(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,