

IG Proforma Letters of Indemnity Review

Introduction

The IG Bills of Lading Committee (the “Committee”) has conducted a review of the suite of standard Letter of Indemnity (“LOI”) wordings recommended for use in the following situations:

- Delivery of Cargo Without Production of the Original Bill of Lading
- Delivery of Cargo at a Port other than that Stated in the Bill of Lading
- Delivery of Cargo at a Port other than that Stated in the Bill of Lading and Without Production of the Original Bill of Lading

The work of the Bills of Lading Committee was greatly assisted by a number of commentaries on the wordings published over the years, together with input from traders and charterers through liaison with BIMCO. The Committee also had input from a former Admiralty Judge in finalising the wordings. Although some amendments were made to the proforma wordings by the Committee as a result of the decision in the Bremen Max in 2009, this appears to have been the first wholesale review of the wordings for a considerable period.

The Committee approached the review with an open mind, not ruling out the potential for a full redraft of the wordings. The potential for significant changes in content had been suggested by some commentators, whilst participants in the Committee’s debates also suggested procedural changes to how LOIs are typically handled (such as, for example, a single LOI being signed by all parties in an LOI chain). However, during the review, the English High Court had the opportunity to look in detail at the LOI wordings and issues of enforcement arising out of them in a series of decisions concerning disputes arising from a chain of LOIs issued in respect of a cargo valued at US\$76 million carried on the Miracle Hope. From these decisions, the Committee took comfort that the LOI wordings were not fundamentally deficient and that there was therefore likely to be more lost than gained by the uncertainty created by a radical change to either the content, format or procedure currently being employed by the industry when dealing with the current LOI wordings (a position which was endorsed by the former Judge who was consulted). As such, the new drafts are an evolution of the old.

General Comments

All three LOI wordings contain the same operative terms (with basic logical differences), so corresponding amendments have been made to all three proforma LOI texts. The introductory paragraphs of each LOI have been broken down into smaller paragraphs to improve the flow of the document whilst still reflecting the request(s) being made in each case.

While a relatively small number of disputes about the LOI wordings come before the courts, this should not detract from the fact that a LOI is a contract between (usually) a shipowner and the party issuing the LOI which is potentially worth many millions of dollars. Things usually go smoothly, but if things go wrong, a vessel is likely to be arrested and the shipowner may be forced to commence legal proceedings to force performance of the LOI terms by the issuer of the LOI. Whilst they are a largely unavoidable feature of international trade, a LOI should be something which both shipowners and the parties issuing LOIs take very seriously.

For the first time, a note has therefore been attached to the proforma itself to remind recipients of the potentially very high value of the contract into which they are entering and the need to consider the creditworthiness of the party offering the LOI. The note also highlights the significant

consequences of delivering a cargo without presentation of an original bill of lading for a recipient's P&I cover.

The Committee has retained the proforma reference to English law and jurisdiction for a number of reasons which are discussed in the Notes.

Although the Committee acknowledged that bank counter-signature by was rare (and potentially only using a bank's own text), they felt that the proforma bank counter-signature texts should be retained, if only to serve as a template to indicate the points to consider if a bank is to counter-sign the LOI. No substantial amendments have been made to the bank texts themselves.

EXPLANATORY NOTES

The following explanatory notes are intended to explain the Committee's thoughts behind the amendments which have been made or other decisions on the recommended wordings. They focus on the indemnity for delivery without production of an original bill, although corresponding amendments have been made to the indemnity for delivery at a port other than stated in the bill.

General

There are three basic IG-recommended LOIs, one each for; Delivery of Cargo Without Production of the Original Bill of Lading; Delivery of Cargo at a Port other than that Stated in the Bill of Lading; Delivery of Cargo at a Port other than that Stated in the Bill of Lading and Without Production of the Original Bill of Lading. Each LOI also has an additional version which sets out terms for counter-signature by a bank. Save for the preambles of the LOIs (which broadly describe the request being made to the carrier in each case), the operative provisions of each LOI and corresponding bank counter-signature wording are the same. As a result, the same amendments have therefore been made to the operative provisions of each of the LOI texts. The text for bank counter-signature has not been substantively amended. In the experience of the committee, although LOIs are seldom counter-signed by banks (and where they are, a bank's own wording is generally used), the committee felt that preserving the suite of bank wordings was worthwhile in case it is used and also in order to provide a template against which to compare any wording provided by a bank.

Introductory Note

A Note has been added to remind recipients of the potentially very high value of the LOI contract into which they are entering and the need to consider the creditworthiness of the party offering the LOI, as well as the significant consequences of delivering a cargo without presentation of an original bill of lading for a recipient's P&I cover.

Vessel, Port, Cargo & Bill of Lading Details

The format of this section has been expanded and headings have been added for the insertion of additional information. The intention of these amendments/additions is to make it absolutely clear which bill(s) of lading and cargo are covered by the LOI.

Preliminary Paragraphs

To improve the flow of the document, the first paragraph of the old LOI wording (which consisted of one sentence) has been split into two paragraphs. The first deals with what has happened to the bill of lading. The second sets out the request being made. The previous reference to "but the bill of lading has not arrived" has been changed to "but the Bill(s) of lading is (are) not currently available to be presented". This reference more accurately encompasses the many reasons why there is no bill of lading to be tendered for the cargo and the specific requirement which cannot be fulfilled by the receiver.

Changes have been made to the wording which now makes up the second paragraph. The requirement to deliver the cargo to the person/company nominated by the requestor (or the person/company reasonably believed to be them) is retained. The carrier may wish to have a specific person identified and details of their identity recorded in the LOI so that they can be checked, but the proforma wording is left deliberately wide to give the greatest protection to the carrier. An additional representation/undertaking as to the status of the party to whom delivery is to be made has been

added to strengthen the promises being given by the requestor, and to make the nature of what the requestor is saying clear to them.

Operative Paragraphs

Paragraph 1 – is unamended.

Paragraph 2 – is unamended. This provision may have significant impact: an order to provide substantial funds to defend legal proceedings was made in the 2020 Miracle Hope litigation.

Para 3 – this paragraph has been broken down into three sub-paragraphs to ease interpretation. Further amendments have also been made. An express obligation to provide security, etc., if a vessel or property belonging to or controlled by the recipient of the LOI has been added. This puts, for example, a charterer receiving an LOI as part of a chain of LOIs and whose own vessel (or a vessel chartered by them) is arrested for security, in the same position as the owner of the vessel which carried the cargo whose vessel is arrested.

The obligation to provide security has deliberately been left without limitation in sub paragraph (a). Where the recipient of the LOI has put up security to obtain release of the vessel, wording has been added to make it clear that the obligation under the LOI is to replace that security (or to provide counter security, etc.) even if the security which has been put in place exceeds the value of the vessel arrested. This addresses the fact that a recipient of an LOI should not be prejudiced if, for example, it was appropriate for them to simply put up the security demanded to avoid further interference with their vessels and/or property, regardless of whether the security they have put up exceeds the value of the vessel which carried the cargo or which was subsequently arrested.

Paragraph 4 – amendments have been made to this paragraph to make it clear that so far as the references to bulk facilities (whether for liquid or dry cargo) are concerned, (a) once discharge is made and the cargo becomes part of a larger mass of cargo so that it effectively becomes impossible to identify that cargo again, and where (b) even if delivery has not physically been made to the receiver themselves (because for example the cargo is physically delivered to the operator of a tank farm, silo, etc.), delivery to the required person is nevertheless deemed to have occurred.

Paragraph 5 – this paragraph has been amended to make it clear that the LOI obligations only come to an end if the bills of lading have ultimately reached the party that took delivery of the cargo and are thus accomplished.

Paragraph 6 – this paragraph is unamended.

Paragraph 7 – this paragraph has been amended to refer enforcement and/or disputes under the LOI to the exclusive jurisdiction of the English Courts. This paragraph was the subject of wide debate. Options considered were, e.g., to mirror the governing charterparty law and jurisdiction clause, or to leave the choice of law and jurisdiction to the parties to negotiate. A decision to retain English law was made for a number of reasons. These included the extensive powers to issue injunctions in the High Court, the power to consolidate proceedings, the experience of the High Court in dealing with LOI disputes, the use of the Contracts (Rights of Third Parties) Act to “perfect” indemnity chains and the benefit of including an express choice in the proforma wording as a means of encouraging adoption of the same choice of law and jurisdiction in a chain of LOIs to ease enforcement up or down an LOI chain.

Signature Provisions & Notes

Small amendments have been made to the signature provisions. The intention is to clearly identify the person signing the LOI. Notes have also been added to emphasise not only the importance of identifying the person in question, but in taking time to consider their capacity to bind the company in question to a set of stringent terms and to significant potential financial exposure. Addressing these points should narrow the scope for potential argument that the person signing did not have authority to bind the company in question and invalidating the LOI.

Wording Incorporating a Bank's Agreement to Join In The Letter Of Undertaking

These wordings have been retained in the proforma indemnity wordings, although the Banks will generally insist on using their own inhouse wordings if they are involved. The only amendments are to paragraph 2. (to mirror the provisions of paragraph 3(b) of the indemnity wording) which were missing from the previous version of the Bank wording and are intended to close down any argument that the Bank would not have to respond in the same circumstances as the requestor.