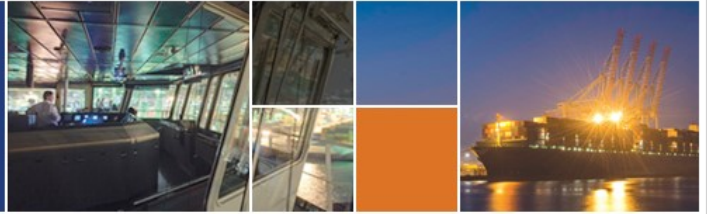




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## The Risks of Letters of Indemnity

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A recent High Court decision by Teare J again highlights the commercial risks associated with delivering cargo against a Letter of Indemnity when no Bill of Lading is presented.

In October 2013, SCIT Trading agreed to sell a cargo of 70,000 tonnes of iron ore to Xiamen C&D Minerals, to be delivered at a main port in China. SCIT Trading had a contract of affreightment with SCIT Services, who agreed a voyage charter with Oldendorff Carriers, who agreed a voyage charter on similar terms with Oldendorff GmbH. Oldendorff GmbH agreed a timecharter with the owners of the panamax bulker ZAGORA. Each of the charterparties had a clause requiring Owners to deliver cargo against charterer's Letter of Indemnity, in case no bill of lading was available for presentation at the discharge port.



Xiamen C&D Minerals agreed, through an associated company, to sell the cargo to an end-user, Shanxi Hainan. The ship loaded the cargo in Australia between 11 and 14 December 2013. On 16 December, Shanxi Haixin nominated Lanshan as the discharge port, and Sea-Road as agents at the port. This information was passed along the charter chain towards owners of the ZAGORA. A few days later letters of indemnity were passed between the parties in the chain, and on 20 December, the Owners informed the Master of the ZAGORA that they had received a Letter of Indemnity for delivering the cargo to Xiamen and instructed him "to deliver the cargo to Xiamen C&D Minerals Co. Ltd. ("Xiamen") or to such party as you believe to be or to represent Xiamen .....or to be acting on behalf of Xiamen .....at Lanshan Port, China, without production of the original bill of lading." When the ship berthed at Lanshan on 29 December, a representative of the agents, Sea-Road attended onboard and advised the Master that he was there to handle cargo arrangements for Xiamen. Discharge was completed on 31 December, and the ship sailed without incident.

When ZAGORA called at Lanshan some eight months later, she was arrested by the Bank of China, who claimed to have paid for the cargo under a letter of credit, but not to have received any payment from the buyer, so that they were lawful holders of the bill of lading, and had a claim against the ship for misdelivery. That claim was brought under Chinese law. When the ship was arrested, the Owners called upon Oldendorff GmbH to honour the terms of the letter of indemnity, and to obtain the release of the ship. A similar request was passed along the charterparty chain, but no action was taken to free the ship. Oldendorff broke the impasse by arranging security, without prejudice to their rights under their charterparties, and the ship was freed to sail almost one month after the arrest.


Oldendorff Carriers then commenced a court action in London against SCIT Services, to enforce their letter of indemnity. SCIT Trading in turn commenced proceedings against Xiamen, and, when charterers raised arguments in defence, Oldendorff also commenced an action against the Owners, so that they could pass any defences back along the charter chain. The three actions, between Owners and Oldendorff GmbH, Oldendorff Carriers and SCIT Services, and SCIT Trading and Xiamen were consolidated so that all of the arguments could be heard before one court. Before the case reached court, Xiamen and the SCIT companies dropped out of the proceedings, so that only the Owners and the Oldendorff companies appeared at court. Oldendorff Carriers might have obtained a default judgement against SCIT Services, but Oldendorff's counsel requested that the Court hand down a judgement on the merits, as it was considered that it might be easier to enforce such a judgement against SCIT Services in the future. Oldendorff also raised arguments that had been brought by Xiamen or SCIT, as defences against the Owners.

Charterers' main argument was that discharge and delivery are different concepts (see the "**BREMEN MAX**", a case that was also decided by Teare J) and that the Owners had been instructed to discharge the cargo to Sea-Road, who were acting as Owners agents for this purpose, and that Sea-Road were to deliver the cargo against presentation of a bill of lading later. As such the letters of indemnity were not triggered by mere discharge of the cargo to Owners agents because this did not amount to delivery to Xiamen. However, the Court found on the facts that Sea-Road were acting as agents of Xiamen, and because Owners had been ordered to deliver the cargo to Sea-Road the letters of indemnity were triggered: Oldendorff were bound by the terms of the letter that they gave to the Owners, and had a claim against SCIT Services under their letter of indemnity.

This case is a reminder to Members of the potential pitfalls of agreeing to deliver cargo carried under a bill of lading without the production of a bill of lading. Whilst a common practice there is no P&I cover for liabilities, costs, or expenses arising from delivery in these circumstances unless otherwise determined by the Club's Directors.

When a Member agrees to surrender possession of the cargo by discharge or delivery other than against production of the relevant bill of lading the Member no longer has "the power to compel any dealings in or with the cargo which can prevent the consignee from obtaining possession" (**Tomlinson J - The Jag Ravi**). As such, there is a risk of claims for misdelivery and, as this case highlights, Letters of Indemnity intended to protect the Member against the potential consequences (ie arrests) and liabilities arising from such claims (and the associated costs) are not always honoured as a Member might expect.

While the Club recommends a wording for letters of indemnity against delivery of cargo without production of bills of lading (see **Steamship Mutual Circular L.141**), it is a commercial decision for the Member to make as to whether the party that issued the letter of indemnity will be both willing and able to comply with the provisions of the letter of indemnity when the consequences and liabilities might be substantial. Careful attention should also be given to the wordings of any letter of indemnity that might be offered.

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