



Illegality in the Shipping Industry Seminar 7 December 2015

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Illegality

Generally

There are regrettably many opportunities for fraud and illegal activities in the maritime business: international trade is very dependent on integrity of documents (bills of lading/letters of credits etc). There are obvious opportunities for theft of cargo, disguising quality of goods etc., falsifying or backdating documents to make illegitimate claims on letters of credit or avoid regulations

Skuld overview of fraud in maritime cases <http://www.skuld.com/topics/legal/fraud--crime/fraud-in-the-maritime-industry/introduction/> (January 2014) describes the following (and suggests ways to counter them):

- Bunkering frauds
- Cargo and document frauds
- Chartering frauds
- Port related frauds
- Blackmail frauds
- Cyber fraud
- Fake job fraud
- Information phishing

The following may also be added:

- Extortion
- Bribery
- Piracy

Illegality

The following is a selection of (mostly bill of lading) cases showing the incidence of fraud in the industry. Paul Herring will speak about bills of lading. This talk is concerned primarily with bribery, piracy, extortion and backdating.

- **Brown Jenkinson & Co Ltd v. Percy Dalton (London) Ltd (1957)**
- **Etablissement Esefka International Anstalt v. Central Bank of Nigeria (1979)**
- **United City Merchants v Royal Bank of Canada (1982)**
- **The Saudi Crown (1986)**
- **Standard Chartered Bank v. Pakistan National Shipping Corp (No. 2) (2000)**
- **Brownsville Holdings Ltd. v. Adamjee Insurance Co. Ltd. "The Milasan" (2000)**
- **Trafigura Beheer BV v. Mediterranean Shipping Co Sa "The MSC Amsterdam" (2005)**
- **Uzinterimpex JSC v. Standard Bank Plc (2008)**
- **STX Pan Ocean Co Ltd v. Bowen Basin Coal Group Pty Ltd and Thomson (2010)**
- **Mv Alina II (2013)**



Illegality

Bribery

Fiona Trust & Holding Corporation v Privalov [2008]

The innocent party may rescind a contract induced by bribery. This case concerned the impact of an allegation of bribery on arbitration agreements contained in allegedly illegal contracts. The House of Lords confirmed that the arbitration tribunal could determine its own jurisdiction and that the allegation of bribery which would render the main contracts unenforceable did not render the arbitration agreements invalid.

Extortion and Piracy

These are examples of cases where illegal acts by third parties impact on relations between carrier, charterer and shipper. The shipping industry has evolved standard contractual provisions to regulate relations between the parties, viz:

BIMCO Anti-corruption clause (November 2015)

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Illegality

Backdating

Particularly:

- Backdating of bills of lading to make them conform with terms of LC
- Backdating of sham documents to support arrest: *The Alina II* (2013)
- Backdating of shipbuilding contracts to evade PSPC/CSR and in future potentially other new regulations.

Illegality

Backdating

“Fraud unravels all” (ex turpi causa non oritur actio or fraus omnia corrumpit)

Per Lord Diplock (United City Merchants v Royal Bank of Canada)

But does it?

“Where issues of illegality are raised, the courts have (as it seems to me) to steer a middle course between two unacceptable positions. On the one hand it is unacceptable that any court of law should aid or lend its authority to a party seeking to pursue or enforce an object or agreement which the law prohibits. On the other hand, it is unacceptable that the court should, on the first indication of unlawfulness affecting any aspect of a transaction, draw up its skirts and refuse all assistance to the plaintiff, no matter how serious his loss nor how disproportionate his loss to the unlawfulness of his conduct.”

Per Bingham LJ in Saunders v Edwards



Illegality

Backdating

English law will regard as void and unenforceable

- a contract to commit a legal wrong
- a contract contrary to morals or public policy

Illegality

Backdating

- Backdated contracts will almost inevitably represent transactions structured to deceive:
 - Alexander v Rayson (1936)
 - Mitsubishi Corporation v Alafouzos (1988) .
- Whether or not “fraud” involved, backdating is likely to be offensive to *English* public policy

Halsbury: “The court will give effect to international agreements incorporated into English law”

United City Merchants (Investment) Ltd v Royal Bank of Canada (1983): issue of letters of credit designed to circumvent the Bretton Woods Agreement

- Deception under *foreign* law/international treaty obligations: SOLAS may lead to contract being unenforceable where English law is expressly chosen as governing law.
- It is not necessary to show that anyone was in fact deceived.
- Under English law it is probably not relevant that the claimant does not need to *rely* on illegal elements of transaction to prove its case (cf Singapore: American Home Assurance v Hong Lam Marine Pte Ltd (1999))

Illegality

What happens if illegality is not pleaded?

- The court or arbitrators must take notice of ex facie illegality even if the defendant does not wish to raise the objection
- If the contract not ex facie illegal but unpleaded facts are revealed in evidence and show that the contract is illegal or void, the court or tribunal should decline to enforce the contract, if satisfied that all the relevant facts are before it

Illegality

Backdating

Impact on guarantees

Construction: Is the security (guarantee) a primary/performance bond or secondary/"see-to-it" guarantee?

- Wuhan Guoyu Logistics v Emporiki Bank (2013)

Typical refund guarantees for shipbuilding contracts are now increasingly likely to be construed as primary securities:

- Spliethoffs Bevrachningskantoor v Bank of China (2015)

Are LCs and Standby LCs to be treated differently from other "performance bonds" in applying the principle of "autonomy"?

- Mahonia No 1 and Mahonia No 2 (2003-4)

"Taint": The validity of the guarantee or letter of credit may depend on (1) the degree of connection with the underlying illegal transaction and (2) the gravity of the illegality.

Impact on settlement agreements

A settlement of a dispute regarding a contract allegedly unenforceable for illegality may be upheld if there was a genuine dispute as to whether the underlying contract was illegal

- Binder v Alachouzos (1972)

Illegality

Foreign proceedings alleging fraud – anti-suit injunctions

- **Spliethoffs Bevrachningskantoor BV v Bank of China (2015):**

Judgment of Chinese court restraining payment in fraud proceedings related to shipbuilding contract recognised in principle by the English court (even though the Chinese proceedings continued in breach of English anti-suit injunction) but Chinese bank nevertheless ordered to pay under refund guarantee. English court took the view that Chinese law did not realistically place the Chinese bank in jeopardy of paying twice and even if it did, since China was not the place of performance, the Chinese bank had nevertheless undertaken an engagement to make payment under English law which would be enforced.
- **Crescendo Maritime Co and Alpha Bank v Bank of Communications (2015)**

English court determined that Chinese bank refund guarantor was bound by award of English arbitration tribunal notwithstanding allegations of fraud brought before Chinese courts. English court granted anti-suit injunction on application of buyer and declaration of non-liability to buyer's bank/assignee in relation to allegations of fraud in Chinese proceedings

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