



## Cargo clarity

**Oz de Sybel**

SHIPOWNERS have long been aware that delivery of cargo without production of an original bill of lading by the person to whom delivery is made takes them outside their P&I cover.

As Lord Denning put it in *Sze Hai Tong v Rambler Cycle [1959] AC 57*: "It is perfectly clear law that a shipowner who delivers without production of the bill of lading does so at his peril."

The International Group of P&I clubs has sought to alleviate the dilemma faced by owners under pressure to depart from this "presentation rule" by creating a standard form of letter of indemnity. However, the actual use of the forms will not displace the club cover exclusion in the event of delivery of cargo without production of the bill of lading.

Accordingly, any LOI that the carrier agrees to accept in lieu of the original bill of lading will represent the measure of his insurance. The High Court decision in *Bremen Max [2009] 1 LL 81* illustrates the cover limits. In that case, the time charterparty imposed a contractual obligation on the owner to accept an LOI in lieu of the bill of lading to enable discharge of the cargo.

On arrival at the discharge port, the bills were not available. The owners received a LOI from charterers and the cargo was discharged. The LOI specified the party to whom the cargo was to be delivered but there was an issue of fact as to whether it was delivered to that party.

Owners subsequently faced claims (and the ship's arrest) for misdelivery of the cargo. The High Court was asked to determine preliminary issues between owners and charterers under the LOI; in particular, whether charterers' undertaking to owners to provide security and obtain the ship's release was conditional upon cargo delivery having been made to the party named in the LOI.

The judge ruled in favour of the charterers and highlighted the difference between discharge and delivery: 'discharge' being the movement of the cargo from the ship over the ship's rail ashore and 'delivery' the transfer of possession of the cargo to a person ashore.

Under time charterparty terms, organising cargo discharge is very frequently charterers' responsibility, but the delivery obligation arises under the bill of lading and affects the owners. Routinely, the bill may well be presented to the charterers' agent at a discharge port, consequently a charterer could be said to take responsibility for owners' delivery obligations as well. Therefore, by specifying the party to whom delivery should be made in the LOI, a charterer is potentially making a shipowner's life unreasonably difficult.

The court makes it clear that the shipowner can shift this responsibility by asking charterers to confirm the identity of the intended receiver. A worried charterer may seek to avoid doing so, particularly where an extended chain of contracts is involved, and an owner under pressure may be keen to discharge the cargo and get away. P&I clubs will often help an owner by involving their local correspondents to check what is happening. Will the International Group also revisit their standard wording? The standard wording already addresses this problem in the oil and gas trade by inserting a suitable deeming provision.

Coupled with the decision by some jurisdictions (notably China) that a carrier may not limit liability for misdelivery claims, the *Bremen Max* provides strong incentives for owners to tread carefully. If they do, the court will give real teeth to the LOI with an order for specific performance to enforce charterers' promise to put up security should the vessel be arrested.

*Oz de Sybel is a partner at*

*Bentleys, Stokes and Lowless*