International Group P&I Club letters of indemnity return to the courts

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In recent weeks the Commercial Court has handed down four important judgments concerning the construction and enforcement of the standard International Group form 'A' letters of indemnity given for the delivery of cargo without presentation of original bills of lading. The judgments all relate to applications for interim mandatory injunctions to enforce the provision of (i) US$76 million security to release the mt MIRACLE HOPE (the "Vessel") and (ii) defence funds to the Vessel's head owners for defending a misdelivery claim brought against them in the High Court in Singapore.

Michael Ashcroft QC and Oliver Caplin acted throughout for Trafigura Maritime Logistics Pte ("*Trafigura*"), the successful injunction applicant, having previously acted in the similar leading cases of *The Zagora* [2017] 1 Lloyd's Rep 194 and *The Songa Winds* [2018] 2 Lloyd's Rep 47; and [2018] 2 Lloyd's Rep 374 (in the Court of Appeal).

Henry Byam-Cook QC acted for Petroleo Brasileiro SA ("*Petrobras*"), one of the injunction respondents, having previously acted in the leading case of *The Laemthong Glory* [2005] 1 Lloyd's Rep 632, [2005] 1 Lloyd's Rep 688 (in the Court of Appeal).

All of the hearings leading to the judgments below took place after the advent of the COVID-19 crisis and were held by either telephone or video under the COVID-19 Protocol. Despite multiple parties, concurrent listings, urgency, and some degree of complexity, everything proceeded smoothly.

Michael Ashcroft QC and Oliver Caplin summarise the key points in each below.

(1) Trafigura Maritime Logistics Pte Ltd v Clearlake Shipping Pte Ltd [2020] EWHC 726 (Comm)

The first judgment in the series was handed down by Henshaw J on 26 March 2020. Trafigura had applied ex parte for a mandatory injunction requiring Clearlake Shipping Pte Ltd ("*Clearlake*") to provide security and defence funds under a letter of indemnity. The judgment, which is otherwise an orthodox application of the settled law in this area (see §31 of the judgment), is interesting because the indemnification provision was contained in clause 33(6) of the charterparty between the parties (an amended Shellvoy 6 form), not in a separately issued document. An argument that the charterparty clause was not enough, and that a separate LOI containing an indemnity needed to be provided, was rejected upon a proper construction of clause 33(6). This may be important to parties using the Shellvoy 6 form, and other charters which do not envisage a separate LOI being issued. Trafigura obtained the injunction it had sought, requiring Clearlake to put up security "forthwith" (which the Judge decided tracked the wording of the standard form LOI).

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(2) Clearlake Chartering USA Inc v Petroleo Brasileiro SA [2020] EWHC 805 (Comm)

Clearlake Chartering USA Inc had sub-chartered the Vessel to Petrobras under a Shellvoy 6 form on materially the same terms as the charter between Trafigura and Clearlake. As such, it proceeded to make a similar ex parte application down the charter chain against Petrobras. Jacobs J granted Clearlake Chartering USA Inc an injunction on 31 March 2020.

(3) Trafigura Maritime Logistics Pte v Clearlake Shipping Pte Ltd and Clearlake Chartering USA Inc v Petroleo Brasileiro SA [2020] EWHC 995 (Comm)

This was the return date of the two ex parte injunction applications detailed above. By the time of the return date, almost one month after the injunction had been obtained, neither security nor defence funds had been provided. The Vessel was still under arrest. Negotiations had taken place between Clearlake and Petrobras with the arresting bank about the terms of a bank guarantee, but an impasse on its terms had not been overcome and an application had been made to the Singapore Court. No other form of security had been proffered.

Trafigura applied to vary the injunction that Henshaw J had granted to now require security to be put up via either a bank guarantee or a cash payment into court within a very short amount of time. Ultimately the Judge ordered that security be provided by a cash payment into the Singapore Court, and that defence funds be provided to the head owners, eight and four working days respectively after the date of the judgment. A large number of issues arose, a small selection of which are set out below (reading the whole judgment is advised).

First, what did an obligation requiring security to be put up “forthwith” mean? How much latitude did an injunction respondent have? Teare J decided that it meant security had to be provided in “the shortest practicable time. What is practicable will inevitably depend on the circumstances of the case” (Judgment §17).

Second, what does it mean when the standard form LOI states that the LOI issuer must provide “bail or other security as may be required…to secure the release of the vessel”? Must they do whatever it takes to secure the release of the vessel in the eyes of the arresting party (in these cases often a bank)? Or is the “requirement” whatever the court of the forum of the arrest requires to permit release? After canvassing various options, the Judge decided the latter (Judgment §28).

Third, if negotiations over the wording of a bank guarantee (the most common form of security) break down, is the LOI issuer obliged to offer some other kind of security, if it is possible? In this case the arresting party had indicated that it would accept a cash payment into Court as security in early April, but the LOI issuers had not gone down that path, instead choosing to enlist the assistance of the Singapore Court to resolve the impasse over the bank guarantee wording. The Judge ordered that a cash payment of security be made, which he considered was necessary to “ensure that the court’s injunctions are effective and achieve their aim” (Judgment §74). The Judge made that order in relation to both Clearlake and Petrobras (the two parties sitting in the position of injunction respondents in their respective sets of proceedings).

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In concert with his definition of "forthwith", if one method of providing security quickly proves to be a dead end, the judgment makes clear that injunction respondents / LOI issuers will be required to take active steps to provide security by other available means.

(4) Trafigura Maritime Logistics Pte v Clearlake Shipping Pte Ltd and Clearlake Chartering USA Inc v Petroleo Brasileiro SA [2020] EWHC 1073 (Comm)

This was the consequential issues hearing of the return date applications for injunctive relief. Some interesting points of note arising from it include the following.

First, it was not appropriate for the security and defence funds payment obligations of Clearlake and Petrobras to be staggered (so that Petrobras at the bottom of the LOI chain was obliged to pay first, and Clearlake was only obliged to pay the security if Petrobras defaulted). That was because Clearlake owed Trafigura independent obligations under the indemnity it had given, not ones contingent on Petrobras' performance.

Second, on the facts of this case, and given the chain-like nature of the indemnities (which are so often present in these cases), it was appropriate for Petobras (to an extent) to pay such of Trafigura's costs of the ex parte application as Clearlake had been ordered to pay, a so-called *Vimera* or non-party costs order under section 51 of the Senior Courts Act 1981 (a similar order was made in *The Songa Winds* litigation).

Third, despite the fact it was possible to characterise Clearlake's conduct as a breach of the indemnity contract, and a failure to comply with Henshaw J's original order, it was not appropriate to order costs to be assessed on the indemnity basis because Clearlake's conduct was not "out of the norm".

Conclusion

The various judgments set out above contain significant and important clarifications on the construction and enforcement of these standard form LOIs. The authors suggest that anyone who may be affected by them reviews the judgments carefully. It is inevitable that further disputes arising from these contracts, and the injunctive relief obtained to enforce them, will be before the courts in due course.

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