P&I liabilities arising under any electronic bills of lading to the extent these liabilities would also have arisen under paper bills of lading.

(b) To the extent these liabilities would have arisen because an electronic bill of lading has been used instead of a paper bill of lading, cover is discretionary unless the electronic trading system has been approved by the International Group.

3. Have any systems been approved by the Club/International Group?

The two systems approved are those set out in the circular:

(a) Electronic Shipping Solutions DSUA 2009.3 and DSUA 2013.1 (“ESS”) and

(b) Bolero International Ltd Rulebook/Operating Procedure 1999 (“Bolero”).

It is always advisable to check that the system preferred bears the correct designation and is the approved version.

4. Is my position better when using one of these approved systems, than another electronic system which has not been approved?

Yes. You will have Club cover for all normal P&I liabilities arising out of the use of one of the approved systems (though not for liabilities which are of a non-traditional P&I nature – see Q6 below) and thereby avoid exposure to the risks connected with the use of non-approved systems as described in Q5 below.

However it is important to note that all exceptions and exclusions under the Club Rules continue to apply (as they would with a paper bill of lading). This includes the traditional exclusions of cover relating to the carriage of goods, such as:

- The issue or creation of an electronic document/record with a description of the cargo or its condition known to be incorrect;
- Short delivery where an electronic document/record is issued or created for an amount of cargo greater than that known to have been loaded;
- Discharge at a port or place other than the port or place provided for in the contract of carriage;
- The issue or creation of an ante or post-dated electronic document/record; and
- Delivery of the cargo without production of the negotiable electronic document/record.

5. What might the risks be if I use an unapproved electronic system?

The risk is the one set out in the answer to question 1 above i.e. that the electronic system is not recognised as performing all the functions that a paper bill of lading would have performed. One example could be that an unapproved system is found, when challenged legally, not to transfer rights in goods in the manner that the creators of the system intended. This may give rise to a dispute about ownership and mis-delivery of the cargo. Another example could be if the Hague or Hague-Visby Rules have not been effectively incorporated into the electronic bill of lading. If it is found that in each case the liability has arisen because of the use of the electronic system, then that will not be covered within normal P&I cover. It may be covered at the discretion of Club Boards.

6. The circular also says that using an electronic bill of lading may expose me to “liabilities which are not of a traditional P&I nature”. What does this mean?

This is a reference to the kind of liabilities you face when using any electronic system or electronic interface in your office or on your ships, for example the risk of viruses, "hacking", or the accidental release or theft of information. Simply put it is the risk of using computers. In this context, such liabilities may include, for example, those which arise under the contractual arrangements which you have to make directly with the system operator (Bolero or ESS or other, non-approved systems), such as obligations to maintain computer links, or the introduction of a virus within the operator's or a user's system. The user agreements also contain undertakings of confidentiality and could give rise to liabilities if broken.

7. Is there an insurance which can cover me for these obligations?

These are non-marine risks, and may be covered by your own business insurances. This is something which you can check with your non-marine business insurance broker. These are not in the nature of P&I risks. In insurance terms, they may be described as "cyber-risks" or business risks.

8. What if I check with my brokers and I can find no such cover?

The answer may lie with Bolero or ESS (or other non-approved systems) who may have dealt with similar enquiries on previous occasions.

9. If I am considering using one of the approved systems and I wish to look into the Bolero Rule Book or ESS User Agreement, how can I obtain a copy?

The party inviting you to use this system should provide this for you, or put you in touch with Bolero or ESS.

10. Do I need to ask you to check and approve the Rule Book or User Agreement of an approved system?

No. The International Group has approved these documents (as long as they are unamended and match the titles set out in the circular) as acceptable.

11. If I am considering using an unapproved system will the Club review the documents?

It is for you to satisfy yourself as to the manner in which the system operates. The Club cannot currently "approve" systems other than through the IG mechanism for doing so. Unapproved system operators can of course approach the IG Secretariat for approval, and the matter would then be considered by the appropriate sub-committee comprised of Club representatives, but this is not a quick or immediate procedure.

12. Electronic systems are based on specific contractual terms rather than statutes and treaties. Is there a risk when using an approved system that the contract of carriage will not be subject to the Hague or Hague-Visby Rules and that I might therefore be deprived of my P&I cover?

No, the contractual terms for both approved systems make clear that any convention, treaty or national law that would have been applicable to carriage under a paper bill of lading will equally govern the carriage using an electronic document or record. Thus, so long as the carriage is subject to Hague or Hague Visby Rules by reference to the terms and conditions incorporated into the electronic document/record and/or by application of convention or national law as if a paper bill of lading had been issued then there will be no problem with Club cover.

If the carriage is compulsorily subject to another liability regime like the Hamburg Rules then again Club cover will remain in place as it would if the carriage were under a paper bill of lading.