PROBLEMS ASSOCIATED WITH NEGLIGENTLY OR FRAUDULENTLY ISSUED BILLS OF LADING

ICC INTERNATIONAL MARITIME BUREAU

In an international trading transaction a Bill of Lading may have up to three functions. It is a "receipt" for the goods given by the carrier, it may be a "document of title" and it may also be a "contract of carriage" between its holder and the carrier named on the Bill of Lading. A Bill of Lading confers rights on the holder against, primarily, the Ship Owner and the world at large.

This paper will examine some of the problems associated with bills of lading which have been negligently or fraudulently issued and the Letters of Indemnity which almost invariably accompany them. Whilst the ship owner (on whose behalf the bill of lading is often drawn out) and the buyer of the cargo are clearly affected by such bills of lading, they can also have disastrous consequences for other parties in the international trading chain, such as banks, the sellers, insurers particularly the Ship Owner's P&I Club who may have to provide security in the event the vessel is arrested. Fictitious names have been used in most cases referred to either for the purpose of protecting the innocent, because of contractual confidentiality clauses or because the matters may be *sub judice*.

The saga of the MV Golden Fountain in Mongla

On 24 October 1996 the *MV Golden Fountain* arrived at Mongla in Bangladesh on a fixture from Port Lanshan in North China. She was carrying a cargo of Cement Clinker for the Voyage Charterers and Shippers named on the Bill of Lading, Messrs Ajax Inc. of Pusan, South Korea. As she was at the end of her voyage, she was low on both victuals and fresh water which she intended to replenish in Mongla. More importantly, from the commercial standpoint, as the Owners and Managers had informed the Master, freight for the carriage of

the cargo as well as demurrage and detention earned at the port of loading had not been paid by the Charterers.

The Owners had demanded the overdue freight from the Charterers on a number of occasions, but except for numerous promises to make payment, no funds were in fact received. Accordingly, the Owners gave notice to the Charterers that until payment was received the ship would not enter the Port of Mongla and the Owners would take every action necessary to safeguard their claim.

By 28th October 1997, the ship was low on both food and fresh water, and she had to proceed as far as the Pilot station at Heron Point in Mongla to take on board the necessary food and water. The pilot station is situated approximately 12 miles down stream from the Port of Mongla in the Ganges Delta. On receipt of food and water the Owners had considered holding the vessel outside Bangladesh Waters until the outstanding freight and other charges were paid.

The Owners had found that the Bills of Lading issued in Lanshan, China, had not been issued in accordance with the instructions given to its Agent. The Bills of Lading had been claused "Freight Pre-paid" instead of "Freight payable as per charterparty". The Shippers and Charterers were at all times aware that the Ship's Agent had no instructions to issue a "freight pre-paid" bill of lading as the charterparty provided for freight to be paid within seven days of signing and releasing the bills of lading. In order to prevent the Bill of Lading being wrongfully negotiated to an innocent third party for value and such party acquiring rights against the Owner on the basis of the representations contained on the face of the Bill of Lading, the Owners placed advertisements in the Bangladesh and South Korean Newspapers giving notice to the Public that the Bills of Lading purported to have been issued in Lanshan in China were invalid. As far as the Owners were aware the Bills of Lading had not been accepted by the Receiver.

Extra-judicial detention of the MV Golden Fountain

On 30th October two armed boats belonging to the Bangladesh Navy arrived alongside the *MV Golden Fountain* at Heron Point and instructed the Master not to move

without permission. At 1815 hrs the Pilot Station informed the vessel that Port Control had advised them that they had received Court Orders not to permit the vessel to sail. It should be noted that, at this stage, no court order had been served on the ship and indeed there was no evidence that one had been made. In the circumstances since the ship had all her documents on board she was arguably entitled to exercise the internationally recognised right of innocent free passage through Bangladesh territorial waters.

Earlier that afternoon the Harbour Master had called at the vessel's agent's office in Khulna and demanded that a Pilot be booked to bring the vessel into Mongla. The agents had informed the Harbour Master that the Pilot would not be booked unless so instructed by the Owners. The Harbour Master then informed the agent that he would have to exercise his discretionary power to bring the vessel in as he had received a Court Order for the attachment of the ship. The agents had demanded to see a copy of the order but the Harbour Master had said that it was in his office and he would arrange for the Agents to have a copy. When the Agents visited the Harbour Master's office the next day he refused to provide them with a copy of the Court Order stating that they would receive a copy directly from the Court. No copy of the Order was received.

The previous day, the ship's Agent had sent a representative to the Sub-Judge Court of Bagerhat which was reputed to have made the Order referred to by the Harbour Master. The Court clerks had only been able to provide copies of the Charterer's applications for an injunction and attachment but no Court Order.

On 31st October the Master telexed the Owners:

> "BOTH NAVAL VSL PASSED CLOSE BY WITH THEIR GUNS TRAINED AT US. 2ND NAVY BOAT ENQUIRED WHY V R NOT GOING IN. TOLD THEM THAT V HAVE ALREADY EXPLAINED TO 1ST BT N PORT CONTROL THROUGH PLT STN. THEY HV ASKED US TO S/BY FOR INSTRUCTIONS."

Judicial Detention

Eventually, on 2nd November 1996, the Order of the Sub-Judge Court of Bagerhat was served on the vessel by the Pilot. Seven days later, the vessel was brought in to the Receiver's private jetty at Mongla. The Charterer had sought a temporary injunction

restraining the removal of the vessel out of the Court's jurisdiction and the vessel, the Master and the Owner were called upon to show cause why such a temporary injunction should not be issued. Pending the hearing of the show cause order, an ex-parte Interim Order was issued restraining the *MV Golden Fountain* from being removed out of the Court's jurisdiction, and directing the Owners to discharge the cargo to the receivers.

Thus, the *MV Golden Fountain* was not detained at Mongla by an Order for its Arrest from the Court of Admiralty in Bangladesh but by an interlocutory restraining order of a Court with ordinary Civil jurisdiction.

Was the detention lawful and valid?

During the period between the service of the Order by the Pilot at Heron Point and the berthing of the vessel the Owners obtained a order from the High Court in Dacca restraining the mandatory order to discharge the cargo pending an appeal against all orders of the Sub-Judge Court of Bagerhat.

In support of its application for the interlocutory restraining order from the Sub-Judge Court of Bagerhat, the Charterer had sought to argue that the Owner had abandoned its right to demand freight and that freight, if any, was not payable until the vessel had reached the Port of Discharge and delivered the cargo. This allegation was made notwithstanding an express provision in the charterparty that freight was to be paid within seven days of signing/releasing Bills of Lading and that it was deemed earned and non returnable vessel and or cargo lost or not lost. The Charterers had further sought damages from the Owners for breach of contract in a sum of approximately USD4.1 Million. These contracts, by their own admission, had been terminated well before the cargo of cement clinker was loaded on the *MV Golden Fountain.*

In the event the Owner's appeal to the High Court was successful and all interlocutory orders of the Sub-judge Court of Bagerhat which were against the Owner were vacated.

Was the Charterer liable to the Owner for wrongfully detaining the vessel.?.

M. Hafizulla, writing in the 5th Volume of *Arrest of Ships* edited by Christopher Hill, refers to only one form of attachment under the Civil Courts as being available in addition to an Arrest by the Court of Admiralty. According to him the Courts in Bangladesh are empowered under the Civil Procedure Code of that Country to order a defendant to provide security and to produce any property belonging to him and to place it at the Court's disposal and to order an attachment. In *United Venture Navigation Ltd v. Samudrajatra Shipping Lines Ltd* (1976) 28 Dhaka Law Reports 231 the High Court considered the question of the attachment of a foreign vessel before judgement and said:

> "It is pertinent to observe that it is extremely doubtful if the provisos of Order 38 have any application in the case of a defendant who does not usually reside, or whose property is not normally situated within the jurisdiction of the Court concerned. The terms of Rule 1 and Rule 5 of the Order are sufficiently clear to indicate that the defendant or the defendant's property as is contemplated by the rules, is such as does usually live or lie within the jurisdiction of the Court. The obligation of the defendant to attend the court to produce the property in question in court is inconsistent with the case of a defendant, who is a foreign national and lives abroad or whose property does not usually lie within the jurisdiction of the Court. The rule contemplates such property as may be produced in Court when ever the defendant may be asked to do so. The presence of and production of a certain property, by such a defendant within the jurisdiction of the Court being dependant upon the will of another Sovereign State whose national the defendant is, the provisions of this order appear to be hardly applicable in this case."

Clearly the injunction/restraining order sought by the Charterers of the *MV Golden Fountain* was more along the lines of a *Mareva* Injunction, first recognised by the English Court of Appeal in the case of *Mareva Compania Naviera SA v International Bulk Carriers SA* [975] 2 Lloyds Rep 509. Many Commonwealth countries have received the *Mareva* injunction into their Civil Procedure without change.

The criteria which must be satisfied before a Court will grant a *Mareva* injunction may be described as stringent. This is because in the majority of cases the Mareva injunction is granted *ex parte* and the Courts recognise that it should not unfairly prejudice the defendant or third parties who are not present at the hearing

It is not intended to examine these criteria in any detail. From the point of view of protecting a ship owner whose vessel is detained by a Mareva injunction, the more important

are perhaps, the requirement to make a full and frank disclosure and to provide an undertaking in damages. If the Court entertains a doubt that the Plaintiff does not have the money to make good the undertaking in damages, the Court has the power order him to provide security for a certain sum in the form of a bond or bank guarantee. As Hirst J explained in the case of *The Mito* [1987] 2 Lloyd's Rep 197 at 198:

> "May I make it plain from the start that there is no doubt in my judgement that the court has the power at the time of either granting or extending the Mareva injunction to order security in support of the usual cross undertaking, in other words, to fortify the injunction by security in the manner which was ordered, for example by Roxburg J in the case of Baxter v Claydon [1952] WN 376. In other words if the Court considers that the cross undertaker, usually the Plaintiff might not be worth powder and shot if it be held that he is obliged to fulfil his cross-undertaking, the Court can strengthen the undertaking by requiring some sort of security."

In the case of the *MV Golden Fountain* the Charterer had clearly given less than a full and frank disclosure since the Owners numerous demands for freight together with the Charterers' repeated promises to make payment, as well as the terms of the Charterparty had not been disclosed. Had such disclosure been made, the Court would have been placed on notice that the Charterer would not be able to meet its undertaking in damages and ordered security to be placed.

There was however, no full and frank disclosure by the Charterer and accordingly, no order requiring the provision of security was made. When the Ship Owner sought the stay of the Orders made by the Sub Judge Court in Bagerhat an application was simultaneously made to for an Order requiring the Charterer to provide security for the Owner's damages. The Court's response was to order the Charterer to show cause why no security should be provided. In the event the question of the Charterer's security for the Owner's damages had not been heard when the High Court in Dhaka vacated the Bagerhat Court's Orders. Thus, when it was established that the Charterer's detention of the *MV Golden Fountain* was wrongful, the Owner was left without any means of recovering damages from the Charterer.

The Arrest of the MV Golden Fountain

The Owner's respite was but very brief. Before the vacation of the lower Court's Orders by the High Court could be notified to the Harbour Master in Mongla, the Receivers

named on the Bill of Lading had the vessel arrested in the Court of Admiralty for the non delivery of the cargo.

Clearly, notwithstanding the advertisements placed by the Owners in the South Korean and Bangladesh Papers, the Bill of lading had been accepted by the Receivers named on the bill of Lading.

Of relevance is the fact that the Owners had not sought an injunction restraining the bank from negotiating the documents on the grounds that the bill of lading was invalid. No doubt, such an injunction would have proved costly to obtain if the Court had called upon the Owner to provide security to back up any undertaking in damages. Without it however, the Owner was fully exposed to the risk of the Receiver becoming a holder of the Bill of Lading for value. The only remedy available to the Owner in the circumstances was to prove to the Admiralty Court that the Receiver, in accepting the Bill of Lading, had notice of the fact that freight had not been paid. If this was established the Owner may have been entitled to exercise a lien on the cargo to enforce the payment of freight.

Also relevant was whether the cargo, which the Owners would rely on for security, had sufficient value to satisfy their claim for freight, demurrage and detention. The C&F value of the cargo in Bangladesh was in the region of USD 475,000.00. The Owners total claim for freight, demurrage and detention as at the date of the detention of the vessel in Mongla amounted to approximately USD 160,000/-. The Owners' P&I Club had not provided a letter of Guarantee or other form of security and since the Owner was unable to provide the requisite security for the release of the vessel pending the outcome of the litigation, they faced the prospect of earning no further revenue from the *MV Golden Fountain* and paying for the maintenance of the vessel and port charges. The Owners were advised locally that the litigation in Admiralty on the merits of the case could continue for a very long time. In the circumstances unless the Owner could be assured of recovering damages for wrongful arrest there appeared little overall benefit in resisting the Receiver's claim.

According to the principles of English Law which have been received into the laws of Bangladesh, damages for wrongful arrest cannot be recovered unless the Owner can establish

there is either *mala fides* or that *crassa negligentia,* which implies malice. Thus, it would seem that, in order to sustain a claim for damages the defendant Owner must be able to point to some aspect of the arresting party's conduct apart from the enforcement of his claim.

On the application of this test, it cannot be said with any certainty that the Owner of the *MV Golden Fountain* would have been able to establish the bad faith or gross negligence on the part of the Consignee. The underlying sales contract was on CFR terms. Accordingly, whilst the risk of loss or damage to the goods passed upon the goods passing the ship's rail at Lanshan, there is no indication of when the parties intended that title in them would pass. Further, without an injunction (with its attendant costs) against the bank seeking to restrain the negotiation of the Bills of Lading the Owners would have difficulty in trying to establish that at the time the Bills of Lading were negotiated all relevant parties were aware that they had been issued without authority and were not recognised by the Owner. This would have involved the matter proceeding to trial, and the Owners having to make the various parties to the letter of credit also parties to the action. This would have most certainly lead to an increase in the legal expenses and exposed the Owners to a liability in costs if they failed to prove that the Receiver's conduct demonstrated bad faith or amounted to gross negligence. This is perhaps the reason the Owners were advised to cut their losses by delivering the cargo to the Receivers and pursue their claim against the Shippers/Charterers.

Pre-dated Bills of Lading and the MV "Rust Bucket"

In July 1995, a small reputable European Steel Trader entered into contracts to supply three cargoes of secondary steel plates from Brownsville in Texas to different buyers in Europe. In all cases payment was under Letters of Credit which contained different "latest shipment dates".

The Small European Steel Trader asked his broker to charter three vessels to carry the cargoes from Brownsville to the relevant ports in Europe. Mindful, of the latest shipment

dates on the L/Cs the trader asked his ship broker to obtain the Owner's specific agreement that the Bills of Lading would be dated at least one day before these dates.

The latest shipment date in the L/C issued in respect of the cargo which was destined for a buyer in Flushing, Netherlands was 5th September 1995. This cargo was fixed to be carried on a vessel which for present purposes will be referred to as the *MV Rust Bucket.* The *MV Rust Bucket* charterparty which was on the standard GENCON Form, with Riders, provided for a laycan 24th August and 3rd September 1997. On 23rd August the Owners informed the Shipper/Charterer's broker that the vessel would arrive on 1st September 1997. In so saying, the Owners confirmed that the B/Ls would be dated 4th September 1995 as previously agreed. On 28th August the Owners gave a revised ETA for Brownsville as 2nd September 1995. On 31st August the Shippers were advised that the vessel would be further delayed. The 3rd of September passed without any further news of the vessel.

On 4th September 1995 the Disponent Owners informed the Charterer's brokers that the vessel would arrive on that day and accordingly sought an extension of the cancelling date until 5th September 1995. The Charterers replied granting the extension but sought confirmation whether the Bills of Lading would be dated 5th September as previously agreed. The Disponent Owners gratefully accepted the extension and confirmed that the bills of lading would be dated 5th September 1995.

On the morning of 4th September 1995, the Charterers *ought* to have been faced with a dilemma: should they exercise their rights under the laycan provision in the charterparty and terminate the contract without further liability to the Ship Owner or wait for the vessel to arrive. Terminating the charterparty would have meant that a new vessel would have to be chartered, the L/C necessarily amended to take into account the new date on which loading would take place. In this case however, the Charterers were in no such dilemma. They honestly believed that due to their agreement with the Disponent Owners, the Bills of Lading would be dated 5th September and they would be able to present the documents required under the L/C and receive payment for the cargo from the buyer. In the cases of the other two

shipments this is exactly what happened. The bills of lading were endorsed with the latest shipment dates although the cargoes were loaded thereafter.

This was not to be in the case of the *MV Rust Bucket.* The vessel eventually arrived on 5th September and loaded the cargo. On 8th September the Disponent Owners informed the Charterers that the Head Owners had refused to give the Master the authority to sign the Bills of Lading as per the Charterer's requirement unless the Charterer provided a Letter of Indemnity.

The Small European Steel Trader was faced with a dilemma. His cargo was out of his custody on board the *MV Rust Bucket.* He could not stop the Head Owners from issuing Bills of Lading dated 8th September. Freight would be due to the Owners and in order to receive payment for his cargo he had to inform the Buyers of the delay in loading and request an amendment to the L/C by way of an extension of the latest shipment date. Alternatively he could issue the LOI requested by the Owners and receive the Bills of Lading he so desperately required. In the event he did not issue a Letter of Indemnity. He went to the Dutch Buyer of the cargo and obtained an extension of the latest shipment date in the L/C of lading in return for a discount of USD12,500/- on the price of the steel.

"Clean" Bills of Lading for damaged cargo - the MV Chinese Junk

In May 1996 a Hong Kong based trader entered into a contract on C&F terms to supply a cargo of 30,000 MT of Grey Portland Cement of Chinese origin in bags to a Buyer in Bangladesh. The cargo was in turn purchased by the Hong Kong company from a Seller in the province of Rizhao, China with whom they appeared to have a long term business relationship. It was proposed that 15,000 MT of the cargo would be shipped in May. However, due to the elections and an uncertain political climate in Bangladesh the Hong Kong company did not arrange shipment and this amount of the cargo was warehoused in Rizhao for three months.

In September 1996 the *MV Chinese Junk* was fixed by a Chartering company owned and operated by the Hong Kong trader to carry the cargo of 30,000 MT of cement from Rizhao to Chittagong and Mongla in Bangladesh. The charterparty provided for "clean on board" "freight collect" Bills of Lading to be issued at the load port. These Bills of Lading were to be switched in Hong Kong against the Charterer's Letter of Indemnity for a second set of split Bills of Lading marked "freight prepaid". Freight at the rate USD 15.5 Net per MT payable in full within 5 banking days after completion of loading and the signing/ releasing of the freight pre-paid Bills of Lading.

On loading in Rizhao, a considerable quantity of the cement which had been warehoused since May was found to be caked and stoned. On instructions from the Charterer, the Master, stopped loading as over 20% of the cargo was stoned/caked. The Charterers and the Shippers entered into negotiations and as a result the Charterer agreed to accept the cargo. The Ship Owners alleged that they did so due to the need to supply the 30,000 MT required in Bangladesh. The Master demanded a Letter of Indemnity from the Shippers/Charterers to sign and release "clean on board" Bills of Lading. It is alleged however that the Shippers threatened to use their influence with the Port Authorities and have the vessel detained indefinitely in Rizhao unless "clean" Bills of Lading were issued. Finally, the Owners of the *MV Chinese Junk* capitulated. In early October 1996 they issued "clean" "freight collect" Bills of Lading for 30,000 MT of the cargo as per the Charterparty and sailed out of Rizhao.

The Owners did not however, instruct the *MV Chinese Junk* to proceed to Bangladesh. They instructed her instead to proceed to the Port of Hong Kong which she entered under her ex name *MV Sampan.* The Owners were understandably very worried. "Clean" Bills of Lading having been issued, there was little doubt that the Bangladesh Receivers would hold the Owners of the *MV Chinese Junk* responsible for the caked and stoned cement.

Whilst she was in Hong Kong, but without disclosing her whereabouts, the Owners demanded that the Charterers issue a LOI in their favour undertaking to indemnify the Owners for all loss they would suffer in the event the vessel was arrested by the Bangladesh

Receivers. The Charterers refused. Whilst they conceded a LOI was due under the Charterparty, they argued that is was in respect of the issue of the second "freight pre-paid" Bill of Lading. The Owners insisted on clausing the second bill of lading as per the Mates' receipts, unless such a LOI was provided. Alternatively, the Owners were prepared to issue "Clean on Board" "Freight Pre-paid" Bills of Lading if the Charterers paid the freight of USD465,000 and deposited a considerable sum of money in an escrow account to be held for the purposes of meeting the Bangladesh Receiver's claims. Although this proposal appeared reasonable, the Charterer was unable to pay the freight or place any moneys in deposit until they had been paid for the cargo by the Bangladesh Buyers. Without a "clean on board" "freight pre-paid" Bill of Lading issued they could not obtain payment under their Letter of Credit. Neither party was willing or indeed able to give in.

The Owners made the first move to break the stalemate. They ordered the vessel to return to the port of Haikou in China. Notwithstanding the fact that "Freight Collect" Bills of Lading had been issued, they sought an Order from the Court in Haikou to exercise a lien on the cargo on the grounds that the freight had not been paid. The Owners remained silent on the cargo's condition and the unclaused Bills of Lading. Accordingly the Court made an Order for the cargo to be sold by auction on 11th December 1996. Notice to show cause why the auction should not proceed was served on the Charterers but not on the Owners of the cargo.

At this stage what action could the Charterer's/Cargo Owners take?

To prevent the cargo being sold the Charterers/Cargo Owners could have gone before the Court and offered to secure the Owner's claim for freight. Once the Ship Owner's claim for freight was secured the vessel would have been free to proceed to the discharge port. Given the Owner's fear of action by the Receiver in Bangladesh for damage to the cargo, there was no guarantee that the Owners would have done so.

If no action was taken to secure the freight claim, the Court would go ahead with the auction and the cargo undoubtedly sold at a knock down price. The Hong Kong Trader, as

owner of at least 50% of the cargo had the right to take action against the Owners of the *MV Chinese Junk* for the breach of their contractual obligation under the Bill of Lading to deliver the cargo to the named destination. These proceedings would have been time consuming and expensive and possibly futile unless secured. They undoubtedly had the right to arrest the vessel and to secure their claim. If they did so, in order to have his vessel released, the Owner of the vessel would have been obliged to provide security for the Hong Kong Trader's Claim.

However unlike in Bangladesh, in order to arrest the vessel they would have had to put up security equivalent to 30 days of demurrage for the vessel. At the Charterparty rate of USD 3,000/- per day would have amounted to USD90,000/-. In addition, the Chinese Courts charge a fee for each case which is calculated out on a percentage of the value of the claim. The Charterer's lawyers also requested security for their charges of USD35,000/- for arresting the vessel.

Unlike the Charterers of the *MV Golden Fountain* the Charterer of the *MV Chinese Junk* had not received payment from its Bangladesh Buyer. Accordingly the Charterers did not take legal action in China and on 12th December 1996 the cargo of cement was auctioned.

Are the Letters of Indemnity demanded above enforceable?

The earliest case in which this issue arose before the English Courts was in *Brown Jenkinson v. Percy Dalton* [(1957) 2 Lloyds List Law Reports 1] which concerned a shipment of orange juice in barrels on board the *MV Titania*.

The MV Titania

In March 1956 Percy Dalton (London) Ltd entered into a contract to sell barrels of orange juice to a Dutch firm. The Dutch company in turn re-sold the cargo to a German company. The consignment was shipped from London to Hamburg on board the German Motor vessel *MV Titania* Owned by the Hamburg-London Linie. The Shippers, Ship

Owners and Dutch Buyers were aware that the barrels in which the Orange Juice was shipped were old, frail and that the juice was leaking on shipment.

The Bills of Lading were claused "received in apparent good order and condition" and issued by the Ship Owner's Agent in London Brown Jenkinson & Co Ltd against the shippers Letter of Indemnity.

At the port of discharge the consignees made a claim for loss in transit. The statement in the Bill of Lading "received in apparent good order and condition" prevented the ship owner from proving against a person who had taken the B/L for value or was presenting it to take delivery of the cargo that the goods were not apparent good order and condition when they were shipped. (*Brandt v Liverpool Brazil and River Plate Steamship Navigation Company.* [1924] 1 KB 575.) The Consignee's claim was paid by Brown Jenkinson & and Co Ltd who sought to recover what they had paid from the Shipper under the LOI. The matter went to court and the shipper Percy Dalton sought to argue, among others, that:

> The letter of indemnity had been issued further to a conspiracy between themselves and the ship owner to misrepresent the condition of the barrels and therefore was unenforceable.

The Ship Owner's Agents succeeded in the Court of first instance. The Shipper appealed and the English Court of Appeal held that the Plaintiffs had made a representation which they knew to be false and which they intended would be relied upon by the persons who received a Bill of Lading: accordingly all the elements of the tort of deceit were present; and that therefore a promise to indemnify the Plaintiff against any loss resulting to them from making the representations was unenforceable.

In finding against the Defendants Lord Justice Morris cited a judgement of Lord Mansfield in *Holman v Johnson* (1775) 1 Cowp. 341:

> "The objection that a contract is immoral or illegal as between plaintiff and defendant sounds at all times very ill in the mouth of the defendant. It is not for his sake that the objection is ever allowed: but it is founded on general principles of policy... The foundation of public policy is this ...No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If from the plaintiff's own stating or otherwise, the cause of action appears to arise ... from the transgression of a positive law of this country, there the Court says he has no right to be assisted. It is

upon that ground that the Court goes; not for the sake of the defendant, but because they will not lend their aid to the plaintiff."

In the light of the decision of the English Court of Appeal in *Brown Jenkinson v Percy Dalton* should the ship owner have been so insistent on the LOI. In both cases and LOI was demanded but not given. In the case of the *MV Rust Bucket* the Charterer sought, in a London Arbitration, to recover the discount of USD 12,500 from the Ship Owner for damages for breach of contract. The Arbitrator held however that the agreement between the parties to falsely date the Bills of Lading the 5th of September was unenforceable.