

LETTERS OF INDEMNITY AT SHIPMENT AND LETTERS OF GUARANTEE AT DISCHARGE

©Prof. William Tetley, Q.C.*

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LETTERS OF INDEMNITY AT SHIPMENT AND LETTERS OF GUARANTEE AT DISCHARGE

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I. Introduction

1) Definition of a letter of indemnity (at shipment)

Letters of indemnity are also known as letters of guarantee and as counter-letters.

In respect to carriage of goods, a letter of indemnity is a written undertaking by a shipper to indemnify a carrier for any responsibility that the carrier may incur for having issued a clean bill of lading when, in actual fact, the goods received were not as stated on the bill of lading.¹

A letter of indemnity is the document by which two parties to a misrepresentation against third parties settle their differences in advance should a third party in the future make a valid claim as a result of the misrepresentation.

The misrepresentation may be of three types:

a) in respect of the actual order and condition of the goods at time of shipment;

b) in respect of the packing when it is in bad order at time of shipment. This latter misrepresentation is more complicated because the actual damage which may ensue from the defective, insufficient or damaged packing is not fixed at the time of the signing of the letter of indemnity. Thus the extent of the commitment of the shipper to the carrier is not known;

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¹ See, for example, the letter of indemnity issued in *United Philippine Lines, Inc. v. Metalsrussia Corp. Ltd.* 1997 AMC 2131 at p. 2133 (S.D. N.Y. 1997), whereby the shippers assumed the following undertaking vis-à-vis the carrier:

“In consideration of your granting and delivering to us, at our request clean bills of lading. . . . We, the undersigned, do hereby undertake to have consignee(s), holder(s) of the above bills of lading or underwriters of the above mentioned cargoes refrain from any [sic] raising claim, based on the above mentioned clean bill of lading, against you in connection with or in any way related to the above mentioned exception(s).

“We further undertake that, should a claim be raised against you . . . we shall protect you and hold you harmless at our cost and expense from any and all such claim(s) and should you be forced to defend, negotiate or settle any such claim, we shall indemnify you immediately upon your request. . . .”

c) letters of indemnity have also been used on rare occasions when original bills of lading have been presumably lost or stolen and duplicate originals are issued.² This is an especially irresponsible procedure. Instead of issuing duplicate bills of lading against a letter of indemnity, the carrier is better advised to insist that a consignee who appears at the time of delivery, without original bills of lading, provide a letter of guarantee from a bank.

2) Definition of a letter of guarantee (at discharge)

A letter of guarantee given at discharge and delivery by a consignee who is unable to surrender original bills of lading which have been issued but lost is not a letter of indemnity (and usually not a document assisting in a misrepresentation or fraud) but rather a security or suretyship agreement. The letter of guarantee is commonly provided by a bank and declares that it will hold the carrier harmless for claims up to a certain sum that may arise from the delivery of goods to a particular person who is unable to surrender the original bills of lading in return for the goods.

3) The purpose of a letter of indemnity (at shipment)

The letter of indemnity results from an attempt by the carrier to satisfy his client, the shipper, whose purpose is to obtain payment of the purchase price of the goods or an immediate documentary credit,³ by issuing to the shipper a document (the clean bill of lading) which he as carrier knows to be incorrect and misleading.⁴

Strong judicial pronouncements abound on the sanctity of the clean bill of lading and the inherent evil of issuing such instruments dishonestly. Wright J., in *United Baltic Corp. v. Dundee Perth & London Shipping Co.*, long ago declared:⁵

“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.”

More recently, the Federal Court of Australia held in *Hunter Grain Pty. Ltd. v. Hyundai Merchant Marine Co. Ltd.*:⁶

² *Nikiforos Zervos v. Sam Houston* 427 F. Supp. 500, 1978 AMC 238 (S.D. N.Y. 1976).

³ Clean bills of lading must ordinarily be tendered to banks in order to permit the issuance of documentary credits. See, for example, the Uniform Customs and Practice for Documentary Credits (“UCP 500”), 1993 Revision, art. 32: “(a) A clean transport document is one which bears no clause or notation which expressly declares a defective condition of the goods and/or the packaging. (b) Banks will not accept transport documents bearing such clauses or notations unless the credit expressly stipulates the clauses or notations which may be accepted.” In the United States, the Uniform Commercial Code regulates documentary credits.

⁴ See, for example, *Agrex S.A. v. Canada (Canadian Dairy Commission)* (1984) 24 B.L.R. 206 (Fed. C. Can.).

⁵ (1928) 32 Ll. L. Rep. 272 at p. 272.

⁶ (1993) 117 ALR 507 at p. 518 (Fed. C. Aust.), citing the third edition of this book at p. 266 and *The Castor* 1930 AMC 1740 at p. 1758 (S.D. N.Y. 1930), where it was held that a bill of lading is a “...document of

“Honesty and integrity in relation to the signing of receipts for goods the subject of bills of lading is essential if persons engaged in international trade are to have any confidence in documents which play such a vital role in relation to the authorization of the payment of money. If receipts are signed dishonestly or in bad faith, the confidence of the international trading community is undermined and a whole system that was designed to work for the benefit and protection of both parties to a transaction such as this will be called into question.”

The same idea (applied in the case of an antedated bill of lading) was echoed forcefully by the Cresswell J. in England in *Standard Chartered Bank v. Pakistan National Shipping Corp. (No. 2)*.⁷

“Antedated and false bills of lading are a cancer in the international trade. A bill of lading is issued in international trade with the purpose that it should be relied upon by those into whose hands it properly comes – consignees, bankers, and endorsees. A bank that receives a bill of lading signed by or on behalf of a shipowner (as one of the documents presented under a letter of credit) relies upon the veracity and authenticity of the bill. Honest commerce requires that those who put the bills of lading into circulation do so only where the bill of lading, as far as they know, represents the true facts.”⁸

The letter of indemnity given by the shipper to the carrier in exchange for the clean bill is usually the central document to a fraud, and has been treated as such by most courts.⁹ As was so boldly stated by Morris L.J., in rejecting a carrier’s claim under such a letter, in *Brown Jenkinson & Co. Ltd. v. Percy Dalton (London) Ltd.*:¹⁰

“On the facts as found, and, indeed, on the facts which are not in dispute, the position was, therefore, that at the request of the defendants the plaintiffs

dignity and courts should do everything in their power to preserve its integrity in international trade for there, especially, confidence is of the essence.”

⁷ [1998] 1 Lloyd’s Rep. 684 at p. 688 (*per* Cresswell J.), upheld [2000] 1 Lloyd’s Rep. 218 (C.A.) and [2003] 1 Lloyd’s Rep. 227 (H.L.).

⁸ In appeal, Evans L.J. ([2000] 1 Lloyd’s Rep. 218 at p. 221 (C.A.)) expressed his concurrence with Cresswell’s J’s statement and added: “This requirement of honest commerce is stringently enforced by the English Courts. If a false bill of lading is knowingly issued by the master or agent of the shipowner, and if the claimant was intended to rely on it as being accurate, did rely upon it and as a result of doing so has suffered loss, the shipowner is liable in damages for the tort of deceit.” See also *Baltic Cotton Co. v. U.S.* 1932 AMC 272 (5 Cir. 1932), an American decision pre-dating U.S. COGSA 1936, which is to a similar effect.

⁹ *Tribunal de Commerce de la Seine*, March 10, 1958, DMF 1958, 414. It was held that the delivery of a clean bill of lading at the request of the shipper, and against the provision of a letter of indemnity by the latter, despite the apparent condition of the merchandise which called for reservations, was a fraud which made the ocean carrier responsible to the consignee and his underwriters. The decision apparently follows the long tradition of the courts of France in respect to counter-letters. See a note of Jean de Grandmaison, DMF 1958, 421, and his reference to the *Cour de Cassation*, July 4, 1927, (Dor. Sup., 5.399), and the *Cour d’Appel de Paris*, November 3, 1925 (Dor. Sup. 3.881).

¹⁰ [1957] 2 Q.B. 621 at p. 632, [1957] 2 Lloyd’s Rep. 1 at p. 9 (C.A.).

made a representation which they knew to be false and which they intended should be relied on by persons who received the bill of lading, including any banker who might be concerned. In these circumstances, all the elements of the tort of deceit were present. Someone who could prove that he suffered damage by relying on the representation could sue for damages. I feel impelled to the conclusion that a promise to indemnify the plaintiffs against any loss resulting to them from making the representation is unenforceable. The claim cannot be put forward without basing it on an unlawful transaction. The promise on 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."

Even when a letter of indemnity is issued in seeming good faith, it can cause confusion and hardship as in the case of the issue of a letter of indemnity exchanged for duplicate original bills of lading when the first originals were purportedly lost.¹¹

4) The effect of a letter of indemnity

A bill of lading is a receipt for goods, a contract to carry those goods and a document of title subject to transfer and endorsement. As such, a bill of lading is a commercial document of dignity¹² and integrity based on good faith. A letter of indemnity, on the other hand, permits a misrepresentation and, in consequence, it should not be invoked against consignees or third parties and, if used against them, it should have no effect. The misrepresentation must, of course, be directly related to the loss or damage complained of.

A number of problems arise from the use of letters of indemnity:

- a) The effect as against third parties and the rights that arise;
- b) The rights and obligations between parties to the letter of indemnity;
- c) Complications which arise when there is damage to the cargo during carriage;
- d) Complications which arise when the carrier is both the charterer and the shipowner taken together and only one of those persons has issued the letter of indemnity

¹¹ *Nikiforos Zervos v. Sam Houston* 427 F. Supp. 500, 1978 AMC 238 (S.D. N.Y. 1976). In this case, the original bills of lading had not been lost but stolen, so that two sets of originals appeared. It would have been better to have put a clause in the second originals to the effect that they had been issued in return for the declaration and guarantee of the shipper that the originals had been lost. Better still, the duplicates should have been non-negotiable. Even with such precautions, two legitimate claimants to the cargo may appear. The best solution would have been to have refused to issue duplicate bills of lading and to have insisted that the consignee appear at discharge and prove his right to the goods as in the case of a non-negotiable waybill. Delivery would then have been made in exchange for a letter of guarantee.

¹² See *The Carso* 1930 AMC 1740 at p. 1758 (S.D. N.Y. 1930).

5) **Condoning letters of indemnity**

Letters of indemnity should not be condoned, by the courts or by commerce; rather they should be discouraged. Recognizing rights even between the parties to a letter of indemnity encourages the commercial use of the document despite the problems that arise when the innocent consignee and his underwriters eventually realize, if they ever do, that the goods at shipment were not as described.¹³ The delays, difficulties and damages caused to the consignee who did not contract to purchase damaged goods, or a lawsuit,¹⁴ can be extensive, just as can be the loss to the underwriter who did not intend to insure already damaged goods.

Most letters of indemnity are entered into by a carrier as a favour to a shipper who has contracted with a third party to provide “clean” bills of lading. As such the letter of indemnity is nothing less than an agreement to defraud a third party. Very, very occasionally, letters of indemnity are issued to settle a dispute between carriers and shippers, but such a settlement should be by some other means than a false bill of lading behind which is hidden a letter of indemnity, written for the sole benefit of the two parties to the dispute.

It is in the writer's experience that, when a claim is ultimately made by the consignee for damaged goods, carriers very often do not reveal the existence of the letter of indemnity. It is even possible that the carrier's claims agent may not know of it. Instead, the carrier will claim in the customary fashion some such exception as peril of the sea or insufficient packing. The existence of most letters of indemnity is only learned by the consignee after suit, either at examination on discovery or at trial. Very often the consignee, or his underwriters, never learn of the existence of the letter of indemnity. This is another particularly nefarious consequence of letters of indemnity.

II. **Letters of Indemnity and the Civil Law**

The civilian attitude towards letters of indemnity is coloured by the general principle of good faith in contract, a doctrine dating back to Roman law¹⁵ which remains a key feature of most, if not all, contemporary civil law legal systems.¹⁶ Good faith in the civil law

¹³ *United Baltic Corp. Ltd. v. Dundee Perth & London Shipping Co. Ltd.* (1928) 32 Ll. L. Rep. 272 at p. 272. Wright J. “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.”

¹⁴ *Brown, Jenkinson & Co. Ltd. v. Percy Dalton (London) Ltd.* [1957] 2 QB. 621 at p. 639, [1957] 2 Lloyd's Rep. 1 at p. 13 (C.A.).

¹⁵ See D.J. Ibbetson, *A Historical Introduction to the Law of Obligations*, Oxford University Press, Oxford, 1999 at p. 8. See also W. Tetley, “Good Faith in Contract, Particularly in the Contracts of Arbitration and Chartering”, available on-line at <http://tetley.law.mcgill.ca/comparative/goodfaith.pdf> and the many other authorities cited there.

¹⁶ See, for example, the French Civil Code, art. 1134 c.c.; the Louisiana Civil Code, art. 1759 c.c.; Quebec Civil Code 1994, arts. 6, 7 and 1375 c.c.q.; the German Civil Code, art. 242 c.c.; the Italian Civil Code, art. 1337 c.c.

requires contracting parties to behave honestly, reasonably and fairly, in the negotiation, conclusion and performance of their bargains.¹⁷ As Lord Justice Bingham perceptively commented in *Interfoto Picture Library Ltd. v. Stiletto Visual Programmes Ltd.*:¹⁸

“In many civil law systems, and perhaps in most legal systems outside the common law world, the law of obligations recognises and enforces an overriding principle that in making and carrying out contracts parties should act in good faith. This does not simply mean that they should not deceive each other, a principle which any legal system must recognise; its effect is perhaps most aptly conveyed by such metaphorical colloquialisms as ‘playing fair’, ‘coming clean’ or ‘putting one’s cards face upwards on the table’. It is in essence a principle of fair and open dealing.”

Against the backdrop of this fundamental concern with honesty and fair play in contract, the civil law treats the letter of indemnity as an example of a “counter-letter”,¹⁹ resulting from a “simulation” by the contracting parties. The Quebec Civil Code 1994,²⁰ at art. 1451(1) c.c.q., defines these terms:

“Simulation exists where the parties agree to express their true intent, not in an apparent contract, but in a secret contract, also called a counter-letter.”

The Louisiana Civil Code makes a fine distinction between simulation and counter-letters at art. 2025:

“A contract is a simulation when, by mutual agreement, it does not express the true intent of the parties.
If the true intent of the parties is expressed in a separate writing, that writing is a counter-letter.”

Applying the overarching civilian principle of good faith in contract,²¹ the civil law has generally taken the position that counter-letters, such as letters of indemnity in the

¹⁷ See J. Pineau, D. Burman & S. Gaudet, *Théorie des Obligations*, 4 Ed., Éditions Thémis, Quebec, 2001 at p. 37: “*Une personne agit de bonne foi s’il adopte dans ses relations avec autrui une attitude honnête, loyale et raisonnable, c’est-à-dire le comportement qu’aurait adopté dans les circonstances le bon citoyen, l’honnête homme.*” (translation): “A person acts in good faith if he adopts in his relationships with others an honest, fair and reasonable attitude; that is to say, the behaviour which the good citizen, the honest man, would have adopted under the circumstances.”

¹⁸ [1988] 1 All E.R. 348 at 352 (C.A.).

¹⁹ M. Rémond-Gouilloud, *Droit Maritime*, 2 Ed., 1993, para. 544.

²⁰ S.Q. 1991, c. 64, in force January 1, 1994.

²¹ See A. Vialard, *Droit Maritime*, 1997 at para. 443, stating that letters of indemnity “... *si elles ne sont pas toujours dictées par une volonté de fraude aux droits des tiers... sont cependant souvent suspectes et contraires à la morale des affaires et à la bonne foi: il s’agit de tromper la confiance de ceux à qui sera présenté un connaissance net, alors que le connaissance aurait dû comporter des réserves sur l’état, la qualité ou la quantité de la marchandise qui y est décrite.*” (translation): “... if they are not always dictated by an intention to defraud third parties... [letters of indemnity] are nevertheless often suspect and contrary to business ethics and good faith: their purpose is to deceive those to whom a clean bill of lading will be

carriage of goods by sea,²² have effect between the parties,²³ but not *against* third parties.²⁴

Art. 1321 c.c. (France) and art. 1321 c.c. (Belgium)²⁵ read in translation:²⁶

“Counter-letters are effective only between the contracting parties; they are not effective *against* third parties.” [Emphasis added].

Thus, the shipper and the carrier may take suit against one another to enforce the counter-letter, but may not invoke it against third parties.²⁷ On the other hand, third parties would seem to be able to invoke the counter-letter against the parties to it.²⁸ For example, they could use the letter of indemnity (a counter-letter) as evidence that the bill of lading should have been claused and that the goods were not “in good order and condition” as described when the bill was issued.

III. Letters of Indemnity and the Common Law

Although the common law, unlike the civil law, never developed, and continues to be sceptical about introducing, any general principle of good faith in contract,²⁹ it has on

presented, whereas the bill of lading should have included qualifications as to the condition, quality or quantity of the goods there described.”[Emphasis added].

²² Vialard, *ibid.*, treats letters of indemnity as counter-letters, subject to the principles of art. 1321 c.c. (France).

²³ See, however, the Louisiana Civil Code, which distinguishes between “absolute simulation”, where the simulation has no effect between the parties because they did not intend it to have any (art. 2026 c.c.), and “relative simulation”, which is intended to produce effects between the parties, though different from those recited in the simulated contract; such effects are then produced if all the requirements of the contract actually intended have been met (art. 2027 c.c.). The Italian Civil Code, art. 1414 c.c., second para., is similar to art. 2027 c.c. (Louisiana).

²⁴ Note, however, that under the Quebec Civil Code 1994, art. 1452 c.c.q., third parties in good faith may, according to their interest, avail themselves of the apparent contract or the counter-letter; however, where conflicts of interest arise between them, preference is given to the person who avails himself of the apparent contract. See also the Louisiana Civil Code, art. 2028 c.c., first para., providing that: “Any simulation, either absolute or relative, may have effects as to third persons.”

²⁵ Adopted in France and Belgium in 1804.

²⁶ “*Les contre-lettres ne peuvent avoir leur effet qu'entre les parties contractantes; elles n'ont point d'effet contre les tiers.*” See also art. 1165 c.c. (France & Belgium). The Louisiana Civil Code, adopted in 1985, has more elaborate provisions at arts. 2025-2028 c.c. Art. 2028 c.c., second para., distinguishes between third parties in good faith and bad faith. “Counter-letters can have no effects against third persons in good faith.” That counter-letters can have no effect against third parties “in good faith”, is understood under most other codes. The good faith of the third party is also expressly mentioned, however, in the Italian Civil Code at arts. 1415 c.c., first para., and art. 1416 c.c., first para. The German Civil Code (the *Bürgerliches Gesetzbuch*), at art. 117 (2), states merely that: (translation): “ If one legal transaction is hidden by a sham transaction, the provisions applicable to the hidden legal transaction apply.”

²⁷ A. Vialard, *Droit Maritime*, 1997 at para. 443.

²⁸ See art. 1415 c.c., second para., of the Italian Civil Code, which expressly permits third parties to assert the simulation against the contracting parties when it prejudices their rights.

²⁹ See generally Tetley, “Good Faith in Contract, Particularly in the Contracts of Arbitration and Chartering”, available on-line at <http://tetley.law.mcgill.ca/comparative/goodfaith.pdf>.

occasion espoused a view of contractual performance rooted in morality, legality and public policy. This view is clearly directed at upholding and promoting the values of honesty and fair dealing as between contracting parties and as regards third parties likely to be affected by their transactions.

Perhaps the clearest statement on immoral or illegal contracts under the common law, and the refusal of the courts to lend aid to either of the parties to them, was made by Lord Mansfield in *Holman v. Johnson*.³⁰

“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, however, that the objection is ever allowed; but it is founded in general principles of policy, which the defendant has the advantage of, contrary to the real justice, as between him and the plaintiff, by accident, if I may so say. The principle of public policy is this; *ex dolo malo non oritur actio*. 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 *ex turpi causa*, or 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 the Court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff.”

After making such a broad, sweeping, high-minded declaration of law, Lord Mansfield unfortunately proceeded to make a narrow, hair-splitting distinction in the example he gave.³¹ If a vendor of lace or tea in Paris sells his product to a purchaser in Dunkirk, which product the vendor knows is for subsequent illegal entry into England, the sale is valid under French law. English courts will therefore recognize the French transaction and enforce payment of the sale's price. An English court would not enforce the contract, however, if it were made for delivery in England. Lord Mansfield, in effect, draws a very fine line as to what the transaction actually was, so that he may ignore the real *intention* of the parties and the knowledge of the vendor that the lace is for illegal entry into England.³²

A better statement of the law is found in *Alexander v. Rayson*.³³

“It is settled law that an agreement to do an act that is illegal or immoral or contrary to public policy, or to do any act for a consideration that is illegal,

³⁰ (1775) 1 Cowp. 341 at p. 343, 98 E.R. 1120 at p. 1121.

³¹ *Ibid.* 1 Cowp. at p. 344, 98 E.R. at p. 1122.

³² Lord Mansfield, a Scot with a sound knowledge of Roman law, as well as French civil and commercial law, attempted to introduce a general principle of good faith into the common law of contract, as is seen in his famous decision in *Carter v. Boehm* (1766) 3 Burr. 1905; 97 E.R. 1162. The task was never completed, however, owing to the rise of *laissez-faire* economic liberalism, which Mansfield also favoured, and which proved to be incompatible with so “paternalistic” a concept as good faith. See P.S. Atiyah, *The Rise and Fall of Freedom of Contract*, Clarendon Press, Oxford, 1979 at p. 168.

³³ [1936] 1 K.B. 169 at p. 182 (C.A.).

immoral or contrary to public policy, is unlawful and therefore void. But it often happens that an agreement which in itself is not unlawful is made with the *intention* of one or both parties to make use of the subject-matter for an unlawful purpose, that is to say a purpose that is illegal, immoral or contrary to public policy ... In such a case any party to the agreement who had the unlawful intention is precluded from suing upon it. *Ex turpi causa non oritur actio*. The action does not lie because the Court will not lend its help to such a plaintiff.” [Emphasis added]

In other words, the parties to an agreement to commit an illegal act (the issue of a clean bill of lading when the goods are not in good order) should not be permitted to make claims against one another on the basis of that agreement.³⁴

IV. Letters of Indemnity and the Hague and Hague/Visby Rules

Art. 3(3) of the Hague and Hague/Visby Rules calls upon the carrier to issue a bill of lading properly describing the goods. Art. 3(8) forbids any agreement whereby the carrier's responsibilities under the Rules are reduced and, in consequence, a letter of indemnity would be “null and void and of no effect”.³⁵

Nevertheless, art. 3(3) reads: “the carrier ... *shall, on demand of the shipper, issue to the shipper a bill of lading ...*” (Emphasis added). This, it could be argued, means, in the case of a letter of indemnity, that an exact and honest bill of lading had *not* been requested by the shipper, and thus it would be further argued that the issue of the intentionally erroneous and misleading bill of lading was not a violation of art. 3(3) and art. 3(8).

The foregoing is a sophistry. The insistence on the issue of bills of lading descriptive of the true condition of the goods under the Hague and Hague/Visby Rules is to protect third parties and the world of commerce in general and not merely the immediate parties to the bill of lading. In any case, the resulting bill of lading, being a fraud, could not be used in evidence *against* a third party. This interpretation is now found in *new* art. 3(4) of the Hague/Visby Rules, whereby proof to contradict a bill of lading is not admissible against a good faith bill of lading holder.

³⁴ Lord Mansfield was cited and relied on by Lord Justice Morris in *Brown, Jenkinson & Co. Ltd. v. Percy Dalton (London) Ltd.* [1957] 2 Q.B. 621 at pp. 637-638, [1957] 2 Lloyd's Rep. 1 at p. 12 (C.A.). The decision of Pearce L.J. in the same case (Q.B. at pp. 639-640, Lloyd's Rep. at p. 13) also cites *Alexander v. Rayson*.

³⁵ *Hellenic Lines, Ltd. v. Chemoleum Corp.*, 36 A.D. (2d) 944, 321 N.Y.S. (2d) 399, 1971 AMC 2605 (N.Y. Supr. Ct., App. Div. 1971). A letter of indemnity was unanimously held to be without effect by art. 3(8), and although the carrier could not take suit on the indemnity agreement, a majority of the Court (4-1) held that the carrier could take suit in negligence against the shipper and use the letter of indemnity as evidence. The dissenting judge would have permitted the carrier to sue on the letter of indemnity in contract. For critical commentary, see C.A. Anderson, “Time and Voyage Charters: Proceeding to Loading Port, Loading, and Related Problems” (1975) 49 Tul. L. Rev. 880 at pp. 895-897.

Art. 3(5) of the Hague and Hague/Visby Rules provides that the shipper is deemed to have guaranteed to the carrier the accuracy at the time of shipment of the marks, number, quantity and weight of the cargo, as furnished by the shipper. The provision also grants the carrier a *statutory* right of indemnity against the shipper for loss, damages or expenses incurred by the carrier as a result of inaccuracies in those particulars, without limiting the carrier's responsibility and liability under the contract of carriage to any other person.³⁶ This statutory right of indemnification does not, however, extend to inaccuracies as regards the condition of the goods.³⁷

Some civil law jurisdictions have incorporated the estoppel concept of the Hague/Visby or Hamburg Rules into their national law and some have enacted rules on letters of indemnity as well. Germany, for example, by virtue of art. 656, second para., of its Commercial Code,³⁸ provides that the bill of lading creates a presumption that the goods have been taken in charge by the carrier in apparent good condition as described therein. The presumption is rebuttable unless the bill of lading has been transferred to a third party in good faith.³⁹ This is in effect a codification of art. 3(4) of the Hague/Visby Rules, although technically Germany is still party to the Hague Rules only.

The Chinese Maritime Code 1993 similarly provides that the goods shall be deemed to be in apparent good order and condition if the carrier or other person issuing the bill of lading on his behalf made no note on the bill regarding their apparent order and condition (art. 76). Except for such a note, the bill of lading is *prima facie* evidence of the taking over or loading by the carrier of the goods as described therein. Proof to the contrary by the carrier is inadmissible if the bill of lading has been transferred to a third party, including a consignee, who has acted in good faith in reliance on the description of the goods contained in the bill (art. 77). The reference to good faith reliance in effect codifies the corresponding provision of the Hamburg Rules (art. 16(2) and (3)).

The Nordic countries (Denmark, Finland, Norway and Sweden), in their common Maritime Code which came into force on October 1, 1994, stipulate that once a party in good faith has acquired a bill of lading in reliance on the statements in it, proof to the contrary is inadmissible.⁴⁰

³⁶ See also the Chinese Maritime Code 1993 at art. 66, which, however, also requires the shipper to have the good properly packed and further requires him to indemnify the carrier for any loss resulting from inadequacy of packing.

³⁷ J.F. Wilson, *Carriage of Goods by Sea*, 4 Ed., 2001 at p. 132; Treitel & Reynolds, eds., *Carver on Bills of Lading*, 2001 at para. 9-152; Gaskell, Asariotis & Baatz, *Bills of Lading: Law and Contracts*, 2000 at para. 7.97.

³⁸ *Handelsgesetzbuch*, art. 656, second para.

³⁹ See R. Herber, "German Law on the Carriage of Goods by Sea" in *New Carriage of Goods by Sea*, H. Honka, ed., Institute of Maritime and Commercial Law, Åbo Akademi University, Finland, 1997, 343-369 at p. 350.

⁴⁰ See, for example, the *Sjölagen/Swedish Maritime Code 1994* (updated to June 30, 2000), published in Swedish and English by the Axel Ax:son Johnsons Institut för Sjö rätt och Annan Transorträtt, no. 22, Jure AB, Stockholm, 2000, chap. 13, sect. 49, third para. This provision is similarly numbered in the Finnish version of the common Maritime Code, but is found at art. 299 in the Danish and Norwegian versions, which have a different numbering system from the Swedish and Finnish versions.

V. Letter of Indemnity and Third Parties

A letter of indemnity is a corollary to a fraud on a third party and cannot be invoked against a third party in good faith who, on the contrary, may use the letter as evidence of the bad order and condition of the goods. Although the damage may not have taken place in the hands of the carrier, the latter is *estopped* from attempting to prove pre-shipment damage as against the consignee.⁴¹ The foregoing principle, drawn from the reported cases, is codified into the Hague/Visby Rules at new art. 3(4), second para., which reads:

“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.”

In the United States, by the *Pomerene Act* 1916/1994,⁴² a common carrier issuing a bill of lading is liable for damages caused by nonreceipt by the carrier of any part of the goods by the date shown in the bill of lading or by failure of the goods to correspond with the description contained in the bill. The carrier is liable to the owner of goods transported under a nonnegotiable bill (subject to the right of stoppage in transit) or to the holder of a negotiable bill if the owner or holder gave value in good faith relying on the description of the goods in the bill or on the shipment being made on the date shown in the bill.⁴³ This provision in effect goes farther than art. 3(4) of the Hague/Visby Rules, inasmuch as the carrier who issues a clean bill is estopped from denying not only the description (i.e. apparent good order) of the goods, but also their date of receipt for shipment⁴⁴.

Some examples of the estoppel are as follows. In *Continex, Inc. v. S. S. Flying Independent*,⁴⁵ it was held that:

“When a carrier issues a clean bill of lading for goods manifestly damaged he is estopped to deny the assertion against a purchaser of the bill of lading who has been misled to his damage by reliance on the representation. But the misrepresentation must relate to the damage.”

⁴¹ This is not the merely “*prima facie evidence*” burden of proof of art. 3(4) first para.

⁴² 49 U.S.C. 80111-80116.

⁴³ 49 U.S.C. 80113(a), formerly sect. 22 of the original *Pomerene Act* 1916.

⁴⁴ This *Pomerene Act* provision also goes further than the U.K.’s *Carriage of Goods by Sea Act 1924*, U.K. 1924, c. 50, sect. 4, and the Canadian *Bills of Lading Act*, R.S.C. 1985, c. B-5, sect. 3. Those latter provisions make the bill of lading issued by the master or by a person having the express, implied or apparent authority of the carrier to sign such documents, conclusive evidence against the carrier (in the U.K.) or the master (in Canada) of the shipment of the goods, or, as the case may be, of their receipt for shipment, in favour of lawful holders of the bill. These provisions create an estoppel only with respect to the shipment or receipt for shipment of the quantity of the cargo covered by the bill of lading, and, unlike the *Pomerene Act*, do not extend to the description (condition) of the goods, or to the date of their receipt for shipment. Nor do they specify the liability of the carrier expressly as does the U.S. statute. In addition, the U.K. statute applies only to negotiable bills of lading (see sect. 1(2)), whereas the U.S. provision applies to both negotiable and non-negotiable bills. The estoppel rule of art. 3(4) of the Hague/Visby Rules therefore remains important in the U.K. and Canada as regards the condition of the goods.

⁴⁵ 106 F. Supp. 319 at p. 321, 1952 AMC 1499 at pp. 1501-1502 (S.D. N.Y. 1952).

The point was reiterated in *Trade Arbed, Inc. v. M/V Swallow*.⁴⁶

“A bill of lading is prima facie evidence that the carrier received the goods as described therein and creates a rebuttable presumption that the goods were delivered to the carrier in good condition.... If a cargo owner purchases the cargo in reliance on a clean bill of lading, then a carrier is estopped from offering evidence of the cargo’s pre-shipment condition.”

A Netherlands Court⁴⁷ held in respect to a bill of lading from Constanza to Rotterdam subject to Roumanian law that the master who issues a bill of lading in the following terms: “weight of the cargo unknown to the master” will nevertheless be held liable for a quasi-delictual act (tort) to the holder in good faith where it is obvious from the letter of indemnity that the bill of lading refers to an inaccurate weight.

In *Demsey & Assocs. v. S.S. Sea Star*,⁴⁸ steel coils were rusted at the time of loading but clean bills of lading were issued against a letter of indemnity. The Second Circuit held that:

“Whereas the sixty-four coils may have been excessively rusted and pitted at the time of loading, defendants are estopped from asserting this because Interstate (the consignee) had no knowledge of this condition, and clean bills of lading were

In *Hunter Grain Pty Ltd. v. Hyundai Merchant Marine Co. Ltd.*, where Hyundai, as time charterer had issued clean bills of lading at the request of the voyage sub-charterer in return for a letter of indemnity, the Federal Court of Australia held that:⁴⁹

“Hyundai cannot therefore be heard to deny that the goods were received on board in apparent good order and condition. The fact that they were not due to no fault of Hyundai is not to the point. The case is one in which Hyundai agreed safely to carry goods received by it in apparent good order and condition to Australia. They arrived in a damaged condition for which, on the

⁴⁶ 688 F. Supp. 1095 at p. 1106, 1989 AMC 2218 at p. 2222 (E.D. La. 1988), citing *Cummins Sales & Service, Inc. v. London & Overseas Ins. Co.* 476 F.2d 498 at pp. 500-501, 1973 AMC 2047 at p. 2050 (5 Cir. 1973), cert. denied, 414 U.S. 1003, 1974 AMC 1889 (1973). See also *Canastrand Industries Ltd. v. The Lara S* [1993] 2 F.C. 553 at p. 574, (1993) 60 F.T.R. 1 at p. 15 (Fed. C. Can. *per* Reed J.): “In my view, the law seems clear that when a buyer of goods takes up a clean bill of lading it is presumed, in the absence of evidence to the contrary, that reliance was placed on it”, citing *Silver v. Ocean Steamship Co.* [1930] 1 K.B. 416 at pp. 428 and 441 (C.A.).

⁴⁷ *Gerechishof te Amsterdam*, March 4, 1976, [1976] ETL 674.

⁴⁸ 461 F.2d 1009 at p. 1015, 1972 AMC 1440 at p. 1448 (2 Cir. 1972). See also *Copco Steel & Engineering Co. v. SIS Alwaki*, 131 F. Supp. 332, 1955 AMC 2001, (S.D. N.Y. 1955); *Copco Steel & Engineering Co. v. Prins Frederik Hendrik*, 129 F. Supp. 469, 1955 AMC 2052 (E.D. Mich. 1955); *Copco Steel & Engineering Co. v. The Prins Willem Van Oranje*, 159 F. Supp. 79, 1958 AMC 532 (E.D. Mich. 1957); *Empresa Central Mercantil de Representacoes Ltda. v. Republic of the United States of Brazil* 147 F. Supp. 778, 1957 AMC 218 (S.D. N.Y. 1957).

⁴⁹ (1993) 117 ALR 507 at pp. 525-526 (Fed. C. Aust.).

basis upon which I am now dealing with the case, there was no explanation. Hyundai is thus liable under s 3 of the United States Act [COGSA]. It cannot discharge the onus which rests upon it under s 4 of the Act of showing that the case comes within one or more of the exemptions for which s 4(2) provides. The estoppel prevents it from relying on this evidence. The plaintiff is thus entitled to succeed against Hyundai on its contractual claim as well as on its claim based on fraud.”

There must, of course, be a relationship between the misrepresentation in the bill of lading relied upon by the plaintiff and the damage discovered at outturn.⁵⁰

As the above decisions point out, courts have properly protected the innocent third party, usually the consignee, from the more egregious consequences of the letter of indemnity. The courts have not, however, gone far enough; they should hold that, as to third parties, the letter of indemnity constitutes a fundamental breach of the contract, depriving the carrier of its defenses under the contract and the law.

VI. Letter of Indemnity and the Package Limitation

A carrier should not be permitted to benefit from the package or kilo limitation as against a third party for pre-shipment damage (or for damage resulting from the pre-shipment condition of the packing) when a letter of indemnity has been issued in exchange for a clean bill of lading. Such damage was not incurred during the contract of carriage but, rather, prior to shipment, and was not what the third party purchased either FOB or CIF. The package limitation only applies to damage during carriage. Another way of looking at the problem is to deem the false bill of lading to be a fundamental breach of the contract (quasi-deviation in the United States) which causes the carrier to lose the defences of the contract and the law including the package or kilo limitation.

The internal French Law of June 18, 1966 at art. 20, second para., specifically causes the carrier (who has received a letter of indemnity in exchange for failing to notate a bill of lading) to lose the package limitation in his defence against a claim of a third party.

Under the Nordic Maritime Code 1994, the carrier similarly loses his right to limitation if the bill of lading contains misleading statements which the carrier realized or ought to have realised were misleading, and if a third party suffers loss through the negotiation of the bill on the faith of the statements being correct. The carrier is also required to declare on the receiver's demand whether the sender has agreed to indemnify the carrier for incorrect or incomplete statements (i.e. by way of a letter of indemnity) and, if so, to provide the letter to the receiver.⁵¹

⁵⁰ See *Atlantic Mutual Ins. Co. v. M/V President Tyler* 765 F. Supp. 815 at p. 818, note 2 (S.D. N.Y. 1990): “In order for a bill of lading to be void because of misrepresentations, the misrepresentations must go to the very essence of the contract.”

⁵¹ See the Swedish/Finnish version of the Nordic Maritime Code 1994, at chap. 13, sect. 50, and the Danish/Norwegian version at art. 300.

VII. Letter of Indemnity and Subsequent Damage

A different problem arises when damaged cargo is loaded on board, a clean bill of lading is issued, the shipper provides a letter of indemnity, and then during the voyage further damage is done. The courts are hard pressed to distinguish between the first damage and the subsequent damage. As a result, the courts have often dealt severely with carriers who have issued clean bills of lading against letters of indemnity.

In *Copco Steel & Eng. Co. v. S.S. Alwaki*,⁵² a clean bill of lading was given in return for a letter of indemnity although the bundles of steel had “light atmospheric rust”. In the subsequent, and inevitable, lawsuit the purchaser of the goods recovered even the cost of removing heavier, flaking damage. One gathers that the Court, because of the letter of indemnity, was very unsympathetic to the carrier in respect to the additional damage.

In the *Empresa Central Mercantil de Representacoes Ltda. v. Republic of the United States of Brazil*,⁵³ clean bills of lading were issued against a letter of indemnity. The carrier claimed that further damage to the cargo took place later on, for which it was not responsible. The Court pointed out that:

“The impact of the record in this case leaves me with two firmly rooted impressions: that the respondent was a party to the deception practiced on the libellant, and that respondent has thrust libellant into this litigation as a direct consequence of that deception. If the measure of damages can be said to be less than perfect it is because of respondent's wrongdoing and it has no standing to complain.”

Considerable confusion and hardship may also arise when there is a transshipment and a letter of indemnity is issued by the first carrier to the second carrier in return for a clean bill of lading.⁵⁴

VIII. Charterer and Vessel Owner

Another difficult problem arises if the charterer issues clean bills of lading against a letter of indemnity and the vessel owner is not a party to the fraud and would not have tolerated such a fraud.

The vessel owner and the charterer are usually together liable to cargo interests for damage during the voyage because the voyage is considered a joint venture under the

⁵² 131 F. Supp. 332, 1955 AMC 2001 (S.D. N.Y. 1955).

⁵³ 147 F. Supp. 778 at p. 781, 1957 AMC 218 at p. 222 (S.D. N.Y. 1957).

⁵⁴ *United Baltic Corp., Ltd. v. Dundee, Perth & London Shipping Co. Ltd.* (1928) 32 L1. L. Rep. 272.

Hague and Hague/Visby Rules. The charterer and the owner, except under a demise charter, divide the various responsibilities of a carrier.⁵⁵

In *Interstate Steel Corp. v. S.S. Crystal Gem*,⁵⁶ where the charterer issued clean bills of lading against a letter of indemnity and the master did not sign the bills of lading (it is not clear if he refused), the district court held:

“Under these circumstances, it would be inequitable to impose primary liability on shipowner, and so I find charterer primarily liable for the damage sustained by excessive rusting, with shipowner entitled to a decree over against charterer should it be required to answer for such damage.”

In *Cargill Ferrous Int'l, A Division of Cargill Inc. v. M/V Sukarawan Naree*,⁵⁷ the shipowner was not privy to, and therefore was not bound by, a letter of indemnity given by the voyage sub-charterer to the time charterer, in return for clean (and backdated) bills of lading, in order to secure appropriate letters of credit.⁵⁸

In *Hunter Grain Pty Ltd. v. Hyundai Merchant Marine Co. Ltd.*, the false bill of lading issued by the time charterer's agent to the voyage sub-charterer/shipper at the latter's request similarly engaged the time charterer's liability for fraud towards the plaintiff consignee, but not that of the shipowner, whose conduct had not be deceitful.⁵⁹

The foregoing is the fair and proper position for the court to have taken. The owner and charterer are usually acting together as the carrier in the joint venture and so should be jointly responsible to a third party under a letter of indemnity, although the charterer should indemnify the shipowner for any loss. That, in fact, is the position taken by the Federal Court of Appeal of Canada in *Canficorp. v. Cormorant Bulk-Carriers*.⁶⁰

IX. Carrier v. Shipper

1) Introduction

Because a letter of indemnity is a contract corollary and necessary to effectuate a misrepresentation (a clean bill of lading issued for damaged goods), one must ask

⁵⁵ See W. Tetley, *Marine Cargo Claims*, 3 Ed., Les Éditions Yvon Blais, Inc., Montreal, 1988, Chap. 10, “Whom To Sue”, and the preliminary version of that chapter in the forthcoming 4 Ed., to be published in 2007, available on-line at <http://tetley.law.mcgill.ca/maritime/ch10.pdf>.

⁵⁶ 317 F. Supp. 112 at p. 121, 1970 AMC 617 at p. 626 (S.D. N.Y. 1970).

⁵⁷ 1998 AMC 566 at p. 571 (E.D. La. 1997).

⁵⁸ Moreover, neither the shipowner nor the time charterer was bound by the clean (and backdated) bills of lading issued in this case by the agent of the voyage sub-charterer, because those bills were not in conformity with the mate's receipts, thereby violating the stipulations of both the time charter and the voyage sub-charter, as well as the terms of the letter from the master authorizing the voyage sub-charterer's agent to issue bills of lading on his behalf. The Court (*ibid.* at p. 572) criticized this “... surreptitious attempt to subject the vessel owner to in personam liability for cargo damage.”

⁵⁹ (1993) 117 ALR 507 at p. 525 (Fed. C. Aust.).

⁶⁰ 1985 AMC 1444 (Fed. C.A.).

whether the letter has effect between the carrier and the shipper. In other words, may a party to a misrepresentation or fraud against a third party use the document against the other party to the fraud? The answer is that the courts have for the most part said “Yes” in the past, but with reluctance and within strict limits. More recently, however, the answer has been “No”, particularly in civil law jurisdictions where the letter of indemnity is increasingly treated by statute and case-law as null and void and contrary to public order.

The dilemma arises because both the carrier and the shipper are parties to the same fraud, and if the carrier is not permitted to invoke the letter of indemnity against the shipper because of the fraud, the shipper (who is also a party to the fraud) is, thus, indirectly permitted to benefit by that fraud. On the other hand, treating letters of indemnity as unenforceable by the carrier against the shipper should discourage carriers from accepting such letters in the first place and thus forestall such fraud before it is committed.

2) Various decisions

At first, the Court of Appeal, in *Ben Line v. Joseph Heureux*,⁶¹ recognized the agreement between the shipper and the carrier (the letter of indemnity) and permitted the carrier to sue the shipper. It was held, however, that the exact terms of the letter of indemnity applied and no more. “Several bundles dirty before shipment” did not include wet staining of the whole shipment; the carrier could claim as against the shipper for only a few dirty bundles and not for those which were wet.

In *Brown, Jenkinson & Co. Ltd. v. Percy Dalton (London) Ltd.*,⁶² the trial court had held the shipper responsible to the carrier because although the parties had conspired to make a false statement on the bill of lading, there was no tort of deceit, since the parties did not sustain any loss as a result of such conspiracy. The Court of Appeal⁶³ held that the clean bill of lading was a misrepresentation and was the consideration for the letter of indemnity: “An agreement is illegal and unenforceable if it has as its object the commission of a tort.”⁶⁴ The letter of indemnity, therefore, could not be relied on by the carrier as against the shipper.

In *Hellenic Lines v. Chemoleum Corp.*⁶⁵ the New York Supreme Court, on appeal, disallowed (4 to 1) the carrier's right to rely on the letter of indemnity issued by the shipper when suing the shipper. The Court held that the letter of indemnity is:

“... barred by statute (46 U.S. Code, sect. 1303(8)). Though it may be said that the interdiction of this type of agreement has nothing to do with a private arrangement for indemnity directly between the parties, not involving an eventual consignee - as this claim for damage does not - the very agreement

⁶¹ (1935) 52 Ll. L. Rep. 27 at p. 32.

⁶² [1957] 1 Lloyd's Rep. 31.

⁶³ [1957] 2 Lloyd's Rep. 1.

⁶⁴ *Ibid.*, at p. 6.

⁶⁵ 1971 AMC 2605 at p. 2606, [1972] 1 Lloyd's Rep. 350 at p. 350. (N.Y. Supr. Ct. App. Div. 1971).

contravenes public policy as expressed in the statute, and should not be enforced.”

But the court then relented somewhat and added that the carrier could “proceed on the theory of negligence, using, if desired, the indemnity document as an admission.”⁶⁶

Steuer J., in dissent, relying on *Duval v. Wellman*,⁶⁷ believed that the carrier could take suit against the shipper, based on “our general rule as to a plea of illegality - that the more innocent party is not affected.”⁶⁸

A completely different approach was taken in *United Philippine Lines, Inc. v. Metalsrussia Corp. Ltd.*,⁶⁹ where the Court held that the suit of the plaintiff shipowner against the defendant voyage charterer/shipper based on the letter of indemnity issued by the charterer in return for a clean bill of lading, was not a maritime contract falling within U.S. admiralty jurisdiction under Federal Rule of Civil Procedure 12(b)(1).⁷⁰ The Court ruled that: 1) the claim did not relate to maritime services or transactions, nor did it relate directly to the vessel or cargo, but rather was based on an agreement separate from the charterparty, and one concluded after the charter had been negotiated; 2) there was no supplemental admiralty jurisdiction over the claim, because the shipowner had not asserted the claim in an indemnity action in the cargo damage suits of the consignee and the cargo underwriter, but rather in a completely separate suit against the charterer; and 3) the indemnity agreement was not essential to the execution of the charterparty as a maritime contract.

German courts do not permit the enforcement of letters of indemnity against the shipper, because such letters are held to be null and void under German law.⁷¹

Under the Nordic Maritime Code 1994, if the sender⁷² has undertaken to indemnify the carrier for loss which arises from the issue of a bill of lading with incorrect statements

⁶⁶ *Ibid.*, 1971 AMC at p. 2606, [1972] 1 Lloyd's Rep. at p. 351. For a criticism of the *Hellenic Lines* decision, see C.A. Anderson, “Time and Voyage Charters: Proceeding to Loading Port, Loading, and Related Problems” (1975) 49 Tul. L. Rev. 880 at pp. 895-897. The civil law also appears to permit the carrier to use the letter of indemnity against the shipper as an admission to prove that the loss or damage really resulted from the act or fault of the shipper for which the carrier is exonerated by the Hague and Hague/Visby Rules. See *Hov van Cassatie van België*, January 31, 2003, [2003] ETL 197.

⁶⁷ 124 N.Y. 156 at p. 160 (1891).

⁶⁸ *Supra*, 1971 AMC at p. 2607, [1972] 1 Lloyd's Rep. at p. 351.

⁶⁹ 1997 AMC 2132 at pp. 2136-2137 (S.D. N.Y. 1997). The Court further found that the defendant charterer was not subject to personal jurisdiction under Federal Rule of Civil Procedure 12(b)(2).

⁷⁰ Federal Rules of Civil Procedure, Rule 12(b)(1) provides: “Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion:

(1) lack of jurisdiction over the subject matter,”

⁷¹ See R. Herber, “German Law on the Carriage of Goods by Sea” in H. Honka, ed., *New Carriage of Goods by Sea*, Institute of Maritime and Commercial Law, Åbo Akademi University, Finland, 1997 at p. 350.

⁷² The Nordic Maritime Code 1994 distinguishes between the “sender”, being the party who enters into a contract with a carrier for the carriage of general cargo by sea, and the “shipper”, being the person who

or without reservations, he is nevertheless not liable to the carrier if this has been done with intent to mislead a holder in due course of the bill.⁷³ Thus the Nordic legislator has, in effect, prohibited carriers from relying on letters of indemnity against contracting shippers who have used such instruments to perpetrate a fraud on third parties.

The position in France is not perfectly clear. At one time, the carrier was permitted to sue the shipper under a letter of indemnity.⁷⁴ More recently, however, it has been held, relying on the second para. of art. 20 of Law no. 66-420 of June 18, 1966, that such a letter is null and void as between the shipper and carrier where the defect in the goods not mentioned in the bill of lading is one of which the master knew or should have known when the bill was signed.⁷⁵

Italian courts appear to agree with the more recent French decisions in treating the letter of indemnity as contrary to public order and hence unenforceable.⁷⁶

X. Delay for Suit

The delay for suit between the carrier and a shipper under the Hague Rules in respect to a letter of indemnity or a letter of guarantee has been held to be one year,⁷⁷ but it is submitted that the one-year delay of the Hague and Hague/Visby Rules should not apply. Rather, because the letter is an agreement separate from the contract of carriage evidenced by the bill of lading, the delay should be the normal delay between merchants who make a contract.⁷⁸ This is the position taken in respect to letters of guarantee given at discharge when cargo was delivered to a person not a holder of the original bills of lading.⁷⁹

delivers the goods for carriage. See the Swedish/Finnish version of the Code at chap. 13, sect. 1 and the Danish/Norwegian version at art. 251.

⁷³ See the Swedish/Finnish version of the Code at chap. 13, sect. 51, and the Danish/Norwegian version at art. 301.

⁷⁴ *Tribunal de Commerce de Rouen*, June 24, 1952, DMF 1953, 34. In this case, the former French domestic Law of April 2, 1936 applied, but the principle under that law was the same as it is under the Hague and Hague/Visby Rules.

⁷⁵ *Cour d'Appel de Paris*, November 7, 1988, (*The Patrick-Vieljeux*), DMF 1989, 655, note R. Achard; *Cour d'Appel de Paris*, September 12, 2002 (*The Catharina*), DMF 2002, 665, and in particular the commentary by P. Bonassies, DMF Hors série no. 7, 2003 at para. 71. See also *Cour de Cassation*, February 23, 1983, DMF 1983, 478, note R. Achard; *Cour d'Appel de Montpellier*, April 30, 1981, note A. Vialard. See also E. du Pontavice, "La lettre de garantie dite frauduleuse délivrée par le chargeur au transporteur maritime et le recours du transporteur contre le chargeur", *Bulletin des Transports* 1984, 315.

⁷⁶ See the excerpt from the decision of the Court of Genoa, December 28, 1959, reported, in French translation, in, DMF 1989, 662.

⁷⁷ *Tribunal de Commerce de Rouen*, June 24, 1952, DMF 1953, 34; *Cour d'Appel de Versailles*, November 18, 1994, DMF 1995, 558, note P.-Y. Lucas.

⁷⁸ In most jurisdictions the delay to sue in breach of contract is five, six or ten years.

⁷⁹ *Rambler Cycle Co. Ltd. v. Peninsular & Oriental Steam Navigation Co.* [1985] ETL 557: here the Malaysian court held the delay was six years. *Cour de Cassation*, February 7, 1984, DMF 1985, 25, [1985] ETL 523: here the delay was held to be ten years. See also *Cour de Cassation*, June 17, 1997 (*The Happy Buccaneer*), DMF 1997, 725, rapport Rémercy (10 years); *Cour d'Appel de Rouen*, November 9, 1999, DMF

XI. Special Damages

May a consignee who relied on a clean bill of lading obtain additional or special damages when a fraud has been perpetrated by the carrier and shipper who have been parties to a letter of indemnity? The Hague Rules make no mention of special damages, and the Hague/Visby Rules at new art. 4(5)(b) would seem to rule out penal damages. Neither the Hague nor Hague/Visby Rules really apply, however, because the claim of the consignee for special damages is in tort (or delict) for the fraud committed and should be in a separate action or at least in a separate head of action.

It is therefore possible that a court will grant penal damages or special court costs, or attorneys' fees in order to recompense the consignee for the administrative expense, legal fees, and the difficulties caused by the issue of a clean bill of lading for damaged goods.

The *Tribunal de Commerce de Rouen*⁸⁰ held that the ocean carrier and the shipper who were responsible for fraudulent acts arising from the delivery of a clean bill of lading in return for a letter of indemnity owed additional damages to the consignee for improper (abusive) resistance to the claim in law against them. Judgment was therefore given for damages of 425,061.69 N.F. (approximately \$85,000 U.S.) and for special damages of 50,000 N.F. (approximately \$10,000 U.S.) because of the contestation of the claimant's action.

The view that the consignee is not sufficiently recompensed for the loss resulting from a letter of indemnity by ordinary damages obtained by court action was expressed by Pearce L.J. in *Brown, Jenkinson & Co. v. Percy Dalton*.⁸¹

"It is not enough that the banks or the purchasers who have been misled by clean bills of lading may have recourse at law against the shipowner. They are intending to buy goods, not law suits."

No special damages, however, were considered in this case, because the action was between the carrier and the shipper.

XII. Is a Letter of Indemnity Ever Permissible?

It has been suggested that there are occasions when letters of indemnity may be issued.⁸² In *Brown, Jenkinson & Co. v. Percy Dalton*,⁸³ it was held by Pearce L.J.:

2000, 729, obs. Y. Tassel (approving the ten-year decisions). See also M. Rémond-Gouilloud, *Droit Maritime*, 2 Ed. 1993 at para. 557; Rodière & du Pontavice, *Droit Maritime*, 12 Ed., 1997, para. 358-1.

⁸⁰ February 23, 1962, DMF 1962, 294.

⁸¹ [1957] 2 Lloyd's Rep. 1 at p. 13, [1957] 2 Q.B. 621 at p. 639.

⁸² *Tribunal de Commerce de la Seine*, March 10, 1958, DMF 1958, 414 at pp. 417-418 (translation):

“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 [of issuing a letter of indemnity] is useful.”⁸⁴

Yet even in cases of trivial or *bona fide* disputes the clean bill of lading which does not mention the dispute can cause the unsuspecting consignee (or his subrogated underwriter) considerable difficulties and loss.⁸⁵ In trivial matters and in *bona fide* disputes, the carrier and shipper should settle their disagreement by some means other than the issue of a bill of lading containing a misrepresentation or omission.⁸⁶

XIII. Letter of Indemnity and Antedated Bills of Lading

A shipper sometimes prevails upon a carrier to enter on its bills of lading, a date of loading or of shipment earlier than the true dates when those operations were completed. The purpose of backdating bills of lading in this way is usually to comply with the terms of a documentary letter of credit or a sale of goods contract, requiring the bill of lading to show shipment of the goods by a specified date.⁸⁷ Where shipment by that particular date proves impossible for whatever reason, instead of rearranging the terms of the letter of credit, it is more convenient for the shipper to offer the carrier a letter of indemnity in return for an antedated bill of lading. Such a letter embodies an undertaking by the shipper to hold the carrier harmless against any losses the carrier may sustain as a result of the backdating of the bill. In virtually all cases, this practice is a fraud perpetrated on third party consignees and endorsees of bills of lading (and/or banks) by carriers anxious to

“... this practice is justified notably to avoid delays in the transmission of a valid document or, more generally, when, by reason of the speed of the operations necessary for the normal exploitation of regular ocean lines, it is impossible for the master to verify with rigorous precision the information which the carrier must provide before shipment ... “

⁸³ [1957] 2 Lloyd's Rep. 1 at p. 13, [1957] 2 Q.B. 621 at p. 639.

⁸⁴ A few authors take a similar view that the letter of indemnity should be accepted as valid and enforceable where no fraud is intended. See P. Todd, *Modern Bills of Lading*, Blackwell Law, Oxford, 1990 at p. 88; Xia Chen, “Chinese Law on Carriage of Goods by Sea under Bills of Lading” (1999) 8 Current Int'l Trade L.J. 89 at p. 92.

⁸⁵ See also Bokalli, “*Crise et Avenir du Connaissance*”, DMF 1998, 115 at p. 118, citing R. Rodière, “*Connaissance clean et lettre de garantie*”, Bulletin des Transports 1962, 135.

⁸⁶ An example of a *bona fide* dispute was one which took place in the Federal Court of Canada, Quebec Admiralty District, when a ship was loaded from a government grain elevator and the official National Harbors Board computer gave a very specific number of tons delivered. The Greek shipmaster, however, believed the computer figure was high by 500 tons, based on his own calculations drawn from his readings of the ship's draft, fore and aft, taken before and after loading. The master would not issue clean bills of lading for more than the amount he had calculated, nor would he accept a letter of indemnity. A motion was immediately made to the Federal Court which refused (in an unreported judgment) to order the master to issue the bills of lading with the additional 500 tons. The ship sailed and a few days later the National Harbours Board advised that its computer had been in error by 500 tons!

⁸⁷ See, for example, *The Saudi Crown* [1986] 1 Lloyd's Rep. 261 at p. 262, where the sales contract required bills of lading to dated “...20 June -15 July 1982 without extension the Bills of Lading to be dated when the goods are actually on board. Date of Bills of Lading shall be accepted as proof of date of shipment in the absence of evidence to the contrary.”

accommodate shippers -- a fraud similar to, and no less reprehensible than, giving a letter of indemnity in return for a clean bill covering cargo not in good condition at loading.⁸⁸ P. & I. clubs offer shipowners no cover for this practice, which is nevertheless prevalent in international trade.⁸⁹

Where the third party relies to its detriment on falsely dated bills, it may recover any resulting losses from the carrier on grounds of fraud and conspiracy. In *Standard Chartered Bank v. Pakistan National Shipping Corp. (No. 2)*, for example, the carrier's agent knowingly issued a false, antedated bill of lading, in return for a letter of indemnity, at the behest of the seller/charterer, in order to permit the latter to be paid under a letter of credit. The carrier, its agent and the charterer were held liable to the bank for the tort of deceit.⁹⁰

In *Leather's Best International Inc. v. M/V Sergipe*,⁹¹ the backdating of bills of lading by the carrier was treated as "unreasonable deviation", which, together with the unjustified deck carriage of the cargo in question, caused the carrier to lose the benefit of the U.S. COGSA package limitation of liability.

As with letters of indemnity issued in return for clean bills of lading, indemnity agreements concluded in consideration of the issuance of antedated bills of lading "... may not be legally enforceable if they are part of a fraud on a third party"⁹² (which is the usual case). So indemnity letters would not seem to be enforceable even as between the parties to such agreements where the parties are privy to a scheme to deceive and defraud banks, consignees or other third parties by means of the backdated documents.

If the antedated bill of lading is issued by a charterer or its agent, who had actual or ostensible authority to sign bills of lading on behalf of the master, the shipowner may be liable for loss or damage caused by the antedating of the bills, even if he did not know of, or consent to, the backdating.⁹³ Nor would the shipowner in such a case be party to any

⁸⁸ See Cresswell J.'s comment in *Standard Chartered Bank v. Pakistan National Shipping Corp. (No. 2)* [1998] 1 Lloyd's Rep. 684 at p. 688, upheld [2000] 1 Lloyd's Rep. 218 (C.A.) and [2003] 1 Lloyd's Rep. 227 (H.L.) that both antedated and false bills of lading are a "... cancer in the international trade". French courts also condemn antedating of bills of lading. See *Cour d'Appel d'Aix*, April 28, 1976, DMF 1977, 27; *Tribunal de Commerce de Marseille*, May 16, 1984, *Revue Scapel*, 1984, 39; V.-E. Bokalli, "Crise et Avenir du Connaissance", DMF 1998, 115 at pp. 119-120.

⁸⁹ See Gaskell, Asariotis & Baatz, *Bills of Lading: Law and Contracts*, 2000 at para. 13.12.

⁹⁰ See also *The Saudi Crown* [1986] 1 Lloyd's Rep. 261 at pp. 265-266, where the plaintiff were held to be entitled to claim damages for loss of opportunity to reject the bills of lading by reason of the fraudulent misrepresentation resulting from their backdating by agents of the defendant shipowners.

⁹¹ 760 F. Supp. 301 at p. 312, 1991 AMC 1929 at p. 1944 (S.D. N.Y. 1991).

⁹² Gaskell, Asariotis & Baatz, *Bills of Lading: Law and Contracts*, 2000 at para. 13.12.

⁹³ See, for example, *The Saudi Crown* [1986] 1 Lloyd's Rep. 261 at p. 264; *The Starsin* [2000] 1 Lloyd's Rep. 85 at p. 97; *Alimport v. Soubert Shipping Co. Ltd.* [2000] 2 Lloyd's Rep. 447 at pp. 448-450. This position would appear consistent with the *Carriage of Goods by Sea Act* 1924, U.K. 1924, c. 16, sect. 4(b) of which provides that the signature of a person who was not the master but had the express, implied or apparent authority of the carrier to sign bills of lading is conclusive evidence of the shipment of the goods in favour of the lawful holder of the bill. But see also *The Hector* [1998] 2 Lloyd's Rep. 287 at p. 297, where the bill of lading, although issued by the time charterer's agent, was found to be unauthorized by the shipowner

letter of indemnity given by cargo interests in exchange for the antedated document.⁹⁴ Nevertheless, if the vessel owner were eventually to be held liable at the suit of a third party victim of the backdating, the owner, being innocent of that misrepresentation, would presumably be entitled to take an indemnity action against the charterer and/or agent who issued the fraudulently dated instrument.⁹⁵

XIV. Letter of Indemnity and the Hamburg Rules

Art. 17 of the Hamburg Rules⁹⁶ is an attempt to legislate on letters of indemnity which are confusingly called “letters of guarantee”.

Art. 17(l) stipulates that the shipper guarantees the accuracy of the particulars he has furnished as to “the general nature of the goods, their marks, number, weight and quantity”. The shipper indemnifies “the carrier against the loss resulting from inaccuracies in such particulars.” The foregoing is thus a straightforward codification of the existing law, except that one must assume that insufficient and defective packing is covered by the words “the general nature of the goods.”

Art. 17(2) is another codification and is to the effect that the letter of guarantee given to indemnify the carrier for losses resulting from issuing an unclaused bill “is void and of no effect as against any third party ... to whom the bill of lading has been transferred.” Thus, estoppel as to the carrier and shipper applies even if the third party did not rely on the bill of lading to his detriment.⁹⁷ This is new law.

Art. 17(3) stipulates that the carrier may invoke the letter of guarantee against the shipper unless the carrier issued the inaccurate bill of lading with intention “to defraud a third party”. But does a carrier ever, in such circumstances, intend to defraud a third party? Usually, he merely wishes to assist his client, the shipper. Thus, proof of fraud will be difficult.

Art. 17(3), second sentence, adds that there is no right of indemnity from the shipper if the reservation in the bill of lading which is omitted “relates to particulars furnished by the shipper ...”. This sentence seems on the surface to be a reasonable provision, because it defines the carrier's recourse against the shipper. Nevertheless, when examined carefully, it is clearly bad law, because it encourages the use of letters of indemnity and the issue of false bills of lading, by providing protection to the carrier, who is one of the parties to the fraud.

because it was both unclaused (and thus not in conformity with the mate's receipt as required by the charter) and dated prior to the completion of loading, which rendered it fraudulent.

⁹⁴ *Cargill Ferrous Int'l, A Division of Cargill Inc. v. M/V Sukarawan Naree* 1998 AMC 566 at p. 5771 (E.D. La. 1997).

⁹⁵ Gaskell, Asariotis & Baatz, *Bills of Lading: Law and Contracts*, 2000 at para. 13.10, note 25.

⁹⁶ Signed at Hamburg on March 31, 1978, and in force November 1, 1992.

⁹⁷ Estoppel is the principle whereby a party (a) to a statement is precluded from denying the validity of the statement to a person (b) who was entitled to rely on the statement (c) and who relied on it (d) to his detriment.

Art. 17(4) is very bad law. It is to the effect that the carrier will lose the benefit of the package limitation in a claim against it of a third party who relied on the description in the bill of lading in a case of “intended fraud”. But the carrier who issues a clean bill of lading against a letter of indemnity, does not *intend fraud*; he only wishes to satisfy his client (the shipper). He may therefore issue a bill of lading for goods already damaged, or for goods insufficiently packed, and then only be responsible up to the package limitation, despite the size of the loss covered by the letter of indemnity. The intentional issue of an erroneous bill of lading is nothing less than a fraud in respect to third parties and is a fundamental breach (quasi-deviation) which should cause the loss of the package limitation.

XV. France

1) Introduction

The Law of June 18, 1966,⁹⁸ contains useful provisions as to letters of indemnity (“*lettres de garantie*”). Art. 20 reads as follows:

(translation)

“All letters or agreements by which the shipper undertakes to remunerate the carrier when this latter or his representative has consented to deliver a bill of lading without reserves are null and without effect as concerns third parties, but these latter may for their part proceed against the shipper.”

“If the reserve which has been voluntarily omitted concerns a defect in the cargo of which the carrier had or should have had knowledge at the time of the signature of the bill of lading, he cannot take advantage of this defect in order to avoid his responsibility and will not benefit by the limitation of responsibility set out in article 28.”

2) The consequences of art. 20

The Law of June 18, 1966, effectively legislates on letters of indemnity as follows:

a) Letters of indemnity are formally declared to be invalid against third parties. Third parties, however, may use them against shippers.

b) Third parties would include endorsees, consignees, banks, underwriters and almost anyone not a party to the letter of indemnity. This is because the term “third parties” is used rather than “third party holder of the bill of lading”. Having relied on the bill of lading or having paid value would not seem to be a qualification necessary to be a “third party”.

⁹⁸ Law No. 66-420. See Rodière & du Pontavice, *Droit Maritime*, 12 Ed., 1997 at para. 343.

c) The first paragraph of art. 20 deals with “proper letters of indemnity”, referring probably to the case where the carrier receives goods, the condition of which the master has no reasonable means of verifying, but about which he has some doubts. For example, coils or rolls of steel may be in various early stages of rusting and as such are difficult to inspect and evaluate. This paragraph is thus an attempt to satisfy the legitimate concern of carriers who accept goods that they cannot properly judge and which are borderline cases. One wonders, however, whether the concept of “proper letters” is useful.

d) The second paragraph of art. 20 is concerned with improper letters of indemnity, where the master knew or should have known of the defect in the cargo. Here, the carrier is responsible to everyone and even loses the advantage of the package/kilo limitation of art. 28.⁹⁹ The law of France has assumed, in effect, that such letters are fraudulent and applies the sanction for fraud so that the carrier loses at least the benefit of the per package limitation.

e) The Supreme Court of France has even held that the second para. of art. 20 prevents the carrier from benefiting from the letter of indemnity in an action against the shipper.¹⁰⁰

Whether or not one agrees that there can be “proper” as well as “improper” letters of indemnity,¹⁰¹ the Law of June 18, 1966 is a subtle solution to a very difficult problem which has been the subject of a frustrating series of studies, international conferences, and unsuccessful attempts at legislation.

XVI. Letters of Guarantee at Discharge

1) Introduction

The problem of whether and when goods may be delivered without an original bill of lading for them being tendered by the receiver remains a major challenge in international commerce today, because ships move ever faster, frequently reaching their

⁹⁹ See, however, Rodière & du Pontavice, *Droit Maritime*, 12 Ed., 1997 at para. 343, who point out that the loss of monetary limitation is of less significance under the Hague/Visby Rules as incorporated into French law by the Decree No. 79-1111 of December 21, 1979 (J.O. December 22, 1979, p. 3251) and Law No. 86-1292 of December 23, 1986 (J.O. December 24, 1986, p. 15542), because the 2 S.D.R. kilo limitation is usually higher than or equal to the exact amount of the goods lost or damaged. The cargo interests can therefore usually recoup their losses in full even if the carrier’s limit of liability is not broken. See also A. Vialard, *Droit Maritime*, 1997 at para. 443.

¹⁰⁰ *Cour de Cassation de France*, February 23, 1983, DMF 1983, 478. Raymond Achard, in a note which follows this decision, questions its validity. See also observations of E. du Pontavice in *Bulletin des Transports* 1984, 315. See also *Cour d’Appel de Montpellier*, April 30, 1981, DMF 1982, 35 and the note attached of Antoine Vialard; *Cour d’Appel de Paris*, November 7, 1988, (*The Patrick-Vieljeux*), DMF 1989, 655, note R. Achard; *Cour d’Appel de Paris*, September 12, 2002 (*The Catharina*), DMF 2002, 665, obs. Y. Tassel, and in particular the commentary by P. Bonassies, DMF Hors série no. 7, 2003 at para. 71.

¹⁰¹ E. du Pontavice *Transports Maritimes et Affrètements*, at p. G. 19, uses the terms “ordinary” and “fraudulent” letters of indemnity. Rodière, *Traité Général, Affrètements & Transports*, tome 2, at para. 471, states that letters of indemnity of the second category are not necessarily fraudulent.

ports of discharge before the original bills of lading can be delivered by post to the lawful receivers there. Bills of lading used in documentary credit transactions can also be tied up for longer than anticipated in the banking systems of the countries concerned. Sometimes also, the bills get lost en route. Cargo consignees and endorsees are anxious to obtain delivery of their purchased goods, especially if they have already entered into on-sales or on-carriage contracts, and so frequently exert enormous pressure on carriers and their agents to turn over the goods to them immediately following their discharge, although no original bills of lading are available to present in return. Shipowners and charterers, for their part, do not wish to delay the voyages of their vessels unduly while awaiting arrival of such documents because of the grave financial losses which such delays can entail. In such situations, a cargo receiver or a bank generally offers the carrier a letter of guarantee promising to remit the original bill of lading as soon as it is received and undertaking to indemnify the carrier for any damages that the latter may sustain for handing over the cargo without such bills.

One must distinguish between a letter of indemnity (issued at time of shipment by a shipper to a carrier in return for a clean bill of lading) and the letter of guarantee issued at discharge when goods are delivered to a person who does not hold the original bills of lading. This the French courts have done.¹⁰²

Before considering letters of guarantee as used in the absence of bills of lading, however, some general considerations relating to the problem of delivery without bills of lading seem worth recalling.

2) Delivery without a bill of lading – a risk for carriers

The *Harter Act* 1893¹⁰³ at sect. 2 covers delivery, the *Pomerene Act*,¹⁰⁴ at 49 U.S. Code 80110(b), forbids delivery without surrender of original bills of lading, but the Hague and Hague/Visby Rules do not apply to letters of guarantee because this is not a question of loss or damage arising from carriage of goods. Rather this is a question of misdelivery and the Rules do not cover delivery. In consequence, carriers who deliver goods under a letter of guarantee cannot invoke art. 4(2)(q).¹⁰⁵

¹⁰² See Rodière & du Pontavice, *Droit Maritime*, 12 Ed., 1997, para. 358-1.

¹⁰³ Act of February 13, 1893, chap. 105, 27 Stat. 445-446, 46 U.S.C. Appx. 190-196.

¹⁰⁴ The original *Pomerene Act* (also known as the “U.S. Bills of Lading Act” or the “Federal Bills of Lading Act”), being the Act of August 29, 1916, ch. 415, 39 Stat. 538-545, formerly codified at 49 U.S.C. 81-124, was recodified by the Act of July 5, 1994, Public Law No. 103-272, sect. 1(e), 108 Stat 1346-1353 as 49 U.S.C. 80101-80116. Sect. 9 of the original *Pomerene Act* 1916 (formerly 49 U.S. Code 89) is now 49 U.S.C. 80110(b) of the *Pomerene Act* 1916/1994. See also *Allied Chemical International Corp. v. Companhia de Navegacao Lloyd Brasileiro* 775 F.2d 476 at p. 483, 1986 AMC 827 at p. 835 (2 Cir. 1985), cert. denied, 475 U.S. 1099, 1986 AMC 2700 (1986); *International Harvester Co. v. TFL Jefferson* 695 F. Supp. 735 at p. 738 (S.D. N.Y. 1988); *Velco Enterprises, Ltd. v. S.S. Zim Kingston* 858 F. Supp. 36 at p. 38 (S.D. N.Y. 1994).

¹⁰⁵ *Allied Chemical v. Lloyd Brasileiro*, *ibid.*

Most bills of lading, however, expressly require delivery to be effected only to a party who presents an original bill of lading,¹⁰⁶ so that the carrier who releases the cargo otherwise than in return for such an original bill is in breach of the contract of carriage.

The case law on the carriage of goods by sea in virtually all jurisdictions makes it clear that the carrier takes a major risk where it delivers cargo to anyone other than the holder of an original bill of lading covering the shipment concerned.¹⁰⁷ The risk is that the party to whom the goods are released without production of the bill may not be entitled to take possession of them or, if so entitled, will default in paying for them, thus rendering the carrier liable to the lawful holder of the bill of lading for breach of contract and/or conversion. Among the classic decisions on the point is *Sze Hai Tong Bank Ltd. v. Rambler Cycle Co., Ltd.*¹⁰⁸ where bicycle parts shipped from England to Singapore by the respondent seller were discharged and delivered, on the orders of the carrier's agent, in exchange for a letter of guarantee issued by the appellant bank, to the buyer/notify party who produced no bill and never paid for the merchandise. Lord Denning in the Privy Council held:¹⁰⁹

“It is perfectly clear law that a shipowner who delivers without production of the bill of lading does so at his peril. The contract is to deliver, on production of the bill of lading, to the person entitled under the bill of lading. In this case it was ‘unto order or his or their assigns’, that is to say, to the order of the Rambler Cycle Company, if they had not assigned the bill of lading, or to their assigns, if they had. The shipping company did not deliver the goods to any such person. They are therefore liable for breach of contract unless there is some term in the bill of lading protecting them. And they delivered the goods, without production of the bill of lading, to a person who was not entitled to receive them. They are therefore liable in conversion unless likewise so protected.”

Indeed, it was held in *The Houda* that:¹¹⁰ “Under a bill of lading contract a shipowner is obliged to deliver goods upon production of the original bill of lading. Delivery without production of the bill of lading constitutes a breach of contract even when made to the person entitled to possession.” The reason for this stringent rule is that the master

¹⁰⁶ See, for example, the Baltic and Maritime Council's (BIMCO's) standard-form Liner Bill of Lading (“Conlinebill 2000”), which on its face provides: “One original Bill of Lading must be surrendered duly endorsed in exchange for the cargo or delivery order, whereupon all other Bills of Lading to be void.”

¹⁰⁷ See generally J.F. Wilson, “The Presentation Rule revisited” [1995] LMCLQ 289.

¹⁰⁸ [1959] A.C. 576, [1959] 2 Lloyd's Rep. 114 (P.C.).

¹⁰⁹ *Ibid.*, A.C. at p. 586, Lloyd's Rep. at p. 120. See also a plethora of other English authorities, including *Glyn Mills Currie & Co. v East and West India Dock Co.* (1882) 7 App. Cas. 591 (H.L.), *The Stettin* (1889) 14 P.D. 142; *Barclays Bank Ltd v. Commissioners of Customs and Excise* [1963] 1 Lloyd's Rep 81, especially at p. 89; *The Houda* [1994] 2 Lloyd's Rep 541, see especially at pp. 550, 552-553 and 556 (C.A.); *Motis Exports Ltd. v. Dampskibsselskabet AF 1912* [1999] 1 Lloyd's Rep. 837, aff'd [2000] 1 Lloyd's Rep. 211 (C.A.); *The Stone Gemini* [1999] 2 Lloyd's Rep. 255 at pp. 262-263 (Fed. C. Aust.).

¹¹⁰ [1994] 2 Lloyd's Rep. 541 at p. 553 (C.A. *per* Leggatt L.J.). Of course, where the goods are delivered without a bill of lading to a party entitled to receive them, no damages are payable. See *ibid.* at p. 556.

cannot know if the party seeking delivery of the cargo is really entitled to possess it unless and until an original bill of lading is produced.¹¹¹

A duty for the carrier to deliver only in return for an original bill of lading has also been held to exist in bailment.¹¹²

In Canada, the Federal Court cited *Sze Hai Tong Bank* with approval in *Kanematsu GMBH v. Acadia Shipbrokers Ltd.*,¹¹³ also approving Lord Diplock's similar holding in *Barclays Bank Ltd. v. Customs and Excise*.¹¹⁴

"Until the bill of adding is produced to him [the shipowner/carrier], unless at any rate, its absence has been satisfactorily accounted for, he is entitled to retain possession of the goods and if he does part with possession he does so at his own risk if the person to whom he surrenders possession is not in fact entitled to the goods."

In the United States, the Second Circuit, in *Allied Chemical International Corp. v. Companhia de Navegacao Lloyd Brasileiro*, citing Carver, held that:¹¹⁵

"Absent a valid agreement to the contrary, the carrier, the issuer of the bill of lading, is responsible for releasing the cargo only to the party who presents the original bill of lading. 'Delivery to the consignee named in the bill of lading does not suffice to discharge the [carrier] where the consignee does not hold the bill of lading.' (2 T.G. Carver, *Carriage by Sea* ¶ 1593 (R. Colinvaux 13th ed. 1982)). If the carrier delivers the goods to one other than the authorized holder of the bill of lading, the carrier is liable for misdelivery... and '[d]elivery to person not entitled to the goods without production of a bill of lading is a 'prima facie ... conversion of the goods and a breach of contract.' 2 *id.* at ¶ 1593"

In France, art. 49 of Decree no. 66-1078 of December 31, 1966 requires the master or the ship's agent to deliver the goods to the consignee identified in a nominative bill of lading; to the party who presents a bearer bill; or to the last endorsee of an order bill. Only presentation of an original of the bill discharges the carrier (art. 50). Delivery to anyone

¹¹¹ *Ibid.* at pp. 556, 557 and 558 (*per* Millett L.J.). See also N. Hamblen, Q.C. and S. Jones, "Charterers' Orders – 'To Obey or Not to Obey'" (2001) 26 Mar. Lawyer 105.

¹¹² See *East West Corp. v. DKBS 1912* [2003] 1 Lloyd's Rep. 239 (C.A.), where the carriers were held to have breached a duty in bailment, or a duty on a basis analogous to bailment, in failing to either deliver the goods against bills of lading or to arrange for customs warehouse and port agents at the port of discharge to ensure that the goods were delivered only against bills of lading.

¹¹³ (1999) 163 F.T.R. 301 at pp. 305-306, 1999 AMC 1533 at pp. 1537-1538 (Fed. C. Can.), *rev'd* on other grounds, (2000) 259 N.R. 201 (Fed. C.A.), but nevertheless citing the dicta in *Sze Hai Tong Bank and Barclays Bank*.

¹¹⁴ [1963] 1 Lloyd's Rep. 81 at p. 89.

¹¹⁵ 775 F.2d 476 at p. 481, 1986 AMC 826 at p. 832 (2 Cir. 1985). See also *C-ART, Ltd. v. Hong Kong Islands Line America*, S.A. 940 F. 2d 530 at pp. 532-533, 1991 AMC 2888 at pp. 2890-2891 (9 Cir. 1991); *Velco Enterprises, Ltd. v. S.S. Zim Kingston* 858 F. Supp. 36 at p. 38 (S.D. N.Y. 1994); *International Knitwear Co. Ltd. v. M/V Zim Canada* 1997 AMC 1290 at p. 1294 (S.D. N.Y. 1994).

other than such a bill of lading holder is a “*faute lourde*” engaging the civil responsibility of the carrier.¹¹⁶

The Nordic Maritime Code 1994 similarly empowers the consignee to receive the goods only if he deposits the bill of lading and gives receipts concurrently with delivery of the goods.¹¹⁷ If originals of the bill have been negotiated to several persons, the person who first receives such an original in good faith is entitled to the goods.¹¹⁸

3) Delivery without a bill of lading - few defences for the carrier

There are few defences available to the carrier who delivers cargo without first obtaining the surrender of the relevant original bills of lading, where the carrier has no letter of guarantee on which to rely for protection against the consequences of such misdelivery. In *The Sormovskiy 3068*, Clarke J. held that¹¹⁹

“... a master or shipowner is not entitled to deliver goods otherwise than against an original bill of lading unless it is proved to his reasonable satisfaction both that the person seeking the goods is entitled to possession of them and that there is some reasonable explanation of what has become of the bill of lading.”

Although the final phrase was intended to provide for cases where the bill of lading is lost, it is not certain that such an excuse for non-conforming delivery remains effective in England today, because in *The Houda*, the Court of Appeal suggested that a court order (following the tendering of a sufficient indemnity) would be necessary to legitimize delivery without a bill where the instrument has allegedly been lost.¹²⁰ Moreover, Rix J., in *Motis Exports Ltd. v. Dampskibsselskabet AF 1912*, regarded *The Houda* as authority for denying the existence of any exception based on proffering a “reasonable explanation” for the loss of the bill.¹²¹

¹¹⁶ See *Tribunal d’Alger*, November 15, 1893, D.P. 95.2.353, note Poncet; *Cour d’Appel d’Aix*, September 6, 1984, DMF 1986, 157; *Cour d’Appel de Rouen*, October 19, 1989, DMF 1990, 96, note R. Achard; *Cour d’Appel de Rennes*, January 9, 1990, DMF 1991, 262 sommaire. See generally M. Rémond-Gouilloud, *Droit Maritime*, 2 Ed., 1993 at para. 553. Only where such non-conforming delivery is required by local law does the carrier have a real defence, for “act of princes”. See *Cour d’Appel d’Aix*, March 29, 1988, Bulletin des Transports 1988, 680; *Cour de Cassation*, February 20, 1990 Bulletin des Transports 1990, 563.

¹¹⁷ See the Swedish/Finnish version of the Nordic Maritime Code 1994 at ch. 13, sect. 54 and the Danish/Norwegian version at art. 304.

¹¹⁸ See the Swedish/Finnish version of the Nordic Maritime Code 1994 at ch. 13, sect. 56 and the Danish/Norwegian version at art. 306. If the goods have been delivered at the port of destination to the holder of any other original, however, the receiver is not obliged to relinquish what he has already received in good faith. Nor is the person who has acquired an order or a bearer bill of lading in good faith obliged to deliver the bill to one who had lost it.

¹¹⁹ [1994] 2 Lloyd’s Rep. 262 at p. 272.

¹²⁰ [1994] 2 Lloyd’s Rep. 541 at p. 553 (C.A.). It is noteworthy that the Nordic Maritime Code 1994 provides that where an application has been made for the nullification of a lost bill of lading, the applicant must provide security corresponding to the amount which the carrier may become obliged to pay on account of the lost bill. See the Swedish/Finnish versions of the Maritime Code 1994, ch. 13, sect. 55 and the Danish/Norwegian versions 1994, art. 305.

¹²¹ [1999] 1 Lloyd’s Rep. 837 at p. 841, upheld [2000] 1 Lloyd’s Rep. 211 (C.A.).

Nor is the carrier excused from proper delivery where a bill of lading produced by the cargo receiver to obtain possession of the goods is subsequently found to have been forged, even if the forgery was unknown to the carrier. Rix J. held in *Motis Exports*:¹²²

“If a shipowner was entitled to deliver goods against a forged bill of lading, then the integrity of the bill as the key to a floating warehouse would be lost. Moreover, as between shipowner and true goods' owner, it is the shipowner who controls the form, signature and issue of his bills, even if as a matter of practice he may delegate much of that to his time charterers or their agents. If one of two innocent people must suffer for the fraud of a third, it is better that the loss falls on the shipowner, whose responsibility it is both to look to the integrity of his bills and to care for the cargo in his possession and to deliver it aright, rather than on the true goods' owner, who holds a valid bill and expects to receive his goods in return for it.”

An exception clause in the bill of lading exonerating the carrier from liability for post-discharge loss must be construed by the court to determine its enforceability, but such a term has not generally been interpreted so as to protect the carrier from the consequences of misdelivery. In *Sze Hai Tong Bank Ltd. v. Rambler Cycle Co., Ltd.*,¹²³ for example, a clause providing that “... the responsibility of the carrier, whether as carrier or as custodian or bailee of the goods, shall be deemed to commence only when the goods are loaded on the ship and to cease absolutely after they are discharged therefrom” was rejected as a defence to a claim for delivery without a bill of lading. The Privy Council decided that it was necessary to read down the clause so as to ensure that it did not interfere with the performance of the main object and intent of the contract of carriage.¹²⁴

A similar view was taken more recently in *The Ines*,¹²⁵ where the impugned clause (cl. 3) of the bill of lading provided that after discharge, the goods were to be “... at the sole risk of the owners of the goods and thus the carrier has no responsibility whatsoever . . .” Clarke J., construing the term in the light of a long line of authorities, and with particular reference to *Sze Hai Tong Bank*, concluded:¹²⁶

¹²² *Ibid.*, Lloyd's Rep. at p. 843. See generally Paul Todd, “Delivery against Forged Bills of Lading” [1999] LMCLQ 449.

¹²³ [1959] A.C. 576, [1959] 2 Lloyd's Rep. 114 (P.C.).

¹²⁴ *Ibid.* A.C. at p. 587, Lloyd's Rep. at p. 121, citing *Glynn v. Margetson & Co.* [1893] A.C. 351 at p. 357 (H.L.); *G.H. Renton & Co., Ltd. v. Palmyra Trading Corporation of Panama* [1956] 1 Q.B. 462 at p. 501, [1955] 2 Lloyd's Rep. 722 at p. 741 (C.A.); [1957] A.C. 149 at p. 164, [1956] 2 Lloyd's Rep. 379 at p. 387 (H.L.). See also this holding reaffirmed later by Lord Reid in *Suisse Atlantique Société d'Armement Maritime S.A. v. Rotterdamsche Kolen Centrale* [1967] 1 A.C. 361 at p. 401, [1966] 1 Lloyd's Rep. 529 at p. 546 (H.L.). See also *Kamil Export (Aust.) Pty. Ltd. v. N.P.L. (Australia) Pty. Ltd.* [1996] 1 V.R. 538 at pp. 550-553 and 558-559 (Supr. Ct. Vict. App. Div.).

¹²⁵ [1995] 2 Lloyd's Rep. 144. See also *Motis Exports Ltd. v. Dampskibsselskabet AF 1912* [1999] 1 Lloyd's Rep. 837 at p. 847, upheld [2000] 1 Lloyd's Rep. 211 at pp. 216 and 217 (C.A.), where a similar clause was construed, with the same result, in a case of delivery under forged bills of lading, although Mance L.J. observed (at p. 217) that “an appropriately worded clause could achieve the result for which the shipowner contends.”

¹²⁶ *Ibid.* at p. 154.

“In my judgment there is nothing in any of the cases which leads to the conclusion that any of the clauses in the bill of lading in this case should be construed as protecting the shipowners unless their agents deliberately and consciously delivered the goods in disregard of the plaintiffs' rights. It is sufficient to conclude (as I have done above) that the provisions in the contract (especially cl 3) should be construed as not excluding the responsibility of the shipowners where they or their agents misdeliver the goods regardless of whether they did so in deliberate and conscious disregard of the rights of the plaintiffs.”

Charterparties today sometimes contain clauses expressly authorizing the master to deliver without production of a bill of lading, and terms of this kind have been upheld. Such clauses also typically provide for an indemnity for the shipowner for the consequences of complying with such an order.¹²⁷ Such clauses *permit*, but do not *oblige*, shipowners to deliver without requiring surrender of the relevant bill, however.¹²⁸

Nor may the carrier ordinarily be excused from delivering cargo without presentation of an original bill of lading by alleging that the applicable laws or customs of the port of discharge require cargo to be handed over to, and warehoused by, a local port or customs authority for a period of time following discharge (often pending customs clearance). Compliance with such laws or customs has generally not been effective to shield the carrier from liability for misdelivery¹²⁹ where the carrier or its agent had the power to prevent the authority from delivering the goods without a bill of lading but failed to exercise that power, resulting in a party taking possession of the shipment without producing a bill.¹³⁰ A few bill of lading forms expressly permit delivery otherwise than in exchange for an original bill of lading, in jurisdictions where such a practice is recognized by custom or law,¹³¹ but such clauses are exceptional; in consequence, they should be

¹²⁷ See, for example, *The Sagona* [1984] 1 Lloyd's Rep. 194; *The Captain Gregos (No. 2)* [1990] 2 Lloyd's Rep. 395 (C.A.); *The Houda* [1994] 2 Lloyd's Rep. 541 (C.A.).

¹²⁸ *The Houda*, *ibid.*, at p. 551.

¹²⁹ See, however, *The Frontier* 1976 (1) SA 708 (S. Africa App. Div.), where proper delivery was held to have taken place where the carrier discharged into the hands of the Matadi port authority, as required by the port, rather than to the consignee directly.

¹³⁰ See, for example, *Allied Chemical Int'l Corp. v. Companhia de Navegacao Lloyd Brasileiro* 775 F.2d 476 at p. 484, 1986 AMC 827 at p. 836 (2 Cir. 1985), cert. denied, 475 U.S. 1099, 1986 AMC 2700 (1986); *Velco Enterprises, Ltd. v. S.S. Zim Kingston* 858 F. Supp. 36 at p. 39 (S.D. N.Y. 1994) (involving port authorities). See also D.B. Sharpe, "Recent Developments in Maritime Law" (1995) 19 Mar. Lawyer 301. See also *East West Corp. v. DKBS 1912* [2003] 1 Lloyd's Rep. 239 (C.A.) (involving a customs warehouse). But see also *Ace Bag & Burlap Co., Inc. v. Sea-Land Service, Inc.* 1999 AMC 837 (D. N.J. 1998), where it was found that because the carrier retained no control over delivery of the goods and had no legal power to prevent the Honduran Customs Authorities from handing them over to a bonded customs warehouse without presentation of a bill of lading, the carrier had made proper delivery according to the laws and customs of the Honduran port of discharge. See also *Crowley American Transport, Inc. v. Richard Sewing Machine Co.* 172 F.3d 781 at p. 785, 1999 AMC 1723 at p. 1726 (11 Cir. 1999), where the bill of lading only required delivery of the cargo to the "Free Trade Zone" in Nicaragua, so that the carrier had no responsibility thereafter.

¹³¹ See, for example, the Mitsui OSK Lines Combined Transport Bill of Lading 1993, cl. 16(h) of which provides in pertinent part: "... and, in particular, the Carrier shall be entitled to give delivery of the Goods

restrictively construed and applied only where there is clear proof of such a law or custom.¹³²

Of course, if the shipper expressly consents to the carrier's making delivery without a bill of lading, or actually instructs the carrier to do so, no problem is likely to arise. But this happens only rarely.

4) Delivery without a bill of lading and letters of guarantee

Given the rigorous principle of delivery only against an original bill of lading, the letter of guarantee is the only practical solution to the various problems encountered when bills of lading are not available at the discharge port when the carrying ship arrives. As was held in *The Sormovskiy 3068*.¹³³

“In trades where it is difficult or impossible for the bills of lading to arrive at the discharge port in time the problem is met by including a contractual term requiring the master to deliver the cargo against a letter of indemnity or bank guarantee. That is commonplace and indeed there was a provision to that effect here.”

In some cases, delivery without a bill of lading against a letter of guarantee has even been held to be a port custom.¹³⁴ In some cases too, shippers will provide a letter of guarantee, which can serve as proof that the carrier made the delivery without a bill of lading on the shipper's instructions.¹³⁵

without surrender of an original Bill of Lading in those jurisdictions where such practice is recognized whether by custom or law. Compliance with such custom or practice shall be deemed to be proper performance of the contract of carriage hereunder.” See also the GAFTA 100 form at line 100: “In the event of the shipping documents not being available on arrival of the vessel at destination, sellers may provide other documents or an indemnity entitling Buyers to obtain delivery of the goods and payment shall be made by Buyers in exchange for the same.” In the U.S., the courts have not enforced even a relatively clear clause of this kind, however. See *International Harvester Co. v. TFL Jefferson* 695 F. Supp. 735 at p. 739 (S.D. N.Y. 1988), treating a similar clause as a violation of the *Harter Act*.

¹³² See Gaskell, Asariotis & Baatz, *Bills of Lading: Law and Contracts*, 2000 at para. 14.16, their note 27, who point out that “a very high degree of proof of custom [permitting delivery without a bill of lading] would be required”. See also *East West Corp. v. DKBS 1912* [2003] 1 Lloyd's Rep. 239 (C.A.), where the evidence adduced in an effort to prove the existence of such a law or custom in Chile was found unconvincing. See also C. B. Acevedo, “The Issue of Misdelivery of the Goods Carried under a Bill of Lading in Chilean Law” 2003 II *Diritto Marittimo* 974-998. See also *Olivine Eltronics Pte Ltd. v. Seabridge Transport Pte. Ltd.* [1995] 3 SLR 143 (Singapore C.A.).

¹³³ [1994] 2 Lloyd's Rep. 266 at p. 272, cited by Rix J. in *Motis Exports Ltd. v. Dampskibsselskabet AF 1912* [1999] 1 Lloyd's Rep. 837 at p. 841, aff'd [2000] 1 Lloyd's Rep. 211 (C.A.). See also *The Houda* [1994] 2 Lloyd's Rep. 541 at p. 553: “In practice, if the bill of lading is not available, delivery is effected against an indemnity.”

¹³⁴ See, for example, *Nebco International Inc. v. M/V National Integrity* 752 F. Supp. 1207 at p. 1221, 1991 AMC 1113 at p. 1117 (S.D. N.Y. 1990), it was found to be the custom of the Port of Spain, Trinidad, for ship's agents to accept bank letters of guarantee and indemnity in lieu of negotiable bills of lading on delivering cargo to consignees, so that the holder of the bills in question, being fully aware of that custom, was estopped from suing the carriers for loss of the cargo delivered against such a letter.

¹³⁵ *Hof van Cassatie van België*, January 31, 2003, [2003] ETL 197.

P. & I. Clubs ordinarily provide no cover for its member shipowners who deliver cargoes without insisting on the presentation of original bills of lading.¹³⁶ The International Group of P. & I. Clubs has nevertheless authored and approved a number of standard-form letters of guarantee (called “letters of indemnity”) which may be used to secure the shipowner’s right to indemnification for delivering cargo in that manner. The intent behind the issuance of these standard-form letters is to assist shipowners in cases where original bills of lading are “stuck” in the banking system or where the carriers are subjected to heavy commercial pressure from consignees or charterers to release the cargo without surrender of any original bill.

There are two basic standard forms (“A” and “C”) relating to delivery without bills of lading. There is also a variant of each of these forms (“AA” and “CC”), which provide for banks to “join in”, together with the party requesting delivery (the “requestor”), in providing the guarantee.¹³⁷ Standard form letters “B” and “BB” are letters of guarantee for the delivery of cargo at a port other than the port specified in the bill of lading (but *with* presentation of a bill of lading). In their most recent versions of 2001,¹³⁸ the form letters are therefore:

Standard Form “A” (“Standard form letter of indemnity to be given in return for delivering cargo without production of the original bill of lading”);¹³⁹

Standard Form “AA” (“Standard form letter of indemnity to be given in return for delivering cargo without production of the original bill of lading incorporating a bank’s agreement to join in the letter of indemnity”);¹⁴⁰

Standard Form “B” (“Standard form letter of indemnity to be given in return for delivering cargo at a port other than that stated in the bill of lading”);¹⁴¹

Standard Form “BB” (“Standard form letter of indemnity to be given in return for delivering cargo at a port other than that stated in the bill of lading incorporating a bank’s agreement to join in the letter of indemnity”);¹⁴²

Standard Form “C” (“Standard form letter of indemnity to be given in return for delivering cargo at a port other than that stated in the bill of lading and without production of the original bill of lading”);¹⁴³ and

¹³⁶ See, for example, the American Steamship Owners Mutual Protection and Indemnity Association Form Policy, provisions 7, concerning cargo liability, providing in pertinent part: “... Provided, however, that no liability shall exist hereunder for:... (h) Loss, damage or expense arising from delivery of cargo without surrender of bills of lading”. See also S.J. Hazelwood, *P & I Clubs: Law and Practice*, 3 Ed., LLP, London, 2000 at p. 193, advising carriers not to rely on the leniency of some clubs whose rules provide some discretion to cover liabilities resulting from delivery without bills of lading in certain cases.

¹³⁷ As a result of discussions between the International Group of P. & I., Clubs and the British Bankers Association (BBA), banks belonging to the BBA are now prepared in principle to join in the letters of guarantee and, through the International Chamber of Commerce, to endeavour to promote the agreed standard wording within the international business community.

¹³⁸ For a useful commentary on the 2001 revisions to the standard forms concerned, see the website of the American Steamship Owners Mutual Protection and Indemnity Association, at <http://www.american-club.com/circulars/cir2-01.pdf>, dated January 26, 2001.

¹³⁹ For the text, see Appendix “1” to this article.

¹⁴⁰ For the text, see Appendix “2” to this article.

¹⁴¹ For the text, see Appendix “3” to this article.

¹⁴² For the text, see Appendix “4” to this article.

Standard Form “CC” (“Standard form letter of indemnity to be given in return for delivering cargo at a port other than that stated in the bill of lading and without production of the original bill of lading incorporating a bank's agreement to join in the letter of indemnity”).¹⁴⁴

Standard Form “A” assumes that the shipowner (and the bank under form “AA”) may face suits by the holder of the original bills for delivery without a bill. Standard Form “C” contemplates that the shipowner (and the bank under form “CC”) may be sued for both delivery without a bill of lading and for deviation.¹⁴⁵

The form letters provide for indemnification of the shipowner, as well as its servants and agents, in respect of liabilities and expenses sustained by the delivery without bills of lading or and with respect to such delivery at a port other than that stipulated in the bills of lading, as the case may be, as well as with respect to the costs of defending suits against them. Bail or other security to prevent the arrest or detention of ships (or associated ships in the same or associated management or control) or to procure their release from arrest or detention or the threat thereof, is also provided for.

The financial liability of the requestor is not limited, but the bank will normally insist on such a limitation, which should be negotiated. A limit of 200% of the sound market value of the cargo at the time of delivery is nevertheless recommended. The liability of each person signing the letter is joint and several. English law and submission to the jurisdiction of the High Court are also provided for.

The International Group's standard forms also contain a provision designed to give greater security to tankers, whereby requested delivery of a bulk liquid or gas cargo to a terminal or facility, or to another ship, lighter or barge, is to be deemed to be delivery to the party to whom delivery has been requested.

The letter of guarantee at discharge is usually not intended to assist in a fraud (although it could be used to that end), but rather to protect the carrier when bills of lading have not arrived or have been misplaced.¹⁴⁶ Nevertheless the terms of the letter should be carefully drafted so that the guarantor (usually a bank¹⁴⁷) does not cover more risks than it

¹⁴³ For the text, see Appendix “5” to this article.

¹⁴⁴ For the text, see Appendix “6” to this article.

¹⁴⁵ See Gaskell, Asariotis & Baatz, *Bills of Lading: Law and Contracts*, 2000, at paras. 14.40 and 14.41, commenting on forms “A” and “C” respectively, as they were before the addition of their respective variants (forms “AA” and “CC”) in 2001.

¹⁴⁶ *Cour de Cassation de France*, January 15, 1968, [1985] ETL 532; *Cour de Cassation de France*, November 24, 1982, DMF 1983, 472.

¹⁴⁷ The bank should also ensure that the party, who took delivery without presenting the bill and for whom the bank has agreed to be the guarantor or surety, has had the letter of guarantee authorized by its board of directors, in accordance with art. 98 of Law No. 66-537 of July 24, 1966, i.e. France's business corporation statute. In *Cour d'Appel de Rouen*, April 11, 1985, upheld by the *Cour de Cassation*, November 25, 1986, DMF 1987, 358 and the similar decision of the Supreme Court of the same date, reported at DMF 1988, 234, the Court sidestepped the requirement of art. 98 by characterizing the letter of guarantee as a promise on the part of the party taking delivery to eventually present the bill to the carrier, rather than as a suretyship agreement. P. Bonassies, in a comment in *Le droit positif français en 1986*, DMF 1987, 132, para. 46, suggests that this strained interpretation could have been avoided by viewing the letter of guarantee as *sui*

actually intended to cover.¹⁴⁸ Also, jurisdiction or arbitration clauses in such letters should be drafted to correspond to similar clauses in the related bill of lading or charterparty.¹⁴⁹ The letter of guarantee is only in respect to responsibility under the contract of carriage and not in respect to the contract of sale.¹⁵⁰ Finally, the letter of guarantee may be a legitimate method of ensuring that the freight is paid.¹⁵¹

In *The Stone Gemini*,¹⁵² it was held that the letter of guarantee was an independent binding agreement, but not one that made any independent misrepresentation giving rise to a remedy under misrepresentation law. The indemnity provided for by the letter was held to cover both the claim of the bill of lading holder and the money expended or debts incurred by the vessel, including those relating to providing security, release from arrest and loss of hire.

Similarly, in *UCO Bank v. Ringler Pte. Ltd.*,¹⁵³ the Singapore Court of Appeal stressed that a letter of guarantee from a bank only entitled the carrier to indemnity against any claim by cargo; it did not operate as delivery of the goods and in no way affected the liability of the carrier for delivery without production of the bill of lading.

In *The Aegean Sea*, the letter of guarantee in the absence of a bill of lading was held not to render its issuer liable under the bill for making a “demand for delivery” as understood in sect. 3(1)(c) of the U.K.’s *Carriage of Goods by Sea Act 1992*.¹⁵⁴

5) Delay for suit

The delay for suit for a claim arising from a letter of guarantee issued at discharge is not the one year of the Hague and Hague/Visby Rules because the claim is for misdelivery and the Rules are not concerned with delivery.

generis, in that it is not unilateral as are most suretyship agreements but essentially synallagmatic. In any case, the courts should not condone arguments based on non-compliance with statutory requirements, especially when there is evidence of fraud.

¹⁴⁸ *Cour d'Appel d'Aix-en-Provence*, September 16, 1980, DMF 1981, 91; affirmed by the *Cour de Cassation*, November 24, 1982, DMF 1983, 472: the letter of guarantee signed by a bank is binding on the bank, even if it subsequently appears that the shipper has acted in a scandalous and very improper fashion. See commentary P. Bonassies, DMF 1986, 77. See also *Cour de Cassation*, December 19, 1980, [1985] ETL 527.

¹⁴⁹ See *Louis Dreyfus Negoce S.A. v. Blystad Shipping & Trading, Inc.* 252 F.3d 218, 2001 AMC 1939 (2 Cir. 2001), cert. denied *sub nom. Negoce v. Blystad Shipping & Trading, Inc.* 534 U.S. 1020 (2001), where the “letter of indemnity” (which was really a letter of guarantee) provided for London litigation, and the related voyage charterparty provided for New York arbitration. The Court held that because the charterparty arbitration clause was “broad” in scope and because the “letter of indemnity” implicated at least two provisions of the charterparty, the time charterer’s claim under the letter would have to be arbitrated in New York.

¹⁵⁰ *Cour d'Appel de Rouen*, June 27, 1979, DMF 1979, 734.

¹⁵¹ *Cour de Cassation de France*, January 15, 1968, [1985] ETL 532.

¹⁵² [1999] 2 Lloyd’s Rep. 255 (Fed. C. Aust.).

¹⁵³ [1995] 1 SLR 713 (Singapore C.A.). See also *The Berge Sisar* [2001] 1 Lloyd’s Rep. 663 (H.L.).

¹⁵⁴ [1998] 2 Lloyd’s Rep. 39.

The *Pomerene Act* 1916/1994 at 49 U.S.C. 80110(b) and the *Harter Act* 1893 at sect. 2 cover delivery and misdelivery, but neither statute contains a delay for suit provision. The Malaysia Federal Court of Appeal has ruled that the delay for the suit between the carrier and person who gave a letter of guarantee is six years under the general law of contract.¹⁵⁵

It is not clear in France whether the delay for suit in a claim under a letter of guarantee is the 10-year delay of the *Code de Commerce* 2000¹⁵⁶ art. L.110-4,¹⁵⁷ or the one year prescription of art. 26 of the Law of June 18, 1966, or the three month extension for a recursory action under art. 32, second para., of the Law of June 18, 1966.¹⁵⁸

Under the standard-form letters of guarantee proposed by the International Group of P. & I. Clubs for delivery without a bill of lading, the liability of the party requesting delivery (the “requestor”) (under standard-form letter “A”) and that of the bank (under standard-form letter “AA”) terminate upon delivery of all original bills of lading to the shipowner. If the original bills of lading are not delivered to the shipowner, the requestor’s liability under the letter continues, but the bank’s liability is limited to an initial period of six years, which term is renewable automatically for further periods of two years at the request of the shipowner. There are two exceptions, however.¹⁵⁹

Under standard-form letters “B”, “C”, “BB” and “CC”, where cargo has been delivered at a port other than that specified in the bill of lading (either with or without presentation of bills of lading) the liability of the requestor (under forms “B” and “C”) and of the bank (under forms “BB” and “CC”) continues until it can be established to the satisfaction of the shipowner that no such claim will be made.

¹⁵⁵ *Rambler Cycle Co. Ltd. v. Peninsular & Oriental Steam Navigation Co.*, [1985] ETL 557.

¹⁵⁶ The Code of Commerce 2000 was enacted as a schedule to *Ordonnance no 2000-912 du 18 septembre 2000 relative à la partie Législative du code de commerce* (J.O. September 21, 2000, p. 14,783), to replace the old *Code de commerce* of 1807. *Ordonnance* 2000-912 was adopted pursuant to Law No. 99-1071 of December 16, 1999 (J.O. December 22, 1999, p. 10,090), which authorized the French Government to adopt the legislative parts of certain codes by *ordonnance*. The *Code de commerce* was among the codes contemplated by that enabling legislation (see art. 1(4) of Law No. 99-1071). For the text of the new Code of Commerce on-line, see <http://big.chez.tiscali.fr/adroit/Commerceetconsommation/html/commerce.htm>. See also the *Rapport au Président de la République du 18 septembre 2000 relatif à la partie Législative du code de commerce* (J.O. September 21, 2000, p. 14,777) and on-line at <http://www.legifrance.gouv.fr/WAspad/UnTexteDeJorf?numjo=JUSX0000038R>.

¹⁵⁷ Art. L.110-4 of the *Code de commerce* 2000 corresponds to art. 189 bis of the former *Code de commerce* of 1807 as amended. The applicability of the ten-year prescription was the view taken by Rodière & du Pontavice, *Droit Maritime*, 12 Ed., 1997 at para. 358-1. See *Cour de Cassation*, February 7, 1984, DMF 1985, 25, [1985] ETL 523; *Tribunal de commerce de Marseille*, December 1, 1979, *Revue Scapel* 1980, 29.

¹⁵⁸ As amended by art. 3 of Law No. 86-1292 of December 23, 1986. The decision of the *Cour de Cassation*, *ibid.*, unfortunately does not decide the issue. See the note attached to the decision, DMF 1985 at pp. 26-27 and commentary by Pierre Bonassies at DMF 1986, 78.

¹⁵⁹ Rather than agreeing to the extension of its liability, the bank may discharge its liability by paying the maximum amount payable under its indemnity. Also, in the event of a demand being made by the shipowner to the bank for payment under the indemnity before the termination date, or if the bank is notified by the shipowner of the commencement of legal proceedings against the shipowner before the termination date, the liability of the bank continues until the demand has been paid or the legal proceedings have been concluded. The bank, if called upon to do so, must pay the amount of any judgment or settlement payable by the shipowner if the requestor has failed to do so.

XVII. Possible Alternatives to Letters of Guarantee

As an alternative to letters of guarantee at discharge, it has been suggested that a central registry be created, in which the original bill of lading would be deposited and at which all subsequent transactions involving the bill would be recorded on notification by the consignee of record (e.g. the bank's security interest and the carrier's unpaid freight charges).¹⁶⁰ The late arrival of the bill of lading at the discharge port would then cease to be a problem, in that the carrier could simply check the registry to ascertain the identity of the party entitled to the goods. But would the registry system ensure identification of the party entitled to the cargo? And who would pay for setting up and operating such a registry?

Another possible alternative to the letter of guarantee would be the increased use of sea waybills instead of negotiable bills of lading for the carriage of goods by sea. Waybill consignees need not present the waybill to take delivery but need only identify themselves as the consignees mentioned in the instrument.¹⁶¹ The non-negotiability of waybills, however, preclude the sale of cargoes travelling under such documents while at sea, and banks generally insist on negotiable bills of lading in documentary credit transactions. For these reasons, waybills, although in increasing use, are still not an acceptable substitute for negotiable bills of lading in international commerce generally.

XVIII. Conclusion

Issuing a clean or an antedated bill of lading in order to assist a shipper to meet the conditions of a documentary letter of credit is a dangerous practice for a carrier, because it is almost always part of a scheme to defraud innocent third party consignees, endorsees and their financial institutions. Letters of indemnity given at shipment to reassure the carrier in such circumstances are increasingly frowned upon by courts, even as between the parties to such counter-letters, and in many countries enforcement of such agreements is now prohibited by national legislation as contrary to public policy/public order.

No less risky for carriers is the practice of delivering cargo to a party other than the holder of an original bill of lading evidencing the carriage of the goods in questions. Carriers who engage in that practice directly or through their agents risk incurring major (and uninsurable) liability for breach of contract and/or conversion. Few defences, either contractual or legal, are available to the carrier caught making such delivery. Yet the

¹⁶⁰ Wilson, *Carriage of Goods by Sea*, 4 Ed., Longman, England, 2001 at pp. 169-170. The registry idea was originally sponsored by the International Association of Independent Tanker Owners (Intertanko), in collaboration with the Chase Manhattan Bank.

¹⁶¹ See W. Tetley, *Marine Cargo Claims*, 3 Ed., Les Éditions Yvon Blais, Inc., Montreal, 1988, Chap. 45: "Waybills", and the preliminary version of that chapter in the forthcoming 4 Ed., 2007, available on-line at <http://tetley.law.mcgill.ca/maritime/ch45.pdf>.

practice continues, owing to the increasing speed of ships, the slowness of mails, delays in documentary processing by banks, the continuing preference of merchants and their bankers for negotiable (as opposed to non-negotiable) transport documents, the lack of a central registry of bills of lading or other alternatives, and the urgent pressures generated by the exigencies of contemporary international commerce. Although the risks of delivery without a bill of lading are great, the practice is nevertheless commonplace,¹⁶² and in most (although not all) cases is done without fraud. Some relief for carriers facing demands for release of cargo by parties unable to surrender original bills of lading is provided by the use of letters of guarantee, such as the standard-form letters approved by the International Group of P. & I. Clubs, particularly where those letters are backed by banks. The letter of guarantee, however, is, and should be treated as, a contract separate from the bill of lading contract, resulting in the application of different rules, particularly in respect of time for suit.

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¹⁶² In *The Sagona* [1984] 1 Lloyd's Rep. 194 at p. 203, for example, it was found that it was common, although not universal practice, in the carriage of oil cargoes up to July, 1978 (the date of shipment concerned in the case), for the master not to insist either on presentation of an original bill of lading or on submission of a letter of indemnity at the port of discharge.

APPENDIX "1"

Standard Form Letter "A"

STANDARD FORM LETTER OF INDEMNITY TO BE GIVEN IN RETURN FOR DELIVERING CARGO WITHOUT PRODUCTION OF THE ORIGINAL BILL OF LADING

To: *[insert name of Owners]* *[insert date]*
 The Owners of the *[insert name of ship]*
[insert address]

Dear Sirs:

Ship: *[insert name of ship]*

Voyage: *[insert load and discharge ports as stated in the bill of lading]*

Cargo: *[insert description of cargo]*

Bill of lading: *[insert identification numbers, date and place of issue]*

The above cargo was shipped on the above ship by *[insert name of shipper]* and consigned to *[insert name of consignee or party to whose order the bill of lading is made out, as appropriate]* for delivery at the port of *[insert name of discharge port stated in the bill of lading]* but the bill of lading has not arrived and we, *[insert name of party requesting delivery]*, hereby request you to deliver the said cargo to *[insert name of party to whom delivery is to be made]* at *[insert place where delivery is to be made]* without production of the original bill 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 liability, loss, damage or expense of whatsoever nature which you may sustain by reason of delivering the cargo 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 cargo as aforesaid, to provide you or them on demand with sufficient funds to defend the same.
3. If, in connection with the delivery of the cargo as aforesaid, the ship, or any other ship or property in the same or associated ownership, management or control, should be arrested or detained or should the arrest or detention thereof be threatened, or should there be any interference in the use or trading of the vessel (whether by virtue of a caveat being entered on the ship's registry or otherwise howsoever), to provide on demand such bail or other security as may be required to prevent such arrest or detention or to secure the release of such ship or property or to remove such

interference and to indemnify you in respect of any liability, loss, damage or expense caused by such arrest or detention or threatened arrest or detention or such interference , whether or not such arrest or detention or threatened arrest or detention or such interference may be justified.

4. If the place at which we have asked you to make delivery is a bulk liquid or gas terminal or facility, or another ship, lighter or barge, then delivery to such terminal, facility, ship, lighter or barge shall be deemed to be delivery to the party to whom we have requested you to make such delivery.
5. As soon as all original bills of lading for the above cargo shall have come into our possession, to deliver the same to you, or otherwise to cause all original bills of lading to be delivered to you, whereupon our liability hereunder shall cease.
6. 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.
7. This indemnity shall be governed by and 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.

Yours faithfully

For and on behalf of
[insert name of Requestor]
The Requestor

.....
Signature

APPENDIX "2"

Standard Form Letter "AA"

STANDARD FORM LETTER OF INDEMNITY TO BE GIVEN IN RETURN FOR DELIVERING CARGO WITHOUT PRODUCTION OF THE ORIGINAL BILL OF LADING INCORPORATING A BANK'S AGREEMENT TO JOIN IN THE LETTER OF INDEMNITY

To: *[insert name of Owners]* *[insert date]*
 The Owners of the *[insert name of ship]*
[insert address]

Dear Sirs:

Ship: *[insert name of ship]*

Voyage: *[insert load and discharge ports as stated in the bill of lading]*

Cargo: *[insert description of cargo]*

Bill of lading: *[insert identification numbers, date and place of issue]*

The above cargo was shipped on the above ship by *[insert name of shipper]* and consigned to *[insert name of consignee or party to whose order the bill of lading is made out, as appropriate]* for delivery at the port of *[insert name of discharge port stated in the bill of lading]* but the bill of lading has not arrived and we, *[insert name of party requesting delivery]*, hereby request you to deliver the said cargo to *[insert name of party to whom delivery is to be made]* at *[insert place where delivery is to be made]* without production of the original bill 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 liability, loss, damage or expense of whatsoever nature which you may sustain by reason of delivering the cargo 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 cargo as aforesaid, to provide you or them on demand with sufficient funds to defend the same.
3. If, in connection with the delivery of the cargo as aforesaid, the ship, or any other ship or property in the same or associated ownership, management or control, should be arrested or detained or should the arrest or detention thereof be threatened, or should there be any interference in the use or trading of the vessel (whether by virtue of a

caveat being entered on the ship's registry or otherwise howsoever), to provide on demand such bail or other security as may be required to prevent such arrest or detention or to secure the release of such ship or property or to remove such interference and to indemnify you in respect of any liability, loss, damage or expense caused by such arrest or detention or threatened arrest or detention or such interference, whether or not such arrest or detention or threatened arrest or detention or such interference may be justified.

4. If the place at which we have asked you to make delivery is a bulk liquid or gas terminal or facility, or another ship, lighter or barge, then delivery to such terminal, facility, ship, lighter or barge shall be deemed to be delivery to the party to whom we have requested you to make such delivery.
5. As soon as all original bills of lading for the above cargo shall have come into our possession, to deliver the same to you, or otherwise to cause all original bills of lading to be delivered to you, whereupon our liability hereunder shall cease.
6. 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.
7. This indemnity shall be governed by and 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.

Yours faithfully

For and on behalf of
 [*insert name of Requestor*]
 The Requestor

.....
 Signature

We, [*insert name of the Bank*], hereby agree to join in this Indemnity providing always that the Bank's liability:-

1. shall be restricted to payment of specified sums of money demanded in relation to the Indemnity (and shall not extend to the provision of bail or other security)
2. shall be to make payment to you forthwith on your written demand in the form of a signed letter certifying that the amount demanded is a sum due to be paid to you

under the terms of the Indemnity and has not been paid to you by the Requestor or is a sum which represents monetary compensation due to you in respect of the failure by the Requestor to fulfill its obligations to you under the Indemnity. For the avoidance of doubt the Bank hereby confirms that:

- (a) such compensation shall include, but not be limited to, payment of any amount up to the amount stated in proviso 3 below in order to enable you to arrange the provision of security to release the ship (or any other ship in the same or associated ownership, management or control) from arrest or to prevent any such arrest or to prevent any interference in the use or trading of the ship, or other ship as aforesaid, and
 - (b) in the event that the amount of compensation so paid is less than the amount stated in proviso 3 below, the liability of the Bank hereunder shall continue but shall be reduced by the amount of compensation paid.
3. shall be limited to a sum or sums not exceeding in aggregate [*insert currency and amount in figures and words*]
 4. subject to proviso 5 below, shall terminate on [*date six years from the date of the Indemnity*] (the 'Termination Date'), except in respect of any demands for payment received by the Bank hereunder at the address indicated below on or before that date.
 5. shall be extended at your request from time to time for a period of two calendar years at a time provided that:-
 - a) the Bank shall receive a written notice signed by you and stating that the Indemnity is required by you to remain in force for a further period of two years, and
 - b) such notice is received by the Bank at the address indicated below on or before the then current Termination Date.

Any such extension shall be for a period of two years from the then current Termination Date and, should the Bank for any reason be unwilling to extend the Termination Date, the Bank shall discharge its liability by the payment to you of the maximum sum payable hereunder (or such lesser sum as you may require).

However, in the event of the Bank receiving a written notice signed by you, on or before the then current Termination Date, stating that legal proceedings have been commenced against you as a result of your having delivered the said cargo as specified in the Indemnity, the Bank agrees that its liability hereunder will not terminate until receipt by the Bank of your signed written notice stating that all legal proceedings have been concluded and that any sum or sums payable to you by the

Requestor and/or the Bank in connection therewith have been paid and received in full and final settlement of all liabilities arising under the Indemnity.

6. shall be governed by and construed in accordance with the law governing the Indemnity and the Bank agrees to submit to the jurisdiction of the court stated within the Indemnity.

It should be understood that, where appropriate, the Bank will only produce and deliver to you all original bills of lading should the same come into the Bank's possession, but the Bank agrees that, in that event, it shall do so.

The Bank agrees to promptly notify you in the event of any change in the full details of the office to which any demand or notice is to be addressed and which is stated below and it is agreed that you shall also promptly notify the Bank in the event of any change in your address as stated above.

Please quote the Bank's Indemnity Ref in all correspondence with the Bank and any demands for payment and notices hereunder.

Yours faithfully,

For and on behalf of

[insert name of bank]

[insert full details of the office to which any demand or notice is to be addressed]

.....
Signature

APPENDIX “3”

Standard Form Letter “B”

STANDARD FORM LETTER OF INDEMNITY TO BE GIVEN IN RETURN FOR DELIVERING CARGO AT A PORT OTHER THAN THAT STATED IN THE BILL OF LADING

To: *[insert name of Owners]* *[insert date]*
 The Owners of the *[insert name of ship]*
[insert address]

Dear Sirs:

Ship: *[insert name of ship]*

Voyage: *[insert load and discharge ports as stated in the bill of lading]*

Cargo: *[insert description of cargo]*

Bill of lading: *[insert identification number, date and place of issue]*

The above cargo was shipped on the above ship by *[insert name of shipper]* and consigned to *[insert name of consignee or party to whose order the bill of lading is made out, as appropriate]* for delivery at the port of *[insert name of discharge port stated in the bill of lading]* but we, *[insert name of party requesting substituted delivery]*, hereby request you to order the ship to proceed to and deliver the said cargo at *[insert name of substitute port or place of delivery]* against production of at least one original bill 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 liability, loss, damage or expense of whatsoever nature which you may sustain by reason of the ship proceeding and giving delivery of the cargo against production of at least one original bill of lading 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 ship proceeding and giving delivery of the cargo as aforesaid, to provide you or them on demand with sufficient funds to defend the same.
3. If, in connection with the delivery of the cargo as aforesaid, the ship, or any other ship or property in the same or associated ownership, management or control, should be arrested or detained or should the arrest or detention thereof be threatened, or should

there be any interference in the use or trading of the vessel (whether by virtue of a caveat being entered on the ship's registry or otherwise howsoever), to provide on demand such bail or other security as may be required to prevent such arrest or detention or to secure the release of such ship or property or to remove such interference and to indemnify you in respect of any liability, loss, damage or expense caused by such arrest or detention or threatened arrest or detention or such interference, whether or not such arrest or detention or threatened arrest or detention or such interference may be justified.

4. 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.
5. This indemnity shall be governed by and 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.

Yours faithfully,

For and on behalf of
[insert name of Requestor]
The Requestor

.....
Signature

APPENDIX "4"

Standard Form Letter "BB"

STANDARD FORM LETTER OF INDEMNITY TO BE GIVEN IN RETURN FOR DELIVERING CARGO AT A PORT OTHER THAN THAT STATED IN THE BILL OF LADING INCORPORATING A BANK'S AGREEMENT TO JOIN IN THE LETTER OF INDEMNITY

To: *[insert name of Owners]* *[insert date]*
 The Owners of the *[insert name of ship]*
[insert address]

Dear Sirs:

Ship: *[insert name of ship]*

Voyage: *[insert load and discharge ports as stated in the bill of lading]*

Cargo: *[insert description of cargo]*

Bill of lading: *[insert identification number, date and place of issue]*

The above cargo was shipped on the above ship by *[insert name of shipper]* and consigned to *[insert name of consignee or party to whose order the bill of lading is made out, as appropriate]* for delivery at the port of *[insert name of discharge port stated in the bill of lading]* but we, *[insert name of party requesting substituted delivery]*, hereby request you to order the ship to proceed to and deliver the said cargo at *[insert name of substitute port or place of delivery]* against production of at least one original bill 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 liability, loss, damage or expense of whatsoever nature which you may sustain by reason of the ship proceeding and giving delivery of the cargo against production of at least one original bill of lading 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 ship proceeding and giving delivery of the cargo as aforesaid, to provide you or them on demand with sufficient funds to defend the same.
3. If, in connection with the delivery of the cargo as aforesaid, the ship, or any other ship or property in the same or associated ownership, management or control, should be

arrested or detained or should the arrest or detention thereof be threatened, or should there be any interference in the use or trading of the vessel (whether by virtue of a caveat being entered on the ship's registry or otherwise howsoever), to provide on demand such bail or other security as may be required to prevent such arrest or detention or to secure the release of such ship or property or to remove such interference and to indemnify you in respect of any liability, loss, damage or expense caused by such arrest or detention or threatened arrest or detention or such interference, whether or not such arrest or detention or threatened arrest or detention or such interference may be justified.

4. 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.
5. This indemnity shall be governed by and 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.

Yours faithfully,

For and on behalf of
 [*insert name of Requestor*]
 The Requestor

.....
 Signature

We, [*insert name of the Bank*], hereby agree to join in this Indemnity providing always that the Bank's liability:-

1. shall be restricted to payment of specified sums of money demanded in relation to the Indemnity (and shall not extend to the provision of bail or other security)
2. shall be to make payment to you forthwith on your written demand in the form of a signed letter certifying that the amount demanded is a sum due to be paid to you under the terms of the Indemnity and has not been paid to you by the Requestor or is a sum which represents monetary compensation due to you in respect of the failure by the Requestor to fulfill its obligations to you under the Indemnity. For the avoidance of doubt the Bank hereby confirms that:
 - (a) such compensation shall include, but not be limited to, payment of any amount up to the amount stated in proviso 3 below in order to enable you to arrange the provision of security to release the ship (or any other ship in the

- same or associated ownership, management or control) from arrest or to prevent any such arrest or to prevent any interference in the use or trading of the ship, or other ship as aforesaid, and
- (b) in the event that the amount of compensation so paid is less than the amount stated in proviso 3 below, the liability of the Bank hereunder shall continue but shall be reduced by the amount of compensation paid.
3. shall be limited to a sum or sums not exceeding in aggregate [*insert currency and amount in figures and words*]
 4. subject to proviso 5 below, shall terminate on [*date six years from the date of the Indemnity*] (the 'Termination Date'), except in respect of any demands for payment received by the Bank hereunder at the address indicated below on or before that date.
 5. may be extended at your request from time to time for a period of two calendar years at a time provided that:-
 - a) the Bank shall receive a written notice signed by you and stating that the Indemnity is required by you to remain in force for a further period of two years, and
 - b) such notice is received by the Bank at the address indicated below on or before the then current Termination Date.

Any such extension shall be for a period of two years from the then current Termination Date and, should the Bank for any reason be unwilling to extend the Termination Date, the Bank shall discharge its liability by the payment to you of the maximum sum payable hereunder (or such lesser sum as you may require).

However, in the event of the Bank receiving a written notice signed by you, on or before the then current Termination Date, stating that legal proceedings have been commenced against you as a result of your having delivered the said cargo as specified in the Indemnity, the Bank agrees that its liability hereunder will not terminate until receipt by the Bank of your signed written notice stating that all legal proceedings have been concluded and that any sum or sums payable to you by the Requestor and/or the Bank in connection therewith have been paid and received in full and final settlement of all liabilities arising under the Indemnity.

6. shall be governed by and construed in accordance with the law governing the Indemnity and the Bank agrees to submit to the jurisdiction of the court stated within the Indemnity.

It should be understood that, where appropriate, the Bank will only produce and deliver to you all original bills of lading should the same come into the Bank's possession, but the Bank agrees that, in that event, it shall do so.

The Bank agrees to promptly notify you in the event of any change in the full details of the office to which any demand or notice is to be addressed and which is stated below and it is agreed that you shall also promptly notify the Bank in the event of any change in your address as stated above.

Please quote the Bank's Indemnity Ref in all correspondence with the Bank and any demands for payment and notices hereunder.

Yours faithfully,

For and on behalf of

[insert name of bank]

[insert full details of the office to which any demand or notice is to be addressed]

.....
Signature

APPENDIX "5"

Standard Form Letter "C"

STANDARD FORM LETTER OF INDEMNITY TO BE GIVEN IN RETURN FOR DELIVERING CARGO AT A PORT OTHER THAN THAT STATED IN THE BILL OF LADING AND WITHOUT PRODUCTION OF THE ORIGINAL BILL OF LADING

To: *[insert name of Owners]* *[insert date]*
 The Owners of the *[insert name of ship]*
[insert address]

Dear Sirs

Ship: *[insert name of ship]*

Voyage: *[insert load and discharge ports as stated in the bill of lading]*

Cargo: *[insert description of cargo]*

Bill of lading: *[insert identification number, date and place of issue]*

The above cargo was shipped on the above vessel by *[insert name of shipper]* and consigned to *[insert name of consignee or party to whose order the bills of lading are made out, as appropriate]* for delivery at the port of *[insert name of discharge port stated in the bills of lading]* but we, *[insert name of party requesting substituted delivery]*, hereby request you to order the vessel to proceed to and deliver the said cargo at *[insert name of substitute port or place of delivery]* to *[insert name of party to whom delivery is to be made]* without production of the original bill 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 liability, loss, damage or expense of whatsoever nature which you may sustain by reason of the ship proceeding and giving delivery of the cargo 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 ship proceeding and giving delivery of the cargo as aforesaid, to provide you or them on demand with sufficient funds to defend the same.
3. If, in connection with the delivery of the cargo as aforesaid, the ship, or any other ship or property in the same or associated ownership, management or control, should be arrested or detained or should the arrest or detention thereof be threatened, or should

there be any interference in the use or trading of the vessel (whether by virtue of a caveat being entered on the ship's registry or otherwise howsoever), to provide on demand such bail or other security as may be required to prevent such arrest or detention or to secure the release of such ship or property or to remove such interference and to indemnify you in respect of any liability, loss, damage or expense caused by such arrest or detention or threatened arrest or detention or such interference, whether or not such arrest or detention or threatened arrest or detention or such interference may be justified.

4. If the place at which we have asked you to make delivery is a bulk liquid or gas terminal or facility, or another ship, lighter or barge, then delivery to such terminal, facility, ship, lighter or barge shall be deemed to be delivery to the party to whom we have requested you to make such delivery.
5. As soon as all original bills of lading for the above cargo shall have come into our possession, to deliver the same to you, or otherwise to cause all original bills of lading to be delivered to you.
6. 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.
7. This indemnity shall be governed by and 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.

Yours faithfully,

For and on behalf of
 [*insert name of Requestor*]
 The Requestor

.....
 Signature

APPENDIX "6"

Standard Form Letter "CC"

STANDARD FORM LETTER OF INDEMNITY TO BE GIVEN IN RETURN FOR DELIVERING CARGO AT A PORT OTHER THAN THAT STATED IN THE BILL OF LADING AND WITHOUT PRODUCTION OF THE ORIGINAL BILL OF LADING INCORPORATING A BANK'S AGREEMENT TO JOIN IN THE LETTER OF INDEMNITY

To: *[insert name of Owners]* *[insert date]*
 The Owners of the *[insert name of ship]*
[insert address]

Dear Sirs

Ship: *[insert name of ship]*

Voyage: *[insert load and discharge ports as stated in the bill of lading]*

Cargo: *[insert description of cargo]*

Bill of lading: *[insert identification number, date and place of issue]*

The above cargo was shipped on the above vessel by *[insert name of shipper]* and consigned to *[insert name of consignee or party to whose order the bills of lading are made out, as appropriate]* for delivery at the port of *[insert name of discharge port stated in the bills of lading]* but we, *[insert name of party requesting substituted delivery]*, hereby request you to order the vessel to proceed to and deliver the said cargo at *[insert name of substitute port or place of delivery]* to *[insert name of party to whom delivery is to be made]* without production of the original bill 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 liability, loss, damage or expense of whatsoever nature which you may sustain by reason of the ship proceeding and giving delivery of the cargo 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 ship proceeding and giving delivery of the cargo as aforesaid, to provide you or them on demand with sufficient funds to defend the same.

3. If, in connection with the delivery of the cargo as aforesaid, the ship, or any other ship or property in the same or associated ownership, management or control, should be arrested or detained or should the arrest or detention thereof be threatened, or should there be any interference in the use or trading of the vessel (whether by virtue of a caveat being entered on the ship's registry or otherwise howsoever), to provide on demand such bail or other security as may be required to prevent such arrest or detention or to secure the release of such ship or property or to remove such interference and to indemnify you in respect of any liability, loss, damage or expense caused by such arrest or detention or threatened arrest or detention or such interference, whether or not such arrest or detention or threatened arrest or detention or such interference may be justified.
4. If the place at which we have asked you to make delivery is a bulk liquid or gas terminal or facility, or another ship, lighter or barge, then delivery to such terminal, facility, ship, lighter or barge shall be deemed to be delivery to the party to whom we have requested you to make such delivery.
5. As soon as all original bills of lading for the above cargo shall have come into our possession, to deliver the same to you, or otherwise to cause all original bills of lading to be delivered to you.
6. 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.
7. This indemnity shall be governed by and 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.

Yours faithfully,

For and on behalf of
 [insert name of Requestor]
 The Requestor

.....
 Signature

We, [insert name of the Bank], hereby agree to join in this Indemnity providing always that the Bank's liability:-

1. shall be restricted to payment of specified sums of money demanded in relation to the Indemnity (and shall not extend to the provision of bail or other security)

2. shall be to make payment to you forthwith on your written demand in the form of a signed letter certifying that the amount demanded is a sum due to be paid to you under the terms of the Indemnity and has not been paid to you by the Requestor or is a sum which represents monetary compensation due to you in respect of the failure by the Requestor to fulfill its obligations to you under the Indemnity. For the avoidance of doubt the Bank hereby confirms that:
 - (a) such compensation shall include, but not be limited to, payment of any amount up to the amount stated in proviso 3 below in order to enable you to arrange the provision of security to release the ship (or any other ship in the same or associated ownership, management or control) from arrest or to prevent any such arrest or to prevent any interference in the use or trading of the ship, or other ship as aforesaid, and
 - (b) in the event that the amount of compensation so paid is less than the amount stated in proviso 3 below, the liability of the Bank hereunder shall continue but shall be reduced by the amount of compensation paid.
3. shall be limited to a sum or sums not exceeding in aggregate [*insert currency and amount in figures and words*]
4. subject to proviso 5 below, shall terminate on [*date six years from the date of the Indemnity*] (the 'Termination Date'), except in respect of any demands for payment received by the Bank hereunder at the address indicated below on or before that date.
5. may be extended at your request from time to time for a period of two calendar years at a time provided that:-
 - a) the Bank shall receive a written notice signed by you and stating that the Indemnity is required by you to remain in force for a further period of two years, and
 - b) such notice is received by the Bank at the address indicated below on or before the then current Termination Date.

Any such extension shall be for a period of two years from the then current Termination Date and, should the Bank for any reason be unwilling to extend the Termination Date, the Bank shall discharge its liability by the payment to you of the maximum sum payable hereunder (or such lesser sum as you may require).

However, in the event of the Bank receiving a written notice signed by you, on or before the then current Termination Date, stating that legal proceedings have been commenced against you as a result of your having delivered the said cargo as specified in the Indemnity, the Bank agrees that its liability hereunder will not

terminate until receipt by the Bank of your signed written notice stating that all legal proceedings have been concluded and that any sum or sums payable to you by the Requestor and/or the Bank in connection therewith have been paid and received in full and final settlement of all liabilities arising under the Indemnity.

6. shall be governed by and construed in accordance with the law governing the Indemnity and the Bank agrees to submit to the jurisdiction of the court stated within the Indemnity.

It should be understood that, where appropriate, the Bank will only produce and deliver to you all original bills of lading should the same come into the Bank's possession, but the Bank agrees that, in that event, it shall do so.

The Bank agrees to promptly notify you in the event of any change in the full details of the office to which any demand or notice is to be addressed and which is stated below and it is agreed that you shall also promptly notify the Bank in the event of any change in your address as stated above.

Please quote the Bank's Indemnity Ref in all correspondence with the Bank and any demands for payment and notices hereunder.

Yours faithfully,

For and on behalf of

[insert name of bank]

[insert full details of the office to which any demand or notice is to be addressed]

.....
Signature