



Letters of Indemnity: The Good, the Bad and the Ugly

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
**Peter Swanson
Bernard LLP
Vancouver, Canada**

Letters of Indemnity: The Good, the Bad and the Ugly

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
**Peter Swanson
Bernard LLP
Vancouver, Canada**

Introduction

Talk will cover:

1. Key Shipping Documents
2. Letter of Indemnity for Clean Bill of Lading
 - Use
 - Legal Problems
3. Letter of Indemnity for non-presentation of Original Bill of Lading
 - Use
 - Legal Problems

Introduction





Key Shipping Documents: Mate's Receipt

- Mate's Receipt:
 - Purpose
 - Common Features
 - Connection with bill of lading
 - Typical Use
 - Is anyone bound by the Mate's Receipt




Key Shipping Documents: Mate's Receipt





Key Shipping Documents: Bill of Lading

- Bill of Lading:
 - Purpose
 - Common Features
 - Connection with mate's receipt
 - Typical Use
 - Is anyone bound by the bill of lading

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Key Shipping Documents: Bill of Lading

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Key Shipping Documents: Bills of Lading

- Different types of Bills of Lading
 - Master's
 - Owner's
 - Charterer's
 - Forwarder's
 - Negotiable
 - Non-negotiable

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Key Shipping Documents: Bills of Lading

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Key Shipping Documents: Bills of Lading

- Parties to a Bill of Lading:
 - Carrier (may be shipowner, charterer, forwarder)
 - Shipper
 - Consignee (*Bills of Lading Act*)
 - Endorsee (*Bills of Lading Act*)

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Key Shipping Documents: Bills of Lading

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Bill of Lading The 3 main functions

1. Receipt
2. Evidence of the Contract of Carriage
3. Document of Title

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Bill of Lading The 3 main functions

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Bill of Lading: A Receipt

- Confirmation of delivery of goods.
- Evidence of facts stated on the bill of lading
 - Shipped on board
 - Quantity shipped
 - Apparent order and condition of the cargo
- Limitations on facts stated on the bill of lading
 - "shippers load and count"
 - "weight, measurement, contents and value unknown"
 - "said to be, said to weigh"
 - Retra clauses

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Bill of Lading: A Receipt

The term "apparent good order and condition" when used in this bill of lading with reference to iron, steel or metal products does not mean that the goods, when received, were free of visible rust or moisture. If the shipper so requests a substitute bill of lading will be issued omitting the above definition and setting forth any notations as to rust or moisture which may appear on the mate's or tally clerk's receipts.

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Bill of Lading: Evidence of the Contract of Carriage

- Evidence only in respect of the Shipper
 - Booking note
 - Charter party
 - Contract of Affreightment
 - Other
- Actual contract in respect of the Consignee or Endorsee
 - Other contract documents may be incorporated by reference

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Bill of Lading: Evidence of the Contract of Carriage

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A Document of Title

- Holder of a negotiable bill of lading entitled to delivery of cargo
- Transfer title by transferring rights under a bill of lading
- Also transfer rights and obligations
 - Right to delivery
 - Right of suit for damage
 - Obligation to pay freight
 - Obligation regarding damage by cargo



A Document of Title



Required Content of a Bill of Lading

Hague-Visby Rules - Art. 3 (3)

After receiving the goods into his charge, the carrier, or the master or agent of the carrier, shall, on demand of the shipper, issue to a shipper a bill of lading showing among other things



Required Content of a Bill of Lading

3. After receiving the goods into his charge the carrier or the master or agent of the carrier shall, on demand of the shipper, issue to the shipper a bill of lading showing among other things:



Required Content of a Bill of Lading

(a) the leading marks necessary for identification of the goods as the same are furnished in writing by the shipper before the loading of such goods starts, provided such marks are stamped or otherwise shown clearly upon the goods if uncovered, or on the cases or covering in which such goods are contained, in such a manner as should ordinarily remain legible until the end of the voyage;



Required Content of a Bill of Lading



Required Content of a Bill of Lading

- (b) either the number of packages or pieces, or the quantity, or weight, as the case may be, as furnished in writing by the shipper;
- (c) the apparent order and condition of the goods.

4. Such a bill of lading shall be prima facie evidence of the receipt by the carrier of the goods as therein described in accordance with paragraph 3 (a), (b) and (c). However, proof to the contrary shall not be admissible when the bill of lading has been transferred to a third party acting in good faith.



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Required Content of a Bill of Lading

- 5. The shipper shall be deemed to have guaranteed to the carrier the accuracy at the time of shipment of the marks, number, quantity and weight, as furnished by him, and the shipper shall indemnify the carrier against all loss, damages and expenses arising or resulting from inaccuracies in such particulars. The right of the carrier to such indemnity shall in no way limit his responsibility and liability under the contract of carriage to any person other than the shipper.



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Required Content of a Bill of Lading

Carrier need not set out certain information:

1. carrier doubts the accuracy, and
2. cannot verify.



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Required Content of a Bill of Lading

Provided that no carrier, master or agent of the carrier shall be bound to state or show in the bill of lading any marks, number, quantity or weight which he has reasonable ground for suspecting not accurately to represent the goods actually received, or which he has had no reasonable means of checking.



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Effect of Transfer

- *Bills of Lading Act*, section 2 and 4
 - Section 2 transfers all rights and obligations
 - Section 4 binds the issuer of the bill of lading to the fact of shipment as against a consignee or endorsee, unless they have actual notice or unless the bill of lading has a stipulation to the contrary
- Presentation of the Bill of Lading
 - How
 - Consequence
 - Some common problems



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Effect of Transfer

Right of consignee or endorsee

2. Every consignee of goods named in a bill of lading, and every endorsee of a bill of lading to whom the property in the goods therein mentioned passes on or by reason of the consignment or endorsement, has and is vested with all rights of action and is subject to all liabilities in respect of those goods as if the contract contained in the bill of lading had been made with himself.

Evidence by bill of lading

4. Every bill of lading in the hands of a consignee or endorsee for valuable consideration, representing goods to have been shipped on board a vessel or train, is conclusive evidence of the shipment as against the master or other person signing the bill of lading, notwithstanding that the goods or some part thereof may not have been shipped, unless the holder of the bill of lading has actual notice, at the time of receiving it, that the goods had not in fact been laden on board, or unless the bill of lading has a stipulation to the contrary, but the master or other person so signing may exonerate himself in respect of such misrepresentation by showing that it was caused without any default on his part, and wholly by the fault of the shipper or of the holder, or of some person under whom the holder claims.



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Letters of Indemnity

The Practice:

1. Provision of clean bill of lading in exchange for an agreement to indemnify for damage to cargo otherwise known.
2. Delivery of goods without presentation of original bill of lading.



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Letters of Indemnity



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Letters of Indemnity: Clean bill of lading for an agreement to indemnify

- Why does this issue even arise?
- Is it a common issue?
- Is there a common practice?
- What is the typical practice?
- Is there anything wrong with the practice?



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Letters of Indemnity: Clean bill of lading for an agreement to indemnify

Definition of 'Clean Bill Of Lading'

A bill of lading issued by a carrier declaring that the goods have been received in apparent good order and condition, without the presence of defects. The bill of lading will not have any adverse notations.



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Letters of Indemnity: Clean bill of lading for an agreement to indemnify

- Consequences of the Practice
 - Clean bill of lading issued - yet see Hague-Visby Rule 3(3)(c)
 - Possible (probable?) negotiation of the bill of lading to innocent third party
 - Fraud on the consignee or endorsee of the bill of lading
 - Difficult Defense
 - Insurance



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Letters of Indemnity: Clean bill of lading for an agreement to indemnify



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**Letters of Indemnity:
Clean bill of lading in exchange for an agreement
to indemnify**

- What do the courts say about this?

Leading Case: *Brown, Jenkinson and Co. Ltd. v. Percy Dalton (London) Ltd.* [1957] 2 Q.B. 621 (CA):

The contract is “illegal” and not enforceable in a court of law. According to Lord Justice Morris: “The claim cannot be put forward without basing it upon an unlawful transaction. The promise upon which the plaintiffs rely is in effect this: ‘If you will make a false representation which will deceive indorsees or bankers, we will indemnify you against any loss that may result to you.’ I cannot think that a Court should lend its aid to enforce such a bargain.”



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**Letters of Indemnity:
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to indemnify**



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**Letters of Indemnity:
Clean bill of lading in exchange for an agreement
to indemnify**

- What do the Canadian courts say about this?

Justice Harrington of the Federal Court of Canada in *Kuehne + Nagel Ltd. v. Agrimax Ltd.* [2010] F.C.J. No. 1623 was very critical of a request for a back dated bill of lading citing *Brown, Jenkinson and Co. Ltd.*



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**Letters of Indemnity:
Clean bill of lading in exchange for an agreement
to indemnify**

- [14] Carriers are often pressured to issue false documents. The document may be false with respect to its date, or with respect to the apparent order and condition of the cargo. Some carriers have, at their folly, issued such documents against letters of indemnity.
- [15] As stated by Mr. Justice Wright, as he then was, in *United Baltic Corporation, Ltd. v. Dundee, Perth & London Shipping Company, Ltd.* (1928), 32 Ll. L.R. 272 at page 272: “The practice of issuing clean bills of lading when goods are damaged is very reprehensible. It leads to trouble, and the people who do it ought to suffer trouble.” ...
- [17] Such letters of indemnity are unenforceable. See *Brown, Jenkinson & Co., Ltd. v. Percy Dalton (London), Ltd.*, [1957] 2 All E.R. 844, 2 Lloyd’s Rep. 1, and *H. Paulin & Co. v. A Plus Freight Forwarder Co.*, 2009 FC 727 (CanLII), 2009 FC 727, 349 F.T.R. 192.



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**Letters of Indemnity:
Clean bill of lading in exchange for an agreement
to indemnify**

- Are there circumstances where an LOI is ok?
 - Perhaps, e.g. honest disagreement as to condition, or something suspected but not discoverable.
 - However, beware!



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**Letters of Indemnity:
Clean bill of lading in exchange for an agreement
to indemnify**

- The evidence seemed to show that, in general, the practice is kept within reasonable limits. In trivial matters and in cases of bona fide dispute where the difficulty of ascertaining the correct state of affairs is out of proportion to its importance, no doubt the practice is useful. Here, however, the plaintiffs went outside those reasonable limits. They did so at the defendants' request without, as it seems to me, properly considering the implications of what they were doing. They thought that they could trust the defendants' agreement to indemnify them. In that they were in error.



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Letters of Indemnity: Delivery of goods without original bill of lading

- Why does this issue even arise?
- Is it a common issue?
- Is there a common practice?
- What is the typical practice?
- Is there anything wrong with the practice?

Letters of Indemnity: Delivery of goods without original bill of lading

Letter of Indemnity - Without Bill of Lading
To : Carrier
Dear Sirs,
S.S. M/V (vessel/voyage):
Goods
No. of pkg :
Name :
Bill of lading no./ Bill of lading ref. :
The above goods were shipped on the above vessel by Messrs. (and consigned to us) but the relevant Bills of Lading have not yet arrived.
We hereby request you to deliver such goods to (us) without production of the Bills of Lading. In consideration of your complying with our above request we hereby agree as follows:
1. To indemnify you, your servants and agents and to hold all of you harmless in respect of any claims, liability, loss or damage of whatsoever nature which you may sustain by reason of delivering the goods to (us) in accordance with our request.
2. In the event of any proceedings being commenced against you or any of your servants or agents in connection with the delivery of the goods as aforesaid to provide you or them from time to time with sufficient funds to defend the same.
3. If the vessel or any other vessel or property belonging to you should be arrested or detained or if the arrest or detention thereof goods as aforesaid to provide you or them from time to time with sufficient funds to defend the same.
4. As soon as all original Bills of Lading for the above goods shall have arrived and/or come into our possession, to produce and deliver the same to you whereupon our liability hereunder shall cease.
5. The liability of each and every person under this indemnity shall be joint and several and shall not be conditional upon your proceeding first against any person, whether or not such person is party to or liable under this indemnity.
6. This indemnity shall be construed in accordance with English law and each and every person liable under this indemnity shall at your request submit to the jurisdiction of the High Court of Justice of England.
7. Where this indemnity has been joined in and countersigned by a bank, the issuer and the bank shall be jointly and severally liable hereunder.
Date / Location :
Company Stamp / Authorized Signature
Bank Stamp / Authorized Signature

Letters of Indemnity: Delivery of goods without original bill of lading

- Key Problem:
 - What if someone else arrives with the original bill of lading asking for the cargo?
 - What if the person who gave the LOU isn't really credit worthy?
 - Who bears such a loss if all goes badly?

Letters of Indemnity: Delivery of goods without original bill of lading

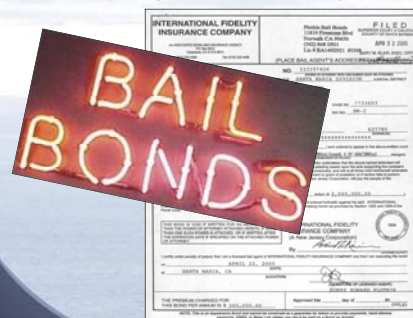


Letters of Indemnity: Delivery of goods without original bill of lading

Key features of LOI endorsed by P&I Clubs:

1. Indemnify and hold harmless;
2. Funds to defend a suit;
3. Funds to provide bail;
4. Delivery of OBL;
5. Law and jurisdiction (English);
6. Bank Guarantee.

Letters of Indemnity: Delivery of goods without original bill of lading



Letters of Indemnity: Delivery of goods without original bill of lading

Other types of LOI:

Delivery of cargo at a port other than that stated in the bill of lading.



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Letters of Indemnity: Other



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Letters of Indemnity: Conclusion

- Bills of lading are important commercial documents.
- Anglo-Canadian and US courts recognize this and will react to the creation of an inaccurate/fraudulent document.
- The practice of issuing an LOI in exchange for a clean bill of lading is problematic and likely illegal.
- The practice of accepting an LOI for delivery without an original bill of lading, while not illegal has its own problems.



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Letters of Indemnity: Conclusion



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THANK YOU

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谢谢
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