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The Miracle Hope (No 5)

Managing Associate, Neila Cheeks considers the judgment handed down by His Honour Judge Pelling KC on 3 October 2022 of Trafigura Maritime Logistics Pte Ltd **("T")** v Clearlake Shipping Pte Ltd (**"CSPL"**) and (1) Clearlake Chartering USA Inc (**"CUSA"**) (2) Clearlake Shipping Pte Ltd (**"CSPL"**) v Petroleo Brasileiro SA (**"PBSA"**) - ("The Miracle Hope (No 5)") (**"the Vessel"**).

Introduction

This judgment follows two previous judgments of 27 April and 6 May 2020 and concern the enforcement of indemnity claims in a charterparty chain for an eye-watering sum of almost US$80M for wrongful delivery of an oil cargo. It is recommended reading because it highlights the risks of inter-group novation of chain contracts without indemnities, poor drafting and the distinction between "discharge" and "delivery". We summarise below a few of the key takeaways from this 122-paragraph judgment.

Facts

The CP Chain and Sale Contract

T voyage chartered the Vessel to CUSA (**"the T Charter"**) who chartered the Vessel to PBSA. Both charters were on amended Shellvoy 6 forms in materially similar terms. A subsidiary of PBSA; Petrobras Global Trading BV (**"PGT"**), sold a cargo of crude oil to Hontop Energy (Singapore) Pte Ltd (**"Hontop")**, DES Qingdao in China. Hontop financed this purchase from Natixis Bank ("**Natixis**") who issued an irrevocable letter of credit naming PGT as beneficiary and providing for payment against original bills of lading (**"OBLs"**) alternatively, by a letter of indemnity.

Delivery without OBLs

On arrival at the discharge port, Hontop (identified as the receiver and purchaser from PGT) sought discharge without presentation of the OBLs. For that purpose, CSPL provided an indemnity to T and PBSA is said to have provided an indemnity to CUSA as allegedly required to do under the charters.

Novation

Sometime after the Vessel discharged the oil and departed, the T Charter was novated by replacing CUSA with CSPL as the "charterer". Importantly, although the T Charter was novated so that CSPL replaced CUSA, CUSA remained the disponent owner to PBSA. This created a gap in the charter chain and a possible "break" in the indemnity chain.

Demands under the indemnities

Upon the insolvency of Hontop in February 2020, Natixis demanded that PBSA and PGT surrender the OBLs and claimed that delivery to Hontop was wrongful and arrested the Vessel in Singapore. As one would expect, claims for indemnity were made down the chain of indemnities. These claims were the subject of the earlier Miracle Hope decisions here:
https://www.bailii.org/ew/cases/EWHC/Comm/2020/1073.html
https://www.bailii.org/ew/cases/EWHC/Comm/2020/995.html

The Claims Under the Indemnities

The head owner commenced arbitration against T who in turn claimed against CSPL under the indemnity provided to T. CUSA and CSPL brought a

claim against PBSA under the indemnity provided to CUSA by PBSA.

PBSA argued that even if CSPL is liable to T, it is not liable to either CUSA or CSPL because the effect of the novation was that CUSA ceased having any liability to T under any indemnity (which had been assumed by CSPL) and PBSA had no contract with CSPL. This was referred to in the judgment as the "Contractual Lacuna Issue".

Decision

Indemnities were upheld from PBSA all the way up to the head owners. Some of the key takeaways from the judgment are:

The Contractual Lacuna Issue: The court held that there was an internal indemnity provided by CUSA to CSPL. It decided that CSPL and CUSA intended that there should be an internal indemnity between them to enable liabilities to pass down the indemnity chain. It justified this on the grounds of (1) the necessity of an implied indemnity (2) evidence of intention and (3) lack of any written indemnity was not an error but was established practice. The message here is to be aware of the evidence required of the necessary indemnities for inter-group novation to avoid such contractual lacunas.

Delivery vs Discharge: Discharge is the physical act of removing the cargo from the ship whilst delivery is giving possession of it to the receiver. Whether such a distinction applies depends on the context. On these facts, there was no such distinction. One of the many factors considered by the court was that the nature of the cargo which, if discharged and not delivered, would have required prior agreement as to storage at the discharge port. There was no such prior agreement. Admittedly, each case will be looked at on its own facts.

The importance of clear drafting: Issues arose as to the meaning of "*an LOI as per Owners' P&I Club wording to be submitted to Charterers before lifting the "subs"* where no such LOI was provided before subjects were lifted. Fortunately for T, the court adopted a commercial approach and did not accept that the failure to supply the wording before subjects were lifted meant that the parties' intention was that PBSA would be entitled to demand discharge or delivery without presentation of the OBLs without providing an indemnity. The problem here was caused by poor drafting such that the process under which terms of the LOI were to be provided were unclear. The lesson is to ensure the drafting is clear and complete.

Comments

The delivery of cargo without the production of OBLS is common in commodities trading. The novation of charterparties for various internal business requirements is also common as is the issue of maritime indemnities up and down the charter chain. Together, as seen in this case, they provide the perfect ingredients for a plethora of complex legal issues. Whilst we fully appreciate the commercial realities and the fast pace of shipping and trade, parties need to have in mind that novation does not always bind parties outside the group where they are third parties to a contractual chain. Unless there is an internal indemnity recorded, there is the risk that these indemnity chains will be broken. In-house counsel would be justified in pressing pause to discuss these issues with their business teams.

Please click here for a copy of the full judgment.

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