Loss Prevention Guide

NORTH
SERVICE, STRENGTH, QUALITY

LETTERS OF INDEMNITY
A GUIDE TO GOOD PRACTICE
Second Edition

Stephen Mills, Ben Roberts and The North of England P&I Association

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THE NORTH OF ENGLAND P&I ASSOCIATION

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GUIDE TO USING ELECTRONIC VERSION

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TERMS OF USE

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INTRODUCTION

LOSS PREVENTION AND LETTERS OF INDEMNITY

In 1998 The North of England P&I Association published a loss prevention guide to bills of lading entitled *Bills of Lading – A Guide to Good Practice* by Stephen Mills. The second edition was published in 2005 and the third edition in 2014. The aim of the guide is to assist ship's officers, operators and managers, as well as those advising them, on the problems and practical issues surrounding the everyday use of bills of lading and also to identify the legal principles and standards against which the use of that document would be judged.

However, the cry of many involved in international trade is that the 'real world' is a different place. Whereas the law expects that the documentary aspects of international sale transactions will comply with long-established principles and standards, those engaged in international trade may sometimes find those principles and standards difficult, if not impossible, to apply or achieve in each and every transaction. In their hour of need they often look to letters of indemnity.

In recognition of the widespread use of letters of indemnity in international trade and shipping in conjunction with, and sometimes in substitution for, bills of lading, an accompanying guide to *Bills of Lading – A Guide to Good Practice*, was published in 2008. This provided commentary on the common types of letter of indemnity, the reasons they are used, the pitfalls, and risks, and some of the legal and insurance issues which arise out of their use. This is the second edition of that guide, having been fully reviewed and updated for 2017.

In the interests of mutuality, the P&I clubs need to work to the same principles and standards as the law applies to the use of bills of lading. The publication of this guide by The North of England P&I Association is not intended to condone or ratify the use of letters of indemnity, or to suggest that they, or their continued use, will be viewed with any greater enthusiasm in the future by the P&I clubs than is currently the case. Using letters of indemnity may give rise to risks which are uninsured and / or uninsurable, and to obligations which may be unenforceable or which may not be worth the paper they are written on.

However, it is recognised that letters of indemnity may legitimately assist trade on many occasions, and hence the advice given in this guide may be welcome, notwithstanding the caveat above. The aim of this guide is to assist ship's officers, operators and managers in the understanding of letters of indemnity and the problems and practical issues surrounding their use.

HOW TO USE THIS GUIDE

Read the health warning in this chapter. After the health warning, the guide has five main colour-coded sections.

- quick reference (red)
- practical guidance (orange)
- detailed analysis (green)
- anatomy of a letter of indemnity (purple)
- legal notes (blue).

The quick reference section or the index may help to identify specific types of problems. The practical guidance section warns of the risk of using letters of indemnity, identifies circumstances in which they are often used and includes a checklist to be followed when taking a letter of indemnity. The detailed analysis section explains the legal principles underlying the practical guidance section, and this is followed by anatomy of a letter of indemnity, a line-by-line analysis of a standard form of letter of indemnity. Both the practical guidance and detailed analysis sections are supplemented by legal notes indicated by a  symbol in the text.

The standard form letters published by the International Group of P&I Clubs are given detailed consideration in Appendix II.

In this guide, indexing and cross-referencing are by paragraph number. Cross-references to *Bills of Lading – A Guide to Good Practice* are to the third edition.

All guidance is based on English law.

TERMS USED

- '*Issuer*' means the person giving the letter of indemnity (i.e. the one promising to indemnify). In legal terms, he or she may also be referred to as the '*indemnitor*', and sometimes (though perhaps inaccurately in the context of letters of indemnity) as the '*guarantor*' or '*surety*'.
- '***Recipient***' means the person receiving the letter of indemnity (i.e. the one who is promising to do something, or not do something, in return for the issuer's indemnity). In legal terms, he or she may also be referred to as the '*indemnitee*' and sometimes as the '*beneficiary*'.
- '***Carrier***' means (unless otherwise stated in the text) the shipowner, disponent owner, time charter operator and any other party performing the function of carrier.

HEALTH WARNING

- Use of letters of indemnity may give rise to **adverse consequences**.
- Some letters of indemnity may be **unenforceable** by the recipient against the issuer.
- Some letters of indemnity do not supplement but in fact **replace insurance cover**.
- A letter of indemnity will be construed strictly in accordance with its terms, and should be **drafted carefully**.
- A letter of indemnity is only as good as the authority and / or **creditworthiness of its issuer**.

- Charterparty clauses in which the carrier agrees to accept letters of indemnity in given circumstances should be **drafted carefully**.
- There may be **alternative options** to accepting a letter of indemnity.
- The purpose of this guide is to highlight some of the **commercial and legal risks** which arise in circumstances where letters of indemnity are used. It should not be used in substitution for taking legal or other advice from lawyers or other advisors.
- The publication or distribution of this guide by P&I clubs **does not promote, condone or ratify the use of letters of indemnity.**

QUICK REFERENCE

HOW TO USE THIS SECTION

All words and expressions shown in **bold print** are included in the index at the end of this guide.

THE LETTER OF INDEMNITY – A QUICK GUIDE TO ITS ROLE AND ITS PROBLEMS

It is impossible to list all of the circumstances in which letters of indemnity are used or suggested. Typical situations, all of which are dealt with in this guide, include the following.

- Where a letter of indemnity is offered in return for
  - including on the bill an incorrect **description** of the goods
  - misdescribing or concealing the **condition** of the goods
  - misdescribing the **quantity** of the goods
  - misdescribing the **voyage**
  - misdescribing the **date of shipment**
  - misdescribing the **date of issue** of the bill of lading
  - **mixing** dry cargoes
  - **co-mingling, blending** or **adding dye** to liquid cargoes
  - **amending** bills of lading
  - issuing **split** or **switch bills of lading** or **delivery orders**
  - issuing **copy** bills of lading, for example '***for customs purposes only***' or other variations from the conventional function of a bill of lading
  - issuing **substitute** bills of lading
  - delivering the cargo **without production** of a bill of lading
  - a **change of destination** from that originally shown on the bill.
- Where bills of lading have been **lost**.
- Where a letter of indemnity (sometimes called a '**seller's letter of indemnity**') is offered instead of the bill of lading in a **letter of credit** transaction.

Sometimes such letters of indemnity may be **unenforceable**, or bring with them **risks and liabilities**, or cause **P&I cover** to be lost or displaced.

The **International Group of P&I Clubs** has drafted recommended standard forms of letter of indemnity for use in specific circumstances. Where these cannot be used and ad hoc letters of indemnity are drafted it is important that any such letters of indemnity should clearly identify the **identity,** rights and obligations of its **issuer** and **countersignatory** (if any); and the **identity**, rights and obligations of the **recipient** and **third party** beneficiaries (if any).

In addition it is also useful if such a letter of indemnity expressly makes clear

- the **law and jurisdiction** to which it is subject
- whether it is intended to confer rights on **third parties**
- any specific terms or obligations regarding the provision of **bail**
- what is to be done in the event of **arrest** of the ship or other assets of the recipient
- the **joint and several liability** of the issuer of the letter of indemnity
- whether it should be **countersigned** by a **bank** or **parent company**
- the **authority** of the **signatory**.

Consideration should also be given to **alternatives** to letters of indemnity. Read the **health warning** on page 4.

PRACTICAL GUIDANCE

INTRODUCTION

1. Carriage of goods by sea is a service industry. It serves the needs of those involved in the international sale of goods.

2. The underlying sales transaction will require either the buyer or the seller – the traders – to find a ship to carry the cargo and to enter into a contract with the carrier on reasonable terms, and which will require the carrier to issue a bill of lading.

3. The bill of lading will perform a number of functions.

(a) It will show that the goods have been shipped, when, in what quantity, and whether they are in apparently sound condition.

(b) It will give the parties to the sale transaction rights against the carrier with regard to safe carriage of the goods and their delivery at destination.

(c) It may be used as a trigger for payment of the price by the buyer to the seller.

4. When functioning in this way, the bill of lading helps to ensure that the seller of the goods will be paid the agreed price on time, and that the buyer can pay for the goods safe in the knowledge that they have been shipped and should be delivered to the buyer by the carrier at the agreed destination. The bill of lading also assists the carrier in ensuring that both buyer and seller get what they want, whilst at the same time ensuring that the carrier does not expose itself to uninsured liabilities.

5. But the real world does not always work that way. Sometimes the unexpected happens, for example

- the goods when shipped do not comply with their contractual description, whether as to condition, type, quantity or promised date of shipment
- the ship is late
- one sale falls through (for example, because a letter of credit has not been opened or confirmed in time) and another sale is hurriedly made in its place, at a time when arrangements for carriage have already been confirmed, or when the goods have already been shipped
- the intended market collapses placing actual buyers in difficulty, and making prospective buyers scarce
- customs or governmental interference cause unexpected problems with clearance for shipment or delivery
- market conditions simply change (due, for example, to environmental catastrophes, application of import quotas, health scares and sanctions).

6. On other occasions, more mundane events interfere.

- Local practices at the load port may frustrate any attempt by the carrier to clause the bill of lading with reservations as to quantity or condition.
- Parties may wish to guard their sources and suppliers and may wish to conceal them from subsequent purchasers.
- Short banking hours, weekends and public holidays, together with cash flow and other financing arrangements between the banks and their customers, may conspire to delay the progress of the bills of lading into the hands of the final receiver. Because of these delays, the ship may arrive at its destination before the bills of lading are available for presentation.

7. These events put the carrier and the traders in conflict. The carrier wishes to issue a bill of lading which is both accurate (in terms of date of shipment, quality, quantity, condition etc. of the cargo) and also with which it can comply (in terms of delivery and place of destination). The seller needs a bill of lading which will satisfy the terms of the sale contract and enable the seller to be paid. The seller will also wish to avoid being liable for any delays at the discharge port arising from the bill of lading not being available. The key problem for the seller is that a particular description of the goods (be it the date of shipment, destination or condition or quantity) may not comply with the terms of an underlying letter of credit or sale contract. The seller will be worried that the cargo, or the documents, may be rejected if the descriptions are not entirely compliant.

8. The traditional structures start to bend and the parties come under pressure, often to varying degrees, to find a solution. That solution involves taking risks and accepting liabilities which, in other circumstances, would not arise. The redistribution of these risks and liabilities may involve the use of letters of indemnity. The letters of indemnity discussed in this guide are, in essence, promises that '*if you do what I ask, I will make sure that you do not suffer any loss*'.

9. Typical situations in which letters of indemnity are used or offered in the context of bills of lading are

- to the carrier for issuing a bill containing or omitting specific information, or
- to the carrier for breaking the terms of the original bill of lading, or
- to the buyer, for making payment under a sale contract without receiving the bill of lading. This is dealt with in a separate section – seller's letter of indemnity (see paragraphs 31–34).

10. In each of these cases one or more of the key functions of the bill of lading (description, delivery, payment) are being circumvented. Therefore, if a party is contemplating giving or receiving a letter of indemnity in response to this change in dynamics, the risks and liabilities concerned need to be carefully considered and assessed. The recipient's compliance with the issuer's request (whatever that may be) in return for a letter of indemnity may give rise to a number of risks and liabilities, including the following.

(a) The risk that the letter of indemnity will not be honoured by the issuer on the grounds that it is unenforceable. This is a serious and important matter and is dealt with in detail in this guide.

(b) The risk that the letter of indemnity will not be honoured by the issuer on other grounds. For example, on the grounds that it was not authorised, that the precise terms of the request had not been complied with, or that the issuer and the recipient did not share a common intention as to the scope of the indemnity.

(c) The risk that the letter of indemnity cannot be honoured, for example because the issuer has no money or has ceased to exist.

(d) The risk that compliance with the issuer's request has exposed the recipient to claims (usually by cargo owners or buyers or financiers), which claims are uninsured.

11. The time to consider and assess these risks and liabilities is

(a) at the time of entering into the charterparty – if there are clauses in the charterparty providing that one party will give or take a letter of indemnity to or from the other party, or

(b) at the time of agreeing to accept a letter of indemnity in response to the intended issuer's request.

AGREEMENT TO TAKE LETTERS OF INDEMNITY IN SPECIFIC CIRCUMSTANCES

Charterparties

12. Charterparties will often provide that the carrier may or will accept a letter of indemnity

(a) in return for delivering the cargo

  (i) without production of the bill of lading, or

  (ii) at a different destination from that stated in the bill of lading

(b) for some other situation.

13. Such clauses will often be ad hoc clauses negotiated as part of the fixture. Points to consider when drafting these are as follows.

(a) Whether the clause imposes an obligation on the carrier to accept such a letter of indemnity, or whether it has the option to do so. That is a matter of legal interpretation (or construction) of the particular words used in the charterparty.

(b) The form of the intended letter of indemnity. Reference could be made to those '*currently recommended by the International Group of P&I Clubs*', or to a form appended to the charterparty. If no form is stipulated, or if the clause states that the carrier '*may*' accept a letter of indemnity, or if the request falls outside the terms of the charterparty clause, the precise terms may be a matter for negotiation at the time the request is made.

(c) Who will issue it and to whom? Be precise here. Is the charterer a parent company? Is the charterparty backed by a parent company guarantee? If so, does similar provision need to be made in respect of the promised letter of indemnity?

(d) The need, if the form is not stipulated by or in the charterparty, to contract for the provision of the various safeguards listed in paragraphs 35–50.

(e) The need for intermediate charterers to ensure that their obligations up and down the charterparty chain are back-to-back.

14. Some standard forms of charterparty provide that a letter of indemnity will be taken in specific circumstances, leaving the wording to be agreed, and other standard forms of charterparty set out the terms of the indemnity in the charterparty itself. It is important to read the charterparty carefully at the time of fixing, with particular consideration being given to all of the points at paragraphs 35– 50.

Delivery of cargo without production of bills of lading

15. This is a classic use of a letter of indemnity and is legitimate, although not without risk. See, in particular, the commentary at paragraphs 75–80 in the detailed analysis section.

Discharge of cargo at a destination other than that stated in the bill of lading

16. This is the classic '*change of destination*' letter of indemnity. See paragraph 81.

Bills of lading, where there is dispute as to condition

17. This, along with disputes as to quantity, is one of the most difficult areas for carriers and traders and raises very difficult practical problems. The buyer will rely upon the master's inspection of the goods when making its decision to take the bill of lading and pay for the goods.

Genuine dispute as to quantity

18. This, along with disputes as to condition, gives rise to serious practical problems for the carrier. The obligations as to what quantities the master can properly sign for are dealt with in detail at paragraphs 4 and 155 to 158 in *Bills of Lading – A Guide to Good Practice*. In the context of letters of indemnity, if the master issues a bill of lading which does not reflect the master's genuine view as to the quantity shipped, and in return takes a letter of indemnity, then that letter of indemnity may be unenforceable.

Co-mingling or blending oil cargoes

19. In the context of bills of lading, co-mingling of oil cargoes is discussed at paragraphs 266 to 269 of *Bills of Lading – A Guide to Good Practice*. In the context of letters of indemnity, the following points arise from the blending of cargo A (loaded at a first port) with cargo B (loaded at a second port) to form a new blend, cargo C.

(a) Any bills of lading issued in respect of cargo A will now be inaccurate in terms of the description of the cargo which is capable of being delivered – cargo A has become cargo C. Those bills of lading need to be collected in and, if they cannot, the consequences of their still being at large, and not capable of being complied with, could be dealt with by suitable letters of indemnity.

(b) The same considerations apply to cargo B as to cargo A.

(c) The problem with cargo C is describing accurately its place of shipment and its origin. All of these may be of importance to the buyer and, possibly, to customs or other authorities. Any offer of a letter of indemnity in return for an inaccurate description of the place, date of shipment or origin of the resulting cargo should be rejected. Other potential problems arising from blending (whether physical, chemical, customs, or otherwise) could and probably should be dealt with in the form of a suitable letter of indemnity from the issuer to the carrier. The description of the resulting quality of the blend, however, is not a matter for the carrier and it is not promising the accuracy of such description.

Adding dye to liquid cargoes

20. The only real problem here is that the party requesting the addition of dye to the cargo may not be the owner of that cargo – often it will be a time charterer who is in the sale and purchase chain as a cost and freight (C&F) seller. If the addition of dye is recognised practice in the particular trade, and if the issuer of the letter of indemnity is creditworthy to the value of the cargo, standard form letters of indemnity (as many of the oil majors have), are often accepted by carriers.

Mixing dry cargoes

21. Similar considerations apply to those at paragraph 19.

Issuing split bills of lading or delivery orders

22. Issuing split bills of lading is common practice and safe if all of the original bills of lading are returned. If they are not, the existence of multiple bills of lading could deceive buyers of the new bills of lading and prejudice the holders of the originals. Letters of indemnity may not be enforceable in those circumstances. The problem with delivery orders is that, although they are recognised as legitimate documents giving rise to a right to demand possession of the goods and to sue the carrier if the goods are lost or damaged, their use is subordinate to the original bill of lading and circumstances can arise where delivery orders have been issued but the original bill of lading legitimately remains in circulation. Although as a matter of law claims under both the delivery order and the bill of lading should not be possible or permitted, a carrier may still be justified, and prudent, to request a letter of indemnity whenever it is asked to agree to and participate in the issue of delivery orders.

Switching or substituting bills of lading with amended new bills

23. As the switching or substituting of bills of lading will usually involve some amendment to their terms, each request must be dealt with as and when it arises. The following are general comments.

(a) Bills of lading are frequently switched to conceal the identity of the original supplier of the cargo from the ultimate buyer. Whether this is likely to deceive or cause loss to the buyer may depend upon many factors, such as origin, import / export quotas, sanctions, taxes and other regulations. It may also affect the carrier's right to sue the original supplier: for example, for the shipment of dangerous cargo. A request to issue switch bills should be considered carefully and if a letter of indemnity is taken, its scope of indemnity should be wide.

(b) If the request does not involve the substitution of inaccurate information, or the omission of important information, upon which a buyer of the new bill of lading would rely, there is no reason why letters of indemnity should not be taken to cover the general and unforeseeable consequences of complying with a request to switch or substitute bills of lading.

(c) If original bills of lading are not being collected in and surrendered in return for the new bills of lading, the existence of multiple bills of lading could deceive buyers of the new bills of lading and prejudice the holders of the originals. Letters of indemnity may be unenforceable in these circumstances.

Replacing lost bills of lading

24. Recent cases show that there is no safe manner for a carrier to deal with the issue of lost bills of lading other than seeking guidance from court in the relevant jurisdiction  . However, if the carrier wishes to take the commercial risk of accepting a letter of indemnity from a party which has an apparent legitimate interest in the cargo (such as the original time charterer which caused the cargo to be loaded on the ship, or the original shipper) and which credibly represents that the bills of lading have been lost, there is no legal obstacle to its doing so  . If there are any grounds for suspicion whatsoever, the request to issue new bills of lading and the offer of a letter of indemnity should be refused.

Late issue of a bill of lading or delivery order

25. Sometimes, one of the parties to a sale and purchase contract requests the carrier to issue bills of lading late, or that original bills of lading be substituted by new bills of lading, in circumstances where the cargo has already been discharged (and sometimes delivered against a letter of indemnity).

26. The basic question which arises is whether a bill of lading can be issued at all for a cargo which is no longer on board a vessel, containing statements as to its condition '*when shipped*' and promising delivery to the holder. There is a further consideration arising out of the simple lateness of issue. English law requires that a bill of lading be issued without undue delay after the cargo has been loaded, and that a bill of lading issued after any longer period of time has elapsed, may be invalid for that reason alone  . Letters of indemnity to support the issue of such a bill of lading (which appears to be valid but may be invalid) are likely to be unenforceable.

Bills of lading issued 'for customs purposes only', 'for inland destinations', carried in ship's bag, etc.

27. These are discussed at paragraphs 8 to 13 of *Bills of Lading – A Guide to Good Practice*. A carrier may wish to ask for a letter of indemnity in any of these circumstances.

TRADERS – SPECIFIC PROBLEMS FOR SELLERS AND BUYERS

28. Carriage of goods by sea usually involves the seller or the buyer procuring a carrying ship and a bill of lading issued by that carrying ship. To achieve this, the seller or buyer may also be the charterer of the vessel. That party occupies a crucial pivotal position

between the sale contract(s) and the carriage contract(s). As charterer, it can give directions to the carrier provided these are within the terms of the charterparty or bills of lading; if they are not, there may be occasions when the carrier will refuse to comply, or will offer to comply only on new terms. Frequently those new terms will include the provision by that trader / charterer of a letter of indemnity.

29. That trader may then need to obtain a similar letter of indemnity from its contracting party under the sale contract. Typical situations would include the following.

- Delivery of cargo without production of bills of lading.
- Change of destination.
- Production of bills of lading for customs purposes only.
- Co-mingling or blending oil cargoes.
- Dyeing the cargo.
- Splitting the cargo into smaller parcels.
- Providing information in the bills of lading (for example, letter of credit or invoice details) beyond the basic information required of the carrier under the carrier's Hague, Hague-Visby, or Hamburg Rules obligations.

30. This right to ask for a similar letter of indemnity will be determined by the terms of the sale contract. If there is no right, then the giving or taking of a letter of indemnity is a new bargain to be negotiated according to the market forces then at work. That bargaining position may be further complicated by the use of seller's letters of indemnity as discussed below.

SELLER'S LETTERS OF INDEMNITY

31. These are letters of indemnity typically provided by a seller to a buyer in order to obtain payment under a letter of credit, the letter of credit being triggered by the provision of a letter of indemnity in a pre-agreed form, rather than by provision of a bill of lading (the bill of lading having been delayed and not yet being in the seller's hands).

32. The terms of a typical seller's letter of indemnity will include the following promises by the seller to the buyer

(a) that the seller has complete title to the cargo, and

(b) that the seller will indemnify the buyer for losses or delays resulting from breach of that promise or from failure to deliver the documents in accordance with the sale contract. These indemnities may have to cover

  (i) the purchase price paid by the buyer (the recipient of the letter of indemnity)

  (ii) losses arising from non-conformity of documents

  (iii) losses under further letters of indemnity issued by the buyer relying on the current letter of indemnity

  (iv) hire, demurrage, damages for detention

  (v) loss of profit.

33. One of the consequences of a seller issuing such a letter of indemnity is that it makes it difficult for the seller then to demand back-to-back letters of indemnity from its buyer in respect of, for example, delivery of cargo without production of bills of lading.

34. The promises in the seller's letter of indemnity are onerous. Therefore, when issuing such letters of indemnity it is important, if possible

(a) to follow the checklist at paragraphs 36–50, and

(b) to obtain a promise from the carrier in the charterparty that it will, if requested, deliver the cargo in accordance with International Group of P&I Clubs standard letters of indemnity form A, B, C or similar. That at least gives the seller some control over delay at the discharge port arising out of late arrival of the bills of lading

(c) to transfer the bill of lading to the buyer as soon as possible. This should put the sale transaction back onto its proper documentary footing and end or reduce the obligations and liabilities under the seller's letter of indemnity.

TAKING A LETTER OF INDEMNITY – A CHECKLIST

35. When agreeing to take a letter of indemnity, thought needs to be given to the issues set out in paragraphs 36–50. If agreeing in a charterparty to accept letters of indemnity, see also paragraphs 12–14.

36. Read the health warning on page 4.

37. If one of the International Group of P&I Clubs standard letters of indemnity is being taken, reference should be made to paragraphs 104–143 which contains a detailed analysis of International Group of P&I Clubs standard letter form A on a paragraph-by-paragraph basis with comment on the form B and C variations. The standard letter for banks to join in the International Group of P&I Clubs letter of indemnity appears in Appendix II and is discussed at paragraph 143.

Addressee

38. Is the letter of indemnity properly addressed? It should show the recipient as addressee.

Issuer

39. Is the issuer accurately identified in the letter heading and in the signature? Are references in the body of the letter of indemnity to the issuer consistent throughout?

Request

40. Is what the issuer wants the recipient to do set out in clear and precise terms?

Illegality

41. Is the request legal? In particular, if the request is to misdescribe the cargo or the voyage, will this mislead a subsequent holder of the bill of lading? If the recipient is being asked by the issuer of the letter of indemnity to sign or authorise a bill of

lading which contains a false representation, and such representation has been made knowingly, or without belief in its truth, or recklessly, then the bill of lading may be deceitful / fraudulent and the letter of indemnity unenforceable. See paragraphs 55–58.

Insurance

42. Will compliance with the request affect the recipient's insurance cover? See paragraphs 83–89.

The indemnity

43. Is the scope of the indemnity, which the issuer gives to the recipient in return for the recipient's performance, set out in clear and precise terms? The recipient needs to be sure that the indemnity covers its requirements. This is a matter of careful reading and draftsmanship.

Law and jurisdiction

44. Does the letter of indemnity clearly state the system of law which is to govern it and the jurisdiction in which it is to be enforced? If the recipient is not in the jurisdiction chosen, then express terms may have to be added so that proceedings can be served on the issuer within the chosen jurisdiction.

Complete

45. Has the letter of indemnity been provided in its completed form? It is not enough for the issuer to promise to provide a letter of indemnity. The letter of indemnity needs to be prepared and delivered. This does not necessarily mean that it has to be an original letter with an original signature on it. For a more detailed discussion see paragraphs 51–54 and 94.

Attachments

46. Would it be advisable to state in the terms of the letter of indemnity that a copy of the bill of lading referred to must be attached to it? This avoids confusion and helps prevent multiple bills of lading being put into circulation.

Financial

47. Has the creditworthiness of the issuer been assessed? Is the issuer (and are its assets) in a jurisdiction where enforcement is straightforward? Are there other enquiries that should be made? Should a countersignature by a parent company or bank be requested? And see paragraph 95.

Signature

48. Is the name of the signatory and his or her job title clearly shown on the letter with a clear statement that he or she is authorised to sign on behalf of the issuer? See paragraphs 96–101. This is an important area.

(a) Follow the guidance at paragraph 94.

(b) Question the authority of any issuer who is clearly not an officer of the issuing company, for example someone who is known to be a clerk, or an external agent (for example a broker) or an officer of only a subsidiary company.

(c) Consider asking for a separate side letter from the company secretary or a senior officer of the company warranting authority of the signatory.

(d) Consider the execution and signature of the charterparty. If the charterparty was sealed with a company seal, so should the letter of indemnity. If the signatory does not have access to the stamp or seal, consider why not.

(e) If in doubt as to how the law of the domicile of the issuer may treat the question of authority, seek guidance from the P&I club or its correspondents in the issuer's country of domicile.

Countersignature

49. Should the letter of indemnity be countersigned by a parent company or a bank? If countersigned by a parent company or a bank is the promise made by the parent company or bank clear from the terms of the letter of indemnity? And see *signature* at paragraph 48.

Back-to-back

50. Does the issuer need to receive a back-to-back indemnity from someone else? Is the recipient obliged to give a back-to-back indemnity to someone else?

DETAILED ANALYSIS

THE LEGAL NATURE OF LETTERS OF INDEMNITY

51. The letters of indemnity discussed in this guide are, in their simplest form, promises from one person to another that, *'if you do what I ask, I will make sure that you do not suffer any loss'*. Or, in context, *'if you (the shipowner) do what I (the charterer) ask (deliver the cargo without production of bills of lading), I (the charterer) will make sure that you (the shipowner) do not suffer any loss'*. In this simple form the letter of indemnity is an ordinary contract and there are no strict requirements as to the form it must take and the requirements as to content are the same as for any other simple contract (see paragraph 54 below).

FORM

52. As stated in the preceding paragraph, there are no strict legal requirements as to the form a letter of indemnity must take where it is a simple promise from one person to indemnify another. But sometimes the performance of the issuer is guaranteed by a third-party countersignatory such as a bank or parent company. The resulting letter of indemnity might then be characterised as a contract of indemnity or as a contract of guarantee depending upon the precise role undertaken by the third-party countersignatory. The distinction may be important because, for a contract of guarantee to be enforceable, specific formalities must be complied with. The contract must be evidenced by a signed note or memorandum (i.e. in writing); it must identify the parties by naming or describing them, and state the capacity in which they contract; it must contain a statement of its material terms; and it must be signed by the guarantor or by its agent.

53. In practical terms, the simplest way to avoid the problems caused by such fine legal distinctions is to ensure that any letter of indemnity, whether in the simple form referred to at paragraph 51, or in the tri-partite form referred to at paragraph 52, is carefully and properly recorded in writing and signed by both the issuer and, if there is one, the third-party countersignatory. That not only satisfies the legal requirements of form which apply to contracts of guarantee, but also, for any letter of indemnity, serves as a reliable means of recording and proving that the promise has been made, the nature of the promise, and what is expected in return. The forms of letter of indemnity which have been prepared by the International Group of P&I Clubs and which appear at Appendix II would always satisfy both these practical and legal requirements.

CONTENT

54. There are no formal requirements for content. It is usual to recite consideration, the request and the promise to indemnify. In the context of letters of indemnity, it is particularly important to take care that the promise to indemnify is not rendered unenforceable by the illegality of the performance requested from the issuer.

UNENFORCEABLE LETTERS OF INDEMNITY – ILLEGALITY

55. The law will not enforce any promises in a transaction where the underlying effect or purpose of the transaction is to deceive an innocent party.

56. An intention to deceive exists not only where the deceiving party knows a document, promise or representation to be false, but also where it makes that document, promise or representation '*without belief in its truth*' or '*recklessly, careless whether it be true or false*'.

57. Although it may seem unfair that the issuer of a letter of indemnity should be allowed to walk away from its promise, the law has decided that it is far more important as a matter of general and public policy that the courts should never be seen to uphold any promise, if to do so would condone the ulterior fraudulent motives.

58. It is quite possible that the issuer will not walk away from the promise on the grounds of illegality. It may have a commercial reputation to protect and it may form the view that to refuse to honour a letter of indemnity on the grounds of its own illegality would damage that reputation. However, there is the risk that the issuer may still seek to achieve the same result (non-payment) on other technical grounds, such as lack of authority of the signatory (see paragraphs 96–101) or absence of common intention between the parties as to the scope of the promise (see, by way of example, paragraph 95).

Misdescription

59. As a matter of general practice it should be assumed that any letter of indemnity which is accepted in return for issuing a misleading bill of lading will be in the category of unenforceable letters of indemnity described at paragraphs 55–58.

60. A bill of lading should be regarded as misleading if it contains a description of the cargo which is not true, or where information which would usually be included in the bill of lading and relied upon by the buyer is, at the issuer's request, excluded from the bill of lading.

61. Information which would usually be included is that which is required as a custom of the trade, or if the governing Hague / Hague-Visby or Hamburg Rules prescribe that such information should be shown on the face of the bill.

Such information includes

(a) the apparent order and condition

(b) the weight or number of packages

(c) date of shipment.

62. The buyer of a bill of lading will expect to see and will rely upon the accuracy of this information. As a simple practical test, if a party has an interest in excluding true information from a bill of lading, then it must be presumed that such information would be of significance to any buyer of that bill of lading, and that excluding it would deceive the buyer.

63. Requests to exclude information (in return for a promise of indemnity) are usually made where a particular description of the goods (be it the date of shipment, voyage or condition or quantity) may not comply with the terms of an underlying letter of credit or sale contract. The proposed issuer of the letter of indemnity (for example the seller of the cargo) will be worried that the cargo, or the documents, may be rejected if the descriptions are not entirely compliant.

The seller may see its practical options as

(a) to negotiate a change in the terms of the sale contract (or letter of credit) so that the goods actually being supplied comply with it

(b) to provide a letter of indemnity to the issuer of the bill of lading. This second option is usually more appealing to the seller than re-negotiating the sale contract.

64. Whenever a letter of indemnity is accepted in return for the issue of a bill of lading where there is doubt over the description of the cargo, the voyage or the date, it is vital that the recipient is fully aware that

(a) this may prejudice its P&I cover (see paragraphs 83–89)

(b) the letter of indemnity may be unenforceable against the issuer (see paragraphs 55–58)

(c) the risks to which the recipient is exposed could be very substantial and disproportionate to the nature or extent of the misdescription. If the misdescription in the bill of lading leads to the cargo or the documents being rejected in their entirety, a very substantial claim will follow.

Exceptions

65. Wherever a carrier issues a bill of lading in the circumstances described at paragraphs 55–58, the consequences described at paragraph 64 are likely to follow. There may be exceptions when, for example, there is a genuine dispute or difference of opinion between a seller of the cargo and the master about the description of the condition and / or quantity of the cargo to be shown on the face of the bill of lading. It may be that a letter of indemnity given as an extra precaution in return for the issue of a bill of lading preferring one description over the other would then be enforceable. These exceptions must be treated with caution and are discussed in more detail below.

66. *Condition*

The Hague, Hague-Visby, and Hamburg Rules all require the carrier to report upon the apparent condition of the goods, as shipped, when issuing the bills of lading.

67. The standard of care expected of the master and the master's duties in clausing are discussed in *Bills of Lading – A Guide to Good Practice*. Frequently, disputes will arise between a carrier and a shipper (or their respective surveyors) as to the condition of cargo shipped on board. The risk to the carrier is that if the master issues a bill of lading which does not reflect the master's genuine view and in return takes a letter of indemnity, then that letter of indemnity may be unenforceable and, therefore, useless in the carrier's hands (see paragraphs 55–58).

68. One of the main difficulties in forming a practical view as to where the line should be drawn is this: the court may always say that if there are two contested views about the condition of the cargo, then there is no reason why both should not be set out on the face of the bill of lading; if this will cause problems with the letter of credit, or compliance with the sale contract, then all the more reason for the buyer (or its bank) to be given this information; if it will not cause problems, then there should be no dispute.

69. This, of course, disregards the practical difficulties of renegotiating sale contracts and / or letters of credit, and the understandable wishes of traders and carriers to avoid these problems by a practical or pragmatic approach. It also disregards the fact that the carrier will always prefer to issue an accurate bill of lading and so has its own incentive to act honestly and carefully. In attempting to draw the line, it may be useful to look at the nature of the problems which frequently arise. These include arguments (a) that poor condition is in fact a feature of this particular cargo (i.e. inherent in its quality), or (b) that the damage is less extensive than stated, or (c) that any damage is trivial.

(a) *Quality.* Sometimes the shipper may argue that damage or foreign particles in goods of a specified quality or grade are accepted as falling within that quality or grade. The shipper therefore asserts that the simple description of quality on the face of the bill of lading is sufficient information for the buyer. This problem could be approached as follows.

- **(i)** If the industry standard is clear, or
- **(ii)** if the carrier's surveyor is knowledgeable about the industry standard, and
- **(iii)** the cargo observed clearly falls within the standard at (i) and / or (ii), then
- **(iv)** a carrier may choose to rely upon the shipper's assertion that there is no doubt as to the condition of the cargo described as loaded. However, as the carrier would nevertheless be entitled to mark its observations on the bill of lading, it may, in consideration of its not doing so, ask for a letter of indemnity
- **(v)** that decision is a commercial decision and it is for the carrier, not its P&I club or the surveyor, to make
- **(vi)** in the absence of compliance with (i) or (ii), the carrier may prefer to argue that if what the seller asserts is true, then it should have no difficulty in accepting clausing on the bill as to condition and the buyer will be happy to accept these clausings for cargo of this particular grade.

(b) ***That the damage is less extensive.*** Sometimes a shipper may argue that the master or surveyor is mistaken as to the extent of damage which it has observed. Here

(i) only the person observing the damage can speak as to the accuracy of his or her statement and strength of his or her belief in that statement

(ii) if the person observing the damage genuinely believes that the person contesting the description was in a position to form a more accurate or comprehensive view, there may be justification in preferring that person's view and using that person's information when issuing the bill of lading

(iii) that is a decision for the carrier and not for the P&I club or its surveyor

(iv) however, if the person observing the damage cannot honestly say he or she is right and that the person contesting it is wrong, or if both parties have enjoyed an equal opportunity to inspect the cargo and neither can accept the observations of the other, then the proper course is probably to show both descriptions on the bill of lading. To do otherwise runs the risk of the description being characterised as '*reckless, careless whether it* [the information] *be true or false*'

(v) if the contesting person asserts that he or she has greater skill and therefore is better able to judge the factual condition of a particular cargo, then this should be dealt with in accordance with (iv) above. The bill of lading should be clausedwith both sets of information. It is not justifiable to rely upon any asserted special skill or judgement of the shipper, other than in the context of (a)(i)–(iii) above.

(c) *Trivial damage.* Shippers sometimes argue that damage, which is so minor in nature and extent that it could not influence the mind of the reasonable buyer in deciding to accept the cargo, should be omitted from the bill of lading in return for a letter of indemnity. It may, however, also argue that in those circumstances it would also be trivial to demand a letter of indemnity. The carrier may argue in response that if there is a genuine dispute as to whether it is trivial, there is a compelling argument for following (b) above.

70. *Quantity*

Unlike condition of the cargo, where the Hague, Hague-Visby and Hamburg Rules place primary responsibility on the master to check the apparent order and condition at the time of shipment, the accuracy of the stated quantity of cargo shipped is primarily the responsibility of the shipper.

71. Under the Hague and Hague-Visby Rules, the shipper guarantees the accuracy of its number, quantity and weight figures. There is no duty on the master to show any figures for quantity in the bill of lading if the master '*has reasonable grounds for suspecting*' the figures supplied or has '*no reasonable means of checking*' them. Articles 16 and 17 of the Hamburg Rules make similar provision.

72. Masters can find themselves in a number of difficult situations when faced with differing ship and shore figures. The Hague / Hague-Visby test at 71 is applied to each situation in turn.

(a) Firstly, masters could have reasonable grounds for suspecting the shipper's figures, for example because they differ widely from their own draught survey or ullage figures, or because they have observed pilferage. Here, masters cannot sign a bill of lading showing only those figures if they think they are not true. A letter of indemnity in return for issuing such an incorrect bill of lading would be unenforceable. Masters can either refuse to include any figures at all (which is not commercially realistic but which is a legitimate bargaining position under the Rules), or they can follow the advice at 4(b)and 141 to 153 of *Bills of Lading – A Guide to Good Practice* and show both sets of figures.

(b) Second, masters may have had no reasonable means for checking the figures. Here they can either refuse to include any figures at all (which is not commercially realistic but which is a legitimate bargaining position under the Rules) or they can make clear on the bill of lading that they make no promise that the figures are accurate. For words which do this, see *Bills of Lading – A Guide to Good Practice* at paragraphs 155 to 158. If the shipper and / or charterer will not allow the master to add these protective words to the bill of lading, the carrier may wish to require a letter of indemnity from the shipper and / or charterer. This letter of indemnity is to indemnify the carrier against the consequences of omitting those protective words and is additional to the guarantee already provided for in the Rules.

(c) The difference between (a) and (b) is that in (a) masters do not believe the shipper's figures to be correct; in (b) they simply do not know.

(d) What is meant by '*reasonable means of checking*'? In practical terms, this may mean, for example, a draught survey, ullage, or tally and, if necessary, a re-check by an independent surveyor. If by this '*reasonable means of checking*' masters derive a different set of figures from those provided by the shipper, then a number of situations arise.

(i) If the two sets of figures are both within the margin of error associated with their only means of checking (for example the inherent inaccuracy of draught surveys, ullage or large-scale tally figures), then masters cannot say that the shipper's figures are wrong; nor that they have no belief in the truth of the shipper's figures. The critical question is whether, by this reasonable means of checking, they now have '*reasonable grounds for suspecting*' the shipper's figures to be wrong. If they have not been able to form such reasonable suspicion on the strength of their reasonable means of checking, then they must issue the bill of lading and rely upon the shipper's guarantee.

(ii) An alternative view is that if a genuine dispute remains as to which set of figures is correct, then their own draught survey (or ullage or tally or independent survey) has not proved to be a satisfactory or '*reasonable means of checking*' in which case they have to fall back on the position described at (b) above.

(iii) If, however, masters are confident that their draught survey (or ullage or tally or independent survey) has given rise to reasonable grounds for suspecting the accuracy of the shipper's figures, then they can either refuse to include any figures at all (which is not commercially realistic but which is a legitimate bargaining position under the Rules), or can follow the route at (e) below.

(e) When masters are asked to sign a bill of lading containing figures which they dispute based on a reasonable means of checking, then they have a number of options

(i) to insist on showing the ship's figures and the shore figures on the face of the bill of lading, or

(ii) to require the shipper to re-check the figures which it has supplied to them, reminding it of its guarantee under the Hague, Hague-Visby or Hamburg Rules, and to carry out their own re-check whereupon they should again work through the steps at (d) above.

(f) Applying the Hamburg Rules to the situations at (a) and (b) above, both are dealt with by Article 16 which provides that masters must state the grounds for suspicion and / or that they have no reasonable means of checking, and specify the inaccuracies. The Hamburg Rules at Article 17 also gives some credence to the use of letters of indemnity in those situations. This is dealt with separately at paragraph 74.

(g) It will be seen that in each of the above cases, where masters include only the shipper's figures on the bill of lading, because they have no reasonable grounds for suspecting them to be wrong, even where slightly different figures have derived from their own checks, the preferred route may be to rely upon the shipper's guarantee. A request for a letter of indemnity may be a genuine and prudent step, but it suggests a knowledge that the included figures are incorrect and willingness to overlook other competing figures; whereas reliance upon a guarantee from the shipper (and / or charterer – see below) is more consistent with the onus placed on the shipper under the Hague, Hague-Visby or Hamburg Rules.

(h) Finally, the guarantee provided by the shipper in the Rules may, in certain instances, also be accompanied by a deemed guarantee from the time charterer if there is a clause paramount in the charterparty.

73. But all of the above must be treated with the greatest of caution. Any situation where masters clearly knew or should have known that the bill of lading was misrepresenting the position, and which they issued knowingly, or without belief in its truth, or not caring one way or the other, could lead to the problems referred to at paragraph 64.

74. *Special provisions of the Hamburg Rules*

Article 17 of the Hamburg Rules expressly deals with letters of indemnity given by the shipper to the carrier in return for the carrier not clausing the bill of lading or including any other reservation (for example as to weight). The Hamburg Rules permit the limited use of such letters of indemnity provided that there is no intent to defraud a third party who acts in reliance on the description of the goods in the bill of lading. This is tacit recognition that letters of indemnity can be used in instances of genuine dispute but not, of course, in the case of fraud (as defined in paragraph 56).

ENFORCEABLE LETTERS OF INDEMNITY

Delivery of cargo without production of the bill of lading

75. The form of the standard letter of indemnity recommended for this purpose by the International Group of P&I Clubs is analysed at paragraphs 104–143.

76. Traditionally, there has been a commercial need for letters of indemnity to be used occasionally to facilitate delivery of cargo without production of the bills of lading because of the following.

(a) The bills of lading may pass through the hands of many traders and banks in several countries. Short banking hours, weekends and public holidays, together with cash flow and other financing arrangements between the banks and their customers, all conspire to delay the progress of the bills of lading into the hands of the final receiver. Because of these delays, the ship may arrive at destination before the bills of lading are available for presentation.

(b) Sometimes the parties to the sale contract have agreed that one or other or both of them may or must provide a letter of indemnity to the carrier in order to achieve early discharge or delivery of the cargo.

(c) Sometimes, one of the parties may have undertaken to be responsible for losses arising from delay in producing the bill of lading – see 'Seller's letters of indemnity' at paragraphs 31–34.

In those circumstances, those in the sale and purchase chain and / or the charterer are likely to ask the carrier to agree to discharge against a letter of indemnity.

77. In the above circumstances the letter of indemnity for non-production of the bill of lading takes the form of a promise by the issuer that it is directing the recipient of the letter of indemnity to deliver the cargo to the party which is entitled to receive it, and which in due course will be the holder of the bills of lading.

78. However, the use of these letters of indemnity sometimes goes beyond simply accommodating the late arrival of the bills of lading. It is sometimes used by traders to allow them greater flexibility in the handling of their documentary requirements. In particular, there may be occasions when the reason that the bill of lading is not available for presentation at the discharge port is *not* that it has been delayed in the banking system, but that it has been withdrawn from circulation by the seller. This is not good practice. A seller might do this if it knows that the bill of lading will not satisfy the requirements of the sale transaction or the underlying financial arrangements (for example the terms of a letter of credit).The seller then procures the issue of a 'bill of lading' in terms which are more suitable for the seller's purpose.

79. This practice is made easier for the seller where it is also the charterer and has, or considers itself to have, authority to issue bills of lading on behalf of the shipowner; and the charterparty contains a promise by the shipowner to deliver against a letter of indemnity. A time charterer for example usually has express or implied authority to issue bills of lading. Such authority is in fact limited to (1) signing any bill of lading

that masters would be required to sign and (2) the issue of only one set – there is no continuing actual authority to issue further sets. In practice, a person on the basis of such authority may be tempted to issue and sign further bills of lading, and those bills of lading, taken in good faith by a subsequent holder, may still bind the carrier.

80. These are difficult situations for the carrier to control and very difficult for the carrier to deal with if it discovers that unauthorised bills of lading have been put into circulation. It is particularly difficult if the carrier agreed in the charterparty that it will deliver against a letter of indemnity. Even if the carrier confronts the time charterer with the fact that additional or replacement bills of lading have been issued by the charterer containing misinformation, the carrier may still be met with the argument that the charterer intends to call upon the carrier to comply with the charterparty promise. The carrier may argue in return that the basis and purpose of that agreement was to deal with situations where the bills of lading simply had not arrived at the discharge port in time (and this is supported by the basic drafting of International Group of P&I Clubs standard letter of indemnity form A) and not to facilitate the issue of misleading bills of lading. The remedy in each case will depend on the overall dynamics of the situation and the carrier should take advice from the P&I club and its lawyers.

Change of destination

81. If the underlying sale transaction is varied, or it fails and a new sale is made, it may be necessary to direct the cargo to another port. If the goods are already afloat and the bills of lading have already been issued, the carrier will require a letter of indemnity to protect it from the consequences of proceeding to that new destination. In proceeding to that new destination, it is breaking the terms of the bill of lading contract.

Final surrender of the bill of lading

82. It is in the interest of the issuer of a letter of indemnity to procure and return to the carrier original bills of lading as soon as they have come into the issuer's possession. Knowing that the bills of lading have been gathered in and returned should assist in limiting the exposure of the issuer under the letter of indemnity. It is also important to the carrier that all original bills of lading should be collected in as soon as possible in order to ensure that its obligations under the letter of indemnity are terminated or minimised. Some letters of indemnity expressly provide that when the bills of lading are returned, the obligations under the letter of indemnity come to an end – see for example International Group of P&I Clubs standard letter form A, paragraph 5.

INSURANCE

83. All P&I clubs expressly state that no claim can be made where the carrier has incurred liability

(a) for discharging the cargo without production of a bill of lading, or

(b) for discharging the cargo at the wrong place, or

(c) for issuing a bill of lading with the incorrect date of loading, containing an incorrect description of the cargo, its quantity or condition or of its port of loading or discharge.

84. Neither the law nor the P&I clubs can or will condone or recommend the use of letters of indemnity where their purpose is to procure the issue of bills of lading which are inaccurate and upon which a third party is likely to rely to its detriment. This is reflected in the rule referred to at paragraph 83.

85. Sometimes letters of indemnity are offered for legitimate reasons, for example because the cargo has been sold or re-sold during the voyage and is to be discharged at a different destination from that stated on the bill of lading, or because the bill of lading will not pass through the commercial and banking formalities quickly enough to be available for surrender to the master when the ship arrives at the destination.

86. The P&I clubs recognise that these situations can arise for genuine commercial reasons. However, the clubs are founded on principles of mutuality and must maintain these. Therefore the rules adhere to the strict benchmark of requiring the production of the bill of lading and requiring discharge at the destination stated in that bill of lading. The P&I clubs do not usually cover situations where claims arise from non-production of bills or from change of destination. Instead the P&I clubs seek to assist their members, and others involved in the shipping industry, by providing (through the International Group of P&I Clubs) forms of recommended letters of indemnity which those parties may choose to use when such situations arise. Those letters are used at the risk of the parties. Their use is instead of P&I cover, and not supplementary to it. Using letters recommended by the P&I clubs is an alternative to cover, not compliance with cover.

87. Furthermore, it is not the giving or the taking of letters of indemnity which prejudices the club cover, but the underlying transaction itself – for example the delivery of the cargo without production of the bill, the delivery at the destination, or the misdescription of the cargo.

88. The P&I clubs expressly contemplate three situations where letters of indemnity may be used in substitution for P&I cover. These are

(a) delivery of cargo without production of the bill of lading

(b) delivery at a destination other than that stated in the bill of lading

(c) a combination of (a) and (b).

These situations are analysed at paragraphs 75–82 and the International Group of P&I Clubs standard letter of indemnity form A is analysed at paragraphs 104–143, and the full set of standard letters are reproduced at Appendix II.

89. There may be letters of indemnity which are neither unenforceable (for reason of illegality) nor within the category contemplated by the P&I clubs (delivery without production of a bill of lading / change of destination), but which simply reflect the situation where the carrier is being asked to do something which it does not have to do, but which afford it some protection if it chooses to do what is being asked of it. Complying with the issuer's request will not necessarily take the carrier outside the

terms of its P&I cover. The approach of the P&I clubs will be to apply their founding principles of mutuality. These situations may include some, but not all, of those at paragraphs 15–27.

MAKING THE LETTER OF INDEMNITY WORK

90. In this section, the remaining legal principles underlying the checklist in the practical guidance section are explained.

Addressee

91. Is the letter of indemnity properly addressed? It should show the recipient as addressee. The recipient may wish also to add protection for '*its servants, agents, officers and employees*'. A time charterer may wish to include a reference to '*owner and / or disponent owner of the (vessel)*'. It is not suggested that this would avoid the time charterer in turn having to provide its own letter of indemnity to the owner, but it may provide greater scope for resolution of problems if calls upon the chain of letters of indemnity are ever made. From an issuer's point of view, it should be careful to identify the scope of beneficiaries. This may include not only the recipient, but also other parties who are clearly intended to benefit from the terms of the letter of indemnity. This means that the recipient may not just be the party named at the head of the letter but also, for example, the owner of any ship arrested in consequence of a claim linked to the original request for which the letter of indemnity was issued.

Request

92. Is the request, that is what the issuer wants the recipient to do, set out in clear and precise terms? Compliance with the issuer's request (for example as to whom delivery of the cargo is to be given in the event of non-production of the bill of lading) is what earns the recipient its right to indemnity. If the recipient does something different or if it accepts and follows different instructions which are not in accordance with the request set out in the letter of indemnity, the letter of indemnity may not bind the issuer.

Indemnity

93. Is the scope of the indemnity (which the issuer gives to the recipient in return for the recipient's performance) set out in clear and precise terms? The recipient needs to be sure that the indemnity covers its requirements. That is a matter of careful reading and draftsmanship. Even the standard International Group of P&I Clubs letters may not exactly fit all situations.

(a) For example, a time charterer taking standard letter A may wish to amend standard clause 3 (see paragraph 125) to protect its own ships from arrest as well as those of the carrier.

(b) The normal legal rules for recovery of damages (linking them to direct and foreseeable losses) may apply to the indemnity. If, for example, the issuer does not provide bail to release the recipient's ship from arrest (as stipulated by International Group of P&I Clubs standard letter of indemnity form A) and the recipient is not financially strong enough to procure the release itself (and its P&I club may not,

of course, assist when a letter of indemnity has been taken), the question arises whether the loss of the ship and its lost earnings can ever be fully compensated within the terms of the standard letters of indemnity under discussion here.

These are examples only. Each letter of indemnity must be carefully read in the context in which it is taken. See also paragraph 95 for scope of a counter-signatory bank's indemnity.

Completed form in place before performance

94. (a) It is important that the letter of indemnity has been provided in its complete form by the issuer to the recipient before the request is carried out by the recipient. For example, a letter of indemnity promised but not provided before delivery of cargo without production of bills of lading might be withheld once the intended issuer has got what he or she wanted (as no longer has an incentive to provide it) and, if it is provided, it may no longer contain valid legal consideration as the promised performance by the shipowner has already been given. For both reasons it is essential to have obtained possession of the letter of indemnity before the requested performance is given.

(b) Ideally, the letter should be in the form of an original signed document, on the issuer's headed notepaper, signed by a signatory whose name and position are clearly and legibly stated and expressly stating that he or she is authorised to sign for and on behalf of the issuer. If a company stamp or seal would be expected (for example because such a stamp or seal was applied when the charterparty was executed), this should also be checked. Having said that, the fact that the letter of indemnity is in the form of a signed fax, or an email from a person who has ostensible or actual authority to issue such letters of indemnity, may be sufficient. This may depend on the specific circumstances. Questions of enforceability in foreign jurisdictions could arise if an original signed document is not available. In each case, it is a question of balancing commercial expediency against legal risk. Whenever a parent company or bank countersigns, the letter of indemnity should be obtained in original and countersigned form before carrying out the requested promise – see paragraph 53.

Countersignature by a bank

95. Whether a bank will countersign a letter of indemnity is a matter for negotiation (as to timing of this negotiation, see paragraph 11). The International Group of P&I Clubs has worked hard to obtain a degree of cooperation from banks as to their role in the provision of letters of indemnity. This is discussed in a circular issued by the International Group of P&I Clubs in February 2001 at Appendix I, and in standard recommended bank-countersigned letters of indemnity known as AA, BB and CC. These are derived from appending the Standard Letter for Banks to join in International Group Letters of Indemnity, which appears in the last section of Appendix II. Where these recommended letters are not used, care must be taken to ensure that all parties are in agreement as to what the bank is promising to do. The bank's role should be to pay if the issuer does not pay. Banks have been known to argue that their signature means something less than that.

Authority

96. When faced with a claim under a letter of indemnity an issuer (or countersignatory) will use whichever legitimate arguments are available to challenge liability. One such argument is that the letter of indemnity was issued by a person who had no authority to give such a letter of undertaking on behalf of the issuer or countersignatory.

97. As a matter of legal analysis, authority comes in two forms.

(a) Actual (or express) authority is the authority given to a signatory by the issuer. It is the actual arrangement between the issuer and the signatory.

(b) Apparent (or ostensible) authority is the authority that the issuer appears to have given to the signatory, as seen from the eyes of a third party, in this case the recipient of the letter of indemnity. Because of this apparent authority, the signatory may bind the issuer to the promises made even if the signatory had no actual authority. The issuer is not allowed to disown those promises. The vital ingredient here is the act or omission of the issuer which causes the recipient to believe that the signatory had actual authority.

98. Proof of actual or express authority may include the provision by the issuer of board minutes, powers of attorney, all properly legalised and notarised in accordance with the laws of the country of domicile. This is highly impractical in a dynamic shipping or trading environment.

99. Proof of apparent or ostensible authority may require evidence of why the recipient was justified in believing that the signatory had authority to issue the letter. Usually, the recipient will be able to show that the issuer acted in such a way as to 'dress' the signatory with the 'clothes of authority' such as, for example, the use of the issuer's notepaper, working from the issuer's offices, the use of a stamp or seal, its conferring upon the signatory a job or office title or description consistent with the issue of important documents. But where there is a bare assertion of authority without these accompanying clothes, a recipient should take care to make further enquiries, possibly seeking confirmation from other officers of the company in the form of a separate signed letter of authority.

100. The problem with relying on apparent or ostensible authority is that the only personal contact that a recipient may have had with the issuer is with the signatory, or where a bank countersigns there may have been no direct contact at all between the recipient and the bank's signatory. In a 2004 Australian case, the countersigning bank argued (in the event unsuccessfully) that the bank employee who signed the letter of indemnity had no authority to bind the bank to the promises made in the letter of indemnity  .

101. In some countries the formal requirements of authority are much more stringent than in others. It must be remembered that the formal authority of a signatory may be determined by the law in which the issuer is domiciled even when there is an express choice of law and jurisdiction in the letter of indemnity, and so concepts of ostensible authority may not assist.

Personal liability of the signatory and third parties

102. Where the letter of indemnity is unenforceable against the issuer for lack of authority of the signatory, an action may lie

(a) against the signatory who has misrepresented his or her own authority to sign

(b) against brokers or intermediaries: for example, which have misrepresented the authority of the signatory or have held out the issuer as having legal status or capacity.

Making a demand under a letter of indemnity

102A. It is important that the recipient of a letter of indemnity gives notice to its issuer as soon as the recipient is aware of any circumstances which may give rise to a demand under the letter of indemnity. For example, the issuer of a letter of indemnity for delivery without production of bills of lading promises (in the standard form letter) to provide bail or other security to release the recipients ship from arrest, for example in respect of a misdelivery claim. In order to enforce such an obligation, it is important that the recipient (in this example the shipowner) immediately gives notice to the issuer that a claim has been notified; that the ship has been arrested or threatened with arrest; that a third party has demanded security for its claim; and that the recipient now requires to be secured by the issuer in accordance with the terms of the letter of indemnity. Clearly the urgency and nature of notification by the recipient to the issuer will vary according to the nature of the claim and the terms of the letter of indemnity.

ALTERNATIVES TO LETTERS OF INDEMNITY

103. It should always be borne in mind that there may be alternative ways in which the carrier can be indemnified for complying with requests made by its charterers, particularly time charterers, or other parties. These may include

(a) the implied indemnity which arises under time charterparties, a simple indemnity afforded to a carrier in respect of consequences directly arising from its complying with a time charterer's instructions

(b) the implied indemnity which, sometimes, but in much more limited circumstances, arises under a voyage charter

(c) express indemnities found in some charterparties

(d) the guarantees given to carriers by shippers under the Hague, Hague-Visby and Hamburg Rules in respect of the particulars, particularly as to weight and quantity, of the cargo furnished by the shippers at the time of shipment

(e) rights which may arise under other parties' letters of indemnity or other contracts, pursuant to the Contracts (Rights of Third Parties) Act 1999.

ANATOMY OF A LETTER OF INDEMNITY

Paragraphs 104–143 in this section provide a detailed analysis of the International Group of P&I Clubs standard letter of indemnity form A.

INT GROUP A: INTERNATIONAL GROUP LETTER OF INDEMNITY TO BE GIVEN IN RETURN FOR DELIVERING CARGO WITHOUT PRODUCTION OF THE ORIGINAL BILL OF LADING ('letter of indemnity')

Text of INT GROUP A standard letter	*Commentary*
To: *[insert name of Owners]* *[insert date]* The Owners of the *[insert name of ship][insert address]*	**104.** The letter of indemnity is a contract between the issuer and the recipient. It is important that the company which owns (or the company which is the disponent owner) of the named vessel is correctly identified in the letter of indemnity, as any legal action by the recipient against the issuer will be brought in the name of the company that is named here. **105.** The letter of indemnity should be on letterhead paper and must always be signed and dated before the cargo is delivered to the named party. This is dealt with in more detail below.
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]*	**106.** These details must accurately reflect the details in the relevant bill of lading. To avoid any ambiguity, it is recommended that the recipient include as much information as possible in this section.
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	**107.** The relevant information in the bill of lading should be inserted in this section of the letter of indemnity. If the consignee is described in the bill of lading as 'to order', it should say so in the letter of indemnity. Note: this should be contrasted with the next box, where the instruction as to delivery should name a recipient, and there should be no reference to 'to order'.
and we, *[insert name of party requesting delivery]*, hereby request you to deliver the said cargo	**108.** The name of the party requesting delivery will be the same as the person signing the letter of indemnity, that is the issuer. Check that the word 'deliver' has not been amended to read 'discharge'.
to *[insert name of party to whom delivery is to be made]* OR to *[insert name of party to whom delivery is to be given]* or to such party as you	**109.** This provision of the letter of indemnity is very important as it establishes to which party the recipient should deliver the cargo. **110.** As the recipient is not going to be presented with an original bill of lading, it cannot be certain that the party it is being asked to deliver the cargo to is the party actually

believe to be or to represent *[insert same name]* or to be acting on behalf of *[insert same name]*

(Alternative wording incorporates the amendment recommended in the October 2010 circular – see paragraph 111 and Appendix I)

entitled to receive it; and furthermore, the issuer does not warrant to the recipient that the named party is the party actually entitled to delivery of the cargo or indeed is even authorised by the holder of the bill of lading to deal with the cargo.

111. The letter of indemnity must correctly identify the party to which the issuer wants the cargo to be delivered and the cargo must actually be delivered to that party. In Clauses 1 to 4 of the letter of indemnity, the issuer agrees to indemnify the recipient in various circumstances provided the cargo is delivered in accordance with its request (i.e. to the named party). The recipient's failure to deliver the cargo in accordance with this request could relieve the issuer from any further liability under the letter of indemnity. To address this concern the International Group of P&I Clubs issued a circular in October 2010 (see Appendix I) giving guidance on how to describe the party to whom delivery is to be made and suggesting an alternative wording. It is important to read the October 2010 circular and if possible to include the amendment suggested therein. An agreement in a charterparty (if dated after October 2010) to accept letters of indemnity for delivery of cargo without production of the bill of lading should be taken to include and require this suggested amendment.

112. The receiver of the cargo should not be described as, or include the words, 'to order'.

at *[insert place where delivery is to be made]* without production of the original bill of lading.

113. This letter of indemnity does not provide the recipient with any right of action against the issuer if the cargo is delivered at a port other than that stated in the bill of lading; therefore, the place where delivery is to be made will be the same as the place identified in the bill of lading.

114. If the issuer wants the cargo to be delivered to a different port or place, the recipient should use the International Group B, BB, C or CC form of letter of indemnity, as the case may be.

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

115. Under English law, all contracts (except those made by deed) must be supported by consideration in order to be binding. Consideration can be described as the benefit or detriment each party receives or suffers in return for the promises they make to each other.

116. In the context of the letter of indemnity, the issuer promises to indemnify the recipient in consideration of the recipient's promise to deliver the cargo without presentation of the original bill of lading.

117. The recipient should not deliver the cargo without having first received the signed and dated letter of indemnity, even if at that stage it is only in facsimile form. (The original signed and dated letter of indemnity should be sent to the recipient as soon as possible thereafter). If the recipient delivers the cargo before the letter of indemnity is in place, it runs the risk that the issuer will be able to successfully argue that the recipient's consideration is 'past consideration', in which case the letter of indemnity would be unenforceable. Ensuring the letter of indemnity is in place before delivery occurs will avoid such problems.

118. The following clauses 1 to 7 set out the issuer's promises to the recipient.

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.

119. The issuer agrees to indemnify (i.e. reimburse / pay) and hold harmless (i.e. not to sue) 'you' (i.e. the recipient – the party identified above), and also the recipient's servants (e.g. the master) and the recipient's agents (e.g. the vessel's manager) in respect of any liability, loss, damage or expense of whatsoever nature.

120. At first sight it appears that the issuer gives a very wide indemnity; however, the indemnity only arises if the liability and so on is sustained by reason of the recipient delivering the cargo in accordance with the issuer's request. This means

(i) delivery otherwise than in accordance with the request will fall outside the scope of the indemnity, and
(ii) the recipient must show that it has sustained the liability and so on by reason of its delivering the cargo in accordance with the 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.

121. The issuer agrees to provide the recipient, its servants or agents with sufficient funds to defend proceedings brought against it.

122. The issuer's obligations under this clause do not arise unless and until such proceedings are commenced against the recipient. The recipient cannot therefore require the issuer to provide funds in advance of the commencement of such proceedings, even if they are threatened. However, if the proceedings fall within the scope of clause 3 the issuer may have to provide bail or security, even if the proceedings are merely threatened (this is discussed below).

123. The term 'proceedings' is not defined in the letter of indemnity; it is suggested that 'proceedings' will include both court and also arbitration proceedings.

124. It is recommended that the recipient should make any demand for funds in writing. What are 'sufficient funds' will be a question of fact in each case. This could clearly lead to disagreements between the issuer and the recipient, its servants or agents. Furthermore, the clause is silent both as to whether the recipient is obliged only to incur reasonable costs in the defence of any proceedings and also whether there is any obligation on the recipient to try to achieve a reasonable settlement at the earliest opportunity. The issuer would more than likely say that it did not agree to pay for expensive and unnecessary litigation.

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

125. After delivery of the cargo without presentation of the bill of lading, the recipient potentially faces a claim from the party truly entitled to the cargo. In those circumstances, that party would probably first try to obtain some form of security for its claim. Clause 3 deals with that eventuality.

126. This, the first part of clause 3, identifies the ship or property which must be under actual / threatened arrest / detention before the recipient can require the issuer to provide assistance. It includes not only the ship named in the letter of indemnity, but also any other ship or property within the same or associated ownership, management or control.

	127. As with clauses 1 and 2, there must be a causal link between the arrest of the ship or property, and the delivery of the cargo in accordance with the terms of the letter of indemnity.
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)	**128.** This, the second part of clause 3, identifies the circumstances in which the issuer must assist the recipient; namely, if there is actual / threatened arrest / detention or interference in the use / trading of the vessel. If the circumstance in which the recipient finds itself is one which is not provided for within clause 3, the issuer probably does not have to assist the recipient at all. As soon as there is any indication of actual or threatened arrest it is vital that the recipient notifies the issuer of a potential demand under clause 3. See paragraph 102A and its legal footnotes. **129.** Although the issuer can be required to provide assistance in the event of either actual or threatened arrest or detention of the ship, in the case of interference with the use or trading of the vessel it would seem that only actual interference will trigger the issuer's obligations.
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	**130.** This, the third part of clause 3, defines the issuer's obligations vis-à-vis the recipient in circumstances described earlier in the clause. Although it is not a requirement of the letter of indemnity, it is recommended that any demand for bail or other security should be made in writing. The issuer can be compelled to do this by a court order for specific performance.
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.	**131.** The first three parts of clause 3 establish when the issuer's obligations arise, and what those obligations are in relation to preventing / lifting the arrest / detention of the affected ship / property or removing the interference in use / trading of the vessel. **132.** This, the final part of clause 3 deals with the consequences of such arrest: it requires the issuer to indemnify the recipient for any liability or loss that was caused by such actual / threatened arrest / restriction or such interference. Before it can claim such an indemnity, the recipient would first need to establish a causal link between the item it claims and the actual / threatened arrest / restriction or interference. If this link is established, the recipient is entitled to be indemnified by the issuer against that particular liability or loss.
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.	**133.** This provision is included in the letter of indemnity specifically for the benefit of tanker operators to avoid any subsequent argument by the issuer that the form of discharge does not satisfy the issuer's request for '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.	**134.** The issuer's liability to the recipient under the letter of indemnity ceases as soon as it has delivered, or caused to deliver, all the original bills of lading to the recipient. **135.** Most bills of lading state that, 'One…being accomplished, the other shall stand void', or words to that effect, that is delivery of cargo against one bill of lading out of a (typical) set of three will satisfy the carrier's delivery obligations. The standard International Group of P&I Clubs letters of indemnity require all originals to be returned. This is because delivery to a wrong consignee, or at a different destination to that shown on the bill of lading, or without any bill of lading at all, is not proper delivery in the ordinary course of business. In all such cases, the final return of all of the original bills of lading is needed. **136.** 'whereupon our liability hereunder shall cease …' This provision is consistent with the situation where the bills of lading have been delayed in passing through the banking system and, in order to obtain immediate delivery, the receiver or the time charterer has provided a letter of indemnity. The underlying assumption is that the receiver is the true owner of the cargo and the only problem is the speed of obtaining the bills of lading. It does not deal adequately with the risk that rights of suit and / or ownership of the goods do not ultimately vest in the receiver – for example where a bank has taken the original bill of lading as a pledge and has not been paid. The receiver (or the time charterer) issues the letter of indemnity to the carrier, and the carrier delivers the cargo, but subsequently the bank, pursuant to its pledge, presents the original bills of lading. It is arguable that such an act will thereby cause the receiver's (or time charterer's) liability to cease under the letter of indemnity. It is only an argument, and it begs the question what 'to cause all the original bills of lading to be delivered to you' means, but it is certainly capable of construction adverse to the interests of the carrier. There may be a case in appropriate situations for deleting these last six words if and when negotiating the terms of the letter of indemnity. It should be borne in mind that this moment may be when entering into the charterparty if it stipulates that bills of lading in the usual International Group of P&I Clubs forms will be accepted by owners.
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.	**137.** If more than one party agrees to be bound by the terms of the letter of indemnity, the recipient can bring an action against any or all of them, either jointly or independently, for the full amount claimed. Additional parties may include, for example, parent companies, co-venturers (for example partners in a joint venture), and banks. However, if a bank is to join in the letter of indemnity on a standard International Group of P&I Clubs form, there is a separate letter to be signed by the bank. See below. **138.** Clause 6 also entitles the recipient to pursue a claim against the issuer, notwithstanding that it may also have a cause of action against another party who may not be a party to the letter of indemnity. This means it is not open to the issuer to require the recipient first to exhaust all other avenues before turning to it for 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.	**139.** Whilst the recipient and the issuer agree that the letter of indemnity will be subject to English law, they do not agree to the exclusive jurisdiction of the High Court of Justice of England. Consequently, the recipient could elect to submit the dispute to a different forum, albeit it still subject to English law.
Yours faithfully For and on behalf of *[insert name of Requestor]* The Requestor …… Signature	**140.** It would be prudent to include more detail of the person signing on behalf of the issuer than appears to be required here (e.g. his or her position in the company and the capacity in which he or she signs the letter of indemnity).

Variations in forms B, C and banks joining in

141. Form B deals with delivery of cargo to ports other than that stated in the bill of lading – the '*change of destination*' letter of indemnity. It contemplates the availability of the bill of lading at the new discharge port. It provides for delivery against '*at least one original bill of lading.*' This technically is inconsistent with the general principle stated at paragraph 135, namely that delivery at a different destination to that shown on the bill of lading is not proper delivery in the ordinary course of business. There is therefore an argument that all of the original bills of lading should be surrendered. In practice, however, this is unlikely to cause problems.

142. Form C deals with the situation where the cargo is delivered at a port other than that stated in the bill of lading and without production of the bill of lading. As that can never be a proper delivery in the ordinary course of business, the letter of indemnity quite properly requires the return of all original bills of lading in due course – see paragraph 135. The draft also does not include the words '*whereupon our liability hereunder shall cease*', which appear in paragraph 5 of Form A and which is commented on at paragraph 136.

143. The current set of standard letters of indemnity recommended by International Group of P&I Clubs was issued in 2001. The drafts included a new and separate standard wording which had been discussed and agreed in principle with members of the British Bankers Association (BBA). The aim of the discussions was to make it easier for banks to join in letters of indemnity where the receiver of the letter insisted that this additional financial security was needed. This was an important and useful achievement. The standard letter for banks to join in International Group of P&I Clubs letters of indemnity appears at Appendix II. A detailed and useful commentary provided by International Group of P&I Clubs was issued in February 2001 and appears at Appendix I. Both should be read carefully. As the liability of the bank appears to depend upon the issuer first having failed to respond to a demand from the receiver of the letter of indemnity, the letter from the bank may be treated by the courts as a guarantee and thus should comply with the formal requirements which are set out at paragraph 53 of the guide.

LEGAL NOTES

These legal notes refer to paragraphs in the practical guidance, detailed analysis and anatomy of a letter of indemnity sections. They are denoted in the text by the ⚖ symbol. The law is stated as understood at 1 December 2016.

Paragraph	*Legal note*
2 (1st)	Sale of Goods Act 1979, s 32(2).
2 (2nd)	The Hague, Hague-Visby and Hamburg Rules.
13(a)	In *The 'Houda'* [1993] 1 Lloyd's Rep. 333 and [1994] 2 Lloyd's Rep. 541, it was held that the following provision in the charterparty did not impose a contractual obligation on the owner to discharge the cargo in the absence of the bill of lading; rather, it merely provided for a letter of indemnity if such discharge took place: '*The master...shall be under the orders and direction of Charterers as regards employment of the vessel...* *Charterers hereby indemnify owners against all consequences or liabilities that may arise from the master, charterers or their agents signing Bills of Lading or other documents or from the master otherwise complying with Charterers or their agents' orders (including delivery of cargo without presentation of Bills of Lading...)... Letter of indemnity to owners P&I club wording to be incorporated in this charterparty.*'
14 (1st)	For example, see clause 13(b) of the Shelltime 4 charterparty: '*13.(b) Notwithstanding the foregoing, Owners shall not be obliged to comply with any orders from Charterers to discharge all or part of the cargo* *(i) at any place other than that shown on the bill of lading and / or* *(ii) without presentation of an original bill of lading* *unless they have received from Charterers both written confirmation of such orders and an indemnity in a form acceptable to Owners.'*
14 (2nd)	For example, see clause 20d of the ExxonMobil Time 2000 and 2012 charterparties.
24 (1st)	See paragraphs 25 and 25B of *Bills of Lading – A Guide to Good Practice*.
24 (2nd)	*Sze Hai Tong v Rambler Cycle* [1959] AC 576.
26	By contrast, delivery orders may be issued at any stage before delivery. See *Benjamin's Sale of Goods*, 8th edition, paragraph 19-044 and *S.I.A.T. di del Ferro v Tradax Overseas S.A.* [1978] 2 Lloyd's Rep. 470, 493; affirmed [1980] 1 Lloyd's Rep. 53.
48(b)(c)(d)	In the case of dealings with a UK registered company the Companies Act 2006 provides protection to a party contracting with that company. Section 39 provides that that the validity of a company's acts is not to be questioned on the ground of lack of capacity because of anything in a company's constitution. Section 40 provides that the power of the directors to bind the company, or authorise others to do so, is deemed not to be constrained by the company's constitution. This means that a third party dealing with a company in good faith need not concern itself about whether a company is acting within its constitution. It also provides that an external party is not bound to enquire whether there are any limitations on the power of the directors.

52(1st) A guarantee is a promise to pay another's debt if he fails to pay. An indemnity is a promise to indemnify the creditor against loss arising out of the principal contract. In the case of the guarantee, the guarantor will only be liable to pay if the principal debtor could still be held legally liable (even though he cannot pay); a promise to indemnify makes the third-party countersignatory liable even though the principal debtor can no longer be held liable. These are fine legal distinctions possibly designed to limit the effect of the Statute of Frauds, 1677. For further discussion see *Treitel: The Law of Contract*, 13th edition, paragraphs 5-013 to 5-015.

52(2nd) Statute of Frauds, 1677. For a general discussion about the specific requirements, see *Trietel: The Law of Contract*, 13th edition, paragraphs 5-012 to 5-0125.

56 See *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*'.

57 In *Brown, Jenkinson & Co., Ltd v Percy Dalton (London), Ltd.* [1957] 2 Lloyd's Rep. 1 at page 13, Lord Justice Pearce referred 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. But it often happens that an agreement which in itself is not unlawful is made with the intention of one or both parties to make use of the subject-matter for an unlawful purpose, that is to say a purpose that is illegal, immoral or contrary to public policy … In such a case any party to the agreement who had the unlawful intention is precluded from suing upon it … The action does not lie because the Court will not lend its help to such a plaintiff.*'

61 The rules are set out in full in the appendices to *Bills of Lading – A Guide to Good Practice*.

65 Some support for this can be found in *Brown, Jenkinson & Co., Ltd v Percy Dalton (London), Ltd.* [1957] 2 Lloyd's Rep. 1 in the following passages of the Court of Appeal judgment:
(At page 9) '*There may perhaps be some circumstances in which indemnities can properly be given. Thus, if a shipowner thinks that he has detected some faulty condition in regard to goods to be taken on board he may be assured by the shipper that he is entirely mistaken: if he is so persuaded by the shipper it may be that he could honestly issue a clean bill of lading while taking an indemnity in case it was later shown that there had in fact been some faulty condition. Each case must depend upon its circumstances. But even if it could be shown that there existed to any extent a practice of knowingly issuing clean bills when claused bills should have been issued, no validating effect for any particular transaction could in consequence result.*'
(At page 13) '*This practice is convenient where it is used with conscience and circumspection, but it has perils if it is used with laxity and recklessness. It is not enough that the banks or the purchasers who have been misled by clean bills of lading may have recourse at law against the shipowner. They are intending to buy goods, not law suits. Moreover, instances have been given in argument where their legal rights may be defeated or may not recoup their loss. Trust is the foundation of trade; and bills of lading are important documents. If purchasers and banks felt that they could no longer trust bills of lading, the disadvantage to the commercial community would far outweigh any conveniences provided by the giving of clean bills of lading against indemnities.*
The evidence seemed to show that in general the practice is kept within reasonable limits. 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. But here the plaintiffs went outside those reasonable limits. They did so at the defendants' request without, as it seems to me, properly considering the implications of what they were doing.'
A more recent statement of the law in this area was made by Lord Toulson in the

Supreme Court case of *Patel v Mirza* [2016] UKSC 42 at page 120 where he said: *'The essential rationale of the illegality doctrine is that it would be contrary to the public interest to enforce a claim if to do so would be harmful to the integrity of the legal system (or, possibly, certain aspects of public morality, the boundaries of which have never been made entirely clear and which do not arise for consideration in this case).In assessing whether the public interest would be harmed in that way, it is necessary (a) to consider the underlying purpose of the prohibition which has been transgressed and whether that purpose will be enhanced by denial of the claim, (b) to consider any other relevant public policy on which the denial of the claim may have an impact and (c) to consider whether denial of the claim would be a proportionate response to the illegality, bearing in mind that punishment is a matter for the criminal courts'.*

However, in the context of the use of letters of indemnity to persuade a carrier to misdescribe the condition or quality of cargo received onboard the attitude of the court seems to be hardening: for example, see Tetley, *Marine Cargo Claims*, 4th edition, Chapter 38: Letters of Indemnity and of Guarantee, paragraphs I(3) and XII. In the light of the cases recountered by Tetley it seems likely that the application of the criteria set out by Lord Toulson would lead to the conclusion that such letters of indemnity will continue to be regarded as unenforceable save in exceptional circumstances.

69(a)(vi) See also the RETLA clause in *Bills of Lading – A Guide to Good Practice* at paragraph 185 and *Bills of Lading – A Guide to Good Practice* glossary.

69(b)(iv) (1st) See the legal note to paragraph 69(a)(vi) above.

69(b)(iv) (2nd) See the definition of deceit in *Derry v Peek* referred to in the legal note to paragraph 56.

69(c) (1st) *Brown, Jenkinson & Co., Ltd v Percy Dalton (London), Ltd.* [1957] 2 Lloyd's Rep. 1 and legal notes 57 and 65.

69(c) (2nd) As to which, see Tetley, *Marine Cargo Claims*, 4th edition, who sees no justification in accepting a letter of indemnity for trivial damage: Tetley, Chapter 38: Letters of Indemnity and of Guarantee, paragraph XII.

71 See proviso to Article 3 rule 3 of the Hague and Hague-Visby Rules.

72 For a more detailed discussion off how to deal with conflicting ship and shore figures in terms of issuing the bills of lading see *Bills of Lading – A Guide to Good Practice* paragraphs 141–154.

72(e)(i) As recommended in *The 'Boukadora'* [1989] 1 Lloyd's Rep. 393. See *Bills of Lading – A Guide to Good Practice* at paragraph 4(b)(ii).

72(g) This assumes masters have acted properly and reasonably so as to put themselves in a position to form a sensible view of what has been loaded. Only in that way can they have reasonable grounds for suspecting the shipper's figures or protest that they have no reasonable means of checking them. If they have not acted properly and reasonably, but negligently, the shipper's guarantee may not apply. Any claim for shortage by a third party will be attributable to masters' negligence. See by analogy *The 'Nogar Marin'* [1988] 1 Lloyd's Rep. 412.

72(h) See *The 'Paros'* [1987] 2 Lloyd's Rep. 269 at page 274 and see legal footnote to paragraph 72(g) above.

74 Both Article 17(3) and 17(4) have been criticised as bad law – see Tetley, *Marine Cargo Claims*, 4th edition, Chapter 38: Letters of Indemnity and of Guarantee, paragraph XIV. Tetley criticises Article 17(3) because it provides that the carrier may rely upon the letter of indemnity against the shipper save where the carrier

has issued the inaccurate bill of lading with the intention '*to defraud a third party*'. Tetley asks how a carrier ever, in such circumstances, intends to defraud a third party? He states that the intention of the carrier is simply to assist its customer, the shipper, and thus the state of mind needed to prove fraud will be difficult. If that proof of fraud cannot be established then the carrier's rights of recourse against the shipper and his right of package limitation are both preserved – something which Tetley criticises as encouraging the use of letters of indemnity and the issue of false bills of lading. The distinction between intending fraud and issuing an erroneous bill of lading simply to satisfy the carrier's client (the shipper) is, he says, an artificial one.

76(b) For example, see clause 11 of GAFTA Form 48.

79 See *Bills of Lading – A Guide to Good Practice* at paragraph 273.

83(c) For example, see The North of England P&I Association Rule 19(17) and the provisos thereto.

91 See *Laemthong International Lines Company Ltd. v Artis and others* [2005] 1 Lloyd's Rep. 688, in which it was held that a shipowner was entitled to enforce not only a letter of indemnity given to it by its charterer, but also a letter of indemnity given by the receiver to the charterer and '*their agents*' and which contained a promise to provide security in the event of the ship (the shipowner's ship) being arrested. It was held that the terms of that letter were clearly intended to benefit the shipowner, which relied upon the provisions of the Contracts (Rights of Third Parties) Act 1999. See also *The 'Jag Ravi'* [2012] 1 Lloyd's Rep. 367.

92 See *The 'Bremen Max'* [2009] 1 Lloyd's Rep. 81 a case concerning a letter of indemnity for delivery of cargo without production of bills of lading. The court held that the promises made by the issuer (the charterer) were conditional upon the recipient (the carrier) delivering the cargo to precisely the person named in the letter. If the carrier delivered to anybody else without production of bills of lading, the charterer's undertakings were not engaged. The International Group of P&I Clubs issued guidance on this point in its Circular of October 2010, which appears in Appendix I. See also *The 'Jag Ravi'* [2012] 1 Lloyd's Rep. 637, where the issuer argued (unsuccessfully) that the owners had promised in the letter of indemnity to give delivery of the cargo, but had in fact merely released the goods to a warehouseman, and that this was less than full delivery and *The 'Zagora'* [2016] EWRC 3212 (Comm) where the issue was whether the agent who took delivery of the cargo when delivered against a letter of indemnity was agent for the carrier (as the issuer contended) or, as was found by the court, as agent for the buyer (in which case the letter of indemnity would respond).

94 In *Chitty on Contracts*, 32nd edition, paragraph 4-027 it is stated that in determining whether consideration is past the courts are not bound to apply a strict chronological test provided that the giving of the consideration and the making of the promise are substantially one transaction. For an example, see *Classic Maritime v Lion Holdings* [2010] 1 LLR 60.

95 *Pacific Carriers Limited v BNP Paribas* [2004] HCA 35 (High Court of Australia, 5 August 2004).

100 See the legal note to paragraph 95 above.

102(a) The action being for breach of warranty of authority.

102(b) These are not straightforward actions and a number of legal hurdles would lie between the claimant and the signatory / broker / issuer.

102A (1st) Such a situation occurred in *The 'Bremen Max'* [2009], Lloyd's Rep. 81. The issuer argued that it could not be compelled to comply with its promise to *'provide on demand such bail or other security as may be required to present such arrest or detention or to secure the release of such ship or property'* in circumstances where the recipient had, for expediency, already provided its own security to obtain the urgent release of the ship. The commercial court rejected the issuer's argument, saying that the issuer's duty to provide (replacement) security was a continuing one even where the shipowner had first provided his own security to release the vessel. Furthermore, that duty would be ordered by specific performance and not simply by the issuer compensating the recipient by way of damages. However, an important factor in the court's decision was that the recipient had notified the issuer of the claim and had made a demand under the letter of indemnity before providing its own security.

102A (2nd) Following *The 'Bremen Max'* case referenced to at the first legal footnote to paragraph 102A, the International Group of P&I Clubs issued a Circular in October 2010 which now appears at Appendix I.

103(a) See *Time Charters*, 7th edition, paragraphs19.15 to 19.19.

103(b) See *Voyage Charters*, 2nd edition, paragraphs18.222 to 18.224.

103(d) Article 3 rule 5 of the Hague and Hague-Visby Rules, and Article 17 of the Hamburg Rules.

103(e) See the legal note to paragraph 91 above.

111 This very point was taken by the issuer in *The 'Bremen Max'* [2009], Lloyd's Rep. 81. See the legal footnote to paragraph 92.

117 The issuer would say that the recipient has freely delivered the cargo to the named party without requiring it (the issuer) to reciprocate by providing a letter of indemnity in a specific form – the recipient may still be able to rely on a right of implied indemnity as against the issuer, but the scope of such an indemnity may not be as wide as the express terms of the letter of indemnity.

119 When a cargo receiver gives a disponent owner a letter of indemnity in return for delivery of the cargo without presentation of the bill of lading, the shipowner may be entitled to rely on that letter of indemnity and proceed directly against the receiver by reason of the terms of the Contracts (Rights of Third Parties) Act 1999. The shipowner would argue that it is the agent of the recipient as referred to in the letter of indemnity. See *Laemthong International Lines Company Ltd. v Artis and others* [2005] 1 Lloyd's Rep. 688.

120 That is to say, there must be an unbroken chain of causation between the delivery of the cargo in accordance with the terms of the letter of indemnity, and the liability, loss, damage or expense which the recipient has sustained.

130 See first legal footnote to paragraph 102A and also *The 'River Globe'* High Ct of Hong Kong SAR [2014] HK CF 1 1876.

APPENDIX I: P&I CLUB CIRCULARS ON STANDARD LETTERS OF INDEMNITY

CIRCULAR OF FEBRUARY 2001

Bills of lading – delivery of cargo
Standard forms of letters of indemnity to be given in return for:

(a) delivery of cargo without production of the original bill of lading
(b) delivery of cargo at a port other than that stated in the bill of lading
(c) delivery of cargo at a port other than that stated in the bill of lading and without production of the original bill of lading

In December 1998, the International Group of P&I Clubs issued a Circular to Members recommending revised wordings of the standard form Letters of Indemnity for use by Members in circumstances where they are requested to deliver cargo without production of the original bill of lading and/or to deliver cargo at a port other than that stated in the bill of lading.

As a result of comment from shipowners and shipowners' organisations, a further review of the wordings has been undertaken and further modifications to the standard wordings have now been made. Moreover, discussions have taken place between the International Group and the British Bankers Association (BBA) and a separate standard wording has been agreed on the basis of which banks members of the BBA will now be prepared in principle to join in the Letters of Indemnity while, through the auspices of the International Chamber of Commerce, the BBA will endeavour to promote this agreed standard wording within the international business community. The BBA has also given its general approval to this Circular.

In consequence of the agreement reached with the BBA, the three recommended standard form Letters of Indemnity are now issued in two versions: INT GROUP A (for delivery of cargo without production of the original bill of lading), INT GROUP B (for delivery of cargo at a port other than that stated in the bill of lading against production of at least one original bill of lading), and INT GROUP C (for delivery of cargo at a port other than that stated in the bill of lading and without production of the original bill of lading) for use when the commercial party requesting delivery (the "Requestor") will alone be signing the Letter of Indemnity, and INT GROUP AA, INT GROUP BB and INT GROUP CC for use when a bank will be joining in the Letter of Indemnity and which forms incorporate, in addition to the same indemnities given by the Requestor under INT GROUP A, B and C, the separate standard wording agreed with the banks.

The principal features of the new wordings are explained below.

Financial Limit

The liability of the Requestor should generally not be limited. However, where a bank is to join in the Letter of Indemnity it will generally insist upon a fixed monetary limit. The amount of the limit must be a matter for negotiation in order that it properly reflects the potential exposure in the particular circumstances, taking into account, inter alia, the sound market value of the cargo at the time of delivery, but it is recommended that the limit should be a minimum of 200% of the sound market value of the cargo at the time of delivery.

Duration of security

Under INT GROUP A and AA, the liability of the Requestor (and, hence, the bank under AA) terminates upon the delivery of all original bills of lading to the shipowner. If the original bills of lading are not delivered to the shipowner, the Requestor's liability under the Letter of Indemnity continues.

Subject to delivery of all original bills of lading as stated, and to the two exceptions described below, the bank's liability under INT GROUP AA is for an initial period of six years, but which is automatically renewable from time to time for further periods of two years at the request of the shipowner. The exceptions are (1) that, rather than agree to an extension of its liability, the bank has the option of discharging its liability by paying the maximum amount payable under its indemnity and (2) that, in the event of a demand being made by the shipowner to the bank for payment under the indemnity before the termination date, or in the event of the bank being notified by the shipowner of the commencement of legal proceedings against the shipowner before the termination date, the liability of the bank will continue until the demand has been paid or the legal proceedings have been concluded, the bank, if called upon so to do, paying the amount of any judgment or settlement payable by the shipowner if the Requestor has failed to do so.

Under INT GROUP B, C, BB and CC, since it is possible for a claim to be pursued against a shipowner for delivering cargo at a port other than that stated in the bill of lading despite cargo being delivered against production of the original bill of lading, or all original bills of lading being subsequently delivered to the shipowner (in particular, in circumstances where a charterer may require a cargo owner to receive his cargo at such other port against his wishes and request the shipowner to accommodate his request), the liability of the Requestor will continue until it can be established to the satisfaction of the shipowner that no such claim will be made.

Accordingly, unless the shipowner is satisfied that no claim of this nature will be made, the liability the bank under INT GROUP BB and CC will be as described under INT GROUP AA above.

Scope of security

The Requestor is obliged to provide bail or other security not only to prevent or lift the arrest of the ship the subject matter of the indemnity, but also any other ship in the same or associated ownership, management or control. In addition, the Requestor is obliged to provide bail or other security to prevent interference in the use or trading of the ship, such as a caveat being entered on the ship's registry to prevent the sale of the ship the subject matter of the indemnity.

Where a bank joins in the Letter of Indemnity it will generally not agree to provide bail or other security. However, the bank will pay any amount up to the limit of its liability under the Letter of Indemnity in order to enable the shipowner to arrange the provision of security if the Requestor fails to provide bail or other security.

Tankers

A provision designed to give greater security to tankers has been incorporated, whereby requested delivery of a bulk liquid or gas cargo to a terminal or facility, or to another ship, lighter or barge is to be deemed to be delivery to the party to whom delivery has been requested.

Members are again reminded that, unless the Association's Committee otherwise determines, there is no cover in respect of liabilities arising out of the delivery of cargo without production of the original bill of lading and/or delivery at a port other than that stated in the bill of lading and that, in such circumstances, Members are strongly advised to ensure that they are fully satisfied with the financial standing and authority of those who are to issue and sign these indemnities.

The standard form Letters of Indemnity are designed to cover a broad range of trades and operations, and Members may wish to modify the standard forms to suit particular requirements. However, in this event, it must be appreciated that if a bank is to join in the Letter of Indemnity there may be limited scope for amendment, and that the Requestor's bank will have to be consulted if any material change is contemplated. The Managers will be pleased to advise Members regarding any proposed modification.

Finally, it is not uncommon for Members to be requested by charterers to agree clauses in charter parties which expressly provide for the delivery of cargo without production of bills of lading and/or at ports other than those stated in the bills of lading against Letters of Indemnity. Members are strongly advised not to accept such clauses and it is recommended that Members seek advice from the Managers before responding to such requests.

CIRCULAR OF OCTOBER 2010

Delivery of cargo without production of bills of lading

Following the decision in the English Commercial Court in the case of *Farenco Shipping Co Ltd v Daebo Shipping Co Ltd* (LLR (2009) Vol 1 81) (*The 'Bremen Max'*) the International Group of P&I Clubs recommends that Members take two further precautions if they choose to accept a Letter of Indemnity for delivery of cargo without production of the original bill of lading. The precautions relate to:

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 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.

APPENDIX II: STANDARD LETTERS OF INDEMNITY

These are the standard draft letters of indemnity provided by the International Group of P&I Clubs. However, the expectation is that they would usually be amended in accordance with the circular dated October 2010 (see paragraph 111 and Appendix I). Indeed, the standard letters of indemnity published by individual P&I clubs may already incorporate the amended wording recommended in the circular.

INT GROUP A: INTERNATIONAL GROUP 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

INT GROUP B: INTERNATIONAL GROUP 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

INT GROUP C: INTERNATIONAL GROUP 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

STANDARD LETTER FOR BANKS TO JOIN IN INTERNATIONAL GROUP LETTERS OF INDEMNITY: APPENDING THIS LETTER TO INT GROUP A, B AND C LETTERS CONVERTS THEM TO INT GROUP AA, BB AND CC RESPECTIVELY

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]

_____

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All references are to paragraph numbers in the practical guidance, detailed analysis and anatomy of a letter of indemnity sections and are colour coded accordingly.

LETTERS OF INDEMNITY
A GUIDE TO GOOD PRACTICE
Second Edition

Stephen Mills, Ben Roberts
and The North of England P&I Association

This unique guide explains how to avoid disputes and problems arising from the use of letters of indemnity. The law expects that the documentary aspects of international sale transactions will comply with long-established principles and standards. However, those engaged in international trade may find those principles and standards difficult to achieve in every transaction, and look to letters of indemnity instead. Rightly or wrongly, letters of indemnity are in widespread use in international trade and shipping in conjunction with, and sometimes in substitution for, bills of lading. This guide – which starts with a health warning – provides commentary on the common types of letter of indemnity, the reasons they are used, the pitfalls and risks, and some of the legal and insurance issues which arise out of their use. It is designed to be used in conjunction with *Bills of Lading – A Guide to Good Practice*, also by Stephen Mills. The guide works on various levels, with a practical guidance section supplemented by a detailed analysis section and footnotes to show the legal foundation of the advice given. This second edition has been fully reviewed and updated.

Stephen Mills is an internationally acknowledged shipping lawyer and mediator. In 1993 he became the founding partner of international maritime law firm Rayfield Mills. In 2007 he joined The North of England P&I Association, initially as general counsel to the P&I team and then as joint head of the freight, demurrage and defence (FD&D) department. He has been an active mediator since 2000 and in 2013 returned to full-time maritime mediation practice (www.seamediation.com).

Ben Roberts is an experienced international shipping lawyer. He joined North in 2007 after working for five years with Rayfield Mills. Since joining North he has specialised in FD&D claims. In 2013 he was appointed manager in the FD&D department and is now group director (FD&D) with responsibility for Greece.

The North of England P&I Association is a leading mutual marine liability insurer based in Newcastle upon Tyne, UK, with regional offices in China, Greece, Hong Kong, Japan and Singapore. The Club has developed a world-wide reputation for the quality and diversity of its loss prevention initiatives.

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