

KISH P & I LOSS PREVENTION CIRCULAR KPI-LP-64-2013 **(Clarification of some confused legal terms)**

► Introduction:

There have been reports of confusion in the use & coverage of some legal terms. These terms may be wrongly used or addressed in documents which can induce misconceptions & at time render claims innocuous or bland.

The following notes have been compiled & extracted from reliable sources in order to clear and redefine the views amongst the members.

A) Letter of Protest (LOP):

A letter of protest, which may also be simply called a "protest", is a written communication intended to convey and record dissatisfaction on the part of the protester (the sender) concerning some matter over which the recipient has control, and holding the recipient responsible for any (legal or financial) consequences of the matter being complained of. A letter of protest may help to substantiate a claim by the owner, or refute a claim by a charterer, harbour authority, etc., and may prove useful, if properly filed, in the resolution of a dispute long after the related event.

Letters of protest may be sent, in appropriate circumstances, by the master of any ship, large or small, in any trade, and can be expected to be received by the master of any ship. They are especially common (in both directions) in the tanker trades, where a variety of reasons give occasion for their sending.

Letters of protest are in most cases in connection with cargo operations, although they may be written about almost any matter where there may be legal liability, whether there is a contractual arrangement between the employers of the sender and recipient (as in the case of cargo-related protests) or not (as in the case of a protest sent to the master of a closely berthed ship that is causing damage to the sender's ship).

Some companies, especially those in the oil, gas or chemical trades, supply their masters with a stock of printed protest forms phrased in the company's "house" style, while others expect their masters to compose suitable protest letters when required.

If not on a company pro-forma document, a letter of protest should be typed or hand-written by the master. The letter should always end in an appropriate formal manner, such as: "the undersigned hereby declares that the Bill of Lading will be signed under protest....." or "....and I hereby lodge protest accordingly, and we, including my disponent owners, hold you and/or Charterers responsible for delays and consequences."

The original letter and one copy, for return, should be sent or given to the recipient, who should be asked to sign for receipt of the letter. (A dotted line at the foot of the letter is normally provided by the writer for the recipient's signature.) The recipient will normally sign ".....for receipt only", so as to avoid any implication that he accepts liability.

The signed, returned copy of the protest letter should be placed in the ship's file, and copies of this should be sent to the company and the port agent. (It may be prudent for the master to take a personal copy off the ship when he leaves, in order to have the facts of the matter to hand if and when details are requested while on leave, etc.)

B) When to issue an LOP:

A letter of protest should be sent to the person in charge of the relevant operations (e.g. terminal supervisor, stevedore, harbour master, etc.) in any of the following circumstances:

- ✓ when there is a discrepancy between ship's and shore cargo figures;
- ✓ when the rate of loading or discharging is too slow or too fast;
- ✓ when berth or fendering arrangements are inadequate;
- ✓ when longshoremen/dockers are misusing ships' equipment and ignoring duty officers' advice;
- ✓ when passing vessels cause ranging, wash damage, etc. whilst loading/discharging;
- ✓ in any other situation where the master wishes to formally record his dissatisfaction with arrangements over which the other party has some control.

Circumstances may arise when it is appropriate to send a letter of protest to the master of another vessel, e.g.:

- ✓ when there is a discrepancy as to the quantity of cargo received from a vessel being lightened;
- ✓ when there is a discrepancy as to the quantity of bunkers received from a bunker vessel, etc.;
- ✓ when another vessel is causing, or likely to cause, damage to own ship (e.g. by mooring/berthing too close).

C) Note of Protest (NOP):

A "protest", sometimes called a "sea protest", is a solemn declaration, made on oath by a shipmaster before a person legally empowered to hear such declarations, that circumstances beyond his control have, or may have, caused loss of and/or damage to his ship and/or its cargo, or have caused him to take action which may render the owner liable to another person. A protest (without an extension) is a simple statement of fact, without added details.

An "extended protest" is a protest to which supplementary information has been added at a later date.

"Noting protest" is the act of making the protest before the appropriate person. The appropriate person before whom a protest should be noted is a notary public in those countries where notaries public are appointed, or a consul in other countries if applicable.

A "notary public" or "notary" is a public official who is primarily concerned with the preparation and authentication of documents for use abroad and is empowered under his country's law to administer oaths (i.e. swearing to the truth of a statement), take acknowledgments, certify documents and take depositions for use in legal actions. The signature and seal or stamp of a notary public is necessary to attest to the oath of truth of a person making an affidavit and to attest that a person has acknowledged that he/she executed a deed, power of attorney or other document, and is required for recording in public records.

D) When to note protest:

Noting protest may help to resist cargo loss or damage claims against the ship-owner, and may be required in the adjustment of a general average, but is not always necessary.

The local P&I club representative should be able to advise the master on the need for noting protest. Generally it may be prudent to note protest in the following situations:

- ✓ after every case of general average;
- ✓ after wind and/or sea conditions have been encountered which may have damaged cargo;
- ✓ after wind and/or sea conditions have been encountered which caused failure to make a cancelling date;
- ✓ after cargo is shipped in a condition likely to deteriorate during the forthcoming voyage;
- ✓ after the ship has sustained material damage;
- ✓ after the ship has caused material damage;
- ✓ after a serious breach of the charter party by the charterer or his agent (e.g. undue delay, refusal to load, cargo not of a sort allowed by the charter party, refusal to pay demurrage, refusal to accept bills of lading after signing because of clausing by master, sending vessel to an unsafe port, etc.);
- ✓ after the consignee fails to discharge or take delivery of the cargo or fails to pay freight.

Protest should be noted as soon as possible after arrival and always within 24 hours of arrival. If in connection with cargo, it should be noted before breaking bulk. If cargo for more than one discharge port is involved, the P&I club correspondent should be asked whether it will be necessary to note protest at each port in the rotation.

E) Letter Of Undertaking (LOU):

A Letter of Undertaking is a document whereby the provider promises the receiver of it to reimburse financial loss incurred as a result of a shipping incident.

An LOU is a guarantee often issued by a P&I Club on behalf of its Member to a claimant who allegedly has suffered a loss for which the Member is liable and covered under its P&I insurance.

In most cases, a Club LOU is issued on the threat of arrest or detention of a vessel. The terms of a Club LOU will include that, once accepted by the receiver as security for his claim, he must release the ship from arrest or detention and promise not to re-arrest the ship or take any action against other assets to obtain security for the same claim.

The main advantages of a Club LOU from the Member's and Club's perspective lie in its ease of issue and flexibility regarding content. Once a security demand is put forward, a Club LOU can be issued as soon its terms have been agreed, formulated and signed, then faxed or e-mailed around the globe in minutes.

The main advantage of a Club LOU from the claimant's perspective is that he obtains a right to recover his claim directly from the Club. It is important that a Club LOU balances the respective interests, i.e. securing the claim without jeopardizing the defendant's rights and defences.

An LOU must usually contains:

- ✓ Identity of parties,
- ✓ Details of the claim,
- ✓ Reason for issue,

- ✓ Reference to the contract or circumstances under which it is given,
- ✓ Maximum amount of security,
- ✓ Triggers for payment,
- ✓ Provision preserving rights and defences,
- ✓ Law and jurisdiction for the claim and for any enforcement of the LOU.

Normally, the trigger for payment under a Club LOU is a settlement agreement between the parties or a final and enforceable court judgment or arbitration award.

Important limitations to keep in mind: P&I Clubs have no obligation to provide LOUs, they are purely discretionary; Club LOUs may not be accepted in some jurisdictions or by the claimant; and the claim may be outside P&I cover.

F) Bank Letter of Guarantee:

Bank Guarantees have a long tradition for securing claims. As with any form of security, it is important that the terms included are in line with recommendations from P & I Club for Letters Of Undertaking (LOUs).

Due to the costs and time involved in issuing Bank Guarantees, especially where more than one bank is involved, there are many advantages in having a Club LOU issued rather than a Bank Guarantee where possible. It should also be remembered that banks are not immune from financial failure and that a Bank Guarantee is not necessarily "better" security.

G) Letter Of Indemnity (LOI):

When one party wants the other to deviate from a normal or regulated practice, it may be necessary to give an indemnity. A Letter of Indemnity is a document which purports to give a party a right of recovery against the LOI issuer for any liabilities, losses, costs or expenses arising from, following the specific requests/orders contained within the LOI.

A typical shipping example is a charterer's order to a carrier to discharge cargo at a discharge port without the receiver providing an original bill of lading in exchange for the goods being delivered. In these circumstances, the carrier's consequential liability for following such an order is excluded from its P&I insurance.

A Letter of Indemnity should normally include:

- ✓ Reason for issue with a description of the circumstances,
- ✓ Indemnity for a list of specific risks,
- ✓ Agreement to provide funds to defend claims,
- ✓ Agreement to provide security if vessel or assets are arrested,
- ✓ Full list of parties jointly liable under the LOI,
- ✓ Law and jurisdiction of the LOI.

It is important to remember that LOIs are not a fix-all solution for any kind of problem. Equally important, some LOIs are unenforceable at law, for example an LOI received in return for issuing a clean on board bill of lading despite the fact that the document was known to contain an incorrect description of the cargo or its quantity or its condition. Furthermore, any LOI is only as good as the party providing it. Hence, accepting an LOI does mean a risk of incurring an uninsured loss.

One must bear in mind the following key questions while issuing an LOI:

1. Why we are taking it?
2. Is it legal?
3. Will it affect the insurance?
4. Is there a credit risk?
5. What are the other risks?
6. Does it do the job?

For the legality matter, it is important to remind the following points:

- .The request may be intended to deceive.*
- .There might be a mis-description of the cargo or voyage involved.*
- .The Change of destination may be an issue.*
- .There might be an intention for co-mingling of the cargo.*
- .And last point is to deliver cargo without production of original bill of lading.*

The effect on the insurance may be:

- ✓ **Mis-description of the cargo or voyage.**
- ✓ **Delivery without production of B/L.**
- ✓ **Change of destination.**