

21 July 2003

TO ALL MEMBERS

Dear Sirs

BILLS OF LADING - DELIVERY OF CARGO - THE REPUBLIC OF KOREA AND THE PEOPLE'S REPUBLIC OF CHINA

Members will be aware that liability arising from delivery of cargo without production of an original bill of lading is not covered under the Rules of the Association, unless the Committee in its sole discretion should decide otherwise. In February 2001, a Group Circular was issued recommending revised wordings of Standard Form Letters of Indemnity and Bank "Join In" agreements for use by Members in circumstances where they are requested to deliver cargo without production of an original bill of lading. Since that time, a number of Associations have noted that Members have experienced problems discharging and delivering cargo at ports in the Republic of Korea and the People's Republic of China, where, following discharge and pending collection by the receiver, the cargo is placed in a bonded warehouse or a Customs controlled holding area.

The purpose of this Circular is

(A) to remind Members:

- (1) that they should not deliver cargo without production of an original bill of lading, since any liability, costs and expenses arising from such action will not ordinarily be covered under the Rules of the Association. If Members, nevertheless, choose to deliver cargo without production of an original bill of lading, they are advised only to do so if they have received a Standard Form Letter of Indemnity and Bank "Join In" agreement as recommended in the Association's February 2001 Circular. In that event, Members are further reminded to ensure that they are fully satisfied with the financial standing and authority of those who are to issue and sign the required indemnities.
- (2) that 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 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.
- (3) that they are advised not to accept any personal guarantees offered by a charterer or sub-charterer in exchange for allowing cargo to be delivered

without production of an original bill of lading and not to make delivery against copies of original bills of lading.

- (B) to provide additional guidance to protect Members discharging cargo at ports in the Republic of Korea and the People's Republic of China.

1. The Republic of Korea

At ports in the Republic of Korea, cargoes are often discharged from vessels and placed in a bonded warehouse pending collection by the cargo owner. The bonded warehouse may be owned either by the consignee, a so-called "self use" bonded warehouse, or by an independent company unrelated to the consignee. In either case, it is the responsibility of the Carrier to obtain an original bill of lading before delivering the cargo. Under Korean law, delivery takes place when control of the cargo is surrendered by the Carrier or his agent to some other party, except in the case of CY/CY (container yard/container yard) cargo where delivery occurs when the cargo leaves the container yard. Accordingly, in the case of a "self use" bonded warehouse, since control of the cargo is effectively surrendered when the cargo leaves the Carrier's custody, usually at the ship's side, delivery takes place at that point. In the case of an independent warehouse company, control of the cargo is not surrendered by the Carrier until it leaves the warehouse, at which time delivery takes place.

In a number of cases, cargoes have been released from both independently owned and "self use" warehouses without production of an original bill of lading. In certain of these cases, although the consignee has taken delivery of the cargo he has not been the bill of lading holder. Subsequently, the bill of lading holder, usually a bank, has claimed against the Carrier when it has been unable either to obtain payment from the consignee or to recover the goods themselves.

There are a number of steps that a Carrier can take to protect himself:

- (1) If the Carrier is asked to surrender control of and, accordingly, deliver the cargo without production of an original bill of lading, he should only do so subject to the provision of a Standard Form Letter of Indemnity and Bank "Join In" agreement as referred to above.
- (2) A carrier is not obliged to discharge cargo to a "self use" warehouse. If there is an alternative, the Carrier can insist that the cargo be discharged into an independently owned warehouse. Alternatively, the Carrier may retain custody of the cargo until production of an original bill of lading or until a Standard Form Letter of Indemnity and Bank "Join In" agreement is provided.
- (3) Where the Carrier discharges cargo into an independently owned warehouse, he is advised to contract with the independent warehouse owner on terms which provide that the warehouse owner shall not deliver the cargo without production of an original bill of lading or without the Carrier's written consent and that the warehouse owner shall indemnify the Carrier should cargo in fact be delivered without production of an original bill of lading or the Carrier's written consent. However, if that indemnity is not enforceable in practice, the Member may have to bear the loss, since P&I cover may already have been prejudiced.

Again, Members should be aware that ultimate enforcement of an indemnity will be dependent upon a variety of factors, including the continued solvency of the party offering the indemnity.

Where a "notify" party is named in the bill of lading, often the cargo owner or a bank, that party should be consulted before the Carrier surrenders control of the cargo.

Members are also warned not to deliver cargo at Korean ports against the presentation of an original bill of lading without first having verified that it has been endorsed in favour of the holder. The Managers are aware that, in the past, Korean banks have been prepared to release an original bill of lading to the local receiver without endorsement in his favour in order to facilitate discharge and delivery, whilst at the same time providing extended credit terms. The Korean Courts have found such delivery by a carrier to be wrongful.

2. The People's Republic of China

At ports in the People's Republic of China, cargoes are often discharged from vessels to Customs controlled warehouses or holding areas pending collection by the cargo owner, against surrender of an original bill of lading. In a number of cases, forged bills of lading have been used to obtain delivery of cargo, possibly with the knowledge of Customs officials, agents' clerks or employees of the terminal operators. In at least one case, a high level anti-corruption investigation was conducted resulting in a number of Customs officials being arrested.

Since effective control over the cargo in ports in the People's Republic of China may be difficult for a carrier to monitor following discharge, and rights of recourse against Customs officials, ships' agents and terminal operators may not be available, there are a number of steps that a Carrier should take to protect himself:

- (1) If the Carrier is requested to deliver the cargo without production of an original bill of lading, he should only do so subject to the provision of a Standard Form Letter of Indemnity and Bank "Join In" agreement as referred to above.
- (2) A Carrier is not obliged to deliver cargo without production of an original bill of lading, and may retain custody of the cargo until it is produced or until a Standard Form Letter of Indemnity and Bank "Join In" agreement is provided. Furthermore, it may in certain circumstances be possible for the Carrier to apply to the Courts for an appropriate Order providing that cargo can only be released against production of an original bill of lading.
- (3) Alternatively, the Carrier may consider discharging cargo into the custody of the Customs Authority with a protective agent or legal representative being instructed, subject to the terms referred to in paragraph B.1.(3) above. The Managers would also recommend that, where permitted, a lien be immediately placed on the cargo to ensure that delivery does not take place without the payment of storage charges incurred.

These recommendations apply equally to shipowners and charterers entered in the Association.

Yours faithfully
A BILBROUGH & CO LTD
(MANAGERS)