

# 诺亚之风

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## 再谈镍矿液化的危险性

在印度尼西亚和菲律宾的镍矿区，雨季从 6 月份开始，会一直持续到 11 月。而菲律宾 9 月至 10 月的台风季节则更令人担忧。Skuld 协会正密切监控着在这些地区装载镍矿的被保险船舶，并且协会发现受到降雨影响的货物数量有所增加。

### Skuld 协会近期经历的镍矿液化事件

最近，协会的一艘入会船舶遇到了镍矿液化问题。据介绍，该轮在菲律宾装载镍矿，开航两天后遭遇热带风暴，货物发生液化。船长报告称，1 号和 2 号货舱的货物已经液化，液化货物的深度离货物表面约 70 厘米。3 号和 4 号货舱里的货物也已滑向左舷侧，船舶向左舷倾斜了大约 7 度。

船长立即采取行动，调整航向、速度及压载，以便更好地稳定船只。幸运的是，天气好转后，该船继续前往卸货港，并于 2019 年 8 月 5 日安全抵达。

### “Nur Allya” 轮- 船舶和 25 名船员失踪

会员们或许已经获悉，这艘悬挂巴拿马旗、52,000 载重吨的“Nur Allya”轮自 8 月 20 日在布鲁岛北部海岸航行时失踪。令人遗憾的是，在经过空中和海上的大规模联合搜救后，至今没有发现失踪船只或船员的任何迹象。

### 来自 INTERCARGO 的紧急警告

在上述船舶失踪后，INTERCARGO 再次发出警告提醒船东、运营人和船员注意，在船舶装载镍矿和其他易液化的货物时一定要极度谨慎小心。





## 建议

协会提醒会员和船长在印度尼西亚和菲律宾地区装载镍矿时要特别小心，并建议采取下列措施：

1. 在到达装货港之前，必须严格遵守保赔协会规定的强制通知要求，并强烈建议安排装船前检验。
2. 一定要提前从托运人处获得所需的货物文件(托运人货物申报单、TML & MC 证书)，以便检查。
3. 确保遵循 IMSBCCode 中列出的所有安全预防措施。
4. 通过摔罐试验密切监测和控制货物及装载情况，拒收任何湿货。

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5. 认真评估和规划船舶驶往卸货港的航程，以尽量减轻船舶的摇摆（例如侧倾等）。还应避开恶劣天气（例如蒲式 7 级以上风力）。

6. 确保租约中已包含适用于易液化的散装固体货物的 BIMCO 租船合同条款。

7. 在天气允许的情况下，每天检查货舱内的货物状况，一旦发现任何异常情况，需立即通知保赔协会。

以上并不是关于货物液化的全面概述，如要了解更为全面的内容，请参考 Skuld 保赔协会（[www.skuld.com](http://www.skuld.com)）之前发布的通函（包括 2018 年 6 月 21 日发布的通函）。

以上，仅供参考。

如有问题欢迎随时与我司联系

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**原文附后**



## Nickel ore liquefaction alert

In the nickel ore regions of Indonesia and the Philippines, the rainy season starts in June and lasts until November. The September-October typhoon season in the Philippines is of particular concern. Skuld is monitoring entered vessels that load nickel ore in the region, and we see an increase of rain affected cargo.

### Nickel ore liquefaction – recent Skuld experience

We recently had a nickel ore liquefaction issue on an entered vessel. She loaded nickel ore in the Philippines and two days later cargo liquefaction occurred when facing a tropical storm. The Master reported that the cargo in holds number 1 and 2 had liquefied, and the depth of the liquefaction was about 70cm from the cargo surface. The cargo in holds number 3 and 4 had slid to the portside and the vessel was listing about 7 degrees to port. The Master had taken immediate actions by adjusting the course and speed and correcting ballasting to better stabilise the vessel. Luckily the weather improved, and the vessel could proceed to her discharge port where she safely arrived on 5 August 2019.

### MV "Nur Allya" – Vessel and 25 crew missing

Members may already know that the 52,000dwt, Panama-flagged, Nur Allya has been missing since 20 August when she was underway along the northern coast of Buru Island. A major search operation involving air and sea assets has regrettably found no sign of the missing vessel or crew.

### Urgent warning from INTERCARGO

INTERCARGO is once again urging shipowners, operators and crew to exercise extreme caution when loading nickel ore and other cargoes that have the potential to liquefy. The warning comes in the wake of the disappearance of the above-mentioned vessel.

### Recommendations

Members and masters are advised to take extreme caution when loading nickel ore in the region of Indonesia and the Philippines.

The following actions are recommended:

1. The compulsory notification requirements set out by the P&I clubs must be complied with prior to arriving at the load port, and a preloading survey is highly recommended.
2. Always obtain the required cargo documentation from the shippers in



advance (Shippers Cargo Declaration, TML & MC certificates) so that it can be checked.

3. Ensure that all safety precautions outlined in the IMSBC Code are followed.

4. The cargo and loading should be closely monitored and well controlled by a Can Test and any wet cargo must be rejected.

5. The passage of the vessel to her discharging port should be well assessed and planned to minimise motions of the vessel (e.g. rolling and pitching etc.). Heavy weather (e.g. wind force BF 7 or above) should be avoided.

6. Ensure that your C/Ps have BIMCO Charterparty clauses for solid bulk cargoes that can liquify.

7. If the weather permits, check the condition of the cargo in the holds daily and notify your club immediately if anything abnormal is found.

The above is not a comprehensive outline on liquefaction and we refer to previous circulars on skuld.com, including the one dated 21 June 2018.



## 谈谈海上货物运输一切险之承保范围

航海活动自诞生以来就被称为“海上冒险”（Maritime Adventure），即使近现代科技高度发达，承担运输任务的船舶和所运货物仍然处在很多不确定的风险之中。在财产保险的范畴，关于海上运输常见的有船舶保险和货物运输保险。在国际贸易活动中，贸易双方往往会在货物买卖合同中约定由何方安排保险以及保险的种类等事宜。只有做到对保险责任的充分理解，投保人再基于货物特性、运输特点、资金负担能力等等，权衡自己要选择的险种。



国内保险公司承保货物运输保险所采用的保险条款都是基于中国人保的海上货物运输保险条款。人保海上货物运输保险条款分为主险条款（Principal Risks）和附加险条款（Additional Risks）。附加险不得单独投保，需要在投保主险之后向同一保险人另外选择投保。

主险分为平安险（Free From Particular Average-F.P.A）、水渍险（With Average-W.A.）和一切险（All Risks）。三个主险条款的保险责任范围逐步增大：平安险的责任范围包括因自然灾害造成的全损和部分意外事故造成的损失和费用；水渍险是在平安险的基础上，保险人还负责平安险所不赔的由于自然灾害造成的货物部分损失；一切险的责任范围是，除了上述平安险和水渍险的各项责任外，还负责被保险货物在运输途中由于外来原因所致的全部或部分损失。[[1]]

对于一切险的承保范围，笔者在日常案件处理以及查阅相关参考文章中，发现一些对一切险责任范围的认识值得商榷，其中主要有以下两种观点：



- 一、保险人对一切货物损失都要赔偿。
- 二、一切险的承保范围仅限于平安险+水渍险+11种普通附加险。

其实，大多数案件的争议在于如何理解一切险中“外来原因”的内涵及外延，我们可通过最高院的判例来探讨一下。

货物被船东违法运走是否是一切险承保责任[[2]]

A公司在B保险公司投保一切险，货物为桶装棕榈油。货物装船后并未送交收货人，而是被该轮私自变卖、走私处理了，走私货物被海关罚没。保险双方就保险责任一事未能协商一致，走向诉讼。

在本案中，最高院对一切险进行了定性分析，笔者总结如下：

1. 一切险是非列明风险。平安险、水渍险为列明的风险，而一切险则为平安险、水渍险再加上未列明的运输途中由于外来原因造成的保险标的的损失。
2. 被保险人须证明保险标的的损失是因为运输途中外来原因引起的。外来原因可以是自然原因，亦可以是人为的意外事故。
3. 外来原因应当限于运输途中发生的，排除了运输发生以前和运输结束后发生的事故。

与此同时，最高院否定了业界常见的“一切险的责任范围包括平安险、水渍险和11种普通附加险”的说法。笔者摘录如下：

1. 1997年5月1日，中国人民银行致中国人民保险公司《关于〈海洋运输货物保险“一切险”条款解释的请示〉的复函》中，认为一切险承保的范围是平安险、水渍险及被保险货物在运输途中由于外来原因所致的全部或部分损失。并且进一步提出：外来原因仅指偷窃、提货不着、淡水雨淋等。鉴于中国人民银行的上述复函不是法律法规，亦不属于行政规章。保险条款亦不在职能部门有权制定的规章范围之内，故中国人民银行对保险条款的解释不能作为约束被保险人的依据。
2. 中国人民银行关于一切险的复函属于对保险合同条款的解释。而对于平等主体之间签订的保险合同，依法只有人民法院和仲裁机构才有权作出约束当事人的解释。
3. 依据保险法第三十一条的规定，对于保险合同的条款，保险人与投保人、被保险人或者受益人有争议时，人民法院或者仲裁机关应当作有利于被保险人和受益人的解释。作为行业主管机关作出对本行业有利的解释，不能适用于非本行业的合同当事人。





最高院最终裁决保险人应赔偿被保险人保险价值损失。本案无疑对行业内相关纠纷起了良好的指导作用。（其他案例延伸阅读一船舶摇晃是否是一切险中的外来原因[[3]]，）

结合上述判例，相信大家能对一切险有一个整体的认知，但是想要把其中道理彻底地搞明白，还需要继续从以下角度考虑。



## 一. 保险条款的解释原则

假如保险单中没有其他特别约定，那么就案例中的双方争议问题，从根源上来说是如何去解释合同的问题。我国海上货运保险合同受《保险法》与《合同法》调整。在这两部法律中，作为特别法的《保险法》中的特殊规定应当优先于《合同法》适用。

海上货运保险条款，依照《合同法》第三十九条[[4]]可以被认为是格式条款，这点基本没有争议。与此同时，《保险法》第十七条[[5]]、三十条[[6]]以及《合同法》第四十一条[[7]]，都对格式条款做出了相关规定。其中，《保险法》第十七条规定了保险人就格式条款的说明义务以及对格式条款中免责条款的效力认定；《合同法》第四十一条规定了格式条款的解释原则，目前通说认为该条款体现了三项针对格式条款的特殊解释原则[[8]]：1) 按照通常理解予以解释。2) 对条款制作人作不利解释。3) 格式条款和非格式条款不一致时采用非格式条款；《保险法》第三十条约定了对于格式条款在通常解释失效产生两种解释的，适用对保险人不利解释原则。



需要注意的是，以上几个条款在适用时有一定的机制，不能够当然地说合同条款就适用不利解释原则。通过细读法条，可以发现对格式条款而言，保险人首先应是说明义务，假如其尽了此义务，便不会产生理解上的争议，继而便不存在再去适用《保险法》第三十条和《合同法》第四十一条了。回到上述案例中，假如保险人在洽谈业务时讲明其承保范围为“水渍险+11 中普通附加险”并在批单中批注，那么就不存在继续讨论的空间，因为合同已经足够明确。

争议往往发生在保险人未能向被保险人说明或者没有很好地说明一切险的承保范围，而在事故发生之后保险双方又产生争议。在这种情况下，可以在《保险法》第三十条和《合同法》第四十一条中借助格式条款的解释原则寻找解决之法。可以看到，两个法条在使用时上有着良好的顺序性，即先是通常理解，假如通常解释不能解决争议，然后在存在两种以上解释的情况下做对条款制作人的不利解释。所以，对一切险而言，何为其“通常解释”便成了揭开其面纱的关隘。

## 二. 外来原因的认定。

人保 09 条款中一切险的描述为：平安险+水渍险+运输途中外来原因所致损失。平安险和水渍险是列明风险，实践中争议不多，但是各方对于“外来原因”这一概念理解并不相同。

通说认为，《合同法》第一百二十五条[[9]]规定了合同条款的一般解释原则，释明了条款解释过程中的几个关键点：词义解释、整体解释、合同目的、交易习惯、诚实信用原则，而且着重强调了词义解释。

“外来原因”是一个组合名词，其中“外来”一般指从外边来的或者非固有的[[10]]。如此看来，“外来原因”只是概括性词语，在没有特别约定的进一步限定下，应当对其作出普通的、开放的理解。在词义解释清晰的情况下，其他的解释只能是“误解”，对于“误解”而言自然不需要再使用其他的解释方法，只需澄清消解即可。对于词义解释，常有人提到术语解释原则，即某些词语在特定行业的特定含义应当被充分考虑。笔者赞成此种观点，但是本文论及的“外来原因”在保险行业内难说有特定含义，故此解释无法当然适用。

当然，此处“外来原因”的解释，应当受保险理论中可保风险等基础概念的制约。

## 三. 5 条除外责任。

普通人在购买一切险后，不可以认为货物所有的损失都可以得到保险人的赔偿，像 09 条款为例，除外责任[[11]]对平安险、水渍险、一切险三个险种都产生约束，这点需要引起重视。保险除外条款的意义在于防止道德风险的发生以及平衡保险双方的利益，其中又有法定除外风险和约定除外风险，限于篇幅，本文不再展开。对于保险人而言，损失必须在非除外责任的情况下，其才负有赔偿义务的可能性。



笔者最后要强调的是，相较于平安险和水渍险而言，一切险下的被保险人在请求保险赔偿时的举证责任要小得多。通常被保险人只需证明货损发生在运输途中的外来原因及完成的初步的举证责任，保险人想要拒赔就要举证事故原因为除外责任。[[12]]

对于被保险人而言，正确地理解保险条款有利于为日常经营做出最为有利的选择。俗语说，没有最好的，只有最合适的。订约之前保险双方充分、有效的沟通落实，才是减少争议的不二法门。

以上，如有问题，欢迎随时与我司联系。

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[[1]]中国人民财产保险股份有限公司还有运输货物保险条款（2009版）

[[2]]（2003）民四提字第5号

[[3]]（2017）最高法民申4861号

[[4]]第三十九条 采用格式条款订立合同的，提供格式条款的一方应当遵循公平原则确定当事人之间的权利和义务，并采取合理的方式提请对方注意免除或者限制其责任的条款，按照对方的要求，对该条款予以说明。

格式条款是当事人为了重复使用而预先拟定，并在订立合同时未与对方协商的条款。

[[5]]第十七条 订立保险合同，采用保险人提供的格式条款的，保险人向投保人提供的投保单应当附格式条款，保险人应当向投保人说明合同的内容。

对保险合同中免除保险人责任的条款，保险人在订立合同时应当在投保单、保险单或者其他保险凭证上作出足以引起投保人注意的提示，并对该条款的内容以书面或者口头形式向投保人作出明确说明；未作提示或者明确说明的，该条款不产生效力。

[[6]]第三十条 采用保险人提供的格式条款订立的保险合同，保险人与投保人、被保险人或者受益人对合同条款有争议的，应当按照通常理解予以解释。对合同条款有两种以上解释的，人民法院或者仲裁机构应当作出有利于被保险人和受益人的解释。

[[7]]第四十一条 对格式条款的理解发生争议的，应当按照通常理解予以解释。对格式条款有两种以上解释的，应当作出不利于提供格式条款一方的解释。格式条款和非格式条款不一致的，应当采用非格式条款。

[[8]]王利明等著. 民法学. 第五版. 北京. 法律出版社. 586页.

[[9]]第一百二十五条 当事人对合同条款的理解有争议的，应当按照合同所使用的词句、合同的有关条款、合同的目的、交易习惯以及诚实信用原则，确定该条款的真实意思。

合同文本采用两种以上文字订立并约定具有同等效力的，对各文本使用的词句推定具有相同含义。各文本使用的词句不一致的，应当根据合同的目的予以解释。

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[[10]]安汝磐,赵玉玲编著.新编汉语形容词词典.北京:经济科学出版社.2003.  
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[[11]]二、除外责任

本保险对下列损失不负赔偿责任:

- (一)被保险人的故意行为或过失所造成的损失。
- (二)属于发货人责任所引起的损失。
- (三)在保险责任开始前,被保险货物已存在的品质不良或数量短差所造成的损失。
- (四)被保险货物的自然损耗、本质缺陷、特性以及市价跌落、运输延迟所引起的损失或费用。
- (五)本公司海洋运输货物战争险条款和货物运输罢工险条款规定的责任范围和除外责任。

[[12]]李民.海上保险中的举证责任及其证明标准研究.大连海事大学.硕士毕业论文.第15页。

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## 聊聊保函那些事：能否相信君子协定？

许多客户在业务过程中会面临签发和接受保函的情况，比如说，无单放货、将货物运往非提单上的指定港口、无视货物的真实状况而被要求签发清洁提单等等。

在这种情况下，保函看起来是一种简单的解决方案，也是履行合同的一种捷径，但是，人们更应该清楚地意识到签发保函所带来的风险。通过本文，保险人旨在向客户介绍保函的使用和目的，以及接受和依赖保函将可能会面临的陷阱。

### 什么是保函？

保函是一种协议，是一方当事人（签发人）请求另一方当事人（接受人）去做他们本没有义务做的事情。作为交换，签发人会承诺，如果因遵守该请求而遭受任何损失，他们将赔偿接受人。但是，请注意，该协议并非没有风险，原因就是保函将不可避免地导致将来可能会违反基础合同（如提单或租约），有时可能会无法强制执行。

### 为什么要签发保函？

各方同意签发和接受保函的原因是基于预期的效果及其可能带来的解决办法。如果能够恰当合理地使用保函，它可以为标准保赔险除外的风险提供赔偿。这样的话，保函本身就成为保函接受者的一种替代保险。存在这种除外风险的情况包括无正本提单放货、偏离合同航程、装运甲板货、签发从价提单、承运珠宝及银行票据、签发预借或倒签提单、签发存在错误描述的提单等。

有时，租约本身允许签发保函的情况很常见。很经典的例子就是，在收到正本提单之前，船舶已到达卸货港。等待提单送达会导致几天甚至更长时间的船期延误。因此，在有些贸易操作中，比如干散货或液体货物运输行业，通常的做法就是并入一个附加条款，允许签发保函以换取无正本提单放货。虽然签发保函这一点被作为合同条款列在租约中，但现实中无法改变的一点是，这可能会导致没有保险赔偿。因此，在此基础上进行的操作完全是一项商业决定。

#### (i) 有利因素

- 提高操作效率 - 如果货物将在不同的港口交付；
- 解决贸易中的不规范行为；
- 防范保险中未涵盖的风险；

#### (ii) 不利因素

- 第三方索赔风险增加；

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- 得不到保险保障；
- 保函签发人可能拒绝履行赔偿；
- 法院可能不认可该保函；

## 会产生什么样的后果？

在有些贸易中，使用保函的做法很常见。但是，有时保函会导致不法行为。

有时候，在无正本提单的情况下，承运人会被要求接受保函来同意放货。但在将货物交付给保函中的指定方后，提单的合法持有人出现了并要求承运人交付货物。此刻由于承运人已将货物交付给了第三方，提单持有人可据此向承运人提起索赔。由于承运人做了他本不应该做的事情，即，在没有提单的情况下，将货物交付给某一方，在此情况下，他们将得不到保险保障。

在此阶段，根据实际情况，会有以下几种可能性。理论上，承运人可以依据保函提出索赔，并据此来防范那些没有保险保障的风险。然而，实际操作中可能会面临各种困难。最常见的是保函签发人拒绝依据保函履行赔偿义务，或是他们根本就没有偿还能力，无法兑现他们的财务承诺。

另一个问题是，如果超过时效或不被法院认可，都会导致保函无法被强制执行。如果是出于合法目的签发的保函，法院通常都是依据其条款和条件执行。然而，有些保函涉嫌欺诈行为。例如，合同方故意预签提单，这种情况下签发的保函就不被法院认可。

最后，人们应该意识到，每一份保函都是一份拥有自己条款和条件的独立的合同。租约中约定的条款，如时效条款或法律适用条款，不会自动合并到保函中。

“任何保函的效力和安全性都取决于保函的签发人，以及他们愿意和能够履行保函承诺的程度。”

## 保函检查清单

一般来说，一方没有义务接受保函。不过，可以理解的是，出于商业需要及合同关系，有时客户会被要求接受保函。这也是即使在保险不再适用的情况下，本文保险人仍愿意为客户提供协助以便尽最大努力保护客户利益的原因。

在接受保函之前，保险人建议慎重考虑如下几点：

√这个要求是否合法？如果你怀疑存在任何欺诈的因素，那么这份保函可能不具有法律效力。

√核实保函签发人的身份及其所属的司法管辖区。毕竟他们是要提供赔偿的一方，这也是他们要具有良好的信誉（财务状况）和信用的原因。



√如果在没有出示提单的情况下被要求交货，一定要核实保函中指定的收货人是否与提单中的原始收货人是否一致或有关联。

√要对保函中的请求进行清晰准确的描述。对于具体要求的任何不准确性或误解都可能会影响到赔偿。

√确保《1993年合同（第三方权利）法》没有被排除在外。

√检查保函中是否有规定时效。如果有，要确保保函中的时效不短于合同中规定的时效。

√检查所适用的法律和管辖权，最好是英国法。

√如果一个租约链项下存在多个保函，要确保在背靠背（back to back）的基础上签发和收取保函。

√如果对接受保函带来的后果或其条款和条件心存疑虑的话，请向您的责任险保险人进行咨询。

接受保函后，一定要注意以下几点：

◆确保履行过程完全符合保函的要求。例如，如果货物不是交付给保函中的指定方，保函接受人将无权进行索赔。

◆在可能的情况下，提供确凿的证据，证明已根据保函履行了该请求（例如，能够显示货物最终被放给谁的证据）。

◆如果发生索赔，应迅速采取行动，依据保函中的条款要求签发人进行赔偿，切记不要错过保函中规定的时效，尤其是在同一链条下签发了一系列保函的情况。

## 结论

虽然保函也存在于许多其他业务中，但它们已成为国际航运和贸易中的一种共性。本通函中已经阐明，即使频繁使用保函，也并非万无一失。最终，只能由客户决定保函是否能给他们提供充分的保障。应仔细考虑这些风险，尤其要特别注意保函的条款、可执行性、签发人的信誉和法律行为能力。

以上，仅供参考。如有问题，欢迎随时与我司联系沟通：

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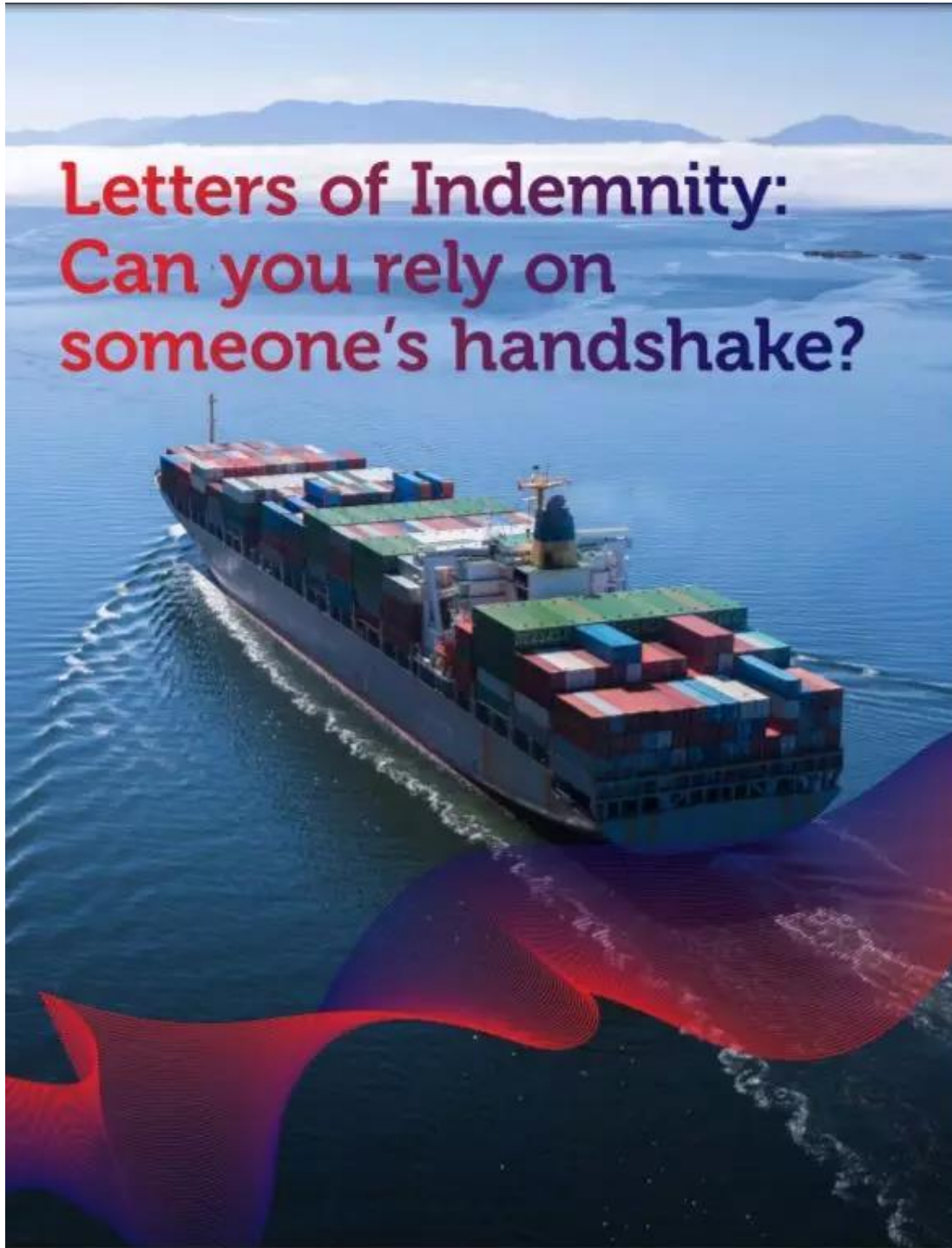
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请参阅我司 2019 年 3 月 5 日发布的文章《再谈无单放货可能导致的严重后果》。

原文附后。





# Letters of Indemnity: Can you rely on someone's handshake?



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Many of our clients at some stage in their business activities have been in a position where the issuance and acceptance of a Letter of Indemnity (LOI) is deemed necessary. Think of a situation where cargo has to be delivered without presenting a Bill of Lading; or where cargo has to be shipped to another port other than stated in the Bill of Lading; or a shipper asks for the issuance of clean Bills of Lading despite the questionable condition of the cargo.

In such situations an LOI may look like an easy solution and a shortcut to fulfilling the contract. However, one should be aware of the risk exposure when an LOI is issued. Through this circular MS Amlin wishes to inform our clients about the use and purpose of LOIs as well as about the pitfalls involved in accepting and relying on an LOI.

### What is a Letter of Indemnity?

A Letter of Indemnity is an agreement wherein one party (the issuer) requests another party (the recipient) to do something which they are otherwise not obliged to do. In exchange, the issuer promises that they will keep harmless and indemnify the recipient of the LOI in the event of any losses

suffered as a result of complying with that request. However, one should be aware that this agreement is not without risks. The reason is that an LOI will inevitably lead to a future breach of an underlying contract (e.g. a Bill of Lading or a Charter Party) and sometimes it may not be enforceable.

### Why is an LOI issued?

The reason why parties agree on the issuance and acceptance of an LOI are the envisaged gains and the solutions it can produce. Provided that LOIs are used wisely and properly, the indemnity they provide can protect the client for risks that fall out of the standard P&I insurance cover. In this way the LOI itself becomes a substitute insurance for the recipient under the LOI. Examples of such a risky course of action may include delivery of goods without presenting the original Bill of Lading; deviation from the contractual voyage; carriage of goods on deck; issuance of ad valorem Bills of Lading; carriage of jewellery and bank notes; the issuance of ante- or post-dated Bills of Lading, and the issuance of Bills of Lading with an incorrect description.

On some occasions it is not unusual that the charter party itself will allow the issuance of LOIs. A typical example is a situation wherein the vessel has arrived in the port of discharge prior to the receipt of the Bill of Lading. Awaiting the Bill of Lading to arrive could result in delays of up to a few days or even more. For this reason in some trades, such as the dry bulk and liquid sectors, it is common practice to insert a rider clause covering the issuing of an LOI in exchange for delivery of the goods without presenting the Bill of Lading. Even though the option of issuing an LOI is contractually set in the charter party, this does not alter the fact that this is a dubious practice for which an insurance cover may not be available. Therefore, proceeding on that basis remains entirely a commercial decision.

Opportunities	Obstacles
<ul style="list-style-type: none"> <li>• Operational efficiency – if cargo has to be delivered in a different port</li> <li>• Solutions for irregularities in the trade</li> <li>• Protection against uninsured risks</li> </ul>	<ul style="list-style-type: none"> <li>• The risk of third-party claims increases</li> <li>• The insurance cover is no longer available</li> <li>• The issuer of the LOI may refuse to honour the indemnity</li> <li>• An LOI may be unenforceable in a court of law</li> </ul>



## What are the consequences?

The use of LOIs is common in some trades and often there are no obstacles. However, there are instances where the LOI can lead to a wrongful act.

Consider the situation where the carrier is requested to deliver the goods on the basis of an LOI without the Bill of Lading being presented. After delivery of the goods to the party named in the LOI, the rightful holder of the Bill of Lading shows up and demands delivery of the cargo from the carrier. As the carrier already delivered the cargo to a third party, the holder of the Bill of Lading can claim damages from the carrier. As the carrier did something he was not supposed to do (i.e. deliver the cargo to a party without a Bill of Lading) his insurance cover will not be applicable.

At this stage, there are several possibilities depending on the circumstances. Ideally, the carrier may trigger the indemnity under the LOI and rely on it as protection against those uninsured risks. However, there may be difficulties in that process and the most common ones are that the issuer may turn out to be untrustworthy and may refuse to honour his undertaking under the LOI, or that he may not be creditworthy and cannot meet his promise financially.

A further problem will arise when the LOI is not enforceable for being either time-barred or considered not legally binding by the court. When an LOI serves a legitimate purpose, courts are generally ready to enforce its terms and conditions. However, some LOIs may constitute a fraudulent act. For example, if the parties deliberately antedated the Bill of Lading, an LOI issued in this regard will not be enforceable in a court of law.

Finally, one should be aware that every LOI is an independent contract with its own terms and conditions. Terms that are agreed upon in the underlying charterparty, such as a time-bar provision or a choice of law clause, will not be automatically incorporated in the LOI.

**“Any Letter of Indemnity will only be as good and safe as the party that issues it, and to the extent that party is willing and able to honour it.”**

## LOI Checklist

As a general rule, a party is not obliged to accept an LOI. Understandably, however, business needs and contractual relations sometimes require clients to do so anyway. That is why MS Amlin wishes to assist in ensuring that the client's interests are protected as much as possible even when insurance cover does not apply.

Before accepting an LOI, we recommend considering the following general checkpoints:

- ✓ Is the request legitimate? If you suspect any element of fraud, then the LOI may not be legally enforceable.
- ✓ Check the identity of the party that issues the LOI and the jurisdiction where they are located. After all, this is the party that is expected to provide the indemnity and that is why their creditworthiness (financial standing) and trustworthiness are essential.
- ✓ Where delivery without presenting a Bill of Lading is requested, check if the party named in the LOI as recipient of the goods matches with or is related to the original consignee under the Bill of Lading.
- ✓ The request in the LOI should be described clearly and accurately. Any uncertainty or misunderstanding as to what precisely is requested, may compromise the indemnity.
- ✓ Make sure that the Contracts (Rights of Third Parties) Act 1999 is not excluded.
- ✓ Check if there is a time bar applicable to the LOI. If there is, make sure that the time bar in the LOI does not provide for a shorter period than the time bar in the underlying contract of carriage.
- ✓ Check the applicable law and jurisdiction, preferably English law.
- ✓ When there is a series of LOIs issued following a charterparty chain, make sure that the LOI issued is on a back-to-back basis with the LOI received.
- ✓ Whenever you are unsure about the consequences of accepting an LOI or about its terms and conditions, contact your liability insurer for advice.

After accepting an LOI, pay attention to the following points:

- ✓ Make sure that performance is carried out in full compliance with the request under the LOI. For example, if the cargo is not delivered to the party named in the LOI, the recipient of the LOI may not be entitled to an indemnity.<sup>1</sup>
- ✓ Where possible, secure evidence that the request was fulfilled in accordance with the LOI (for example, proof showing who the cargo was eventually released to).
- ✓ If a claim arises, take a quick action to enforce the terms of the LOI against the issuer, bearing in mind the applicable time bar especially when a chain of LOIs has been issued.

<sup>1</sup> The Bremen Man (2009)



## Conclusion

While LOIs can be seen in many other lines of business, they have also become a common feature of international shipping and trade. In the present circular it has been shown that even though LOIs are frequently used, they do not come without risks. At the end of the day it is up to the client to decide if the LOI could provide adequate protection. The risks should be considered carefully and special attention needs to be paid to the terms of the LOI, the enforceability, and the creditworthiness and legal capacity of the issuer.

For any queries on the topic, please do not hesitate to contact our Client Services Desk at [ClientServices@msamlin.com](mailto:ClientServices@msamlin.com)



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