

Bills of lading, letters of indemnity and demurrage

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The bill of lading is the central document of seaborne commodity trading. It is a receipt for the goods, evidence of the contract of carriage and a document of title that allows the holder to claim the cargo from the carrier and to transfer ownership and possession by endorsement. In string sales, in which the same cargo is sold several times during the voyage, the original bills often do not reach the final buyer before the vessel arrives. The industry's solution is the letter of indemnity (LOI). The seller, and sometimes its bank, undertakes to indemnify the shipowner against any liability arising from the delivery of the cargo without production of the original bill of lading. The trader gives a corresponding indemnity to its own seller or charterer up the chain.¹

The International Group of P&I Clubs has published standard forms of letters of indemnity. Form A covers delivery without production of the original bill of lading, form B delivery at a port other than that stated in the bill and form C both. The forms are governed by English law with jurisdiction of the High Court, provide for the provision of bail if the vessel is arrested and recommend a bank countersignature. The P&I clubs do not cover the shipowner's liability for delivery without production of an original bill, which makes the creditworthiness of the indemnifying trader decisive.² Several frauds in commodity trade finance have involved cargoes released against letters of indemnity to buyers who had not paid the financing bank, a risk treated in Chapter G.I. A Lugano trader that issues LOIs should record them as contingent liabilities, limit them by board-approved policies and ensure that its own LOIs are backed by corresponding indemnities from its buyers.

Demurrage is the liquidated damages payable by the charterer to the shipowner when loading or discharge exceeds the agreed laytime. In trading chains, each sale contract passes demurrage risk to the next party through laytime and demurrage clauses that mirror the charter party, with

notices of readiness, time bars for claims and documentation requirements. Demurrage disputes are frequent and are usually decided in London arbitration under the terms of the London Maritime Arbitrators Association (LMAA).³ For a trader, the essential discipline is to align the time bars and documentation requirements of the sale contracts with those of the charter party. A demurrage claim received from the owner can then be passed on to the buyer within the contractual deadline.

1 Retention of title and the Swiss register

A seller who is not paid in advance or secured by a letter of credit may wish to retain title to the goods until payment. Swiss law makes this difficult. Under Article 715 of the Civil Code (ZGB), a retention of title in a movable thing transferred to the acquirer is effective only if registered. The public register is kept by the debt enforcement office at the acquirer's current place of residence.⁴ Registration is constitutive. Without it the reservation has no effect in rem, and the procedure is governed by an ordinance of the Federal Supreme Court of 19 December 1910. For goods imported into Switzerland, Article 102 of the Federal Act on Private International Law (PILA) recognizes a retention of title validly created abroad for three months. It cannot be invoked against third parties in good faith. A retention of title on goods intended for export is governed by the law of the state of destination under Article 103 PILA.⁵

In practice the Swiss register plays little part in Lugano's commodity trade, because the goods rarely enter Switzerland. A trader selling a cargo from Turkey to Italy relies on the letter of credit, on the control of the bills of lading or on the law of the place where the goods lie when title is to pass. The register remains relevant for the distribution and logistics companies of the Mendrisiotto, whose goods are physically in Ticino (Chapter F.III), and for Swiss buyers of machinery and equipment.

2 Notes

1. West of England P&I Club, Notice to Members No. 13 1998/1999 (above) (standard letters of indemnity given by the party requesting delivery of the cargo without production of the original bill of lading, with bank countersignature). ↩
2. West of England P&I Club, Notice to Members No. 13 1998/1999 , January 1999, <https://www.westpandi.com/publications/notice-to-members/1998-1999/notice-to-members-no-13-19981999/> (forms A, B and C; no cover for delivery without production of an original bill;

- bank countersignature; liability capped at 200 per cent of CIF value in the bank's undertaking; English law and High Court jurisdiction). ↩
3. London Maritime Arbitrators Association, LMAA Terms (2021). ↩
 4. Swiss Civil Code of 10 December 1907 (ZGB), SR 210, Art. 715 para. 1, text at law.ch, <https://law.ch/lawinfo/eigentumsvorbehalt/gesetzliche-grundlagen/>. ↩
 5. Law.ch (above) (Ordinance of the Federal Supreme Court of 19 December 1910 on the Registration of Retentions of Title, SR 211.413.1; PILA, Art. 102 and 103). ↩

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