



**Subject: Standard Forms of Letters of Indemnity
Delivery of Cargo without Production of Bills of Lading**

Circular to Assureds (no 010 2010)

Background

Following a decision in the English Commercial Court in the case of *Farenco Shipping Co. v Daebo Shipping Co Ltd (LLR (2009) Vol 1 81)* – the “**BREMEN MAX**”) the majority of Owners P&I Insurers have issued similar Circulars to their Members containing a number of additional precautions that ought to be considered if their Members choose to accept a Letter of Indemnity (“LOI”) for delivery of cargo without production of the original bill of lading.

The case concerns a wrongful delivery claim in a long chain of charterparties where the High Court judge was asked to decide on various preliminary issues of construction of multiple LOIs in the same form provided by each charterer to its disponent owner.

A standard P&I LOI wording for release of cargo without production of the original bill of lading has existed for some time however the findings of the Court made it advisable for owners to revise the current wording with a view to avoiding prejudicing their rights and overcoming potential defences or obstacles by the requestor when seeking to enforce the indemnities contained in the LOI.

The revised procedures being adopted within the market will be relevant to Charterers Club Assureds acting as disponent owners in a charter party chain and, generally, when they are the beneficiaries of such an LOI.

The Owners Revised Position

The precautions in question should be read in the context of the wording of the standard form recommended by the Owners P&I Clubs which for ease of reference is attached hereto as Annex 1.

Reproduced below (in italics) is the new wording the IG Clubs are recommending to their shipowning clients by circulars in relation to this topic.

- 1) *The identity of the party to whom delivery is to be given*

The opening paragraph of the Letter of Indemnity includes a number of italicised insertion instructions in brackets which are to be completed when the Letter of Indemnity is issued. This Circular deals with the identity of the party to whom delivery is to be made which appears as:

[insert name of party to whom delivery is to be made]

Recommendation: As well as inserting the name of the specific party (person or company) to whom delivery is to be made, Members should request that the blank section be completed as follows:

" X [name of the specific party] or to such party as you believe to be or to represent X or to be acting on behalf of X"

Reason: If a specific party only is named in the Letter of Indemnity, the Member may be assuming the burden of properly identifying that party. If the Member then mis-identifies the party, and delivers to some other party, there is then the risk that the Member is not entitled to indemnity, because he has not satisfied the pre-conditions in the Letter of Indemnity for delivery to the named party. The wording suggested above is designed to ensure so far as possible, that if the Member believes that the party to whom physical delivery of the cargo is given is X or is acting on behalf of X, he can rely on the Letter of Indemnity.

2) Timing of Demands under the Letter of Indemnity

In the event that a Member delivers cargo without production of the bill of lading in return for a Letter of Indemnity and an allegation is subsequently made against the Member that it has mis-delivered the cargo, accompanied by a security demand from the claimant, then the Member should immediately give notice to the issuer of the Letter of Indemnity that:

- (a) a claim has been notified*
- (b) security has been demanded from the Member*
- (c) the Member now requires to be secured by the issuer in accordance with paragraph 3 of the Letter of Indemnity.*

It is essential that this is done before the Member provides any security itself to the original claimant.

Reason: The Member may prejudice his right to demand and receive security under the Letter of Indemnity if he provides security to the claimant before making his own demand for security under Clause 3 of the Letter of Indemnity.

Naturally all references to Member above should be interpreted as Assured. Other than this we find the IG Clubs' reasons for the changes self-explanatory. Annex 1 attached contains a redline showing how the amended LOI will look when introducing the IG Club's recommendation set forth in point 1 above.

The Charterers Club's position

In many trades it is quite normal to find charterparty clauses that provide for the delivery of cargo without production of original bills of lading; furthermore the Club recognises that it is common industry practice for LOI's to be accepted in return.

A guide to the assistance a client could get is given below and would be assessed on a case by case basis

Class I – Defence:

Club support for any claim relating to the release of cargo without production of the original bills of lading will be considered strictly on an ad hoc basis, taking into account the facts, circumstances and the merits of each case.

Class II – Liability:

The Club will not incur any costs, nor indemnify a client, in respect of any matter that arises directly or indirectly as a result of, or is increased or aggravated by, cargo being released without production of the original bills of lading.

The Club would always endeavour to adopt a constructive and pragmatic approach in claims handling and if you have specific queries you should alert your usual claims handler at the Club as soon as possible.

The full judgment on the Bremen Max is available from Carlos Vazquez at the Club on request cvazquez@else.co.uk.

Michael Else and Company Limited, as Managers
Dated London 20 November 2010

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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