Letters of Indemnity & Bills of Lading

a precarious symbiosis

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Introduction

This project is intended to focus upon the use of Letters of Indemnity (LOI) in practical terms. How they complement, compromise and/or supplant Bills of Lading (BL) in the movement, transfer and finance of goods. In particular it will comment upon how they are used and construed by supply chain members such as:

- Carriers / Vessel Owners / Disponent Owners / Charterers, Agents, Traders and of course Bankers.

This paper will focus upon "standard" BLs i.e. ocean and/or charter party BLs as opposed to "straight" BLs or Sea Waybills.

In a perfect world LOIs would (probably) not be required, however the problems and delays affecting the carriage of goods often demand the use of LOIs in order to oil the wheels of commerce. The BL roles as noted below are such that timely presentation of the BL would ensure that a seller would be paid, the buyer or his banker would obtain title to the goods, and the carrier / vessel owner would be discharged from his contractual obligations in the carriage of the goods.

Circumstances often prevail to hinder one or more aspects of the BL function(s). For this reason LOIs may be used to prevent avoidable delays and expenses and as such are closely intertwined with the use of the underlying BLs. Absent the availability of an electronic alternative (e-BLs) in a given situation, LOIs will continue to serve a vital purpose in facilitating international trade and commerce.

Chapter I

Bill of Lading (BL)
The major functions include:

1. evidence of receipt of goods
2. as evidence of a contract for the carriage of goods
3. as a document of title enabling transfer of property in goods

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Introduction

The bill of lading (BL) is a vitally important document in the global movement of goods, regardless of the legal form chosen. BLs have a long historical background reaching back to the very beginning of sea transport of goods between different countries. J.F. Wilson puts their origin at the 14th century[2] although it is known that ships were required to take a clerk on board for the purpose of maintaining a register of goods loaded as early as 1063.[3]

There is reference to ship owners' liability limitation already in the 14th century[4] stipulating that no liability for damage to goods is accepted which have not been recorded in writing.

This paper concerns itself primarily with negotiable[5] bills of lading i.e. those permitting a transfer of property in the goods, one reason being that these are the type of BL demanded by banks financing goods who often depend upon them for collateral security which can be destroyed by the use of LOIs. Such negotiable BLs can be distinguished from "straight" BLs in that the latter require no endorsement in order for

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[2] *Wilson J.F. Carriage of Goods by Sea, 5th ed. 2004 (Pearson Longman, London) pp 115*
[3] The Ordonnance Maritime of Trani *viz. Mitchellhill A. Bills of Lading Law and practice, 2nd ed. 1990 (University Press, Cambridge) pp 1*
[4] Customs of the Sea*, a manuscript believed to have been drawn up in Barcelona viz. Mitchelhill A. above*
[5] *the contextual meaning of negotiable e.g. "transferable" is dealt with below*

the consignee to obtain possession of the goods shipped. The difference between negotiable and "straight" BLs is discussed below.

As evidence of receipt of goods

A bill of lading (BL) provides *prima facie* written evidence of a number of facts of great importance to those involved in the shipment of goods. The shipper needs to know at what stage the goods have been taken into the custody of the carrier, in part to establish who becomes liable for damage to the goods at what time. This is indicated by a received for shipment BL which will indicate the external condition of the goods at the time of receipt.[6]

Similarly a shipped on board BL evidences not only that the goods indicated therein have been loaded on board[7] but also the date of loading[8] as also the apparent external condition of same.[9] Provided the shipper has demanded a BL of the master, the data noted previously will be required per statute assuming that the BL incorporates and is thus subject to such provisions.[10]

There is an exception to the general rule that a BL evidences receipt of goods, this being when a master is in breach of authority by signing a BL when no goods have actually been shipped.[11] In this event the carrier is not bound thereby nor is he liable to a consignee or transferee therefore either in contract or by estoppel.[12] This decision was upheld by Lord Esher M.R. who stated that the captain had "*no authority to make a contract of carriage to bind the shipowner except in respect of*

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[6] *The Peter der Grosse (1875) 1 P.D. 414; The Lucky Wave (1985) 1 Lloyd's Rep. 80*
[7] *Smith v Bedouin Steam navigation Co (1896) A.C. 70*
[8] *J. Aron & Co (Inc) v Comptoir Wegimont (1921) 3 K.B. 435 AT 437; Rudolph A. Oetker v IF International Frachtagentur A.G. (1985) 1 Lloyd's Rep. 557*
[9] *Carriage of Goods by Sea Act 1971, Sch. Art. III, rr.3(c) and 4.*
[10] *Viz. Hague & Hague-Visby Rules, Art. III s.3*
[11] *Grant v Norway (1851) 10 C.B. 665*
[12] *River Gurara (cargo owners) v Nigerian Shipping Line (The River Gurara) (1998) Q.B. 610 at 625*

goods received by him."[13] Further support was provided by Devlin J. who held that "*in many cases … no contract of carriage is concluded until the goods are loaded or accepted for loading*."[14]

As between the shipper and carrier, at common law, the BL is only *prima facie* evidence of the facts stipulated therein[15] e.g. if "short delivery" of the goods indicated therein were claimed, the carrier would bear no liability if he could prove that the quantum delivered was in fact that received.[16]

However, once the BL has been indorsed to a third party, then such defences may no longer be available to the carrier who may be estopped from disclaiming liability for statements made in the BL. This may relate to the condition of goods at the time of shipment[17]or shipped on the date indicated.[18]

Because the ship's master will rarely know what has really been taken aboard (especially with regard to container cargoes) he will invariably have to rely upon the details as provided by the shipper which are subsequently entered in the BL data. To protect himself from including incorrect or misleading information in the BL there is invariably a pre-printed limitation clause incorporated. This is usually phrased as an "unknown" clause.

In one case[19] this ensured that the carrier was not liable for short delivery of material said to be 937 tons on the BL because same stated "*weight, measurement, contents and value (except for the purpose of*

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[13] *Leduc v Ward (1888) 20 Q.B.D. 475 "*If the goods have not been received, the bill of lading cannot contain the terms of a contract of carriage with respect to them as against the shipowner*".*
[14] *Heskell v Continental Express Ltd (1950) 1 All E.R. 1033 at 1037*
[15] *J. Aron & Co (Inc) v Comptoir Wegimont (1921) 3 K.B.*
[16] *Hogarth Shipping Co Ltd v Blythe Greene Jourdain & Co Ltd (1917) 2 K.B. 534*
[17] *Compania Naviera Vasconzada v Churchill & Sim (1906) 1 K.B. 237*
[18] *The Saudi Crown (1986) 1 Lloyd's Rep. 261; Standard Chartered Bank v Pakistan National Shipping Corp (1995) Q.B. 610 2 Lloyd's Rep. 365*
[19] *New Chinese Antimony Co Ltd v Ocean SS. Co Ltd (1917) 2 K.B. 664*

estimating freight) unknown" it being held that the BL was not *prima facie* evidence that such a quantity had indeed been loaded because the primary statement regarding the quantity was qualified by the words "*except for the purpose of evidencing freight*" which was held to prevail.

Concerning the apparent order and condition of goods loaded, the liability limitation noted above appears also to hold provided the BL contains a suitable disclaimer. Thus although a BL stated "*received in good order and condition*" this clause was overruled because the Mate's Receipt (to which the BL had been made subject) indicated that "*many bags stained, torn or sewn*"[20] whereupon the carrier was not liable for damage occurring prior to shipment. In contrast, when the Master knows that the goods shipped are not in good condition but issues a BL stating otherwise, the carrier becomes liable for the loss relating to the substandard goods' condition.[21]

The underlying logic behind the afore mentioned decisions is well demonstrated in a case[22] in which a number of BLs were issued. It was held that some of the BLs were not *prima facie* evidence of the quality of the goods shipped because of a "*quantity ….. unknown*" clause whereas another, which was superimposed with the Master's stamp and signature against the "Shipper's Description of the goods" was held to confirm the details indicated therein.

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[20] Canadian & Dominion Sugar Co Ltd v Canadian National (West Indies) Steamships Ltd (1947) A.C. 46
21 The Skarp (1935) p. 134
22 Rederiaktiebolaget Gustav Erikson v Dr. Fawzi Ahmed Abou Ismail (The Nerroe and the Askoe) (1986) 2 Lloyd's Rep. 281

As evidence of a contract for the carriage of goods

It might be expected that a BL would be issued before the vessel has sailed, a view common in the past[23] but no longer valid today as this function has been generally assumed by shore-based parties.[24]

A BL may either "contain" or "evidence" a contract of carriage[25] but the point at which such contract comes into being depends upon the circumstances and intent. It would appear that this invariably occurs before the BL is signed.[26] Intent to contract can be inferred from the act of presenting goods for shipment and the carrier actually loading or accepting same for loading.[27]

The contract may indeed pre-date even this event i.e. when shipping space has been booked.[28] However, it has also been asserted "*there is almost always an antecedent contract*"[29] but this will depend upon whether the pre-delivery / shipment negotiations conform to general legal principles regarding contract formation. The one-sided advice of terms upon which goods would be carried from carrier to shipper does not constitute a binding contract[30] but is rather an invitation to treat.[31]

That the BL itself is not the contract of carriage but merely evidences same was categorically stated by Lush J.[32] who further stated that "*The contract has come into existence before the bill of lading is*

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[23] *Nolisement (Owners) v Bunge & Born (1917) 1 K.B. 160 at 169-170*
[24] *Pyrene Co Ltd v Scindia Navigation Co Lte (1954) 2 Q.B. 402 at 420*
[25] *Carriage of Goods by Sea Act 1992, s.5(1)*
[26] *Pyrene Co Ltd v Scindia Navigation Co Lte (1954) 2 Q.B. 402 at 414*
[27] *Heskell v Continental Express Ltd (1950) 1 All E.R. 1033 at 1037*
[28] *Pyrene Co Ltd v Scindia Navigation Co Lte (1954) 2 Q.B. 402 at 424*
[29] *Gulf Steel Co Ltd v Al Khalifa Shipping Co (The Anwar al Sabar) (1980) 2 Lloyd's Rep. 261 at 263*
[30] *Scancarriers A/S v Aotearoa International Ltd (The Barranduna) (1985) 2 Lloyd's rep. 419*
[31] *Carver on Bills of Lading, see page 69, footnote 18 referring to "Treitel, p.10"*
[32] *Crooks v Allan (1879) 5 QBD 38 at p 40. See also Lord Bramwell in Sewell v Burdick (1884) 10 APP Cas 74 at p 105.*

signed."[33] The importance of this to a shipper of e.g. lost or damaged goods, is that he may thus sue a carrier for breach of contract even when the loss or damage arose prior to a BL being issued.[34]

Should the BL as subsequently issued deviate from the terms of a prior oral agreement, it appears that the shipper is protected and may claim for damages arising therefrom.[35] In this case (*The Ardennes*) the goods arrived later than an orally agreed date. The carrier pleaded the liberty clause in the BL as a defence but this was overridden by the previous oral agreement.

A shipper could also raise a plea of rectification if the written document deviates from an oral agreement.[36] Once the BL is indorsed for value to a transferee however the BL becomes conclusive evidence of the terms of the contract of carriage.[37]

Where carriage is subject to a Charter Party, any BL issued thereunder serves merely as a receipt for goods, the contract of carriage between shipper and charterer being found solely in the Charter Party.[38]

As a document of title enabling transfer of property in goods

Regarding the passing of property and the use of BLs in so doing, Lord Wright stated: "*By mercantile law, the bills of lading are the symbols of the goods*."[39] We have authority which holds that, in CIF contracts, property passes upon indorsement.[40] Whilst BLs are often referred to

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[33] *ibid*
[34] *Pyrene v Scindia Navigation Co (1954) 2 QB 402*
[35] *The Ardennes (1951) 1 KB 55*
[36] *Roberts v Leicestershire CountyCouncil (1961) Ch 555*
[37] *Leduc v Ward (1888) 20 QBD 475*
[38] *Wilson J.F.,* Carriage of Goods by Sea*, 5th ed. 2004 (Pearson Longman, London) at page 132, 5.2.2*
[39] *Ross T Smyth & Co Ltd v TD Bailey son & Co, H.L. (1940) 3 All E.R. 60 relating to transfer of property under a CIF contract resp. appropriation of goods to a contract enabling such transfer*
[40] *The Albazero (1977) A.C. 774 per dicta Roskill L.J. and Ginzberg v Barrow Haemetite Steel Co (1966) 1 Lloyd's Rep. 343 per dicta McNair J.*

as being negotiable, this is but a synonym for "transferable"[41] and means only that they may be used to transfer property in goods. In order for a BL to fulfil this function, it must be an "order" BL. It can be issued to order and blank endorsed by the shipper (becoming a bearer BL) or be issued to order of a named party or assigns thus requiring indorsement by this order party for further transfer of property in the goods. If it is however consigned for delivery to a named party it becomes a so-called "straight" BL and thus loses any quality of negotiability.[42] The pertinent differences are discussed later.

Transfer of the BL is normally construed as being tantamount to transferring i.e. delivering, the goods themselves, however concerning possession of the goods, whilst the goods are in the custody of the carrier the carrier has actual possession whereas the BL holder will enjoy constructive possession of same.[43]

Regardless of whether a BL is negotiable / transferable or not, only such rights will be passed between the parties as were intended. In certain circumstances transferring title to the goods is never intended e.g. when the consignee is the same as the shipper and/or when the consignee is part of the same business group as the shipper, often the case where global corporations move goods.

Naming a bank as order party or consignee does not necessarily indicate the intention that goods should actually be delivered to this party, albeit the bank could present the BL and claim and sell the goods in the event of need. What is achieved by this construction is the creation of a pledge or charge in favour of the bank as financier who can use this as collateral security for its loans.

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[41] *Kum v Wah Tat Bank (1971) AC 439 at p. 446 per Lord Devlin: "It is well settled that "Negotiable", when used in relation to a bill of lading, means simply transferable."*
[42] *The Chitral (2000) 1 Lloyd's Rep. 529*
[43] *Schmitthoff, 15-038 p. 289, and footnote 45*

Even if the buyer is entered as consignee it does not necessarily mean that the seller intended to pass property in the goods to the buyer.[44] According to *Wilson*[45] once a BL has been indorsed and delivered, four conditions must be met in order to transfer ownership of the goods:

- the order BL must be transferable on its face i.e. expressly deliverable to order or assigns
- the goods must be 'in transit' at the time of indorsement, not necessarily floating goods but in the custody of a carrier or forwarding agent and before the goods have been delivered to the buyer
- the person giving the BL must have good title to the goods for he can only transfer such title as he had respectively the transferee cannot obtain a better title than that possessed by the transferor. This is the major difference between "negotiable" BLs and a truly negotiable instrument such as a bill of exchange.
- an indorsement must embody the intent to actually transfer the ownership in the goods evidenced in the BL, to this end there are three potential scenarios foreseen:

- i. property is passed absolutely, probably the most common intent e.g. title to pass upon payment of goods/documents
- ii. there is no intent to pass property in the goods e.g. when goods are moving between corporate units within a global enterprise or if the seller wishes to retain ownership in the goods until paid, which is permitted under s.19 of the Sale of Goods Act 1979. This object could be achieved by either inserting the seller or his agent as consignee of the BL or, by using a documentary collection i.e. making release of the documents conditional upon acceptance of a bill of exchange attached thereto

[44] *The Kronprinsessan Margareta (1921) 1 A.C. 486 at 517*
[45] *Wilson, John F. at p. 133 ff*

- iii. the indorsement represents no more than the intent to create a pledge or charge over the goods in favour of a financing party as security for a loan, usually with no expectation of the financier taking delivery of the goods although this course of action remains open in order that said goods could be taken and sold to clear any unpaid debt(s).

As noted earlier, it might be useful at this stage to define and compare negotiable and so-called "straight" BLs regarding passing of property.

Within the context of this paper negotiability as applied to BLs can be defined as *a transfer of the constructive possession of the goods and may, if so intended, operate as a transfer of the property in them*[46] which definition derives from *Lickbarrow v Mason*[47] in which negotiability relating to the BL considered[48] was distinguished from that applicable to a bill of exchange, as only property was passed.[49]

Thus when a BL is stated to be negotiable this means no more than that it is transferable.[50] This is important for financing banks in that a pledge over a BL equates to a pledge on the goods[51] thus securing the payments advanced to trading companies. Another important aspect is that only such transferable BLs can be used when goods pass through a chain of sellers / buyers who need to transfer property in the goods along the commercial chain.

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[46] Carver on Bills of Lading, *Ch. 6, pg. 267 & footnote 2*
[47] *(1787) 2 T.R. 63; reversed (1790) 1 H.B1. 357; but restored by the House of Lords (1793) 2 H.B1. 211*
[48] *one "shipped by any person or persons to be delivered to order or assigns" and thus, by mercantile custom, recognised as being "negotiable and transferable" enabling the transferor to pass property in the goods to the transferee*
[49] *Thompson v Dominy (1845) 14 M. & W. 403 at 408*
[50] *Kum v Wah Tat Bank Ltd (1971) 1 Lloyd's Rep 439 at 446 ("'negotiable' when used in relation to a bill of lading means simply transferable")*
[51] *Official Assignee of Madras v Mercantile Bank of India Ltd (1935) A.C. 53 at 60*

"Straight" BLs seemingly enjoy no English law definition[52] although there is support for holding that they are "*not bills of lading at all but sea waybills*"[53] at least with regard to any statutory definition[54] but can be said to be such as make goods deliverable to the named consignee rather than "to order or assigns". On the other hand, whilst they may be documents of title by virtue of having to be surrendered to the carrier or bailee in order to obtain delivery of the goods indicated therein,[55] they represent no, or only limited transferability.

One consequence of this difference is that a shipper's rights against the carrier can neither be transferred by indorsement to a transferee under a straight BL nor is constructive possession of goods passed[56] whereas this is invariably the case with an order / negotiable BL. In essence then, the main difference between straight and order or bearer BLs is that the former cannot be transferred by indorsement (where necessary) and delivery.[57]

An ITIC[58] article[59] draws the attention of members to the dangers inherent in the practice of releasing goods without production of a straight BL. The case analysed dealt with the shipment of T-shirts from China to Israel carried by a Japanese shipping line. The consignee was unable to produce the original BL upon arrival of the goods in Haifa. Instead he furnished the Israeli agent with an invoice and indemnity for USD 7'200.- and evidence that this amount had been paid to a bank in China.

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[52] *Parsons Corp v C.V. Scheepvaartonderneming Happy Ranger (The Happy Ranger) (2002) EWCA Civ 69d; (2002) All E.R. (Comm) 24 at (27)*
[53] *Parsons Corp v C.V. Scheepvaartonderneming Happy Ranger (The Happy Ranger) (2002) EWCA Civ 69d; (2002) All E.R. (Comm) 24*
[54] *Carriage of Goods by Sea Act, 1992 s.1(3)*
[55] *J.I. MacWilliam Co Inc v Mediterranean Shipping Co SA (The Rafalea S) (2005) UKHL 11 (2005) 2 All E.R. 86, affirming (2004) Q.B. 702*
[56] *Parsons Corp v C.V. Scheepvaartonderneming Happy Ranger (The Happy Ranger) (2002) EWCA Civ 69d; (2002) All E.R. (Comm) 24 at (27)*
[57] *Carver on Bills of Lading, pg. 5, 1-007*
[58] *International Transport Intermediaries Club*
[59] *see: http://www.itic-insure.com/downloads/publications/intermediary /intermediarySep2005.pdf#search="letter of indemnity"*

As was the "custom of the trade" at that time in Haifa, the agent released the goods without production of the original BL, and did so without obtaining authority from his principal. Several months later the shipper (who still held all 3 original BLs) asked the Japanese carrier to advise upon the whereabouts of his cargo.

The shipper was informed that the goods had been delivered as noted above. To quote the ITIC article: "*Up to that time, there had been various decisions of the Chinese courts that straight bills of lading were not documents of title and that the responsibility of the carrier under the contract of carriage to deliver that cargo should be regarded as accomplished once the cargo had been delivered to the named consignee*."

The shipper sued for $23'000.- (allegedly the actual goods value) but lost at the court of first instance (Guangzhou Maritime Court, following previous decisions) however, upon appeal, the higher court (Guangdong Higher People's Court) reversed this decision and found for the shipper, finding the carrier liable for $23'000.- plus costs. This prompted the carrier to claim from their agent $59'000.- in due compensation of the shipper's claim upon itself plus its own legal costs.

The article goes on to hold up two errors made by the carrier's agent: failure to obtain the carrier's written authority for releasing the goods and for so doing against an LOI which differed from the carrier's approved wording and for an inadequate sum. The BL in question was subject to three separate jurisdictions, Israeli, Chinese and Japanese. To summarise the article's analysis it can be said:

Under Israeli law, since the House of Lord's decision in the "Rafaela S" the purported "custom of trade" is no longer recognised, and goods may

only be delivered under straight BLs against presentation of an original.

Under Chinese law, contrary to previous practice[60] it has now been decided[61] and as per the decision discussed above, here also goods may only be delivered against production of an original straight BL.

Gaskell[62] holds that "*If there is no named consignee and "order" statement, the bill will probably be a straight bill.*"[63] And quotes Benjamin[64] in stating "… *the shipper cannot oblige a carrier under a straight bill of lading to deliver goods to a different consignee from that named in the bill simply by altering it, but can give direct instructions to the carrier to that effect.*"

As a counterpoint to the authorities noted above, he refers to authorities which hold that a straight BL does not need to be produced to obtain delivery of the goods[65] and prefers Benjamin [66] *"… on the basis that there is no real distinction between a waybill and a straight bill, and that neither are needed to obtain delivery of the goods (unless the contract so requires).*"

BLs are still customarily issued in sets, usually of between 3 –6 BLs. What is the legal effect of indorsing one or more of the BLs to different parties? Although this might be accidental, it is equally possible that the transferor intends to defraud.

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[60] *in accordance with Article 79 (I) of the Chinese Maritime Code*
[61] *at the Thirteenth National Seminar on Maritime Adjudication, in Quingdao in Sept. 04*
[62] *Gaskell, N. at 14.23 on p. 419*
[63] *see The Chitral (2000) 1 Lloyd's Rep. 529*
[64] *see para. 18-049*
[65] *The Merchants Guide, p. 45, notes that the US legal position is that a straight bill does not have to be presented, but that general practice elsewhere is to require a "straight bill" to be surrendered, rather like an order bill, see Gaskell at 14.24 on p. 420*
[66] *at 18-014*

It has been established that the first transferee, giving good value, obtains title in the goods.[67] Lord Westbury held that "… *the first person who for value gets the transfer of a bill of lading, acquires the property, and all subsequent dealings … must in law be subordinate to that first one … because he had the legal right in the property*."[68] This fact is reflected in wording commonly indicated on the face of BLs e.g. "one being accomplished all others being null and void" or words of similar effect.

The above is relevant regarding LOIs as a testament to the benefit of using either one original BL or the Bolero Title Registry,[69] either or both of which eliminate the risk of multiple holders claiming the same goods, the latter being preferred as it obviates the need for LOIs to discharge goods without production of an original BL.

[67] *Barber v Meyerstein (1887) LR 4 HL 317*
[68] *ibid*
[69] *essentially a secure data bank holding "virtual" BLs which can be electronically issued, endorsed and ultimately presented by authorised signatories to the Rulebook and platform, see Carr I., International Trade Law at Ch. 4 and Aikens R. in Bills of Lading at 2.125 on p. 36*

Chapter II

Letter of Indemnity (LOI)

1. delivery of cargo without presentation of original BL
2. pre- or ante dating BL viz. date of shipment and/or issuance
3. incorrect description of one or more of the following:
   - goods
   - condition
   - quantity
4. misdescribing the voyage (rotation / deviation)
5. mixing of dry cargoes
6. co-mingling, blending, dyeing of liquid cargoes
7. for the issuance of:
   - split / switch BLs
   - copy BLs

Introduction

The LOI can be variously described as a letter of indemnity (at shipment), a letter of guarantee or indeed as a counter-letter (at discharge).[70] These can be distinguished from one another thus:

At Shipment (Letter of Indemnity)

The object here is for the shipper to obtain a clean BL from the carrier, in consideration for which the shipper agrees to indemnify the carrier for his complicity in misstating the facts with regard to the goods received as evidenced on the face of the BL.[71] Why might a shipper wish to do this? Usually it is in order to obtain payment from his buyer

70 Tetley Prof. – Marine Cargo Claims, 4th ed. Ch. 38 (viz bibliography)
[71] United Philippine Lines Inc v Metalrussia Corp Ltd. 1997 AMC 2131 at p. 2133 (S.D.N.Y. 1997)

(consignee) for which he needs a "clean"[72] BL which omits any negative clausing regarding the condition and/or packing of the goods shipped. This is especially so if the sale is secured by a documentary credit as banks will reject a BL as discrepant should it bear any such negative clausing unless the credit allows otherwise. This practice is condemned by the courts as being reprehensible as it undermines the faith that the trading community is entitled to have in the integrity of BLs used in international trade.[73]

At Discharge (Letter of Guarantee)

This is a rather different document as it is given by the issuer to secure the carrier for delivering goods to a consignee without presentation of an original BL because this/these are presumed lost. It is often provided by a bank as a suretyship, holding the carrier harmless for claim(s) up to a pre-determined sum. When issued by a bank it is less likely to be (ab)used for deliberate misrepresentation.

Delivery of cargo without presentation of original BL

This is probably the most common use for the LOI deriving from the increasing speed of vessels in reaching the discharge port, a benefit oft negated by the time required to clear BLs through banking channels when goods are being sold under Letters of Credit (LC). Misdelivery occurs when goods are delivered without production of a BL and this is so regardless of whether the person taking the goods is the owner,[74] the named consignee[75] or the intended recipient of the goods. As noted above, although a straight BL (if construed as a sea waybill[76]) needs to

[72] *as defined in UCP 500, art. 32*
[73] *Hunter Grain Pty Ltd v Hyundai Merchant Marine Co. Ltd. (1993) 117 ALR 507 at p. 518*
[74] *The Jag Shakti (1986) AC 337*
[75] *The Stettin (1889) 14 PD 142*
[76] *Law Commission Report on* Rights of Suit in Respect of Contracts for the Carriage of Goods by Sea*, Law Com. No. 196, Scot. Law Com. No. 130 (1991), §5.7*

be surrendered in order to obtain delivery of goods[77] (contradicting a view taken in Hong Kong[78]) banks financing transactions invariably call for order or bearer BLs as these latter are documents of title providing banks with a security interest in the goods being financed.

In an early case[79] dealing with the delivery of goods without production of an original BL, Butt J. held that there was no essential difference between German and English law on the matter hence "… *a shipowner is not entitled to deliver goods to the consignee without the production of the bill of lading*." In this case it was claimed that under German law delivery could be made to a named consignee even without the BL being furnished. The court rejected this argument as stated above.

It should be noted that under certain circumstances delivery of goods without presentation of an original BL might be foreseen in the contract of carriage or be a trade custom in certain areas.[80] However, Diplock L.J. held that a shipowner is not obliged to surrender possession of the goods to anyone, even the consignee, unless the original BL is produced to him, provided the BL was issued subject to a contract of carriage.[81]

As an adjunct to the above the carrier is nonetheless protected if he delivers goods against presentation of just one original BL out of a set. As Lord Blackburn[82] stated "… *unless this was the practice, the business of a shipowner could not be carried on, unless bills of lading were made in only one part* …" As noted elsewhere, this case dealt with the release of goods under a delivery order although certain of the

[77] *J.I. MacWilliam Co Inc v Mediterranean Shipping Co SA (The Rafalea S) (2005) UKHL 11 (2005) 2 All E.R. 86, affirming (2004) Q.B. 702*
[78] *The Brij (2001) 1 Lloyd's Rep. 431 at 434 (Hong Kong High Court)*
[79] *The Stettin (1889) 14 PD 142*
[80] *Chilewich Partners v MV Alligator Fortune (1994) 2 Lloyd's Rep 314*
[81] *Barclays Bank Ltd v Commissioner of Customs and Excise (1963) 1 Lloyd's Rep. 81*
[82] *Glyn Mills Currie & Co v East and West India Dock Co (1882) 7 App Cas 591*

BLs had already been endorsed and pledged to a financing bank of which the warehouseman (carrier equivalent) had no prior knowledge.

It is a commonplace within the oil trading community that cargoes are discharged against LOIs without presentation of an original BL. This practice does not however bestow upon the shipper / charterer the right to demand of the master / shipowner that goods be so discharged even when the charter party clause foresee an LOI or indemnity for such action. This position was so stated by Staughton J. in *The Sagona*[83] "[The charter party clauses] *do not in my view impose any express obligation on the charterers to discharge a cargo in the absence of the bill of lading. They merely provide for a letter of indemnity if such discharge takes place. But I do not construe the clauses as imposing a contractual duty on the owners*."

This position was reiterated by the Court of Appeal in *The Houda*[84] (thus revoking an earlier decision in the Commercial Court) in which it was established that time charters have no general right to order an owner to discharge or deliver the cargo without production of the original BL. This was so even though the charter party included a clause expressly permitting *inter alia* charterers to order discharge of goods without delivery of an original BL and indemnifying the owners for so doing.[85] In other words, it gave the charterers the right to order discharge of goods without production of the original BL, but imposed no duty upon the master or owner to comply with such a request. In this same case, Leggatt L.J. stated: "*Under a bill of lading contract a shipowner is obliged to deliver goods upon production of the original bill of lading. Delivery without production of the bill of lading constitutes a breach of contract even when made to the person entitled*

[83] *The Sagona (1984) 1 Lloyd's Rep. 194 at 201*
[84] *Kuwait Petroleum Corp v I.& D. Oil carriers Ltd (The Houda) (1994) CA, 2 Lloyd's Rep. 541*
[85] *i.e. "Charteres hereby indemnify owners against all consequences or liabilities that may arise from the master, charterers or their agents …. Complying with charterers' or their agent's orders, (including delivery of cargo without presentation of bills of lading …)"*

to possession … It is an incident of the bill of lading contract that delivery is to be effected only against the bill of lading."

Statements in other cases[86] that might have been understood to permit the release of goods without production of an original BL, provided a reasonable excuse for such non-production could be given have, it appears, been countermanded by the decision made in *The Houda*. This case turned upon the fact that the BLs, due to the outbreak of war and invasion of Kuwait, had been left behind at the port of loading and were never seen again. The charterers averred that they were entitled to demand discharge of goods without production of the BLs however Neil LJ held that a carrier's contractual obligations are not fulfilled "… *if the cargo is delivered to a person who cannot produce the bill of lading*." However, if delivery is made to the true owner there can be no claim for damages. Neil LJ further stated that a time charterer's rights "… *do not entitle him to insist that cargo should be discharged without production of the bill of lading*." This view was supported by Leggatt LJ in the same case who went on to say that; "*In practice, if the bill of lading is not available, delivery is effected against an indemnity. Where the bill of lading is lost, the remedy, in default of agreement, is to obtain an order of the court …*"

Regarding the matter of BLs representing a bank's security interest, where seller and buyer agree to transfer ownership and possession in the goods before the financing bank obtains the BLs, it appears that the bank (as holder of the BLs) cannot subsequently sue the carrier for wrongful delivery, as the bank has no title to sue.[87] In this particular case delivery of goods was obtained against an LOI whereas the bank was persuaded to delay negotiating documents until well after goods had been discharged to the buyer. When the buyer defaulted on its

[86] *Barclay Bank Ltd v Commissioners of Customs & Excise (1963) 1 Lloyd'sRep.81, p 88 and The Sormovskiy 3068 (1994) 2 Lloyd' Rep. 266*
[87] *Goodacre, J. Kenneth, Marine Insurance Claims, 3rd edition, 1996 (Witherby & Co. Ltd., London) on page 1043-1044 referring to The Future Express, (1993) 2 Lloyd's Rep. 542*

debt to the bank, the bank sought to sue the shipowner for conversion of goods but failed in its suit for the reason given above. In essence this was because the seller and buyer agreed to transfer goods' ownership and possession prior to the bank obtaining the original BLs which, according to the Court of Appeal, meant the bank had no title to sue the carrier for wrongful delivery.[88]

Another instance where a bank suffered loss due to the use of an LOI arose as follows: A shipment of bicycles was secured by presenting BLs through Bank of China (BoC) to the buyer for payment. Unbeknown to the seller or BoC the buyers induced their bank, Sze Hai Tong Bank, to countersign an LOI in favour of the shipowner in order to obtain delivery of goods without production of the original BL. Once the seller became aware of the situation he brought proceedings against the carrier claiming damages for breach of contract and conversion. Not only did the High Court of Singapore hold the carrier liable towards the seller but also instructed the bank to indemnify the carrier by virtue of countersigning the LOI. This decision was ultimately upheld by the Judicial Committee of the Privy Council[89] Lord Denning stating that:

> *"It is perfectly clear that a shipowner who delivers without production of the bill of lading does so at his peril. The contract is to deliver, on production of the bill of lading, to the person entitled under the bill of lading….. The shipping company did not deliver the goods to any such person. They are therefore liable for breach of contract unless there is some term in the bill of lading protecting them. And they delivered the goods, without production of the bill of lading, to a person who was not entitled to receive them. They are, therefore, liable in conversion unless likewise protected."*

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[88] *see also Aiken R. et al, Bills of Lading at 9.86 on p. 202 stating: "The action failed, the court concluding that although it was the original intention of the parties that the claimant should become a pledge of the goods, which would have given it possessory title sufficient to sue, it never did so; nor did it acquire any other security rights in the goods, and thus had no title to sue."*

[89] *Sze Hai Tong Bank v Rambler Cycle Co Ltd. (1951) A.C. 576 at 586*

In one case the carrier tried to argue that the LOI was a "demand for delivery" under s.3(1)(c) of the carriage of Goods Act 1992 in which event the LOI issuing party (in this case the receiver) would become liable under the bill.[90] The court declined to accept the argument holding that the LOI imposed no obligation upon the issuer to receive the goods but provided only an indemnity for certain claims if the goods were in fact received.

The shipowner is not absolved from liability if goods are delivered against presentation of a forged BL respectively forged indorsement because such a document, per Stuart Smith LJ, is *"… in the eyes of the law a nullity … which has no effect whatever."*[91] Stuart Smith LJ also noted that another reason for demanding presentation of an original BL in order to obtain delivery of the goods derives from the fact that the shipper may change the consignee details, thus making the goods deliverable either to himself or to his order,[92] this having occurred in *London Joint Stock Bank v British Amsterdam Maritime Agency*.[93]

On the other hand, if a carrier delivers goods against presentation of an original BL, even if a third party has an interest in the goods e.g. as financier, a carrier will be held harmless provided he had no knowledge of an assignment.[94]

[90] *The Aegean Sea (1998) 2 Lloyd's Rep. 39*
[91] *Motis Exports Ltd v Dampskibsselkabet (2000) 1 Lloyd's Rep 211*
[92] *Voyage Charters, 18.158*
[93] *(1910) 16 Com. Cas. 102*
[94] *Glyn Mills v East & West India Dock Co (1882) 7 App Cas 591 – in this case the defendant was a warehouseman, but his status in the circumstances concerned was identical to that of a carrier*

Incorrect description of one or more of the following:

- *goods*
- *condition*
- *quantity*

Provided a BL incorporates the Hague / Hague-Visby / Hamburg Rules then certain information including *inter alia* the description of the goods, its condtion and quantity would need to be evidenced on the face of the bill.[95] The primary reason for this is that with regard to the items enumerated (the only ones relevant to this particular part of the discussion), all parties to a BL will need to know the full details of the goods shipped as each in turn will expect to be able to rely upon the veracity of the information given. Clearly the contracting parties, seller and buyer, need to establish compliance (or not) with the contract but also the carrier needs to ensure that he fulfils his contractual obligations by releasing the correct goods to the proper receiver. Not least of all, any claim(s) for loss or damage will be linked to statements made on the face of the BL regarding the items discussed hereunder.

Description of the goods

The goods description may include such items as the date of shipment and the voyage details.[96] Concerning the former there is much case law to deplore accepting an LOI for the mis-dating of BLs. Usually if a date of shipment is shown on a BL to be different from the actual date then it is antedated. The reason for this is that a shipper invariably wishes to evidence a BL shipment date within the contractually permitted time-frame.[97] In this case (*The Saudi Crown*) the plaintiffs could claim

[95] *respectively per Hague / Hague-Visby Rules in Article 3.3. – Hamburg Rules in Article 15*
[96] *Mills S. – Letters of Indemnity, a guide to good practice, 1st ed. 2005 on p. 21 para. 63*
[97] *The Saudi Crown (1986) 1 Lloyd's Rep. 261 at p. 262*

damages by virtue of being deprived of the opportunity to reject the backdated BLs. Another reason may be the obligation to comply with LC terms and conditions in order to obtain payment thereunder. In this event a third party who has relied upon the ante-dated BL to his detriment, could commence proceedings against the carrier for fraud and conspiracy.[98]

Even if the shipowner is unaware of, and thus gave no consent to, the issuance of such fraudulently backdated BLs, he may still be made liable for the consequences arising therefrom provided the charterer or agent had actual or ostensible authority to issue BLs on his behalf.[99]

Nor would the fact that the shipowner was not a party to any LOI given for such antedating of the BL avail him.[100] This standpoint is consistent with the Carriage of Goods by Sea Act 1992, c. 16, sect. 4(b) whereby such BLs are conclusive evidence of the shipment of the goods in favour of the lawful holder of the bill. However, assuming the shipowner was the innocent victim of such BL backdating under an LOI, presumably he could seek legal recourse against, and damages from, the party who did fraudulently issue the backdated BL.[101]

If a carrier's employee fraudulently alters (e.g. ante-dates) a BL in order to facilitate the fraudulent availment of an LC then the carrier will normally be held liable.[102] If the fraudulent alteration occurs after issuance then the BL's status will depend upon the nature of the forgery and who committed it.[103] In one case[104] the seller's agents

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[98] *Standard Chartered Bank v Pakistan National Shipping Corp (1995) Q.B. 610 2 Lloyd's Rep. 365*
[99] *The Starsin (2000) 1 Lloyd's Rep. 85 at p. 97; Alimport v Soubert Shipping Co. Ltd. (2000) 2 Lloyd's Rep. 447 at pp. 448-459*
[100] *Cargill Ferrous Intl', A division of Cargill Inc. v M/V Sukarawan Naree 1998 AMC 566 at p. 5771 (E.D. La. 1997)*
[101] *Gaskell, Asariotis & Baatz, Bills of Lading: Law and Contracts, 2000 at para. 13.10, note 25*
[102] *Blue Nile Co. Ltd v Emery Customs Brokers (S) Ptd Ltd (1992) 320 L.M.L.N., applying Kooragang Investments Pty Ltd v Richarson & Wrench Ltd (1982) A.C. 462 but not Grant v Norway (1851) 10 C.B. 665*
[103] *Gaskell N. at 14.46 on p. 427*

deleted part of the BL clausing to give the appearance of an October shipment.[105] The forgery did not nullify the BL in that case albeit a nullity might be presumed if a forgery was such as to corrupt the entire instrument.[106]

The *Saudi Crown* decision discussed above was not followed by Rix J. in *The Hector*[107] that dealt with ostensible authority to issue BLs. In this case Rix J. held *obiter* that owners could not be held responsible for a false BL because the BL did not reproduce clausing indicated in the mate's receipt regarding the cargo condition and was also falsely dated[108] and thus "*…as a "shipped" bill became a fraudulent one, irrespective of the mate's receipt. That is sufficient in my view to render the bill unauthorized by the owners, whether authority is sought in concepts of actual, usual or ostensible authority*." Per Rix J. even though the owner held out the charterers as authorised to sign BLs by virtue of his vessel being under time charterers' orders, they were not thus granted usual or ostensible authority to sign false BLs.

A distinguishing factor between the cases discussed above is that the claimants in the *Saudi Crown* sued in tort[109] whereas in *The Hector* and *The Starsin*[110] the claim was for breach of the BL contract which carriers sought to deny for lack of authority.

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[104] *Kwei Tek Chao v British Traders and Shippers (1954) 2 Q.B. 459*
[105] *deleting the first five words of "received for shipment and since shipped Oct.31"*
[106] *see Motis Exports (2000)*
[107] *Sunrise Maritime Inc v Uvisco Ltd; The Hector (1998) 2 Lloyd's Rep. 287*
[108] *see Aikens R. et al, Bills of Lading at 3.66-67 on p. 54*
[109] *for misrepresentation inducing claimant to become indorsees of the BL*
[110] *Homburg Houtimport B.V. v Agrosin Private Ltd (The Starsin) (2003) UKHL 12*

Description of the condition

With regard to the condition of goods, the master has the right to add wording to a BL which, as held by Colman J. indicates "*the apparent order and condition of the goods according to the reasonable assessment of the master. That was not a contractual guarantee of absolute accuracy as to the order and condition of the cargo or of its apparent order and condition*:"[111] In *The David Agmashenebeli* the master insisted upon clausing the BL in such a way as to indicate that: "*… the whole or a substantial part of the cargo was thus affected …*" i.e. in this case discoloured, whereas in fact only a small proportion of the cargo was discoloured. Thus, the defendants "*had failed to issue to the shippers a bill of lading which a reasonably observant master could properly have made. Accordingly, the defendants were in breach of their contractual duty arising under art III, r 3 of the* [Hague-Visby] *rules*."

The crux of the case turned upon the master's insistence upon clausing the BL in such a way that a misleading impression of the condition of the goods was given. This led to the consignee / buyer rejecting the BL and only accepting the goods at a lower price, the market value of same having fallen between conclusion of the sales contract and presentation of the documents for payment. The seller considered the clause used[112] to describe the condition of the goods shipped to be inappropriate which in turn, by virtue of the buyer's rejection of documents, had incurred a commercial loss for the seller. In the event, the goods evidenced discoloration affecting ca. 1% of the total and only a tiny quantity of contaminants.

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[111] *The David Agmashenebeli (cargo owners) v The David Agmashenebeli (owners; The David Agmashenebeli, (2002) 2 All ER (Comm) 806, (2002) EWHC 104 (Comm)*

[112] *"Cargo discoloured also foreign materials eg Plastic, Rust, Rubber, Stone, Black particles found in cargo."*

In a detailed analysis of a carrier's duty in providing a BL to a shipper upon the latter's demand, Colman J. found that the shipper must perforce have a very good perception of the condition of the goods as he is invariably the party producing and tendering the BL to the master for his signature. By so doing "… *the shipper invites the carrier to acknowledge the truth of the statement in the tendered bill as to the order and condition of the goods which the shipper has delivered into the possession of the carrier* …" thus when a master signs such a BL as tendered he merely makes a representation as to the apparent order and condition of the goods, having simply been invited to "… *express his acknowledgement of the truth of the statements in the bill*." If the carrier or master cannot in good faith do so, he is entitled to qualify the BL expressing "… *a view that could properly be held by a reasonably observant master* …"

In conclusion Colman J. stated that it is "… *the shipowner's duty to issue a bill of lading which records the apparent order and condition of the goods according to the reasonable assessment of the master*." Which however would not represent "… *any contractual guarantee of absolute accuracy as to the order and condition of the cargo or its apparent order and condition* …" He also rejected the argument that the Hague-Visby Rules, e.g. Art. III Rule 3, implied any such duty upon the carrier. The BL need only "… *express[es] that which is apparent to the master … according to his own reasonable assessment* …"

Thus, although Colman J. considered that the actual condition of the goods did not necessarily warrant the clause used by the master, the master was not entitled to issue a clean BL. A further claim that the carrier was liable in tort, by misrepresenting the apparent order and condition of the goods, was also dismissed. It was held that subjecting carriers to such tort liability would exercise an inhibiting influence upon masters and might cause delay in issuing BLs. Nor was it considered just to add such a liability in addition to that imposed by

other rules e.g. "*At least where the Hague Rules or Hague-Visby Rules govern the bills of lading, the third "test" in Caparo v Dickman (1990) 2 AC 605 – that it is fair, just and reasonable to impose a duty of care in all the circumstances – is not satisfied.*" Therefore, the BL was held to be justifiably claused and the claim was accordingly dismissed.

In arriving at his decision as outlined above, Colman J. expressly declined to follow dicta in the *Arctic Trader*[113] where it was stated *obiter* that Art. III rule 3 of the Hague-Visby Rules represented "*an unqualified or 'absolute' contractual undertaking, not merely one which the shipowner, or the master, must take reasonable care to perform.*"[114] In this case mates receipts were issued which failed to evidence the contaminated condition of the goods. Based upon these, clean BLs were subsequently issued. The court held that, contrary to the position with regard to the issuance of BLs, the master owed no duty to the charterers to exercise care and skill with regard to the clausing of mates receipts.

The relevance of the above regarding LOIs is that a master cannot wilfully or negligently misdescribe the goods loaded. However, there are instances where an honest disagreement arises between shipper and master as to the actual condition of the goods. Although the master could clause the BL to reflect his honest opinion, when the shipper has to present a clean BL in order to obtain payment, he will normally seek to obtain such clean BL by giving the master an LOI to this effect. At this stage, both parties (shipper and carrier) start to move onto thin ice. By knowingly misdescribing the goods' condition the carrier becomes an accessory to deception in that the condition is misrepresented[115] to the consignee / holder / buyer who may be

[113] *The Arctic Trader (1996) 2 Lloyd's Rep. 449*
[114] *at p. 458*
[115] *Derry v Peek (1889) 14 App. Cas 337 "*Fraud is proved when it is shown that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false*"*

expected to depend upon the BL as being conclusive evidence as to the condition of the goods shipped.

A BL may be said to evidence certain facts, the condition of the goods being one such. Once possessed by the consignee or indorsee for value, such facts borne upon the BL may become conclusive evidence of same versus the shipowner who will become estopped from from denying the veracity of them.[116] Statutory support for this is given in the Hague and Hague/Visby Rules in Article III rule 4 as also s 4 of the Carriage of Goods by Sea Act 1992. Estoppel arises when a BL holder has altered his position in reliance upon the BL itself e.g. taken or paid for goods, and invariably then when value has been given for the BL. This view was stated by Scrutton L.J. thus: "*The mercantile importance of clean bills of lading is so obvious and important that I think the fact that [the consignee] took the bill of lading, which is in fact clean, without objection, is quite sufficient evidence that he relied on it.*"[117]

However, where a BL has been claused regarding the apparent order and condition of the goods, the owner will not be estopped from denying liability for damage. This was the case when sugar, shipped under a BL stating "Received in apparent good order and condition" transpired to be damaged upon arrival. The BL also bore a clause stating "Signed under guarantee to produce ship's clean receipt" which was held to be sufficient warning to any subsequent holder of the BL that the pre-printed statement note above regarding the goods' condition was thus superseded by the additional clausing.[118]

There is a well-known case relating to blatant mis-description of the condition of goods loaded[119] in which a clean BL was issued against an LOI for 100 barrels of orange juice which were in fact noted by the tally

[116] *Brandt v Liverpool (1924) 1 K.B. 575*
[117] *Silver v Ocean SS. Co. (1930) K.B. 416, 428*
[118] *Canadian and Dominion Sugar Co Ltd v Canadian National (West Indies) Steamships Ltd (1947) AC 46 PC*
[119] *Brown, Jenkinson & Co. Ltd v Percy Dalton (London) Ltd. (1957) 2 Lloyd's Rep. 1*

clerk as being "old and frail" which further evidenced some as leaking. Not only do BLs obtained under such circumstances undermine the trust which is placed in them by the trading community, but the consequence of taking an LOI for such misrepresentation is that the LOI itself will invariably prove to be unenforceable[120] against the issuer and thus worthless.

There was a recent case of a dispute between the shipowner and the time charterer regarding the master's refusal to load cargo which, in the master's opinion, was not of good condition and would thus require him to issue claused BLs.[121] This refusal was based upon cl. 52 of the Charter which stipulated *inter alia* "Master has the right and must reject any cargo that are [sic] subject to clausing of the BS/L." The dispute was resolved by the issuance to the master of an LOI. It was established that the shippers were prepared to insert in the BL the "complete and accurate description of the cargo according to the finding of the pre-loading survey by the Owners' surveyors."[122]

Because the BL goods description would have accurately described the cargo no further clausing would have been necessary to reconcile the "apparent order and condition" of the goods stated in the BL. Therefore the master was wrong to refuse issuance of the BLs as demanded.

Description of quantity

Irrespective of the legal provisions to which a BL is made subject[123] it must indicate *inter alia* the quantity of goods loaded. It is implicit in

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[120] *ibid at page 13, Pearce LJ referring to the general principle in Alexander v Rayson (1936) 1 K.B. 169, 182; "*It is settled law that an agreement to do an act that is illegal or immoral or contrary to public policy, or to do any act for a consideration that is illegal, immoral or contrary to public policy, is unlawful and therefore void*."*

[121] *Sea Success Maritime Inc v African Maritime Carriers Ltd (2005) EWHC 1542 (Comm), 2005/248*

[122] *ibid at p. 9*

[123] *e.g. the Hague / Hague-Visby or Hamburg Rules*

the Rules that the shipper provides this information.[124] Accordingly, the BL given to the shipper invariably incorporates limitation clausing excluding liability for information provided to the carrier with clauses such as "*weight, measure, quantity/unknown*", "*shipper's load and count*" or "*said by shipper to contain*" or variations of similar import.

This does not however absolve the carrier of liability for providing BLs indicating the statutorily required information[125] which, regarding said information, in the event of same being transferred to a third party, becomes binding upon the carrier.[126] However, if the carrier reasonably suspects, or is unable to check, information given (e.g. where sealed containers are used) he may decline to issue a BL using such data.[127] In all events, the shipper is deemed to guarantee the accuracy of the data provided and to indemnify the carrier for using it in any BL he issues.[128]

According to Hazelwood[129] carriers handling oil or liquid cargoes experience difficulties in the exact measurement of such goods which can lead to disputes when the shore tank and ship's weight diverge. The P&I Clubs recommend that should the divergence exceed 0.2% to 0.3% then the carrier should clause the BL accordingly. This is to protect him from a short delivery claim at discharge port for which the club will invariably provide no indemnity. Hazelwood goes on to reiterate the point made elsewhere that "*Should the master be offered a letter of indemnity in exchange for signing a false bill of lading such an indemnity would be unenforceable where it is known that the bill of lading is false.*"[130] and that public policy would not countenance the indemnification of such fraudulent and unlawful activities.

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[124] *Hague & Hague-Visby Rules, Art. 3 rule 3: "… as furnished in writing by the shipper …"*
[125] *Hague-Visby Rules, art. III rule 3*
[126] *Hague-Visby Rules, art. III rule 4*
[127] *Hague-Visby Rules, art. III rule 3*
[128] *Hague-Visby Rules, art. III rule 5 and Hamburg Rules art. 17(1) see also The Boukadoura (1989) 1 Lloyd's Rep. 393*
[129] *Hazelwood S. - P&I Clubs; Law and Practice at p. 179*
[130] *idem quoting Brown Jenkinson & Co. v Percy Doulton (London) Ltd (1957) Q.B. 621*

If the shipper has been provided with a "Received for Shipment" BL then this will only represent *prima facie* evidence of the condition and quantity etc. of the goods taken into custody by the carrier at that particular time, but not as at the time of shipment. Should the shipper require this evidentiary proof (e.g. to obtain payment under a Letter of Credit) then he is entitled to demand the subsequent issuance of a "Shipped" BL.[131]

Whether a BL can be said to make a binding representation as to the quantity of goods loaded was the subject of *The Mata K*.[132] This case dealt in part with short delivery of 11'000 mt of muriate of potash loaded under a BL stating "weight, measure, quality, quantity, condition, contents and value unknown." Clarke J. held that the shipowners were not bound by any bill of lading quantity statement, even under s.4 of the 1992 Act. They had not, in fact, stated any quantity of goods loaded."[133] Clarke J. goes on to state that "… *a bill of lading which states that 11'000 tonnes of cargo were shipped "quantity unknown" is not a representation that 11'000 tonnes were shipped. Any other conclusion would give no meaning to the expression "quantity … unknown*". Viscount Reading C.J. in an earlier case[134] and Longmore J. in *The Atlas*[135] both supported this view, the latter stating "*If the bill of lading provides that the weight is unknown it cannot be an assertion or representation of the weight in fact shipped*."

Regarding such "weight …unknown" clausing, Clarke J. stated "*There is no suggestion or evidence that the plaintiffs asked the defendants to issue a bill of lading showing the shipment of 11'000 tonnes without the*

[131] *Hague-Visby Rules, art. III rule 7*
[132] *Agrosin Pte Ltd v Highway Shipping Co Ltd (The Mata K) Q.B. (Comm.) (1998) 2 Lloyd's Rep. 614*
[133] *Todd P., Cases and Materials on International Trade Law, 1st ed. 2003 (Sweet & Maxwell, London) on p. 730, 14-051*
[134] *New Chinese Antimony co Ltd v Ocean Steamship Co Ltd (1917) 2 K.B. 664 at p. 669*
[135] *Noble Resources Ltd v Cavalier Shipping Corporation (The Atlas) (1996) 1 Lloyd's Rep. 642*

qualification 'weight … unknown'. and "*… the natural inference is that the shippers were content with [the] bill of lading …*" and "*If they had wanted a bill of lading in a different form they would surely have drafted one*." The foregoing derived from a discussion of the effect of the Hague Rules, art. III (3) and (4).

In an unreported Canadian case heard before the Federal Court of Canada, Quebec Admiralty District, there was a dispute between the shipper loading grain from a government grain elevator and the master regarding the actual tonnage loaded. Basing his calculations on the ship's fore and aft drafts, the master maintained the the quantity indicated as delivered by the official National Harbours Board was 500 mts too high. The master refused to accept an LOI for the issuance of a clean BL for the disputed tonnage whereupon a motion was presented to the Federal Court to oblige the master to issue BLs for the higher tonnage. The court declined this request and, some days after sailing, the National Harbours Board admitted that its computer had indeed been "out" by 500 mts.[136] A case indicating that accepting an LOI too readily it may not always be the best course of action.

[136] *see Tetley at Chapter 38, postscriptum*

Misdescribing the voyage (rotation / deviation)

Within the geographical limits agreed, a charterer may usually instruct the master to proceed to such ports as he wishes and the master may not unduly question such orders provided they do not endanger the safety of the ship or cargo.[137] However, if the master reasonably believes that such risks could ensue from following orders, he is not only entitled but indeed obliged refuse them.[138] This becomes of particular importance if the port chosen is considered to be an unsafe port, as these are orders that the charterers are not entitled to give.[139] This will obviously affect the validity and value of an LOI given for amending any discharge port instructions.

The consequences of deviation i.e. moving from the proper and/or agreed route can be serious for the shipowner. Under common law concerning the carriage of goods by sea, it is implicit that no deviation will occur. This derives from *Davis v Garret*[140] which disposed of earlier doubts as to this matter. In this case a cargo of lime had been loaded on a barge (the *Safety*) from the river Medway to London. In the course of transit the barge deviated to both the East Swale and Whitstable Bay (due to smuggling activities) and was ultimately struck by a storm. Once seawater made contact with the cargo it caught fire and the master had to abandon the vessel with the loss of both cargo and barge. The deviation was held to be outside the customary route. The barge owner declined liability, claiming that the storm was in fact the proximate cause of loss and that he had not undertaken to transport the cargo direct to London. Concerning the latter point, the court held that "… *We cannot but think that the law does imply a duty in the owner of a vessel, whether a general ship or hired for the special*

[137] *Portsmouth Steamship v Liverpool & Glasgow Salvage Association (1929) 34 LI.L.Rep. 459*
[138] *The Hill Harmony (2001) 1 Lloyd's Rep. 147 at p. 160*
[139] *The Sussex Oak (1950) 83 LI.L.Rep. 297*
[140] *(1830) 6 Bing 716, Court of Common Pleas*

purpose of the voyage, to proceed without unnecessary deviation in the usual and customary course."[141]

Extracting a few points from *Gaskell's*[142] extensive treatment of deviation we deduce "… *some uncertainty concerning the effects of deviation*,"[143] in that it is unclear whether deviation will "destroy the whole contract" or rather preclude the shipowner from relying upon certain exceptions and limitations. In favour of the first variant we have Fletcher Moulton LJ stating that a guilty shipowner "*cannot be considered as having performed his part of the bill of lading contract and therefore he cannot claim the benefit of stipulations contained in his favour in the bill of lading*."[144]

This interpretation was taken up in the textbooks with *Carver* in 1909 stating that a deviation denies the shipowner of his exceptions of perils with "*The deviation, therefore, displaces the special contract*."[145] This stand was supported by Scrutton's "… *unequivocal opinion that deviation was a fundamental breach …*"[146] This strict line is also taken by Lord Atkin in *Hain v Tate & Lyle*[147] following *Stag Line v Foscolo Mango*.[148]

One consequence of this is that Lord Atkin felt that no contract freight could be claimed after deviation unless the deviation had been waived but without deciding whether *quantum meruit* freight could be

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[141] *Dockray's notes on this case are instructive and stated in full in Appendix III*
[142] *Gaskell N. in Ch. 6 ff*
[143] *Gaskell N. at 6B.7, 6.51 on p. 187*
[144] *Joseph Thorley v Orchis S.S. Co. (1907) 1 K.B. 660 at p. 669*
[145] *Gaskell N. at 6.52 on p. 188*
[146] *ibid*
[147] *Hain S.S. Co v Tate & Lyle (1936) 41 Com. Cas 350 holding; "I venture to think that the true view is that the departure from the voyage contracted to be made is a breach by the shipowner of his contract, a breach of such a serious character that, however slight the deviation, the other party to the contract is entitled to treat is as going to the root of the contract, and to declare himself as no longer bound by any of the contract terms. I wish to confine myself to contracts of carriage of goods by sea, and in the circumstances of such a carriage I am satisfied that by a long series of decision, adopting in fact commercial usage in this respect, any deviation constitutes a breach of contract of this serious nature."*
[148] *Stag Line v Foscolo Mango (1932) A.C. 328*

claimed. Gaskell opines that "*It might be better to rely on the law as it was understood previously and explained by such judges as Lord Esher MR in Balian v Joly Victoria and Co.*[149] *Noting the wide and narrow views, he inclined to the narrower view … The "whole" bill of lading would not go, it would simply be the exceptions and limits … consistent with all the early cases … concerned with cargo los and exceptions, and assumed that deviation would not affect the right to contractual freight.*"[150] The above has in impact upon the breadth of application of an LOI for deviation and the benefit thereof available to a carrier.

An LOI normally comes into play when the shipper wishes to have the vessel stop at additional ports, possibly outside the agreed geographical area, or to alter the previously agreed sequence i.e. rotation of ports. In order to obtain the agreement of the owner / master an LOI would be called for to protect same from the consequences of such deviation(s). This might become unnecessary if the BL / Charter Party contains a liberty to deviate clause. However, such permissible deviation only allows the vessel to call in at ports along the normal course of the voyage. Requesting the vessel to go outside the geographical area agreed could impinge or invalidate the owner's insurance cover and should thus only be agreed to by same after careful consideration.

This narrow interpretation at common law derives from an early case *Leduc v Ward*,[151] where the BL gave "… *liberty to call at any ports in any order, and to deviate for the purpose of saving life or property*." The vessel was due to proceed from Fiume to Dunkirk, but sailed instead to Glasgow, vessel and cargo being lost near Ailsa Craig. The deviation was in the order of 1200 miles off the ordinary course. The cargo owners sued for non-delivery. It was held by Lord Esher MR that notwithstanding this clause "… *the term can have but one meaning, namely, that the ports, liberty to call at which is intended to be given,*

[149] *Balian v Joly Victoria and Co. (1890) 6 T.L.R. 345*
[150] *see e.g. Cole v Shallet; Bornmann v Tooke*
[151] *(1888) 20 QBD 475, CA*

must be ports which are substantially ports which will be passed on the named voyage."

When the importance of the timely arrival of the vessel has been intimated, even verbally, this has been held to countervail an express term in the BL (Liberty Clause) permitting the owner to vary the voyage at will.[152] In this particular case a shipment of mandarins was to be shipped direct from Cartagena to London for arrival latest 30th November. This was to avoid the risk of higher duties being imposed as from 01st December and to obtain a commercially better price. All parties to the shipment were advised of the facts however the owner decided to stop first at Antwerp, arriving there on 30th November and proceeded thence to London, vessel arriving 04th December. The shipper had to bear higher duties and obtained a lower price for his goods, as anticipated. By virtue of his breach of oral warranty the shipper was entitled to claim damages, Lord Goddard CJ holding:

"(i) *the bill of lading was not in itself the contract between the shipowner and the shipper, and, therefore, evidence was admissible of the contract which was made before the bill of lading was signed and which contained a different term*."

Except where a shipper has availed himself of the entire cargo capacity of a vessel, he will be but one of several shippers with goods on board, all of whom will be expecting the vessel to arrive at one or more ports within a given time frame. Because an unjustifiable delay may be construed as a deviation[153] as also for insurance purposes[154] the owner will give careful consideration to a request to alter the vessel's rotation.

What if a charterer chooses to nominate, or deviate to, a port which the owner considers not to be a safe port? It has been said that such an order need not be obeyed by the shipowner as such an order represents

[152] *The Ardennes (Owner of Cargo) v The Ardennes (The Owner)(1950) 2 All ER 517*
[153] *Scaramanga v Stamp (1880) 5 C.P.D. 295 at p. 299*
[154] *Marine Insurance Act 1906, ss. 48, 49*

a breach of contract.[155] Should the ship incur physical damage as a result, this would then be recoverable from the charterers.

The possible consequences for the owner of effecting an unjustifiable deviation, which is a fundamental breach[156] (although some doubt has been cast upon this construction by Lloyd L.J.[157]) of the carriage contract, are that a cargo owner may either take this as a repudiation of the contract and thus claim damages or decide to waive the breach but reserve his right to claim damages.[158]

In conclusion one can say that, absent contrary express terms, one would expect a particular vessel[159] to take a direct and reasonable course without unreasonable deviation or delay.[160] It is expected that the direct[161] and "usual and reasonable route"[162] will be used, however it is open to the owner to give evidence in support of the route actually taken bearing in mind the circumstances at the time of shipment.

[155] *The Stork (1955) 2 QB 68*
[156] *Photo Production Ltd v Securicor Ltd (1980) A.C. 827*
[157] *Kenya Railways v Antares Co. Ptd. Ltd (The Antares) (1987) 1 Lloyd's Rep. 424, 430 stating "The deviation cases should now be assimilated to the ordinary law of contract."*
[158] *Compagnie Primera, etc v Compania Arrendataria,etc. (1940) 1 K.B. 362 at p. 375*
[159] *Balian v Joly Victoria (1890) 6 T.L.R. 345 (CA)*
[160] *Davis v Garret (1860) 6 Big. 716; Scaramanga v Stamp (11880) 5 C.P.D. 295 subject to de minimis limitation*
[161] *Reardon Smith Line v Black Sea and Baltic General Insurance (1939) A.C. 562 at p. 584*
[162] *Scrutton on Charterparties, Art. 127 at p. 256*

Mixing of dry cargoes
Co-mingling, blending, dyeing of liquid cargoes

Based on personal experience, it appears that the above practices are quite common in oil and petrochemicals transactions and although LOIs are indeed frequently called for, issuing or accepting then inspires neither fear nor dread. This probably derives from the long-established nature of the procedures and thus their general acceptance in trade circles. What both have in common is that the original nature and quality of the materials used is perforce altered by the process of blending. LOIs are usually then called for when the blending operation takes place on the vessel because pre-blended goods would be shipped as such and bear the corresponding product name(s).[163]

Assuming different BLs were issued, perhaps at different ports and possibly for different shippers, the owner needs to locate both sets of BLs before issuing fresh BLs for the co-mingled goods. The LOI protects the owner against the financial and commercial consequences of having two or more sets of BLs in circulation and if the subsequently blended product is different from that intended e.g. off specification (off-spec) and thus not in accordance with the sales contract.

The blending operation might also make identification of the original nature and origin and date of shipment of the initially separate goods impossible, for which the owner will also require an indemnity. As the resulting blend will affect the description of goods, the owner will not wish to be held responsible for this material alteration.

Co-mingling will be agreed *a priori* by the various shippers and cannot be imposed by the shipowner because the master cannot simply mix the

[163] *See Appendix IV for an example of such an LOI*

goods "*and leave the consignees to sort them out*"[164] as this would not be a good delivery.[165] Previously property in unascertained goods remained with the shipper however in accordance with the Sale of Goods Act 1979 s 20A[166] property now passes to the consignee who thus becomes a tenant in common. If, by virtue of the co-mingling, the shipowner cannot deliver the exact goods indicated on any given BL, he is obliged merely to deliver the correct proportionate quantity of the aggregate to each consignee.

Where goods of similar nature and quality, belonging to various cargo owners, have been shipped under different BLs, said goods having been co-mingled and become thereby indistinguishable, these cargo owners become tenants in common.[167] Although the shipowner is essentially obliged to apportion and deliver the co-mingled goods as noted above, he may be freed of this duty if the sundry BLs contain such express provisions or if the port customs in the port of discharge so allow.[168]

A previously applied penal rule[169] held that where goods were wrongfully mixed, the total admixture became the sole property of the innocent party.[170] This rule has since been overruled with the effect that the innocent party now has priority with regard to the delivery of goods out of the total admixture and also has a right to claim damages for any loss incurred by the co-mingling.[171]

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[164] *Cooke, Julian et al, Voyage Charters 2nd edition, 2001 (Lloyd's Shipping Law Library, LLP London) at 10.10*
[165] *Sandeman v Tyzack (1913) A.C. 680, 697; Dampsk. S/S Svendborg v L.M.S. Rlz (1930) 1 K.B. 83, 93 per Scrutton L.J.*
[166] *Enacted by the Sale of Goods (Amendment) Act 1995*
[167] *Spence v Union Marine Co. (1886) L.R. 3 C.P. 427, following Buckley v Gross (1863) 3 B. & S. 566 and Jones v Moore (1841) 3 Y. & C. 351*
[168] *Grange v Taylor (1904) 9 Com. Cas. 223*
[169] *Lupton v White (1608) 15 Ves. 342; Sandeman v Tyzack (1913) A.C. 680 (per Lord Moulton)*
[170] *Scrutton, Art. 152 at p. 294*
[171] *India Oil Corp. v Greenstone Shipping S.A. (The Ypatianana) (1987) 2 Lloyd's Rep. 286, 298*

For the issuance of:

- *split / switch BLs*
- *copy BLs*

Issuing Split / Switch BLs

Regarding split BLs, this usually occurs when goods shipped in one lot need to be split amongst various buyers. The point at which this exercise becomes potentially fraught is usually then when the last receiver comes to take his goods. If there is a shortfall this last receiver will insist upon obtaining the full quantity indicated in the relative BL. If the shortfall is slight, usually under 0.5% (a common insurance franchise) then it becomes a straight loss for the receiver, although any quantity exceeding such franchise can be claimed under the insurance certificate/policy. The insurance underwriters in turn will obtain by subrogation the right to claim against the carrier for such loss if they feel a claim is warranted and feasible. The carrier will invariably call for an LOI to secure him for all and any consequences arising from so splitting a BL.

The advice given by one P&I Club[172] is to ensure return of the full set of original BLs prior to splitting, that the information remains unchanged except for the quantity shown on each split BL, that a request to change the port of loading/discharge be strictly denied and that in all events an express LOI is obtained from charterers. A corollary to this may be the request to change the name of the shipper for commercial reasons.[173] The requestor is to provide a good reason for this and care must be taken (see above regarding port of loading/discharge) to ensure

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[172] *The North of England P&I Association, Newcastle upon Tyne, England, see: Splitting Bills of Lading, Signals 38, January 2000 available on: http://www.nepia.com/risk/publications/newsletters/archive/38/signals38.php#Splitting%20bills%20of%20lading*

[173] *Noble Resources Ltd v Cavalier Shipping Corp (The Atlas) (1996) 1 Lloyd's Rep. 642 at 644*

the legality of a split BL viz. breaking quotas, embargoes etc. to avoid becoming mired in a fraudulent act.

It appears that splitting BLs is a common practice[174] (personal experience confirm this assertion) and generally safe provided the entire set of original BLs is gathered in prior to splitting. If this is not done there is a risk that two or more sets of BLs could be put into circulation, possibly deceiving subsequent buyers and prejudicing the legal rights of the holders of the original BLs. Splitting of BLs may be done to alter the identity of receivers and/or the quantities of goods to be released to same.[175]

Another (and from personal experience common) reason for splitting BLs is to hide the identity of the original shipper and/or supplier from the ultimate buyer as in *The Atlas*.[176] In this case Longmore J. felt it was a dangerous practice prone to fraud and that it must only be done with the shipowner's express authority. Lloyd J.[177] concurred with this view regarding the putting into circulation of a second set of BLs. It has also been suggested that the practice of splitting bills is not legitimate.[178] Mills S. follows this line of reasoning regarding splitting BLs (as opposed to switching BLs) saying that if all original BLs are not gathered in prior to the splitting, LOIs issued "… *may not be enforceable in those circumstances*."[179] The same thus being true for the switching / substituting of BLs. The shipowner apparently risks being "… *contractually liable under both sets of bills of lading; and expenses incurred as a result of the difficulty in which he thus finds himself cannot be recovered from the holder of either set*."[180] Switch

[174] *Mills S. Letters of Indemnity, art. 22 at p. 12*
[175] *as in The Irini A (1999) 1 Lloyd's Rep. 189 and 196*
[176] *Noble Resources Ltd v Cavalier Shipping Corp. (The Atlas) (1996) 1 Lloyd's Rep. 642*
[177] *The Lycaon (1983) 2 Lloyd's Rep. 548, 522 ex Bills of Lading at 3.127 on p. 69*
[178] *S.I.A.T. di del Ferro v Tradax (1978) 2 Lloyd's Rep. 470, 493*
[179] *Mills S. Letters of Indemnity art. 22 at p. 13*
[180] *Elder Dempster Lines v Zaki Ishag (The Lycaon) (1983) 2 Lloyd's Rep. 548 ex Carver at 6-072 on p. 327*

BLs have also been used to change the date of shipment[181] e.g. to one capable of determining the price of the goods shipped.[182]

Concerning switched BLs, a fairly recent case[183] appears to support the practice of switching BLs for, although BNP claimed *inter alia* that the use of switch BLs was illegal (this practice is common in SE Asia) and had thus adversely affected BNP's contractual relationships, the court disagreed and found against them on this point.

It transpired in *The Atlas*[184] that there was no implied or ostensible authority of the shipowner to issue a second set of BLs. Although the sub-sub charterers would, under the chain of charters,[185] have authority to issue BLs binding upon the shipowner,[186] this was not the case for the switch BLs as there was no evidence to indicate that the shipowner had ratified the excess of authority simply by the act of delivering the cargo against an LOI without being furnished with the original BL.

[181] *The Wiloni Tanana (1993) Lloyd's Rep. 41*
[182] *Rudolf Oetker v IFA Internationale Frachtagenture AG (The Almak) (1985) 1 Lloyd's Rep. 557*
[183] *Pacific Carriers Ltd v Banque Nationale de Paris, Supreme Court of New South Wales, Australia viz. Luxford, Derek:* The power of the pea*, as partner of Phillips Fox, available on "http://www.maritimeadvocate.com/i19_aust.php"*
[184] *The Atlas (1996) 1 Lloyd's Rep. 642, 644*
[185] *per Baughen S., Shipping Law at p. 32; "Even if they do not have express actual authority to sign the bills of lading themselves, the charterers will have implied actual authority to do so if the charter expressly authorises them to require the master to sign bills of lading as presented by the charterer. In* The Vikfrost *this implied authority extended not only to the subcharterer but to its loading agents. Their signature for the master therefore meant that the bill became a shipowner's bill."*
[186] *The Vikfrost (1980) 1 Lloyd's Rep. 560*

Issuing Copy BLs

This is an especially fraught issue and one requiring the particular diligence of the carrier and an awareness of the risk of fraud. The request to issue copy / replacement BLs would most probably arise when the original(s) have (allegedly) been lost or destroyed. This is a difficult situation for the shipowner for it appears that despite being provided with a "reasonable explanation" this would be insufficient to protect and/or indemnify him for discharging goods without the presentation of at least one original BL.[187] An earlier decision suggesting that "… *it is no doubt necessary to imply a term that the master must deliver cargo without production of an original bill of lading in circumstances where it is proved to his reasonable satisfaction … what has become of the bills of lading*."[188] has, as noted below, apparently been overruled.

A remedy for resolving the loss of a BL[189] advises that when one is lost, destroyed or stolen, which thus precludes its presentation to the carrier by the person entitled to receive the goods, application can be made to the courts for relief. The courts possess in equity a discretionary right to give directions regarding delivery of the cargo subject to the buyer giving to the carrier an indemnity sufficient to indemnify him for the release of goods without production of an original BL. *The Houda*[190] which deals with this matter illustrates the courts' apparent preference for obtaining such relief rather than (as in splitting BLs) a copy set being made or permitting that goods are delivered without production of an original BL but against an LOI for same.

[187] *The Houda (1994) 2 Lloyd's Rep. 541*
[188] *The Somorvskiy3068 (1994) 21 Lloyd's Rep. 262 per Clark J.*
[189] *Bills of Lading, Aikens et al at 13.43 on p. 359*
[190] *Kuwait Petroleum Corp v I & D Oil Carriers Ltd (The Houda) (1994) 2 Lloyd's Rep. 541, 553, 558*

Although English law foresees circumstances under which a person might accept a reasonable explanation for the failure to produce an important document, this is not the case with regard to BLs.[191] In *The Houda* the invasion of Kuwait obliged the master to sail, leaving the signed original BLs behind, which were subsequently irrecoverable. The charterers then claimed that they were thereby entitled to obtain delivery of the goods without production of an original BL. This was not accepted by the court, Neill J. stating: "*It is of course open to a shipowner to decide that he is adequately protected by a letter of indemnity and delivery in the absence of the bill of lading, but in my judgment the rights of a time charterer to give orders do not entitle him to insist that cargo should be discharged without production of the bill of lading*." And Leggatt LJ added: "*In practice, if the bill of lading is not available, delivery is effected against an indemnity. Where the bill of lading is lost, the remedy, in default of agreement, is to obtain an order of the court that on tendering a sufficient indemnity the loss of the bill of lading is not to be set up as a defence …*"

Statements given in decisions[192] which apparently suggested that goods could be delivered without production of an original BL, provided a reasonable excuse for its non-production could be rendered, appear now to have been overruled by *The Houda*.[193]

Thus, the remedy for a lost BL would be that given above, any other course of action might expose the discharging carrier to potential liability which, depending upon the party indemnifying him, might prove to be greater than the value of an LOI given.

[191] *Sze Hai Tong Bank v Rambler Cycle Co Ltd. (1951) A.C. 576 per dicta Lord Denning*
[192] *Barclays Bank Ltd v Commissioner of Customs and Excise (1963) 1 Lloyd's Rep. 81; Sze Hai Tong Bank v Rambler Cycle Co Ltd. (1951) A.C. 576*
[193] *Dockray M, Carriage of Goods by Sea at p. 91: "… these suggestions can now be discounted."*

Chapter III

Protection and Indemnity Club (P&I) cover considerations

Of particular concern for vessel owners with regard to:

a. The risk of loss of cover (uninsured / uninsurable risks)

b. P&I "standard" LOI draft texts as provided to club members

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Before considering what P&I Clubs do not cover, it might be useful to briefly discuss the origins of these clubs and their underlying purpose. The early hull insurance market sought to limit its liabilities strictly to damage to the owners' hulls, hence the name. However, a succession of various acts (e.g. Lord Campbell's Act,[194] the Employers' Liability Act 1880, others being the Factory Acts and Workmen's Compensation Acts) as also an important legal case (*Westernhope*[195])[196] drove the shipowners to seek more comprehensive cover to augment that available in the market.

To this end various English shipowners clubbed together to form associations to mutually secure those liabilities for which cover was not available elsewhere, calling themselves initially Protection Clubs. At a later stage, and driven once more by statutory support provided to employees of all stripes, employers and hence shipowners also became liable *inter alia* for loss of life and injuries sustained at work. This obliged the Protection Clubs to expand the range of cover provided and

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[194] *which enabled dependants to sue for damages upon death of a relative deriving from a shipowner's negligence*

[195] *per Hazelwood S. p. 7, no reference to this case can be found albeit the vessel is also referred to as* Westenhop *and* Western Hope.

[196] *As the result of a deviation, the vessel* Westernhope *was lost in 1870. The court held that the shipowner could not rely on the carriage contract exceptions but was liable for the entire cargo value.*

ultimately to amend their nomenclature to incorporate Indemnity from which we now derive the Protection and Indemnity Clubs.

However, not all risks could be borne, nor the full range of commissions and omissions of the club members. Therefore, subject to the discretion of the club directors, certain liabilities will not be insured, amongst which are those for the taking of LOIs.[197]

The risk of loss of cover (uninsured / uninsurable risks)

Since moving from banking into the trading community one has heard many times that LOIs are, respectively must be, acceptable and secure because they are furnished by the P&I Clubs on behalf of members. This has led to a general lack of concern in the giving and taking of such indemnities which is, or at least should be, of more general concern, because the P&I Clubs expressly exclude any liability for (most of) the LOIs issued to and accepted by shipowners.[198]

The reason for this express exclusion of liability by the P&I Clubs for certain defined acts goes to the very roots of a shipowner's contractual obligations under a contract of carriage. It is axiomatic that a carrier has to deliver the goods furnished to him by the shipper under a contract of carriage in accordance with the governing contractual and statutory stipulations.[199] Simply put, it is the reasonable expectation of a shipper that the goods he has entrusted to the carrier are delivered to the shipper's nominated buyer, be this the consignee of the BL or to his order e.g. a person still to be defined, and at the place of delivery as mutually agreed.

[197] *Viz Gard P&I Club Rules, 55a at p. 106*
[198] *See UK P&I Club Rules, Rule 2, s 17 D, a-d inclusive as an example on web link http://www.ukpandi.com/ukpandi/resource.nsf/Files/Rules06/$FILE/Rules06.pdf*
[199] *Hague-Visby Rules, Art. III, s 2*

The generally accepted means of evidencing compliance with these delivery obligations is the surrendering of an original BL to the shipowner by the person legally entitled to claim the goods.

Some clubs differentiate between "negotiable" and "non-negotiable" BLs in that they exclude losses deriving from goods' delivery under the former without production of an original BL respectively delivery to a person other than the designated consignee in the latter. The reason for this can be found in the problems deriving from the mis-delivery of goods. In the case of a so-called negotiable BL the carrier cannot necessarily know beyond doubt whether a BL made out "to order" has in the meantime been endorsed to a named party or indeed in blank, and thus who the true owner of the goods evidenced therein really is. Should the carrier deliver goods to an unlawful receiver he could make himself liable for the tort of conversion and thus liable for the full value of the goods but potentially without recourse to any contractual exemptions and limitations.[200]

The carrier has *inter alia* two clear duties with regard to discharging his contractual delivery obligations; to deliver the goods to the person rightfully entitled to them and against production of an original BL.[201] Thus, even if he delivers to the rightful owner (and thus avoids the risk of being found a tortfeasor for conversion) he could be liable for breach of the contract of carriage as against the shipper or an endorsee.[202]

Even if the owner obtains an indemnity for delivering without BLs he could still be found guilty of conversion.[203] One reason for this sounds in the shipper's right, in certain circumstances, as an unpaid seller, of

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[200] *The Sagona (1984) 1 Lloyd's Rep. 194 at p. 198; The Jag Dhir and Jag Shakti (1986) 1 Lloyd's Rep. 1*
[201] *"The contract is to deliver on production of the bill of lading, to the person entitled under the bill of lading" per Lord Denning in Sze Hai Tong Bank Ltd v Rambler Cycle Co. Ltd (1959) 2 Lloyd's Rep. 114; see also the Houda (1994) 2 Lloyd's Rep. 541 at p. 553, per Leggatt L.J.*
[202] *The Carriage of Goods by Sea Act 1992*
[203] *The Sormovskiy 3068 (1994) 2 Lloyd's Rep. 266 at p. 274, per Clarke J.*

stoppage *in transitu* i.e. to forbid the delivery of goods whilst in transit. This might arise if for example the intended buyer had become insolvent after shipment, but before delivery of, the goods.

Even in the absence of an express indemnity, the carrier might be entitled to an implicit indemnity for carrying out his principal's instructions provided the acted reasonably and that "*such an act is not apparently illegal in itself but is done honestly and bona fide in compliance with the [charterers] instructions*".[204] If however the owner agrees an express obligation to deliver without an original BL in the contract of carriage or charter party, as was the case in *The Delfini*,[205] he will, according to Hazelwood,[206] be left without P&I club cover and must therefore look to the indemnifying party for recompense of any losses incurred.

One way of trying to circumvent the legal problems concerning the use of LOIs is to have a BL travel with the goods in the ship's bag. Whilst this might seem an obvious solution to potential delays at the discharge port, demurrage etc. the P&I Clubs frown upon the practice. This is an artifice in that the master would give the BL to the named recipient who would then return it to him in order to obtain delivery of the goods. The inherent risks involved include wrongly identifying the recipient (see above regarding the tort of conversion) and that the other original BLs have been otherwise endorsed to another party in the interim. The onus is thus put on the master to properly identify the rightful receiver. This practice was found to be quite common in the oil trade and, should the charterparty incorporate such a clause, it appears the courts will oblige a master to give effect to same.[207] Because mis-delivery of both

[204] *Betts & Drewe v Gibbins (1834) Ad. & E. 57; Dugdale v Lovering (1875) L.R. 10 C.P. 196*
[205] *Delfini, The (1990) 1 Lloyd's Rep. 252, C.A.*
[206] *Hazelwood S. at p. 190*
[207] *The Mobil Courage (1987) 2 Lloyd's Rep. 655 although, to quote Hazelwood (p. 193 fn 268): "... the case actually concerned a master's refusal to sign a bill of lading to be carried on board rather than the duty to deliver against an on-board bill of lading and so the legality of the practice was not investigate thoroughly or ruled upon conclusively."*

the BL and cargo could jeopardise the owner's P&I cover the clubs advise their members to mitigate their risk by clausing the remaining BLs with: "One original bill of lading retained on-board against which delivery of cargo may properly be made on instructions received from shippers/charterers."

To supplement the remarks upon deviation given elsewhere, it is to be noted that (as with the delivery of goods without production of a BL) the P&I Clubs usually exclude any indemnity for deviation. There are a couple of reasons for this; a deviation might jeopardise the protection afforded to the carrier under his contract of carriage. This might well invalidate any exemptions and liability limitations available to him under the Hague or Hague-Visby Rules, compliance with which P&I Clubs invariably insist as minimum standards of operation. Hence the clubs usually recommend members to incorporate clauses in their contracts of carriage which allow for a legitimate departure from the contractual or normal route.

Unjustifiable deviation was once considered a fundamental breach of contract[208] however this strict view appears to have been undermined by later cases[209] which appear to have raised some doubts as to whether a carrier who has deviated may or may not depend upon the exemptions and limitations provided for in his contract of carriage. In one case, it was the manner in which a particular contract exemption clause was construed which denied a shipowner recourse to the benefits thereunder, and not any issue of fundamental breach deriving from the deviation.[210]

As an additional service, some clubs offer their members an open deviation insurance which is placed in the traditional market but for

[208] *Joseph Thorley v Orchis Steamship Company (1907) 1 K.B. 660 per Fletcher Moulton L.J.; Stag Line Ltd v Foscolo, Mango & Company (1932) A.C. 328 at p. 347, per Lord Russell*
[209] *Suisse Atlantique Societe D'Armament Maritime S.A. v N.V. Rotterdamsche Kolen Centrale (1967) 1 A.C. 361; Photo Production Ltd v Securicor Transport (1980) A.C. 827 at p. 845*
[210] *The Chanda (1989) 2 Lloyd's Rep. 494 at p. 505 per Hirst J.*

which the club itself assumes no direct liability, acting solely as agents. This provides members with a potential source of compensation for events for which the club itself excludes liability. Cover hereunder is predicated upon the member's notification to the club of an intended deviation. It also covers contractual deviations e.g. shipment on deck where the BLs show under-deck stowage, shipment on a vessel other than that given in the contract of carriage or an unauthorised transhipment and docking with cargo on board. Some non-English jurisdictions consider these events to be "deviations" and thus expose carriers to legal risk.[211]

We are informed in clear terms that "*The fact that there is available a "Club Letter" which is in common use should not be taken as being an encouragement or approval by the club of the practice of delivering without bills of lading. The position of the clubs remains firmly against such practices.*"[212] Such wording is provided simply to better protect innocent members' legal interests when placed in a dilemma.

The club letter wording deliberately provides for no express expiry date because this can vary depending upon circumstances and jurisdiction. Under English Law the usual time-bar for bringing a mis-delivery claim (being breach of contract and conversion) is six years[213] whereas the Hague and Hague-Visby Rules limit the duration for bringing such a claim to one year[214] from delivery or when delivery should have taken place. It would appear that the time-bar for such claims could be as long as 30 years[215] in some jurisdictions, hence the clubs' exclusion of any express expiration date in the proposed LOI wording. The member will be secured against claims until such time as all original BLs have been furnished to him in liquidation of the LOI.

[211] *Hazelwood S., at p. 181*
[212] *Hazelwood S. at p. 193 ff*
[213] *Limitation Act 1980 s. 5*
[214] *Art. III Rule 6*
[215] *Hazelwood S. at p. 195*

In practice both banks and traders "write off" LOIs after one year of issuance, perhaps because the vast majority of BLs are issued subject to either the Hague or Hague-Visby Rules or, thankfully, because so few claims ever arise under LOIs and this is held to be a reasonable period of time to keep such instruments on their books. As a concession to the banks, the previous LOI wording now incorporates a financial liability limit i.e. 200% of the CIF value of the goods shipped.

Steps to protect innocent owners were undertaken by the Steamship Mutual Club which offered members a special insurance cover of up to USD 10 million for mis-delivery liabilities incurred by their agents. This cover was not subject to the usual risk-pooling but could be laid off in the traditional market for re-insurance purposes.[216]

During a bankers' event recently it was stated that a particular bank was considering retaining, at 100% of the goods' value, all LOIs on their books and taking them against trading companies' bank lines.[217] If this practice became widespread, it might herald the end of LOIs as we now know them because companies could not afford to have their bank facilities so encumbered.

[216] *Cohen Michael M., paper on Letters of Indemnity- see "Articles" for full details*
[217] *new branch opening of Standard Chartered Bank in Geneva, Switzerland 23rd March 2007*

Chapter IV

Validity and /or enforceability of an LOI

a. legal consequences of issuing and accepting an LOI

b. liability(ies) incurred and rights of suit

Introduction

If one compares the characteristics and intent of a BL and an LOI Tetley[218] states that the former "*is a commercial document of dignity*[219] *and integrity based on good faith*." Creswell J. supports this concept[220] holding that a BL "*should be relied upon by those into whose hands it properly comes* …[for its] *veracity and authenticity* [and that it] *represents the true facts*."

The LOI however serves a fundamentally different purpose. At worst it can be condemned as an accessory to fraud[221] when e.g. a clean BL is obtained by the shipper for damaged goods[222] or as a false representation[223] to a third party receiving the BL and relying upon the representation.

In a pithy denunciation of LOIs Tetley states: "*A letter of indemnity is the document by which two parties to a misrepresentation against*

[218] *Tetley Prof.* – Marine Cargo Claims, *4th ed. Ch. 38*
[219] *The Carso 1930 AMC 1740 at p. 1758 (S.D.N.Y. 1930)*
[220] *Standard Chartered Bank v Pakistan National Shipping Corp. (No. 2) (1998) 1 Lloyd's Rep. 684 at p. 688, upheld (2000) 1 Lloyd's Rep. 218 (C.A.) and (2003) 1 Lloyd's Rep. 227 (H.L.)*
[221] Tribunal de Commerce de la Seine, *10.03.1958, DMF 1958, 414*
[222] *United Baltic Corp v Dundee Perth & London Shipping Co. (1928) 32 LI. L. Rep. 272 at p. 272*
[223] *Brown Jenkinson & Co. Ltd v Percy Dalton (London) Ltd (1957) 2 Q.B. 621*

third parties settle their differences in advance should a third party in the future make a valid claim as a result of the misrepresentation."[224] In noting that a number of civil law jurisdictions contemplate "…*the general principle of good faith in contract, a doctrine dating back to Roman law …*" he goes on to quote Bingham L.J. extolling the virtues of same.[225] He further draws our attention to the fact that "… *the common law, unlike the civil law, never developed, and continues to be sceptical about introducing, any general principle of good faith in contract, it has on occasion espoused a view of contractual performance rooted in morality, legality and public policy.*"

This helps to give us an understanding of why, as in several civil law jurisdictions, English law does not countenance the upholding of LOIs in a transaction tainted by their use. This doctrine was clearly stated by Lord Mansfield who held that; "*The principle of public policy is this; ex dolo malo non oritur actio. No Court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act.*"[226]

This credo was reiterated in a much later case with; "*It is settled law that an agreement to do an act that is illegal or immoral or contrary to public policy … is unlawful and therefore void. In such a case any party to the agreement who had the unlawful intention is precluded from suing upon it. Ex turpi causa non oritur actio. The action does not lie because the Court will not lend its help to such a plaintiff.*"[227]

Both the aforementioned statements were cited in a well-known case[228] in which the use of LOIs to obtain clean a BL was roundly condemned.

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[224] *Tetley Prof.* – Marine Cargo Claims*, 4th ed. Ch. 38 at I 1)*
[225] *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd (1988) 1 All E.R. 348 at 352 CA*
[226] *Holman v Johnson (1775) 1 Cowp. 341 at p. 343, 98 E.R. 1120 at p. 1121*
[227] *Alexander v Rayson (1936) 1 K.B. 169 at p. 182 (C.A.)*
[228] *Brown Jenkinson & Co. Ltd v Percy Dalton (London) Ltd (1957) 2 Q.B. 621*

None of which however alters the fact that LOIs are an integral part of business (especially in the oil trade) and must thus be accommodated by the commercial interests involved therein.

Even where no LOI is requested or issued, circumstances may arise upon the issuance of a BL that could entitle the issuing party to an indemnity for so issuing it.[229] This could be an express indemnity e.g. as under the NYPE charter, 1993 version and clause 30 (b) thereof (see Appendix for the relevant section). Or an indemnity might be implied according to the tests proposed by Mustill L.J. in *The Nogar Marin*.[230]

These tests are reproduced in Appendix V. In reviewing these tests[231] it appears that a shipowner will be indemnified even for those acts that he is obliged to obey[232] but not for risks arising under contract.[233] The onus is upon a claimant to prove that a liability was incurred by complying with the request, using the legal principles of causation.[234] However, if an act for which an indemnity has been given is performed negligently, it appears the indemnity is thereby nullified.[235]

Even absent an express e.g. written indemnity "… *an indemnity will normally be implied against liability incurred by the owners as a consequence of complying with the charterers' orders or directions*."[236]

Whilst there are no statutory rules *per se* for issuing or accepting LOIs, various bodies have formulated guidelines in an attempt to standardise both the wording and utilisation of LOIs in daily business. The great

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[229] *Bills of Lading at 3.129 on pp 69 ff*
[230] *The Nogar Marin (1988) 1 Lloyd's Rep. 412, 417*
[231] *Bills of Lading at 3.135 on p. 71*
[232] *The Island Archon (1994) 2 Lloyd's Rep. 227; in Elder Dempster & Co. v Dunn (1909) 15 Com.. Cas. 49 shipowners obtained an indemnity after signing a bill "as presented" as they were required to do.*
[233] *The Aquacharm (1980) 2 Lloyd's Rep. 237; The Darya Tara (1997) 1 Lloyd's Rep. 42; The Aegean Sea (1998) 2 Lloyd's Rep. 39, 68-69; Newcastle P&I v Gard (1998) 2 Lloyd's Rep. 38; The Marie H (1998) 2 Lloyd's Rep. 71*
[234] *The Eurus (1996) 2 Lloyd's Rep. 408, affd. (1998) 1 Lloyd's Rep. 351*
[235] *Chitty 29th edition, 2004 (Sweet & Maxwell, London) para. 14-015*
[236] *see Wilford M. et al in Time Charters at 19.11 on p. 317*

majority of LOIs would appear to follow the wording as proposed by the P&I community, for examples of which see Appendix II. For the benefit of its members concerning the use and acceptance of LOIs, ITIC has produced a set of guidelines ('Ten Golden Rules', see Appendix I.) designed to ensure their members avoid the main LOI-linked pitfalls.

As stated above, if the charterer wishes to have the right to oblige the master / owner to deliver cargo without the production of an original BL corresponding express clausing, unambiguously worded, must be incorporated in the charter party. A general indemnity given by the charterer to the owner for such delivery is of itself insufficient.[237] In particular, the owner must remember that his agreement to such a clause will assuredly deny him all protection under his P&I cover.

Although the owner is invariably entitled to refuse delivery of goods without production of an original BL, Phil Parry[238] suggests owners "*investigate alternative remedies such as discharge into a warehouse*." in order to mitigate liability due to unreasonable delay that "*may prejudice the owner's right to recover*."

Concerning the charterer's implied obligation to indemnify the owner should BLs be presented and signed which negatively vary the terms of the charter party it appears that should the master negligently sign BLs as being clean when in fact the goods are damaged, the charterer's implied indemnification obligation towards the owner is forfeit.[239] This is stated as follows by Colman J:[240]

> "Much less would a charterer be likely to assume the risk of eventualities causally contributed to by negligence or other fault on the part of Owners notwithstanding that charterers' order may have initiated the train of events

[237] *The Houda, Kuwait Petroleum Corp v I. & D. Oil carriers Ltd (1994) CA, 2 Lloyd's Rep. 541*
[238] *Special Report on Bills of Lading: Letters of indemnity vital if papers are missing*
Lloyd's List, December 30, 1997, Pg. 6, 918 words, By PHIL PARRY
[239] *Naviera Mogor S.A. v Societe Metallurgique de Normandie (The Nogar Marin) (1988) 1 Lloyd's Rep. 413*
[240] Ullises Shipping Corporation v Fal Shipping Co Ltd (The Greek Fighter) *[2006] EWHC 1729 (Comm), 2003*

> leading to Owners' loss. For these reasons it is improbable that a charterer would ever willingly enter into an indemnity which protected Owners from losses not predominantly or proximately caused by the charterers' orders under the charter. In this connection, the judgment of Mustill LJ in *The Nogar Marin* [1988] 1 Lloyd's Rep 412 at pp 421 – 422 is particularly relevant. Visibly defective cargo was loaded on board but not recorded as such by the master on the mate's receipt. In consequence, when the charterers presented clean bills of lading to Owners' agents for signature, the agents signed them. Owners then became liable to receivers on the clean bills and looked to the charterers for an indemnity. The arbitrators had held that the intervening negligence of the master broke the chain of causation between the charterers' act of presenting inaccurate bills and the receivers' claim on owners. The award was appealed and upheld, Mustill LJ observing:
>
> "Finally, on this part of the case, we believe that, although the arbitrators may perhaps have . . . compressed the position as regards causation, the analysis [is] essentially correct. True, the master did not sign the bill. But if it was his mistake concerning the receipt which permitted [the agents] to sign the bills without qualification, and if his act was not strictly 'intervening', it can justly be regarded as predominant, on the arbitrators' findings, over whatever breach the charterers may have committed by presenting for signature bills of lading which conformed with the receipt which the master had previously signed."

The above of course is to be distinguished from the shipper seeking a clean BL, despite circumstances normally attracting clausing thereon, by means of giving an LOI in consideration for same. Should the master furnish such a clean BL, depending upon the nature of the factual inaccuracies,[241] any LOI so obtained will be unenforceable against the shipper.[242]

One type of LOI which may prove enforceable is one obtained regarding the condition of the goods, when the shipper and master are honestly of different opinions[243] albeit Morris LJ[244] opined that "*The practice, however usual, of employing an indemnity as a means of settling an argument between the shipper and the master is not, it is thought, one which the court would encourage*."

If a BL has been negligently, as opposed to fraudulently or recklessly, issued with regard to the factual statements contained therein, liability

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[241] *E.g. concernng "the date of shipment, or the nature, quantity of condition of the cargo .." viz. Scrutton, Art. 43, p. 85*
[242] *Brown Jenkinson & Co. Ltd v Percy Dalton (London) Ltd (1957) 2 Q.B. 621*
[243] *Scrutton on Charterparties, Art. 61 at p. 116*
[244] *Brown Jenkinson & Co. Ltd v Percy Dalton (London) Ltd (1957) 2 Q.B. 621*

might arise thereby under two heads, the first at common law[245] and the second, assuming a BL having been relied upon and thus taken up and paid for, under the Misrepresentation Act 1967.

Although no case law regarding the former head has been found, it is suggested that a lack of reasonable care in issuing a BL, in view of the relationship between shipowner and a subsequent BL holder, might under certain circumstances give cause for a valid claim for damages. However, this view is considered unsound by *Scrutton*[246] who states that "*The Carriage of Goods by Sea Act does not create a new contract between the shipowner and the holder, but rather rings about a species of statutory assignment of the original agreement between the shipper and shipowner. This is not the kind of transaction to which the Misrepresentation Act is directed*."

[245] *Viz. Hedley Byrne v Heller (1964) A.C. 465*
[246] *Scrutton on Charterparties, Art. 61 at p. 117*

Legal consequences of issuing and accepting LOI

It is perhaps trite law to state that the owner accepting an LOI does so at his own risk and invariably without the benefit of P&I cover. This point was driven home by a case[247] in which the relevant bank (fortunately) countersigned the LOI provided to the owner for discharging goods without BLs being provided. The owner, after being advised that its defence to the conversion claim lacked merit, then settled the claim for conversion by paying a very significant sum to the claimants (a finance company) which event triggered a claim by the owner upon the bank that countersigned the LOI. The bank resisted but the court found as follows: although the bank had not entered into a contractual obligation to honour the indemnity[248] it had given its personal assurance that the issuer (who by the time the case went to court was insolvent), was good for said indemnity and for this reason was liable to the owner.

Should the shipper present a BL to the master for signature which contains factual inaccuracies, the master is under no obligation to so sign it[249] but, if he does so negligently and thereby incurs a liability to the consignee, the extent of the master's knowledge of the mis-statement and the nature thereof, will determine the shipowner's right be indemnified by the shipper for such inaccuracy(ies).[250] If this factual mis-statement relates to e.g. *"… the date of shipment or the apparent order and condition of cargo, no right to an indemnity will be implied and any express indemnity will be unenforceable."*[251] This is a classic

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[247] *Pacific Carriers Ltd v Banque Nationale de Paris, Supreme Court of New South Wales, Australia viz. Luxford, Derek:* The power of the pea*, as partner of Phillips Fox, available on "http://www.maritimeadvocate.com/i19_aust.php"*

[248] *the bank claimed it had merely authenticated the issuer's signatures on the LOI which claim the court dismissed*

[249] *Naviera Mogor S.A. v Societe Metalurgique de Normandie (The Nogar Marin)(1988) 1 Lloyd's Rep. 413*

[250] *Scrutton on Charterparties and Bills of Lading, 20th edition, 1996 (Sweet & Maxwell, London) p. 85, Art. 43*

[251] *idem*

case of an LOI being given to obtain a clean BL and which, to the cost of the shipowner, proves to be unenforceable.

However, where the shipper has furnished the master with a BL to be signed and/or claused as the master sees fit, but the master fails to take reasonable steps to apprise himself of the true nature of the goods and/or the apparent order and condition thereof, then there will be no implied indemnity owed by the shipper to the owner for any liability or consequences arising from the negligence on the part of his servant, the master, in signing the BL.[252]

According to an article by Charles Williams[253] in discussing how the use of an LOI might affect the underlying sales contract, he states that; "*A carrier is entitled to rely on a Bill of Lading "time bar" even if goods are mis-delivered under an LOI*"[254] and also that; "*A carrier which negligently delivers without production of a Bill of Lading will be able to rely on the package limitation.*"[255] He then quotes verbatim the judgment of Langley J. in the "Fortune"[256] a case which merits a concise review as it founds upon an action related to a letter of credit.

Without detailing the entire chain of counterparts, Fortune, the Buyer, issued a letter of credit to Cosco-Feoso (C-F), the Seller for 5000 mt of gasoil. Due to the short voyage transit, the documents stipulated in the letter of credit (LC) were not available for negotiation, instead of which C-F presented their LOI under the LC which, after due consideration, the issuing bank paid for, duly debiting Fortune's account for same. To avoid delays in discharging the goods, LOIs were issued whereby C-F instructed the goods to be delivered, without presentation of BLs, to a 3rd party, undertaking to deliver the BLs to the shipowner once they

[252] *The Nogar Marin, supra*
[253] *Letters of Indemnity, Thomas Cooper & Stibbard, London*
[254] *Pacific Carriers v BNP Paribas (High Court of Australia 5/8/2004)*
[255] *Carriage of Goods by Sea Act 1992, s. 2.2(a)*
[256] *Fortune Hong Kong Trading Ltd v Cosco-Feoso (Singapore) Pte Ltd. The "Freja Scandic" (2002) EWHC 79 (Comm) following The Jag Shakti (1986) 1 AC 337 - All ER 480*

had obtained them. Apparently the final destiny of the goods remained unknown.

C-F having obtained payment for the goods by presenting the LOI under the LC and instructing the shipowner to deliver the goods to a 3rd party against an LOI, Fortune instigated proceeding alleging both deceit[257] and breach of the terms of the LOI[258] claiming restitution of the funds reimbursed under the LC. Langley J. held that Fortune succeeded in both its claims thus enforcing an LOI against the issuer.

That an LOI is enforceable against the issuer was recently re-iterated in a case[259] referred to in an article by-lined by S. Speares.[260] This dealt with the common LOI chain of charterer / shipowner / receiver(s) with the charterers going into liquidation. In this case, to distinguish it from the norm, the receivers gave their LOI to the charterers, not the shipowner. A Yemeni bank arrested the vessel alleging they possessed the original BLs. Ms Speares writes:

> LETTERS of indemnity given by a receiver to a charterer in lieu of bills of lading can be enforced by the owner directly against the receiver, the Appeal Court in London has found.
>
> Lord Justice Clarke and Lord Justice Neuberger ruled in favour of Laemthong International Lines, saying that under the Contracts (Rights of Third Parties) Act 1999 owners could proceed directly against the receivers under the latter's letter of indemnity.
>
> "The receivers sent their LOI to the charterers and not to the owners, and the owners did not say that they were parties to the contract contained in or evidenced by it," the appeal court judgment stated.

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[257] *ex p. 7 of the judgment; "... by that by the LOI Cosco-Feoso represented that it had free title to and the right to possession of the cargo, that is was able to transfer title and possession to and effect delivery of the cargo and had the present intention of obtaining and surrendering the Bills of Lading to Fortune whereas in fact by reason of the Owners LOI Cosco-Feoso did not have free title to the cargo, nor a right to possession of it nor the capacity y to transfer title in or effect delivery of it to Fortune, nor the present intention to obtain and surrender the Bills to Fortune."*

[258] *Idem; "... in failing to transfer title and deliver the cargo to Fortune and in failing to "make all reasonable efforts" to obtain and surrender the Bills to Fortune."*

[259] *Laemthong International Lines Co Ltd v Artis and others, (2005) EWHC 1595 (Comm) 2004/441)*

[260] *Letters of indemnity enforceable, judges rule, Lloyd's List, May 12, 2005*

> "The owners' case, which was accepted by the judge, is that they are entitled to enforce the terms of the receivers' LOI in their own right by reason of the terms of the 1999 Act.
>
> The appeal court judges agreed with Mr Justice Cooke that for the purpose of delivering the cargo the owners acted as the charterer' agents and were intended to be covered by the expression "your agents" in the LOI."

This is a possibly significant application of 3rd party rights to sue in a not uncommon commercial situation. The shipowner would apparently also be protected if, acting in good faith and in the absence of fraud or illegality, he were to deliver goods to a consignee not entitled to the goods and became thus liable towards the rightful owner.[261]

Although the English courts have apparently set their faces against the use of LOIs it would appear that some authors contemplate certain circumstances in which they could be tolerated. Pearce L.J. held that; "*In trivial matters and in cases of bona fide dispute where the difficulty of ascertaining the correct state of affairs is out of proportion to its importance, no doubt the practice is useful.*"[262]

Tetley also draws our attention to some authors who; "… *take a similar view that the letter of indemnity should be accepted as valid and enforceable where no fraud is intended.*"[263]

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[261] *Miskin Manor Shipping v Herbert Clarke (1927) 29 LI.L. Rep. 282 per Hazelwood at p. 193*
[262] *Brown Jenkinson & Co. Ltd v Percy Dalton (London) Ltd (1957) 2 Q.B. 621*
[263] *Tetley Prof.* – Marine Cargo Claims, *(4th edition due to be published in 2008) Ch. 38 at XII citing: "See P. Todd,* Modern Bills of Lading, *Blackwell Law, Oxford, 1990 at p. 88; Xia Chen, "*Chinese Law on Carriage of Goods by Sea under Bills of Lading*" (1999) 8 Current Int'l Trade L.J. 89 at p. 92*

Liability(ies) incurred and rights of suit

Whereas most parties in the trade chain are known or can be readily identified e.g. buyer, (intermediary) seller, shipper / consignor, consignee, indorser / indossant / order party, agent etc. the carrier is not always immediately apparent. Should this be the party against whom proceedings need to be commenced how does one go about establishing the carrier's identity for legal purposes? First we have to distinguish between the actual and legal carrier.[264] As the name suggests, the contract of carriage is always concluded with the legal carrier. Making reference to a shipowner may muddy the waters as this can apply either to a registered shipowner, a demise charterer, a disponent owner (sub-charterer) a contracting carrier.[265] Deciding whether a BL is a charterer's or an owner's bill can only be done on a case-by-case basis taking all the circumstances into consideration.[266] It thus depends upon the construction of any particular BL[267] with *Carver* also splitting the BL types essentially as enumerated above.[268]

An interesting point is raised by *Carver*[269] where he discusses and distinguishes between *The Roseline*[270] and *The Athanasia Comninos,*[271] preferring the latter, whereby it appears that the shipper is *prima facie* the original party to a BL contract because the BL is made out in his name,[272] whereas the consignee or order party would obtain any due contractual rights of suit by virtue of applicable statute.

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[264] *see Schmitthoff 15-051 at p. 308*
[265] *The Stolt Loyalty (1995) 1 Lloyd's Rep. 598 viz. Schmitthoff at p. 309*
[266] *Sunrise Maritime Inc v Uvisco Ltd; The Hector (1998) 2 Lloyd's Rep. 287*
[267] *The Berkshire (1974) 1 loyd's Rep. 185 at 187; The Venezuela (1980) 1 Lloyd's Rep. 393 at 395; The Rewia (1991) 2 Lloyd's Rep. 325 at 336; Homburg Houtimport B.V. v Agrosin Private Ltd (The Starsin) (2003) UKHL 12 viz Carver at 4-032 p. 141*
[268] *Carver at 4-031 p. 139*
[269] *Carver 4-024 at p. 134*
[270] *Union Industrielle et Maritime v Petrosul International (The Roseline) (1987) 1 Lloyd's Rep.18*
[271] *The Athanasia Comninos (1979) (1990) 1 Lloyd's Rep. 277*
[272] *Carver at p. 134 fn 65; "Prima facie a bill of lading contains or evidences a contract between shipper and carrier … for the carriage of goods to the order of the consignee (or as the shipper may direct ..). It is the very fact that the consignee was not a party to that contract which*

As a general rule, under a demise or bareboat charter whereunder the charterer employs the crew and master through and by whom the carriage operation is effected, the BLs (signed by the master as agent of the charterer) will be charterers bills and this charterer will also be the carrier. Under these forms of charter, the demise charter contract is one of hire for the vessel itself.[273] For this reason there will rarely arise a contract between a shipper and the shipowner under BLs signed by the master, as the master being in the employ of the demise charterer will invariably not have authority from the owner to bind the him.

In a case[274] that demonstrates this point, a vessel (*The Asia*) was demise chartered to prospective buyers of same. BLs were issued to the shippers for the cotton loaded, some signed by the master and some by other agents of the charterers. The shippers were unaware of the underlying demise charter. Upon the vessel foundering the cargo was lost however the shipowners were found not liable as the BLs issued did not give rise to any contract between shippers and shipowners.

Lord Herschel L.C. explained his reasoning thus per extract from *Carver* "*… a person can be held liable under a contract which he does not make himself only if the contract was made on his behalf by someone whowas his agent or servant, and that this requirement was not satisfied as against the shipowner because the master was, when he signed the bill, the agent, not of the shiponwer, but of the demise charterer.*"[275]

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necessitated legislation such as the Bills of Lading Act 1855 and the Carriage of Goods by Sea Act 1992."

[273] *Baumwoll Manufactur von Carl Scheibler v Furness (1893) A.C. 8; The Guiseppe di Vittorio (1998) 1 Lloyd's Rep. 136 at 156; BP Exploration Operating Co Ltd v Chevron Transport (Scotland) (2001) UKHL 50, (2002) 1 All E.R. (Comm) 1 at [78-79]*

[274] *Baumwoll Manufactur von Carl Scheibler v Furness (1893) A.C. 8*

[275] *Carver 4-031 at p. 140*

Notwithstanding this line of reasoning it appears that even in a time or voyage charter where the master is a servant or agent of the owner, a BL issued to a shipper could be found to be a charterer's rather than an owner's BL[276] albeit a BL signed for or on behalf of the master may create a rebuttable presumption that such a BL is an owner's BL.[277] This is apparently so because it might be argued that the owner is held to be engaged by the charterer as a sub-contractor. Such a relationship could however not be imputed under a demise charter for the master and crew are employed by the charterer to execute carriage operations.

The other charters involve the shipowner retaining possession of the vessel[278] and control of the crew and master and who puts same at the disposal of the charterer in accordance with the type of contract agreed. Thus, BLs issued to shippers under such charters may be construed as owner's BLs against whom potential litigants could claim damages. In reiterating that deciding whether a BL is an owner's or a charterer's bill is a matter of construction, five points are proposed as a means of establishing the true nature of a BL: *1) the way in which the bill is signed; 2) the authority of the signer; 3) other terms of the bill; 4) relevant terms of the charterparty; and 5) certain other extraneous circumstances.*[279]

Working through the above five points should enable an aggrieved person to establish against whom a claim should properly be made. This is important because if the wrong person us targeted, by the time a claim comes to court re-directing a claim to the correct party might be precluded by virtue of all claims being time-barred under the Hague or Hague-Visby Rules. For this reason, when e.g. a shipper or receiver

[276] *The Venezuala (1980) 1 Lloyd's Rep. 393; The Starsin (2003) UKHL 12*
[277] *The Rewia (1991) 2 Lloyd's Rep. 325*
[278] *Ellerman Lines v Lancaster Maritime Co (The Lancaster) (1980) 2 Lloyd's Rep. 497 at 500; Scandinavian Trading Co A.B. v Flota Petrolera Ecuatoriana (The Scaptrade) (1983) A.C. 694 at Hyundai Merchant Marine Co Ltd v Karander Maritime Co Ltd (The Niizuru) (1996) 2 Lloyd's Rep. 66 at 72*
[279] *Carver 4-033 at p. 142*

cannot readily identify the shipowner he may need to sue both in order to ensure his claim is not subsequently time-barred.

The role of banks in international trade is very important as they provide *inter alia* letters of credit used for financing many of the deals. Traditionally they have used collateral documents to secure their financing, a fact referred to by Scrutton LJ long ago.[280] These days we are told; "*… banks today must look to their arrangements with their clients as their source of security*."[281] This is especially pertinent when one considers the regular use of LOIs and hence a bank's ultimate reliance upon its client for recompense of outstanding loans. Despite this, financing banks will always take a pledge upon the underlying goods, specifically or under a general assignment or debenture over the client's assets.

The bank obtains a "special interest" in the goods when a BL is transferred for the purpose of pledging same and thereby the right as pledgee to sell them if required.[282] That a BL confers a special interest in the goods was asserted by Lord Wright.[283] Provided the BL is held by the bank and has been made out to their order or endorsed in blank and, of primary importance the goods have not been disposed of, the bank may sell them. If in fact the goods have in the interim been discharged and disposed of, the bank might have a right to sue the carrier for misdelivery and the buyer and receiver for conversion.[284]

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[280] *Guaranty Trust Co of New York v Hannay (1918) 2 KB 623 stating: "… the exchange house … has, until the bill is accepted, the security of a pledge of the documents attached and the goods they represent."*
[281] *Jack R. – Documentary Credits at 11.1 on p. 250*
[282] *The Odessa (1916) 1 AC 145*
[283] *Official Assignee of Madras v Mercantile Bank of India (1935) AC 53*
[284] *Glynn, Mills Currie & Co v East and West India Dock Co (1882) 7 App. Cas 591 at 606; Bristol and West of England Bank v Midland Rly Co (1891) 2 QB 653; and Ernest Scragg & Sons Ltd v Perseverance Banking and Trust Co Ltd (1973) 2 Lloyd's Rep 101*

However, according to Debattista, a bank's pledge becomes ineffective if "*… goods … have been delivered, without presentation of the bill, to the person entitled to their delivery*," He bases this on dicta by Lloyd J:[285] "*… the bank's security depends, not on the contract between the buyer and his bank, but on the ability of the seller to pledge the documents of title on his behalf and with his consent*."[286] The facts of this case turn upon collusion between seller and buyer whereby the seller withheld documents from presentation to the bank until the goods had already been discharged to the buyer. Whilst noting that the decision in the case in question has been criticised, Aikens[287] avers: "… *that delivery in such circumstances will "exhaust" the bill as a document of title*." This is of importance to financing banks when one considers how many cargoes are discharged under LOIs and of equal concern to sellers who thus dispose of the goods and thereby incur a liability to the bank.

One aspect, of a practical nature, regarding rights of suit relates to an omitted re-indorsement of a BL.[288] In this case, BLs were indorsed in blank with the name of the collecting bank being subsequently added by the seller thus changing the endorsement from blank to special. The BLs were lodged with the bank to whom the BLs had been endorsed for collection. The buyer declined to take up and pay for the documents which were returned to the seller without any further indorsement of the BLs by the bank. Goods were discharged against an LOI without production of the BLs.

When the seller commenced proceeding against the carrier for conversion, having disposed of goods without production of the BLs, it was held that "*Indorsement was crucial to enable K [seller] to become the lawful holder again. Accordingly, K had not acquired any rights of suit in relation to the bills of lading. East West Corp v DKBS 1912*

[285] *The Future Express (1993) 2 Lloyd's Rep. 542 at 547*
[286] *Debattista, The Sale of Goods Carried by Sea at 2-53 on p. 48*
[287] *Aikens R. et al, Bills of Lading at 2.97 on p. 30*
[288] *Bandung Shipping Pte Ltd v Keppel Tatlee Bank Ltd. (2003) 3 LRC 436*

(2002) 1 All ER (Comm) 676 applied." This underlines the importance of checking indorsements in order to safeguard one's rights of suit in circumstances similar to those discussed above.

Further to the East West Corp case noted above, it appears that the rights of suit under an order BL (in this case issued to the order of various Chilean banks) are transferred to the consignee. This is not the case with a straight BL (one of the nine BLs were consigned to a Chilean bank, not issued to the order of same). In this event the shipper apparently retains his rights of suit as a straight BL was held in this particular case not to be a document of title enabling transfer of constructive possession.

In a rather different case, it was decided that the shipowner could avail himself of the LOI issued by the receiver to the charterer.[289] In this rather complicated scenario concerning the shipment of sugar from Santos, Brazil to Aden, Yemen the charter party provided *inter alia* for the discharge of goods without production of the original BL.[290] The goods were delivered to the receivers against their LOI, who wished to preclude costs being incurred for any delay in berthing the vessel, and claiming that the original BLs had not been received.

The BLs were in fact held by the financing bank which had issued their letter of credit to the sellers (charterers) and paid to them the sum claimed of $3 million thereunder. When the buyer (receiver) failed to reimburse the bank for this sum, withholding some part thereof due to a dispute regarding the sales contract, the bank arrested the vessel.

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[289] *Laemthong International Lines Co Ltd v Artis and others, (2005) EWHC 1595 (Comm) 2004/441*

[290] *"In the event of the original bills of lading are not being available at discharge port on vessel/s arriving, if so required by charterers, owners/master to release the cargo to receivers on receipt of faxed letter of indemnity. Such letter of indemnity to be issued on charter/s head paper, wording in accordance with the usual P&I Club wording, and signed by charters only always without a bank counter signature."*

As is usual in such circumstances, there were two LOIs in circulation, one being given by the charterer to the owner, the other being given by the receiver to the charterer.

The shipowner had the undisputed right to claim under the LOI given to it, however the issuing party had in the meantime become insolvent,[291] thus destroying any realisable value the LOI might otherwise have had. In view of this, the owner sought to avail himself of the LOI issued by the receiver to the charterer.

To quote Aikens J. it was held that: "*The key question that faced Cooke J was whether or not the ship owners could take the benefit of the LOI given by the receivers to the charterers by utilising the Provisions of the Contract (Rights of Third Parties) Act 1999. Cooke J held that the ship owners could enforce rights against the receivers' LOI. His judgment was upheld by the Court of Appeal*."

This case is discussed by *McKendrick*[292] who notes the facility now granted for "leap-frogging" a chain of LOIs, at least in this case to the benefit of the owner thus able to avail themselves of the receiver's LOI.

It seems that a BL notify party obtains thereby no rights of suit or ownership,[293] indeed that there is not even a presumption that the named notify party was the intended consignee.[294]

[291] *Having entered in liquidation or administration in France and subsequently taking no further part in the legal proceedings*
[292] *McKendrick: Contract Law: 2e – Updates – Chapter 27 Third Parties at page 1240, 2005*
[293] *Tetley Prof.* – Marine Cargo Claims*, (4th ed. due to be published in 2008) Ch. 8 s. 8)*
[294] *Ishag v Allied Bank (1981) 1 Lloyd's Rep. 92 at p. 99*

During the course of a conference lecture[295] Mr. Dodds stated:

> As far as discharge LOIs is concerned, Mr Dodds said: "If a trader agrees to issue an LOI prior to receiving payment of the price of the goods which are delivered, the trader automatically exposes itself to a credit risk against its buying counterparty.
>
> "Any retention of title provisions contained in the sale contract would be rendered practically ineffective and the seller would be likely to be treated as an unsecured creditor in the event of the buyer's insolvency."
>
> He explained that even in markets where the practice is to transfer title upon shipment, the giving of an LOI means that the trader is effectively worse off, having given up its statutory unpaid sellers' lien and surrendered its right to take delivery under the bill of lading.
>
> In addition, a trader issuing a letter of indemnity "also assumes a contingent liability to the carrier". In the event of a buyer becoming insolvent, third party claims would "flow through to the trader via the LOI."

All of which above should be sufficient to give any trader pause for thought, not only because the use of an LOI exposes the seller to a buyer's insolvency risk, but that having done so he forfeits his title retention and unpaid seller's lien and potentially becomes an unsecured creditor. In addition to which he might also be confronted by a 3rd party claim directed to him by the shipowner.

There appears to be some doubt with regard to the duration of an owner's liability for mis-delivery, and thus conversion under English law, although the quantum would likely be 100% of the goods' CIF value[296] plus accrued interest and costs. The usual time limit for bringing an action under English law for such a tort (i.e. conversion) and breach of contract is six years[297] hence the interest element could prove to be a significant element of any claim.

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[295] *Richards Butler's Scandinavian Shipping Conference- Lloyd's List, May 31, 2006 Wednesday - Why sticking to the letter of the law lessens financial pain: Letters of indemnity carry risks on both sides but you still need them. - Byline: Sandra Speares*

[296] *see The Jag Dhir and Jag Shakti (1986) Lloyd's Rep. 1*

[297] *Limitation Act 1980, section 5*

The time-bar under the Hague and Hague-Visby Rules for bringing an action relating to a BL related breach of the carriage contract is one year from delivery or when delivery should have taken place.[298]

As stated above, doubts have been raised as to the duration of potential liability for mis-delivery arising under the giving or taking of an LOI. However with regard to the Hague-Visby Rules[299] is seems that one year is the time-bar for bringing a claim for carriage or miscarriage of goods.[300] *Hazelwood S.* considers that there is rather more doubt regarding the time limit for mis-delivery claims subject to the Hague Rules.[301] Although the Privy Council found that the one-year time bar applied to mis-delivery, this is not conclusive as the Hague Rules in the case in question were not fully incorporated into the carriage contract.[302] In a case turning upon delivery of cargo without procuction of an original BL it was held that the carrier could rely upon a time-bar for this particular act.[303]

According to a P&I Club circular[304] explaining the new LOI wording, it appears that under the Int Group A and AA wordings that, subject to all original BLs being returned to the shipowner, an indemnifying bank's liability remains in place for six years, renewable for two year periods at the shipowner's request. If the original BLs are not returned then the bank's indemnification remains in force for an indefinite term, although the bank can terminate its liability by paying the maximum amount due under the relevant LOI. See above regarding English Law time-bars for the source of this particular six year period. Concerning the Int Group B, C, BB and CC LOIs and the duration of a bank's

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[298] *Art. III Rule 6 "... the carrier and the ship shall in any event be discharged from all liability whatsoever in respect of te goods unless suit is brought within one year ..."*
[299] *The Captain Gregos No. 1 (1990) 1 Lloyd's Rep. 310 at p. 315 per Bingham L.J.*
[300] *The Zhi Jiang Kou (1989) 1 Lloyd's Rep. 413; (1991) 1 Lloyd's Rep. 493 (Australia)*
[301] *Hazelwood S. at p. 194*
[302] *The New York Star (1980) 2 Lloyd's Rep. 217*
[303] *P.S. Chellaram & Co v China Ocean Shipping Company (The Zhi Jian Kou) (1991) 1Lloyd's Rep. 493 (C.A. N.S.W.)*
[304] *ex Skuld News Archive, Bills of Lading – Delivery of Cargo / Standard Forms of Letters of Indemnity – Skuld News – circulars 31 January 2001*

liability thereunder, even if all original BLs are indeed returned to the shipowner the bank will only be released when the shipowner is fully satisfied that no claim will be made against him for delivering goods to a port other than the one stated in the BL.

In conclusion it could be said that, despite the legal minefield which surrounds the use of LOIs, they have become a necessary evil without which international trade would be severely damaged. Until a viable alternative becomes available e.g. e-BLs as propounded by Bolero and for which instruments statutory allowance is made, they will remain an integral part of business life. To paraphrase a banking colleague, until such time as a "major" defaults upon an LOI or, as noted above, banks start to retain LOI contingent liabilities at full cost on their books, it is reasonable to assume that LOIs will be around for a long time to come. One can only try to sound an occasional warning note upon their use.

Appendices

Appendix I

ITIC has produced a simple and invaluable set of guidelines for the delivery of cargo. It is well worth the effort to retain and work through this list. The 'Ten Golden Rules' are as follows: Always obtain:

1. The original bill of lading;
2. The correct bill of lading; or,
3. A letter of indemnity, in which case,
4. has your principal given written authority to release and agreed the wording and security?
5. Has the cargo owner authorised release in writing?
6. Is it counter-signed by a first-class bank?
7. Is it addressed to both you and your principal?
8. Does it contain adequate financial and time limits?
9. Do the goods itemised correspond exactly to those in the delivery order?
10. Is it an original document, not a fax or a photocopy?

Appendix II a)

Applicable link:

http://www.ukpandi.com/ukpandi/infopool.nsf/70970a8273cf412080256c800003b110/6947aebb016aece180256db30050c909/$FILE/INTGRPA.doc

INT GROUP A

STANDARD FORM LETTER OF INDEMNITY TO BE GIVEN IN RETURN FOR DELIVERING CARGO WITHOUT PRODUCTION OF THE ORIGINAL BILL OF LADING

To : [*insert name of Owners*] [*insert date*]

The Owners of the [*insert name of ship*]

[*insert address*]

Dear Sirs

Ship: [*insert name of ship*]

Voyage: [*insert load and discharge ports as stated in the bill of lading*]

Cargo: [*insert description of cargo*]

Bill of lading: [*insert identification numbers, date and place of issue*]

The above cargo was shipped on the above ship by [*insert name of shipper*] and consigned to [*insert name of consignee or party to whose order the bill of lading is made out, as appropriate*] for delivery at the port of [*insert name of discharge port stated in the bill of lading*] but the bill of lading has not arrived and we, [*insert name of party requesting delivery],* hereby request you to deliver the said cargo to [*insert name of party to whom delivery is to be made*] at [*insert place where delivery is to be made*] without production of the original bill of lading.

In consideration of your complying with our above request, we hereby agree as follows :-

1. To indemnify you, your servants and agents and to hold all of you harmless in respect of any liability, loss, damage or expense of whatsoever nature which you may sustain by reason of delivering the cargo in accordance with our request.

2. In the event of any proceedings being commenced against you or any of your servants or agents in connection with the delivery of the cargo as aforesaid, to provide you or them on demand with sufficient funds to defend the same.

3. If, in connection with the delivery of the cargo as aforesaid, the ship, or any other ship or property in the same or associated ownership, management or control, should be

arrested or detained or should the arrest or detention thereof be threatened, or should there be any interference in the use or trading of the vessel (whether by virtue of a caveat being entered on the ship's registry or otherwise howsoever), to provide on demand such bail or other security as may be required to prevent such arrest or detention or to secure the release of such ship or property or to remove such interference and to indemnify you in respect of any liability, loss, damage or expense caused by such arrest or detention or threatened arrest or detention or such interference, whether or not such arrest or detention or threatened arrest or detention or such interference may be justified.

4. If the place at which we have asked you to make delivery is a bulk liquid or gas terminal or facility, or another ship, lighter or barge, then delivery to such terminal, facility, ship, lighter or barge shall be deemed to be delivery to the party to whom we have requested you to make such delivery.

5. As soon as all original bills of lading for the above cargo shall have come into our possession, to deliver the same to you, or otherwise to cause all original bills of lading to be delivered to you, whereupon our liability hereunder shall cease.

6. The liability of each and every person under this indemnity shall be joint and several and shall not be conditional upon your proceeding first against any person, whether or not such person is party to or liable under this indemnity.

7. This indemnity shall be governed by and construed in accordance with English law and each and every person liable under this indemnity shall at your request submit to the jurisdiction of the High Court of Justice of England.

Yours faithfully
For and on behalf of
[*insert name of Requestor*]
The Requestor

……
Signature

Appendix II b)

Applicable link:

http://www.ukpandi.com/ukpandi/infopool.nsf/70970a8273cf412080256c800003b110/6947aebb016aece180256db30050c909/$FILE/INTGRPAA.doc

INT GROUP AA

STANDARD FORM LETTER OF INDEMNITY TO BE GIVEN IN RETURN FOR DELIVERING CARGO WITHOUT PRODUCTION OF THE ORIGINAL BILL OF LADING INCORPORATING A BANK'S AGREEMENT TO JOIN IN THE LETTER OF INDEMNITY

To : [*insert name of Owners*] [*insert date*]

The Owners of the [*insert name of ship*]

[*insert address*]

Dear Sirs

Ship: [*insert name of ship*]

Voyage: [*insert load and discharge ports as stated in the bill of lading*]

Cargo: [*insert description of cargo*]

Bill of lading: [*insert identification numbers, date and place of issue*]

The above cargo was shipped on the above ship by [*insert name of shipper*] and consigned to [*insert name of consignee or party to whose order the bill of lading is made out, as appropriate*] for delivery at the port of [*insert name of discharge port stated in the bill of lading*] but the bill of lading has not arrived and we, [*insert name of party requesting delivery],* hereby request you to deliver the said cargo to [*insert name of party to whom delivery is to be made*] at [*insert place where delivery is to be made*] without production of the original bill of lading.

In consideration of your complying with our above request, we hereby agree as follows :-

1. To indemnify you, your servants and agents and to hold all of you harmless in respect of any liability, loss, damage or expense of whatsoever nature which you may sustain by reason of delivering the cargo in accordance with our request.

2. In the event of any proceedings being commenced against you or any of your servants or agents in connection with the delivery of the cargo as aforesaid, to provide you or them on demand with sufficient funds to defend the same.

3. If, in connection with the delivery of the cargo as aforesaid, the ship, or any other ship or property in the same or associated ownership, management or control, should be

arrested or detained or should the arrest or detention thereof be threatened, or should there be any interference in the use or trading of the vessel (whether by virtue of a caveat being entered on the ship's registry or otherwise howsoever), to provide on demand such bail or other security as may be required to prevent such arrest or detention or to secure the release of such ship or property or to remove such interference and to indemnify you in respect of any liability, loss, damage or expense caused by such arrest or detention or threatened arrest or detention or such interference, whether or not such arrest or detention or threatened arrest or detention or such interference may be justified.

4. If the place at which we have asked you to make delivery is a bulk liquid or gas terminal or facility, or another ship, lighter or barge, then delivery to such terminal, facility, ship, lighter or barge shall be deemed to be delivery to the party to whom we have requested you to make such delivery.
5. As soon as all original bills of lading for the above cargo shall have come into our possession, to deliver the same to you, or otherwise to cause all original bills of lading to be delivered to you, whereupon our liability hereunder shall cease.

6. The liability of each and every person under this indemnity shall be joint and several and shall not be conditional upon your proceeding first against any person, whether or not such person is party to or liable under this indemnity.

7. This indemnity shall be governed by and construed in accordance with English law and each and every person liable under this indemnity shall at your request submit to the jurisdiction of the High Court of Justice of England.

Yours faithfully
For and on behalf of
[*insert name of Requestor*]
The Requestor

……
Signature

We, [*insert name of the Bank*], hereby agree to join in this Indemnity providing always that the Bank's liability:-

1. shall be restricted to payment of specified sums of money demanded in relation to the Indemnity (and shall not extend to the provision of bail or other security)

2. shall be to make payment to you forthwith on your written demand in the form of a signed letter certifying that the amount demanded is a sum due to be paid to you under the terms of the Indemnity and has not been paid to you by the Requestor or is a sum which represents monetary compensation due to you in respect of the failure by the Requestor to fulfil its obligations to you under the Indemnity. For the avoidance of doubt the Bank hereby confirms that:-

(a) such compensation shall include, but not be limited to, payment of any amount up to the amount stated in proviso 3 below in order to enable you to arrange the provision of security to release the ship (or any other ship in the same or associated ownership,

management or control) from arrest or to prevent any such arrest or to prevent any interference in the use or trading of the ship, or other ship as aforesaid, and

(b) in the event that the amount of compensation so paid is less than the amount stated in proviso 3 below, the liability of the Bank hereunder shall continue but shall be reduced by the amount of compensation paid.

3. shall be limited to a sum or sums not exceeding in aggregate [*insert currency and amount in figures and words*]

4. subject to proviso 5 below, shall terminate on [*date six years from the date of the Indemnity*) (the 'Termination Date'), except in respect of any demands for payment received by the Bank hereunder at the address indicated below on or before that date.
5. shall be extended at your request from time to time for a period of two calendar years at a time provided that:-

a) the Bank shall receive a written notice signed by you and stating that the Indemnity is required by you to remain in force for a further period of two years, and

b) such notice is received by the Bank at the address indicated below on or before the then current Termination Date.

Any such extension shall be for a period of two years from the then current Termination Date and, should the Bank for any reason be unwilling to extend the Termination Date, the Bank shall discharge its liability by the payment to you of the maximum sum payable hereunder (or such lesser sum as you may require).

However, in the event of the Bank receiving a written notice signed by you, on or before the then current Termination Date, stating that legal proceedings have been commenced against you as a result of your having delivered the said cargo as specified in the Indemnity, the Bank agrees that its liability hereunder will not terminate until receipt by the Bank of your signed written notice stating that all legal proceedings have been concluded and that any sum or sums payable to you by the Requestor and/or the Bank in connection therewith have been paid and received in full and final settlement of all liabilities arising under the Indemnity.

6. shall be governed by and construed in accordance with the law governing the Indemnity and the Bank agrees to submit to the jurisdiction of the court stated within the Indemnity.

It should be understood that, where appropriate, the Bank will only produce and deliver to you all original bills of lading should the same come into the Bank's possession, but the Bank agrees that, in that event, it shall do so.

The Bank agrees to promptly notify you in the event of any change in the full details of the office to which any demand or notice is to be addressed and which is stated below and

it is agreed that you shall also promptly notify the Bank in the event of any change in your address as stated above.

Please quote the Bank's Indemnity Ref …… in all correspondence with the Bank and any demands for payment and notices hereunder.

Yours faithfully
For and on behalf of
[*insert name of bank*]
[*insert full details of the office to which any demand or notice is to be addressed*]

…….
Signature

Appendix II c)

Applicable link:

http://www.ukpandi.com/ukpandi/infopool.nsf/70970a8273cf412080256c800003b110/6947aebb016aece180256db30050c909/$FILE/INTGRPB.doc

INT GROUP B

STANDARD FORM LETTER OF INDEMNITY TO BE GIVEN IN RETURN FOR DELIVERING CARGO AT A PORT OTHER THAN THAT STATED IN THE BILL OF LADING

To : [*insert name of Owners*] [*insert date*]

The Owners of the [*insert name of ship*]

[*insert address*]

Dear Sirs

Ship: [*insert name of ship*]

Voyage: [*insert load and discharge ports as stated in the bill of lading*]

Cargo: [*insert description of cargo*]

Bill of lading: [*insert identification number, date and place of issue*]

The above cargo was shipped on the above ship by [*insert name of shipper*] and consigned to [*insert name of consignee or party to whose order the bill of lading is made out, as appropriate*] for delivery at the port of [*insert name of discharge port stated in the bill of lading*] but we, [*insert name of party requesting substituted delivery*], hereby request you to order the ship to proceed to and deliver the said cargo at [*insert name of substitute port or place of delivery*] against production of at least one original bill of lading.

In consideration of your complying with our above request, we hereby agree as follows :-

1. To indemnify you, your servants and agents and to hold all of you harmless in respect of any liability, loss, damage or expense of whatsoever nature which you may sustain by reason of the ship proceeding and giving delivery of the cargo against production of at least one original bill of lading in accordance with our request.

2. In the event of any proceedings being commenced against you or any of your servants or agents in connection with the ship proceeding and giving delivery of the cargo as aforesaid, to provide you or them on demand with sufficient funds to defend the same.

3. If, in connection with the delivery of the cargo as aforesaid, the ship, or any other ship or property in the same or associated ownership, management or control, should be arrested or detained or should the arrest or detention thereof be threatened, or should there be any interference in the use or trading of the vessel (whether by virtue of a caveat being entered on the ship's registry or otherwise howsoever), to provide on demand such bail or other security as may be required to prevent such arrest or detention or to secure the release of such ship or property or to remove such interference and to indemnify you in respect of any liability, loss, damage or expense caused by such arrest or detention or threatened arrest or detention or such interference, whether or not such arrest or detention or threatened arrest or detention or such interference may be justified.

4. The liability of each and every person under this indemnity shall be joint and several and shall not be conditional upon your proceeding first against any person, whether or not such person is party to or liable under this indemnity.

5. This indemnity shall be governed by and construed in accordance with English law and each and every person liable under this indemnity shall at your request submit to the jurisdiction of the High Court of Justice of England.

Yours faithfully
For and on behalf of
[*insert name of Requestor*]
The Requestor

……
Signature

Appendix II d)

Applicable link:

http://www.ukpandi.com/ukpandi/infopool.nsf/70970a8273cf412080256c800003b110/6947aebb016aece180256db30050c909/$FILE/INTGRPBB.doc

INT GROUP BB

STANDARD FORM LETTER OF INDEMNITY TO BE GIVEN IN RETURN FOR DELIVERING CARGO AT A PORT OTHER THAN THAT STATED IN THE BILL OF LADING INCORPORATING A BANK'S AGREEMENT TO JOIN IN THE LETTER OF INDEMNITY

To : [*insert name of Owners*] [*insert date*]

The Owners of the [*insert name of ship*]

[*insert address*]

Dear Sirs

Ship: [*insert name of ship*]

Voyage: [*insert load and discharge ports as stated in the bill of lading*]

Cargo: [*insert description of cargo*]

Bill of lading: [*insert identification number, date and place of issue*]

The above cargo was shipped on the above ship by [*insert name of shipper*] and consigned to [*insert name of consignee or party to whose order the bill of lading is made out, as appropriate*] for delivery at the port of [*insert name of discharge port stated in the bill of lading*] but we, [*insert name of party requesting substituted delivery*], hereby request you to order the ship to proceed to and deliver the said cargo at [*insert name of substitute port or place of delivery*] against production of at least one original bill of lading.

In consideration of your complying with our above request, we hereby agree as follows :-

1. To indemnify you, your servants and agents and to hold all of you harmless in respect of any liability, loss, damage or expense of whatsoever nature which you may sustain by reason of the ship proceeding and giving delivery of the cargo against production of at least one original bill of lading in accordance with our request.

2. In the event of any proceedings being commenced against you or any of your servants or agents in connection with the ship proceeding and giving delivery of the cargo as aforesaid, to provide you or them on demand with sufficient funds to defend the same.

3. If, in connection with the delivery of the cargo as aforesaid, the ship, or any other ship or property in the same or associated ownership, management or control, should be arrested or detained or should the arrest or detention thereof be threatened, or should there be any interference in the use or trading of the vessel (whether by virtue of a caveat being entered on the ship's registry or otherwise howsoever), to provide on demand such bail or other security as may be required to prevent such arrest or detention or to secure the release of such ship or property or to remove such interference and to indemnify you in respect of any liability, loss, damage or expense caused by such arrest or detention or threatened arrest or detention or such interference, whether or not such arrest or detention or threatened arrest or detention or such interference may be justified.

4. The liability of each and every person under this indemnity shall be joint and several and shall not be conditional upon your proceeding first against any person, whether or not such person is party to or liable under this indemnity.

5. This indemnity shall be governed by and construed in accordance with English law and each and every person liable under this indemnity shall at your request submit to the jurisdiction of the High Court of Justice of England.

Yours faithfully
For and on behalf of
[*insert name of Requestor*]
The Requestor

……
Signature

We, [*insert name of the Bank*], hereby agree to join in this Indemnity providing always that the Bank's liability:-

1. shall be restricted to payment of specified sums of money demanded in relation to the Indemnity (and shall not extend to the provision of bail or other security)

2. shall be to make payment to you forthwith on your written demand in the form of a signed letter certifying that the amount demanded is a sum due to be paid to you under the terms of the Indemnity and has not been paid to you by the Requestor or is a sum which represents monetary compensation due to you in respect of the failure by the Requestor to fulfil its obligations to you under the Indemnity. For the avoidance of doubt the Bank hereby confirms that:-

(a) such compensation shall include, but not be limited to, payment of any amount up to the amount stated in proviso 3 below in order to enable you to arrange the provision of security to release the ship (or any other ship in the same or associated ownership, management or control) from arrest or to prevent any such arrest or to prevent any interference in the use or trading of the ship, or other ship as aforesaid, and

(b) in the event that the amount of compensation so paid is less than the amount stated in proviso 3 below, the liability of the Bank hereunder shall continue but shall be reduced by the amount of compensation paid.

3. shall be limited to a sum or sums not exceeding in aggregate [*insert currency and amount in figures and words*]

4. subject to proviso 5 below, shall terminate on [*date six years from the date of the Indemnity*) (the 'Termination Date'), except in respect of any demands for payment received by the Bank hereunder at the address indicated below on or before that date.

5. shall be extended at your request from time to time for a period of two calendar years at a time provided that:-

a) the Bank shall receive a written notice signed by you and stating that the Indemnity is required by you to remain in force for a further period of two years, and

b) such notice is received by the Bank at the address indicated below on or before the then current Termination Date.

Any such extension shall be for a period of two years from the then current Termination Date and, should the Bank for any reason be unwilling to extend the Termination Date, the Bank shall discharge its liability by the payment to you of the maximum sum payable hereunder (or such lesser sum as you may require).

However, in the event of the Bank receiving a written notice signed by you, on or before the then current Termination Date, stating that legal proceedings have been commenced against you as a result of your having delivered the said cargo as specified in the Indemnity, the Bank agrees that its liability hereunder will not terminate until receipt by the Bank of your signed written notice stating that all legal proceedings have been concluded and that any sum or sums payable to you by the Requestor and/or the Bank in connection therewith have been paid and received in full and final settlement of all liabilities arising under the Indemnity.

6. shall be governed by and construed in accordance with the law governing the Indemnity and the Bank agrees to submit to the jurisdiction of the court stated within the Indemnity.

It should be understood that, where appropriate, the Bank will only produce and deliver to you all original bills of lading should the same come into the Bank's possession, but the Bank agrees that, in that event, it shall do so.

The Bank agrees to promptly notify you in the event of any change in the full details of the office to which any demand or notice is to be addressed and which is stated below and it is agreed that you shall also promptly notify the Bank in the event of any change in your address as stated above.

Please quote the Bank's Indemnity Ref …… in all correspondence with the Bank and any demands for payment and notices hereunder.

Yours faithfully
For and on behalf of
[*insert name of bank*]
[*insert full details of the office to which any demand or notice is to be addressed*]

……
Signature

Appendix II e)

Applicable link:

http://www.ukpandi.com/ukpandi/infopool.nsf/70970a8273cf412080256c800003b110/6947aebb016aece180256db30050c909/$FILE/INTGRPC.doc

INT GROUP C

STANDARD FORM LETTER OF INDEMNITY TO BE GIVEN IN RETURN FOR DELIVERING CARGO AT A PORT OTHER THAN THAT STATED IN THE BILL OF LADING AND WITHOUT PRODUCTION OF THE ORIGINAL BILL OF LADING

To : [*insert name of Owners*]
[*insert date*]
The Owners of the
[*insert name of ship*]
[*insert address*]

Dear Sirs

Ship: [*insert name of ship*]

Voyage: [*insert load and discharge ports as stated in the bill of lading*]

Cargo: [*insert description of cargo*]

Bill of lading: [*insert identification number, date and place of issue*]

The above cargo was shipped on the above vessel by [*insert name of shipper*] and consigned to [*insert name of consignee or party to whose order the bills of lading are made out, as appropriate*] for delivery at the port of [*insert name of discharge port stated in the bills of lading*] but we, [*insert name of party requesting substituted delivery*], hereby request you to order the vessel to proceed to and deliver the said cargo at [*insert name of substitute port or place of delivery*] to [*insert name of party to whom delivery is to be made*] without production of the original bill of lading.

In consideration of your complying with our above request, we hereby agree as follows :-

1. To indemnify you, your servants and agents and to hold all of you harmless in respect of any liability, loss, damage or expense of whatsoever nature which you may sustain by

reason of the ship proceeding and giving delivery of the cargo in accordance with our request.

2. In the event of any proceedings being commenced against you or any of your servants or agents in connection with the ship proceeding and giving delivery of the cargo as aforesaid, to provide you or them on demand with sufficient funds to defend the same.

3. If, in connection with the delivery of the cargo as aforesaid, the ship, or any other ship or property in the same or associated ownership, management or control, should be arrested or detained or should the arrest or detention thereof be threatened, or should there be any interference in the use or trading of the vessel (whether by virtue of a caveat being entered on the ship's registry or otherwise howsoever), to provide on demand such bail or other security as may be required to prevent such arrest or detention or to secure the release of such ship or property or to remove such interference and to indemnify you in respect of any liability, loss, damage or expense caused by such arrest or detention or threatened arrest or detention or such interference, whether or not such arrest or detention or threatened arrest or detention or such interference may be justified.

4. If the place at which we have asked you to make delivery is a bulk liquid or gas terminal or facility, or another ship, lighter or barge, then delivery to such terminal, facility, ship, lighter or barge shall be deemed to be delivery to the party to whom we have requested you to make such delivery.

5. As soon as all original bills of lading for the above cargo shall have come into our possession, to deliver the same to you, or otherwise to cause all original bills of lading to be delivered to you.

6. The liability of each and every person under this indemnity shall be joint and several and shall not be conditional upon your proceeding first against any person, whether or not such person is party to or liable under this indemnity.

7. This indemnity shall be governed by and construed in accordance with English law and each and every person liable under this indemnity shall at your request submit to the jurisdiction of the High Court of Justice of England.

Yours faithfully
For and on behalf of
[*insert name of Requestor*]
The Requestor

……
Signature

Appendix II f)

Applicable link:

http://www.ukpandi.com/ukpandi/infopool.nsf/70970a8273cf412080256c800003b110/6947aebb016aece180256db30050c909/$FILE/INTGRPCC.doc

INT GROUP CC

STANDARD FORM LETTER OF INDEMNITY TO BE GIVEN IN RETURN FOR DELIVERING CARGO AT A PORT OTHER THAN THAT STATED IN THE BILL OF LADING AND WITHOUT PRODUCTION OF THE ORIGINAL BILL OF LADING INCORPORATING A BANK'S AGREEMENT TO JOIN IN THE LETTER OF INDEMNITY

To : [*insert name of Owners*]
[*insert date*]
The Owners of the
[*insert name of ship*]
[*insert address*]

Dear Sirs

Ship: [*insert name of ship*]

Voyage: [*insert load and discharge ports as stated in the bill of lading*]

Cargo: [*insert description of cargo*]

Bill of lading: [*insert identification number, date and place of issue*]

The above cargo was shipped on the above vessel by [*insert name of shipper*] and consigned to [*insert name of consignee or party to whose order the bills of lading are made out, as appropriate*] for delivery at the port of [*insert name of discharge port stated in the bills of lading*] but we, [*insert name of party requesting substituted delivery*], hereby request you to order the vessel to proceed to and deliver the said cargo at [*insert name of substitute port or place of delivery*] to [*insert name of party to whom delivery is to be made*] without production of the original bill of lading.

In consideration of your complying with our above request, we hereby agree as follows :-

1. To indemnify you, your servants and agents and to hold all of you harmless in respect of any liability, loss, damage or expense of whatsoever nature which you may sustain by reason of the ship proceeding and giving delivery of the cargo in accordance with our request.

2. In the event of any proceedings being commenced against you or any of your servants or agents in connection with the ship proceeding and giving delivery of the cargo as aforesaid, to provide you or them on demand with sufficient funds to defend the same.

3. If, in connection with the delivery of the cargo as aforesaid, the ship, or any other ship or property in the same or associated ownership, management or control, should be arrested or detained or should the arrest or detention thereof be threatened, or should there be any interference in the use or trading of the vessel (whether by virtue of a caveat being entered on the ship's registry or otherwise howsoever), to provide on demand such bail or other security as may be required to prevent such arrest or detention or to secure the release of such ship or property or to remove such interference and to indemnify you in respect of any liability, loss, damage or expense caused by such arrest or detention or threatened arrest or detention or such interference, whether or not such arrest or detention or threatened arrest or detention or such interference may be justified.

4. If the place at which we have asked you to make delivery is a bulk liquid or gas terminal or facility, or another ship, lighter or barge, then delivery to such terminal, facility, ship, lighter or barge shall be deemed to be delivery to the party to whom we have requested you to make such delivery.

5. As soon as all original bills of lading for the above cargo shall have come into our possession, to deliver the same to you, or otherwise to cause all original bills of lading to be delivered to you.

6. The liability of each and every person under this indemnity shall be joint and several and shall not be conditional upon your proceeding first against any person, whether or not such person is party to or liable under this indemnity.

7. This indemnity shall be governed by and construed in accordance with English law and each and every person liable under this indemnity shall at your request submit to the jurisdiction of the High Court of Justice of England.

Yours faithfully
For and on behalf of
[*insert name of Requestor*]
The Requestor

……
Signature

We, [*insert name of the Bank*], hereby agree to join in this Indemnity providing always that the Bank's liability:-

1. shall be restricted to payment of specified sums of money demanded in relation to the Indemnity (and shall not extend to the provision of bail or other security)

2. shall be to make payment to you forthwith on your written demand in the form of a signed letter certifying that the amount demanded is a sum due to be paid to you under the terms of the Indemnity and has not been paid to you by the Requestor or is a sum which represents monetary compensation due to you in respect of the failure by the Requestor to fulfil its obligations to you under the Indemnity. For the avoidance of doubt the Bank hereby confirms that:-

(a) such compensation shall include, but not be limited to, payment of any amount up to the amount stated in proviso 3 below in order to enable you to arrange the provision of security to release the ship (or any other ship in the same or associated ownership, management or control) from arrest or to prevent any such arrest or to prevent any interference in the use or trading of the ship, or other ship as aforesaid, and

(b) in the event that the amount of compensation so paid is less than the amount stated in proviso 3 below, the liability of the Bank hereunder shall continue but shall be reduced by the amount of compensation paid.

3. shall be limited to a sum or sums not exceeding in aggregate [*insert currency and amount in figures and words*]

4. subject to proviso 5 below, shall terminate on [*date six years from the date of the Indemnity*) (the 'Termination Date'), except in respect of any demands for payment received by the Bank hereunder at the address indicated below on or before that date.

5. shall be extended at your request from time to time for a period of two calendar years at a time provided that:-

a) the Bank shall receive a written notice signed by you and stating that the Indemnity is required by you to remain in force for a further period of two years, and

b) such notice is received by the Bank at the address indicated below on or before the then current Termination Date.

Any such extension shall be for a period of two years from the then current Termination Date and, should the Bank for any reason be unwilling to extend the Termination Date, the Bank shall discharge its liability by the payment to you of the maximum sum payable hereunder (or such lesser sum as you may require).

However, in the event of the Bank receiving a written notice signed by you, on or before the then current Termination Date, stating that legal proceedings have been commenced against you as a result of your having delivered the said cargo as specified in the Indemnity, the Bank agrees that its liability hereunder will not terminate until receipt by the Bank of your signed written notice stating that all legal proceedings have been concluded and that any sum or sums payable to you by the Requestor and/or the Bank in connection therewith have been paid and received in full and final settlement of all liabilities arising under the Indemnity.

6. shall be governed by and construed in accordance with the law governing the Indemnity and the Bank agrees to submit to the jurisdiction of the court stated within the Indemnity.

It should be understood that, where appropriate, the Bank will only produce and deliver to you all original bills of lading should the same come into the Bank's possession, but the Bank agrees that, in that event, it shall do so.

The Bank agrees to promptly notify you in the event of any change in the full details of the office to which any demand or notice is to be addressed and which is stated below and it is agreed that you shall also promptly notify the Bank in the event of any change in your address as stated above.

Please quote the Bank's Indemnity Ref …… in all correspondence with the Bank and any demands for payment and notices hereunder.

Yours faithfully
For and on behalf of
[*insert name of bank*]
[*insert full details of the office to which any demand or notice is to be addressed*]

…….
Signature

Appendix III

Notes extracted from *Dockray, Martin* – Cases & Materials on the Carriage of Goods by Sea, *3rd edition, 2004 (Cavendish Publishing Ltd, London)* on page 64

1. The judgments in Davis do not explain why the court thought that there should be a duty not to deviate. Reports of the case show that counsel for the cargo owners argued that this obligation was necessary in order to prevent delay, because the risks assoiated with the usual route were the only things the shipper could take into account when entering into a contract and because a deviation by the carrier would make the shiper's insurance policy on the goods void.
2. There is no suggestion in the report of the judgment that the decision was confined to deviations for an illegal purpose (smuggling) or to dangerous places (*Safety* was not designed for the open sea).
3. The barge owner did not argue that he was protected by the standard form exclusion of liability for "dangers and accidents of the seas". It seems likely that both the parties and the court read the exclusion clause as applying only to losses occurring on the proper route.
4. The judgment suggest that after a wrongful deviation a carrier might escape liability for loss or damage to cargo if, but only if, he can show that the loss would also have happened on the proper route. In practice it will be very difficult to show this where the immediate cause of the loss is a storm or other natural force; but it might be possible in the case of losses by fire or inherent vice.

Appendix IV

Date : .....

To : The Owners of M/T
C/O : TSAKOS SHIPPING AND TRADING S.A.
Athens/Greece.

Whereas M/T .... is chartered to ..... (insert full style name and address) (hereinafter called "the Charterers")under C/P dated ..... and loaded following cargoes :

(1) 1. Port of loading:
2. Bill of Lading Number:
3. Bill of Lading Date:
4. Shippers:
5. Cargo grade/name:
6. Quantity:
7. Consignees:
8. Destination:

(2) 1. Port of loading:
2. Bill of Lading Number:
3. Bill of Lading Date:
4. Shippers:
5. Cargo grade/name:
6. Quantity:
7. Consignees:
8. Destination:

(3) 1. Port of loading:
2. Bill of Lading Number:
3. Bill of Lading Date:
4. Shippers:
5. Cargo grade/name:
6. Quantity:
7. Consignees:
8. Destination:

The Charterers have further requested:

(AA) That the vessel loads the following additional cargoes:
(a) At one or two safe ports ....., a quantity of about ..... metric tonnes of .....
(b) (b) At the port of ....., a quantity of about ..... metric tonnes of .....

(BB) That after loading cargo from ..... and while on route to ..... vessel is to transfer all cargoes evenly from all cargo tanks including slop tanks) across to all tanks, such that cargoes

supplied from ..... can be loaded in an even ratio to all cargo tanks.

IN CONSIDERATION OF YOUR COMPLYING WITH OUR ABOVE REQUESTS WE HEREBY
AGREE AS FOLLOWS:

01. THAT ALL RESPONSIBILITIES, RISKS AND LIABILITIES FOR AND INCIDENTAL TO THE PERFORMANCE OF THE COMINGLING OPERATION AND ALL CONSEQUENCES HOWSOEVER ARISING THEREFROM ARE FOR OUR ACCOUNT, INCLUDING BUT NOT LIMITED TO THE COSTS OF ANY DELAYS AT THE RATE OF DEMURRAGE UNDER ABOVE CHARTER PARTY, PLUS COSTS OF BUNKERS CONSUMPTION.

02. WE ACCEPT FULL RESPONSIBILITY AND RISK FOR THE SUCCESS OR OTHERWISE OF THE COMINGLING OPERATION AND IN PARTICULAR FOR THE SPECIFICATION OF THE RESULTING COMINGLED CARGO AND THE CONSEQUENCES OF ANY FAILURE OF THE SAID OPERATION ARISING FROM THE NEGLIGENCE OF MASTER, OFFICERS, CREW AND/OR OWNERS AND/OR OWNERS' SERVANTS OR FROM ANY OTHER CAUSE ARE FOR OUR ACCOUNT.

03. BEFORE THE COMINGLING OPERATION COMMENCES,
(a) TO OBTAIN AND PROVIDE YOU WITH WRITTEN CONFIRMATION OF AUTHORITY TO PERFORM THE AFORESAID COMINGLING OPERATION AND TO SIGN THIS LETTER OF INDEMNITY ON THEIR BEHALF FROM:

(i) THE IDENTIFIED CONSIGNEES AS RECORDED ON THE BILLS OF LADING FOR THE CARGOES LOADED AT .....,

(ii) THE IDENTIFIED OWNERS OF THE CARGOES TO BE LOADED AT .....

04. WHETHER BEFORE, DURING OR AFTER DISCHARGE, TIME TO BE PAID FOR BY US AT THE RATE OF DEMURRAGE UNDER ABOVE CHARTER PARTY, PLUS COSTS OF BUNKERS CONSUMPTION FOR ALL TIME ACTUALLY SPENT TO CLEAN THE TANKS, LINES AND PUMPS OF THE VESSEL TO THE SATISFACTION OF SURVEYORS APPOINTED BY YOU, SUCH OPERATIONS TO BE AT OUR OWN RISK AND EXPENSE, OR OTHERWISE LOST FOR ANY REASON WHATSOEVER CONNECTED WITH THE COMINGLING OPERATION.

05. TO INDEMNIFY YOU IN RESPECT OF ANY LOSS OR DAMAGE TO THE VESSEL INCLUDING ITS TANKS, PUMPS AND LINES, CAUSED OR PARTLY CAUSED BY THE COMINGLING OPERATION.

06. TO PAY YOU ON DEMAND THE AMOUNT OF ANY LOSS OR DAMAGE OF WHATSOEVER NATURE WHICH THE MASTER AND/OR AGENTS OF THE VESSEL AND/OR ANY OTHER OF YOUR SERVANTS OR AGENTS WHATSOEVER MAY INCUR AS A RESULT OF THE VESSEL COMINGLING THE CARGO AND/OR SUBSTITUTING THE BS/L AS AFORESAID.

07. TO INDEMNIFY YOU, YOUR SERVANTS AND AGENTS AND TO HOLD ALL OF YOU HARMLESS IN RESPECT OF ANY LIABILITY, LOSS, DAMAGE OR EXPENSES OF WHATSOEVER NATURE WHICH YOU MAY SUSTAIN BY REASON OF COMPLYING WITH OUR ABOVE REQUESTS.

08. IN THE EVENT OF ANY PROCEEDINGS BEING COMMENCED AGAINST YOU OR ANY OF YOUR SERVANTS OR AGENTS BY REASON OF COMPLYING WITH OUR ABOVE REQUESTS TO PROVIDE YOU OR THEM ON DEMAND WITH FIRST CLASS BANK SECURITY TO THE SATISFACTION OF THE CLAIMANTS AND/OR SUFFICIENT FUNDS TO DEFEND THE SAME.

09. IF, IN CONNECTION WITH THE DELIVERY OF THE CARGO AS AFORESAID, THE SHIP OR ANY OTHER SHIP OR PROPERTY IN THE SAME OR ASSOCIATED OWNERSHIP, MANAGEMENT OR CONTROL, SHOULD BE ARRESTED OR DETAINED OR SHOULD THE ARREST OR DETENTION THEREOF BE THREATENED OR SHOULD THERE BE ANY INTERFERENCE IN THE USE OR TRADING OF THE VESSEL (WHETHER BY VIRTUE OF A CAVEAT BEING ENTERED ON THE SHIP'S REGISTRY OR OTHERWISE HOWSOEVER), TO PROVIDE ON DEMAND SUCH BAIL OR OTHER SECURITY AS MAY BE REQUIRED TO PREVENT SUCH ARREST OR DETENTION OR TO SECURE THE RELEASE OF SUCH SHIP OR PROPERTY OR TO REMOVE SUCH INTERFERENCE AND TO INDEMNIFY YOU IN RESPECT OF ANY LIABILITY, LOSS, DAMAGE OR EXPENSE CAUSED BY SUCH ARREST OR DETENTION OR THREATENED ARREST OR DETENTION OR SUCH INTERFERENCE, WHETHER OR NOT SUCH ARREST OR DETENTION OR THREATENED ARREST OR DETENTION OR SUCH INTERFERENCE MAY BE JUSTIFIED.

10. AS SOON AS ALL ORIGINAL Bs/L OF THE ABOVE CARGO SHALL HAVE COME INTO OUR POSSESSION TO DELIVER THE SAME TO YOU.

11. THE LIABILITY OF EACH AND EVERY PERSON UNDER THIS INDEMNITY SHALL BE JOINT AND SEVERAL AND SHALL NOT BE CONDITIONAL UPON YOUR PROCEEDING FIRST AGAINST ANY PERSON, WHETHER OR NOT SUCH PERSON IS PARTY TO OR LIABLE UNDER THIS INDEMNITY.

12. THIS INDEMNITY SHALL BE GOVERNED BY AND CONSTRUED IN ACCORDANCE WITH ENGLISH LAW AND EVERY PERSON LIABLE UNDER THIS INDEMNITY SHALL AT YOUR REQUEST SUBMIT TO THE JURISDICTION OF THE HIGH COURT OF JUSTICE OF ENGLAND.

YOURS FAITHFULLY,

.....	.....
For and on behalf of	For and on behalf of
.....	.....
Charterers	(Consignees) under B/L No. issued at (port/date)
.....	.....
For and on behalf of	For and on behalf of
.....	.....
(Consignees) under B/L No. issued at (port/date)	(Consignees) under B/L No. issued at (port/date)

Appendix V

Implied Indemnity Tests as per Mustill L.J. in *The Nogar Marin* as extracted from *Bills of Lading* at 3.134 on p. 70.

1. … when an act is done by one person at the request of another which act is not manifestly tortuous to the knowledge of the person doing it, and such act turns out to be injurious to the rights of a third party, the person doing it is entitled to an indemnity from him who requested that it should be done.
2. This is, however, a general principle, not a conclusion of law, which is always to be drawn. As Mr Justice Grove was careful to point out in *Dugdale v Lovering*, whether there is an obligation to indemnity must greatly depend on the circumstances of each individual case. Notes of caution to a similar effect may be found elsewhere in the authorities.
3. A special situation exists where the person receiving the request or demand has a duty to act upon it. Here, as we understand it, the right of the indemnity does arise by operation of law, except in the case where there is a "default" on the part of that person. The merits of a fourth proposition have been much disputed in argument here and below. If we are right in the analysis of the issues which arise on the particular facts of this case, at which we have arrived, it makes no difference whether the proposition is right or wrong, and there is nothing to be gained by exploring it at length. We will however briefly state that in our judgment it is correct. The proposition is:
4. The "default" which disqualifies the plaintiff who acts ministerially is the same as the "manifestly tortuous" act which is an exception to the general principle. It always involves an element of turpitude and does not extend to the case where the actor has carelessly failed to make enquiries which would have revealed the true nature of the act, or where he has culpably but not recklessly drawn the wrong inference from such enquiries as he has made."
