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How do you control – and overcome – the risks associated with letters of indemnity?

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Three Questions

- The risks to the shipowner of delivering without production of original bills of lading
- The risks to the recipient of a letter of indemnity
- The risks to the giver of a letter of indemnity

Misdelivery – Owners’ defences

- Delivery to a party which is entitled to possession
 - Lord Blackburn in *Glyn Mills Currie & Co. v. East and West India Dock Co.*, (1882) 7 App.Cas. 591:
 - “if the person to whom [the owner] delivered was really entitled to the possession of the goods, no one might be entitled to recover damages from him for that breach of contract.”
 - *The Houda* [1994] 2 Lloyd’s Rep. 541
 - *The Nika* [2021] 1 Lloyd’s Rep. 109

Misdelivery – Owners’ defences

- Consent or acquiescence of the bill of lading holder
- *Maynegrain Pty Ltd v. Compafina Bank* (PC, unrep. 25.1.18)
 - Consent of the pledgee is a defence to a claim in conversion by the pledgee.
- *Taylor's Fashions v. Liverpool Victoria Trustees* [1982] 1 QB 133 at 151:
 - “a very much broader approach which is directed rather at ascertaining whether, in particular individual circumstances, it would be unconscionable for a party to be permitted to deny that which, knowingly, or unknowingly, he has allowed or encouraged another to assume to his detriment than to inquiring whether the circumstances can be fitted within the confines of some preconceived formula serving as a universal yardstick for every form of unconscionable behaviour.”

Has the right to an indemnity been triggered?

- A separate LOI? *The Miracle Hope* [2020] EWHC 726 (Comm) at [45] – [50]
- Unilateral contract? *The Jag Ravi* [2012] 1 Lloyd's Rep. 637
- Strict compliance:
 - deliver to X “or to such party as you believe to be or to represent [X] or to be acting on behalf of [X]”.
 - 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.”
- *The Songa Winds* [2018] 2 Lloyd's Rep. 47 at [52] and [59]

Can the indemnifying party be compelled to perform?

- Para.3 of the IG LOI:
 - “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 ...”
- *Tenacity Marine v. NOC Swiss* [2020] EWHC 2820 (Comm)

Can the indemnifying party be compelled to perform?

- Availability of an interim mandatory injunction.
- Damages not an adequate remedy
 - *The Laemthong Glory (No.2)* [2005] 1 Lloyd's Rep. 632 at [47]-[52]
 - *The Bremen Max* [2009] 1 Lloyd's Rep. 81 at [23]
 - *The Universal Bremen* [2020] 1 Lloyd's Rep. 206 at [30]
- Irreversibility of security not an obstacle
 - *The Miracle Hope* [2020] EWHC 726 (Comm) at [55]

Can the indemnifying party be compelled to perform?

- Unwilling or unable to pay?
- Impossibility defence: *Tenacity Marine v. NOC Swiss* [2020] EWHC 3214 (Comm)
- Claim under sub-LOI
 - *The Jag Ravi* [2012] 1 Lloyd's Rep. 637
 - LOI addressed to multiple parties
 - *The Laemthong Glory (No.2)* [2005] 1 Lloyd's Rep 632 and [2005] 1 Lloyd's Rep 688
 - Contracts (Rights of Third Parties) Act 1999

Can the indemnifying party be compelled to perform?

- Expiry of the LOI
 - Para.5 of IG LOI

“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.”

- *The Songa Winds* [2018] 2 Lloyd’s Rep. 47 at [66]
- *Euro-Asian Oil SA v. Abilo (UK) Ltd* [2017] 1 Lloyd’s Rep. 287 at [351]
- *Bosma v. Larsen* [1966] 2 Lloyd’s Rep. 22



Risks to giver of indemnity

- Liability to indemnify without recourse
- Liability to secure claim without control of its defence
- Possibility of taking over defence of claim but only by agreement

Conclusions

- Shipowner risks a misdelivery claim
- Recourse against LOI subject to risks that indemnity not engaged or cannot be enforced
 - May be mitigated by rights of shipowner under multiple LOIs
- Giver of indemnity exposed to risk of securing a claim without control of defence
 - May be mitigated by claims handling agreement



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