ONC The Voyager
May 2020

Cover Story

The UK Court granted a mandatory injunction after a telephonic hearing on the urgent need to release an arrested vessel

Introduction

The UK Court handed down a decision in *Trafigura Maritime Logistics Pte Ltd v Clearlake Shipping Pte Ltd* [2020] EWHC 726 (Comm) after a remote hearing by telephone and granted to the Claimant time charterer an urgent mandatory injunction compelling the Defendant voyage charterer to provide security to enable the release of a vessel "Miracle Hope" ("**Vessel**") which was under arrest in Singapore.

Background

The Claimant time chartered the Vessel from Ocean Light Shipping Inc ("**Ocean Light**"), and then voyage chartered the Vessel to Clearlake Chartering USA Inc ("**CUSA**") ("**Charterparty**"), which is a different entity from the Defendant, Clearlake Shipping Pte Ltd, in the case. CUSA voyage chartered the vessel to Petroleo Brasileiro SA on terms materially similar to those contained in the Charterparty, including the indemnity provision, to ship crude oil pursuant to a trade financed by the bank Natixis. No Club letter of indemnity ("**LOI**") was provided to or requested by CUSA or the Defendant before the Charterparty became an unconditional binding contract. An addendum to the Charterparty was then entered into to substitute the Defendant for CUSA as the charterer after the discharge of cargo.

A dispute arose in relation to the relevant bills of lading. In March 2020, the bank Natixis Singapore commenced proceedings against the "Owners and/or demise charterers" of the Vessel and the Singapore Court granted a warrant of arrest over the Vessel. Natixis demanded security of US$76 million to

secure the release of the Vessel and the Ocean Light demanded the Claimant to put up the security. The Claimant then requested the Defendant to comply its obligations under the indemnity clause but no positive response was received. Finally, the Claimant sought urgent injunctive relief from the Court to compel the Defendant to fulfil its obligations under the indemnity to provide the security as requested by Natixis to secure the release of the Vessel.

Legal principles

In deciding whether an injunction should be granted, the Court highlighted that it has the power to grant an injunction where it is "just and convenient" to do so and the principles set out in *American Cyanamid Co v Ethicon Ltd* [1975] AC 396 apply to the grant of mandatory injunctive relief: If the Court is persuaded that damages would not be an adequate remedy for the Applicant and that a cross-undertaking in damages would adequately protect the Respondent if the injunction were found to have been wrongfully granted at trial, that should ordinarily be in favour of granting the mandatory injunction, without the need to progress to the balance of convenience assessment. If there is uncertainty as to the adequacy of damages, then the Court should proceed to analyse the balance of convenience.

Defendant's arguments and Court's decision

The Defendant argued that it was not liable under the indemnity and no injunction should be granted for the following main reasons:

1. There was at the least a serious question whether the application had been brought against the correct party;
2. The terms of the indemnity clause relied upon had not been provided in time as required under the Charterparty thus had not been complied with;
3. No separate LOI was provided to the Claimant as required under the Charterparty therefore no indemnity has in fact arisen; and
4. The circumstances did not justify the extreme urgency with which the application had been made, particularly bearing in mind the serious nature of the relief being sought, namely a mandatory injunction that the Defendant put up US$76 million by way of security plus defence costs (in an unspecified amount) in relation to a claim between two third parties.

The Court rejected all of the Defendant's arguments. The Court found it unable to accept the wrong defendant point because the signature of the addendum would have served little purpose unless it was intended to place the Defendant in the shoes of CUSA for all purpose, including any outstanding liabilities that had already arisen, and, as a result of the addendum, the Defendant at the very least assumed all the charterer's obligations required to be performed after the signing of the addendum.

Regarding the argument of indemnity wording not provided in time, in circumstances where the Defendant had in fact after conclusion of the fixture requested the indemnity wording from the Claimant, had been provided with it, and had then gone on specifically to invoke the clause in conjunction with instructions to discharge the cargo without presentation of original bills of lading, the Court found that this point had no merit.

Considering the communications between the parties in the past, the Court found that the Defendant had waived any requirement for a separate LOI and/or would be estopped by convention from asserting now that no indemnity arose. The Court also considered that the shipping market for Very Large Crude Carriers such as the Vessel was very volatile and there was a very pressing need for the security to be provided in order to secure its release.

In view of the above, the Court held that the Claimant would succeed on its claim on the merits, the damages would not be an adequate remedy, cross-undertaking in damages would provide adequate protection to the Defendant if the injunction were found to have been wrongfully granted, and taking into account the risk of prejudice to each party, the balance of justice is in favour of granting the mandatory injunction sought by the Claimant.

Therefore, the Court granted the mandatory injunction, subject to the provision of a parent company guarantee by the Claimant as a cross-undertaking in damages.

Conclusion

In this case, the judgment reinforced the legal principles in granting a mandatory injunction, in particular whether damages would be an adequate remedy and cross-undertaking in damages would provide adequate protection to the Defendant. The Court hearing the case by way of telephone also demonstrated that the Court is making its best endeavours to overcome the difficulties currently arising from the COVID-19 and minimise the disruption to court operation as well as access to justice.

Whilst all hearings in Hong Kong Court have generally resumed starting from 4 May 2020, it also announced a greater use of remote hearings by video-conferencing facilities back in early April 2020 to cope with the challenges posed by the COVID-19, which provided a helpful guidance on how to better utilise technology in dispute resolution. However, it remains to be seen whether the Hong Kong Court will adopt the UK Court approach and is prepared to hear injunction applications by way of telephone hearing.

Shipping in the crosshairs of the EU emission strategy

In November 2019, the European Commission president Ursula von der Leyen announced a plan to regulate international shipping emissions and include it in the European Union's cap and trade scheme and the Emissions Trading System. Greens MEP Jutta Paulus has taken the mantle on maritime emissions for the European Parliament, producing a thorough proposal for all ships under the MRV to reduce their carbon intensity by at least 40% by 2030 and forcing them to contribute to a European maritime decarbonisation fund. Ms Paulus' proposal suggested that regulations will go through reviews and stakeholders will have a chance to chime in, where the shipping industry can have an impact in the final layout of the rules. The International Maritime Organization's focus on short-term measures means EU member states have a degree of autonomy in supporting the options they want. Reducing GHG emissions by at least 50% by 2050 would require $1trn to $1.4trn in investments from 2030 onwards. It remains to be seen what kind of financial assistance the EU will provide to enable the green transition.

Coronavirus: Cruise operators excluded from US bailout

The US Senate passed a bill to set aside US$500m for large employers in March. US media reported that to qualify for the bailout, companies must be created or organised in the US or under the laws of the US, and have significant operations and most of their employees there. US President Donald Trump commented that it would be very tough to make a loan to a company based in a different country but the US government was "going to work very hard on the cruise line business" and "try to work something out". The Cruise Line Industry Association ("**CLIA**"), an industry group, said that the industry would not be able to access the US$500m of US business aid because they incorporate offshore.

EU suspends separate shipyard merger probes

The European Commission (the "**Commission**") has halted its investigations into two shipyard mergers, namely the merger of Italy's Fincantieri with France's Chantiers de l'Atlantique (the "**European Shipbuilding Merger**"), and the merger of South Korea's Hyundai Heavy Industries with Daewoo Shipbuilding & Marine Engineering (the "**South Korean Merger**") amid the coronavirus outbreak which has prevented the companies concerned from providing further information. According to the Commission, the European Shipbuilding Merger may create concerns about price increases due to reduced competition in the cruise shipbuilding sector and the South Korean Merger may significantly reduce competition in the market for cargo shipbuilding, which could lead to higher prices, less choices and reduced incentives to innovate. The process of putting the investigations on hold is known as "stopping the clock". This procedure in merger investigations is activated if the parties fail to provide, in a timely fashion, important information that the Commission has requested from them. Once the missing information has been supplied by the parties, the clock will be re-started and the deadline for the Commission's decision will be adjusted accordingly.

US exporters hit out at punitive charges

The Agriculture Transportation Coalition (the "**Coalition**") has headed a list of 80 agricultural export producer organisations calling on National Economic Council director Lawrence Kudlow and Secretary of Agriculture Sonny Perdue for "urgent engagement" to ensure the continued free movement via shipping containers to international markets of critical food and agricultural products by undertaking a shake-up of detention and demurrage charges during the coronavirus pandemic. According to the Coalition, carriers and terminal operators impose detention and demurrage charges on US agriculture businesses when ocean freight containers cannot be returned to, or picked up from, marine terminals within a short "free time" window, even when the delay is caused by the ocean carriers or terminals themselves. The Coalition pointed out that even before the coronavirus fallout, the Federal Maritime Commission ("**FMC**") referred to the detention and demurrage fees imposed by the ocean carriers as punitive, unwarranted, exacting a heavy economic toll. The letter of the Coalition met with a strong response from the World Shipping Council which considers detention and demurrage as tools to incentivise the prompt movement of cargo and containers and to allocate risk and compensate service providers for loss of the use of terminal space and containers when cargo fails to move.

Daelim Corporation v Bonita Company Limited, Eastern Media International Corporation, Far Eastern Silo & Shipping (Panama) S.A.

[2020] EWHC 697 (Comm)

* *

This case illustrates the powers that the English Court may exercise in support of arbitral proceedings. The English Court confirmed the limited nature of its power under s 44(3) of the Arbitration Act 1996 that any orders made had to be necessary for the preservation of evidence or assets.

The claimant, Daelim Corporation ("**Daelim**"), had chartered to Bonita Company Limited ("**Bonita**") a Panamax bulker " DL Carnation" under a bareboat charter and Bonita had further sub-chartered the "DL Carnation" to Eastern Media International Corporation, Far Eastern Silo & Shipping (Panama) S.A. (together known as "**EMIC**"). Each bareboat charter provided for arbitration of disputes in London under the London Maritime Arbitration Association ("**LMAA**") Terms.

The parties agreed to early termination of bareboat charters and entered into a Termination and Settlement Agreement (the "**TSA**"). At the time, Bonita also owed Daelim approximately US$1 million of hire under the head bareboat charter. The TSA provided for HKIAC arbitration in Hong Kong governed by English law. The TSA, among others, provided for payments by EMIC of approximately US$6 million directly to Daelim and US$500,000 to Bonita as a "*full and final indemnity and settlement to any and all claims of loss, damage and/or incidental expenses with regard to the charter hire payable at the rate* …".

In relation to the payment of US$500,000 to Bonita (the "**Disputed Sum**"), Daelim and Bonita each asserted that they are entitled to be paid by EMIC. Daelim asserted that their right arose out of an assignment under the terms of the head charter. Daelim was concerned that if EMIC paid Bonita, the funds paid would be dissipated before any final determination on whether EMIC should pay the Disputed Sum to Daelim or Bonita.

EMIC was willing to pay into a joint account if appropriate terms could be agreed, and leave Daelim and Bonita to argue between themselves on who is entitled to the Disputed Sum. Daelim supported the idea but Bonita did not agree to it. In the absence of a consensual tripartite solution, EMIC made it clear it would pay Bonita if it is not restrained from doing so. Daelim then sought and obtained from the English Court an ex parte injunction in respect of the Disputed Sum (the "**June Order**"). The June Order:

i. restrained EMIC from paying the Disputed Sum to Bonita, pending further order of the Court (paragraph 5.1 of the June Order);

ii. required EMIC to pay the Disputed Sum into an agreed account or failing an agreement, into the Court (paragraph 5.2 of the June Order); and

iii. restrained Bonita from demanding and/or taking any steps to demand or to recover the Disputed Sum from EMIC until further Order of the Court (paragraph 5.3 of the June Order).

On the return date, having received undertakings from EMIC in respect of paragraphs 5.1 and 5.2 of the June Order, the Court confined the order to paragraph 5.3 of the June Order. At this stage, Daelim had commenced LMAA arbitration under the head charter against Bonita.

Bonita then applied to discharge paragraph 5.3 of the June Order. Bonita challenged the Court's jurisdiction to grant the relief granted by paragraph 5.3 of the June Order in that it was not an order falling within the scope of the Court's power under s.44(3) of the Arbitration Act 1996 ("**s.44(3)**") to interfere in the arbitral process.

The Court held that any order made under s.44(3) must be necessary for the purpose of preserving evidence or assets. Only such a necessity will justify intervention by the court, since the intention is that there be as little interference with the arbitral process as possible: *Cetelem SA v Roust Holdings Ltd* [2005] EWCA Civ 618 [2005] 1 WLR 3555.

The Court was not convinced that preventing Bonita from commencing the substantive proceedings, viz. HKIAC arbitration proceedings, was required for the purpose of preserving assets. Restraining Bonita from commencing an arbitration under the TSA in Hong Kong but leave Daelim free to do so would be unjustified. On that basis, the Court concluded that paragraph 5.3 of the June Order should not have been sought or granted and discharged paragraph 5.3 of the June Order accordingly.

Shanghai Shipyard Co Ltd v Reignwood International Investment (Group) Company Limited

[2020] EWHC 803 (Comm)

In this case, the English Court has provided guidance on the different types of guarantee that might be given under the same shipbuilding contracts and their implications when payment has to be made.

The Defendant was originally the buyer of a shipbuilding contract dated 21 September 2011 ("the **Contract**") in respect of a drillship, Hull No S6030 ("**the Vessel**"). The Claimant (the "**Builder**") and the Defendant (the "**Guarantor**") entered into a contract which entitled an "Irrevocable Payment Guarantee" (the "**Guarantee**") on 17 November 2011. The Guarantee was given to secure a final payment of US$170 million (the "**Final Instalment**") by the buyer under the Contract.

By a Novation Agreement dated 30 November 2012, OPUS Tiger 1 Pte Ltd., an indirect subsidiary of the Defendant, replaced the Defendant as the buyer (the "**Buyer**"). The Buyer did not take delivery of the Vessel under the Contract. Its position was that the Vessel was not in a deliverable state. The Builder claimed the Final Instalment from the Buyer and then on 23 May 2017 made a demand against the Guarantor under the Guarantee. An arbitration was commenced under the Contract on 13 June 2019.

The present case was a trial of two preliminary issues concerning the nature of the Guarantee and the circumstances in which payment is required:

a. As regards the Guarantor's liability, whether the Guarantee provided on behalf of the Buyer was a demand guarantee or a "see to it" guarantee (the "**First Issue**"); and

b. Whether the Guarantor is entitled to refuse payment pending to the outcome of the arbitration between the Builder and the Buyer in respect of the Buyer's liability to pay and the Builder's entitlement to claim the Final Instalment (the "**Second Issue**").

On the First Issue, the English Court concluded that the Guarantee is a "see to it" guarantee upon examination of the terms of the Guarantee against the relevant background and context.

The Court approached the language of the Guarantee in line with the guidance given by the Court of Appeal in *Wuhan Guoyo Logistics Group v Emporiki Bank of Greece* [2014] 1 Lloyd's Rep 266, that "*the only assistance which the courts can give in practice is to say that, while everything must in the end depend on the words actually used by the parties, there is nevertheless a presumption that, if*

certain elements are present in the document, the document will be construed in one way or the other…".

In the context of guarantee, such elements include those derived from Paget's Law of Banking, which states that "*Where an instrument (i) relates to an underlying transaction between the parties in different jurisdictions, (ii) is issued by a bank, (iii) contains an undertaking to pay 'on demand' (with or without the words 'first' and/or 'written') and (iv) does not contain clauses excluding or limiting the defences available to a guarantor, it will almost always be construed as a demand guarantee…In construing guarantees it must be remembered that a demand guarantee can hardly avoid making reference to the obligation for whose performance the guarantee is security…*" (the "**Paget's presumption**").

Applying the "Paget's presumption", the Court opined that cogent indications that the instrument was intended to operate as a demand guarantee will be required given the significance of the fact that the current instrument is not issued by a bank, financial institution or insurance company in the ordinary course of its business. Accordingly, in the absence of indications of that strength or quality, the language of the Guarantee does not make the grade of a demand guarantee. The Guarantee was a "see to it" guarantee such that a demand could not be validly made until the underlying liability had been determined in the arbitration.

The Second Issue required the Court to determine is whether on its true construction, Clause 4 of the Guarantee operates only as a defence to a claim under the Guarantee if arbitration is commenced before demand is made. Clause 4 of the Guarantee stated:

"*In the event that [the Buyer] fails to punctually pay the Final Instalment guaranteed hereunder in accordance with the Contract or [the Buyer] fails to pay any interest thereon, and any such default continues for a period of fifteen (15) days, then, upon receipt by [the Guarantor] of [the Builder's] first written demand, [the Guarantor] shall immediately pay to [the Builder] or [the Builder's] assignee all unpaid Final [I]nstalment, together with the interest as specified in paragraph (3) hereof, without requesting [the Builder] to take any further action, procedure or step against [the Buyer] or with respect to any other security which you may hold.*

In the event that there exists dispute between [the Buyer] and the Builder as to whether:

i. [The Buyer] is liable to pay to the Builder the Final Instalment; and

ii. The Builder is entitled to claim the Final Instalment from [the Buyer],

and such dispute is submitted either by [the Buyer] or by [the Builder] for arbitration in accordance with Clause 17 of the Contract, [the Guarantor] shall be entitled to withhold and defer payment until the arbitration award is published. [The Guarantor] shall not be obligated to make any payment to [the Builder] unless the arbitration award orders [the Buyer] to pay the Final Instalment. If [the Buyer] fails to honour the award, then [the Guarantor] shall pay you to the extent the arbitration award orders."

The Court held that there is no basis in the language of the Guarantee for an interpretation that the parties intended that the benefit of these arrangements would not apply or would be taken away permanently unless the dispute had been submitted to arbitration before a demand was made under the Guarantee. The Court found that on the true construction of the Guarantee, the Guarantor is entitled to refuse payment under Clause 4 of the Guarantee pending and subject to the outcome of an arbitration between the Builder and the Buyer in respect of a dispute as to the Buyer's liability to pay and the Builder's entitlement to claim that Final Instalment, regardless of whether and when such an arbitration has been or will be commenced.

Qatar National Bank (QPSC) v The Owners of the Yacht Force India

[2020] EWHC 719

In this case, the English Admiralty Court had to decide whether it was appropriate to set aside the order for sale due to the unusual circumstances.

On 29 January 2020, the Admiralty Court made an order at the request of the claimant that the yacht "Force India" be sold. After bids had been received by the Admiralty Marshal during the sale process, the claimant applied to the Court for an order to set aside the order for the sale. The Court declined to grant such an order but suspended the sale to enable a proper hearing to take place on notice to the interested parties.

On 20 March 2020, the hearing took place by telephone as a result of the coronavirus crisis. The Admiralty Court decided to set aside the order for sale in the present case because an independent third party had paid the sums secured by the mortgage which rendered the judicial sale of the yacht "Force India" unnecessary.

The Admiralty Court held that the need to set aside the order for sale in the present case was brought by unusual and exceptional circumstances. The asset which the third party wished to acquire, viz. a property on an island off the coast of France, was charged with a debt which also secured in part by the mortgage on the yacht. Thus when the loan secured by the charge on the property was paid to the claimant, the smaller sum secured by the mortgage on the yacht was also discharged. These are unusual circumstances in the context of sales by the Admiralty Court.

The Admiralty Court acknowledged that if it became the practice for orders for sale to be set aside, those willing to incur the time and expense involved in making a bid for a vessel ordered to be sold may feel disinclined to do so. That might lead to vessels being sold for less than their market value and might tarnish the reputation of the Court. In the long term, the service provided by the Admiralty Court to the maritime community would or might be damaged. The setting aside of sales should certainly not become a practice.

The Admiralty Court emphasised the need for orders setting aside judicial sales of vessels to remain the exception rather than the norm, with a view to protecting its reputation and its ability in future cases to achieve a vessel's market value when an order for sale is made.

What measures could be adopted to facilitate maritime trade during the COVID-19 pandemic?

Introduction

The G20 Leaders gathered to hold a Summit on COVID-19 on 26 March 2020 and they agreed, among other things, that they should work to ensure the flow of vital medical supplies, critical agricultural products, and other goods and services across borders and to resolve disruptions to the global supply chains amidst the pandemic.

In this regard, the International Chamber of Shipping (ICS), the Baltic and International Maritime Council (BIMCO), the Cruise Lines International Association (CLIA), the Federation of National Associations of Ship Brokers and Agents (FONASBA), the International Association of Classification Societies (IACS), the International Association of Ports and Harbors (IAPH), the International Marine Contractors Association (IMCA), the International Maritime Employers' Council (IMEC), the International Association of Dry Cargo Shipowners (INTERCARGO), Interferry (INTERFERRY), the International Ship Managers' Association (INTERMANAGER), the International Association of Independent Tanker Owners (INTERTANKO), the International Parcel Tankers Association (IPTA), the International Transport Workers' Federation (ITF), the International Group of Protection and Indemnity Associations (P & I Clubs) and the World Shipping Council (WSC) proposed a *Preliminary list of recommendations for Governments and relevant national authorities on the facilitation of maritime trade during the COVID-19 pandemic* (the "**Recommendations**") to the International Maritime Organization (IMO). The Recommendations aim at keeping the supply chains open and maritime trade, transport and services undisrupted.

What are the recommendations in relation to access to berths in ports?

Governments should ensure the access of commercial ships to berths in port and terminals, and quarantine restrictions should not be imposed on the ship itself, otherwise timely discharge and loading of cargos will be affected.

What should governments do to facilitate crew changes in ports?

Governments should designate professional seafarers and marine personnel as "key workers" providing essential service, grant them with necessary and appropriate exemptions from national travel or movement restrictions and permit them to disembark ships in port

and transit through their territory for crew changes and repatriation.

Further, identification documents such as official seafarers' identity documents, discharge books, STCW certificates, seafarer employment agreements and letters of appointment from the maritime employer should be accepted as evidence of being a professional seafarer for the purpose of crew changes.

Approval and screening protocols for seafarers seeking to disembark ships should be implemented and information in relation to the WHO's advice on the protection against COVID-19 should be provided to ships and crews.

What should governments do to facilitate port and related operations?

Governments should identify port workers, port authority and port service personnel and other vital ancillary personnel as "key workers".

Any special measures imposed on arriving ships because of COVID-19 should be shared and communicated in a timely manner to international shipping and all relevant stakeholders.

To minimise physical interaction, governments should promote electronic means for ship-shore, administrative and commercial interactions between entities operating in a port and ships.

In light of measures being put in place as a result of COVID-19, governments should also provide customs and board control stations in ports, and port health authorities with sufficient resources to clear and process import and export cargo shipments, ships and crew, and make arrangements for pilots to continue to embark and disembark from visiting ships.

In order for ships to maintain compliance, any essential ship's classification and statutory surveys and inspections should be permitted to be undertaken.

What should governments do to ensure health protection in ports?

Governments should advise ships to monitor shipboard personnel while in port and request ships to report any cases of illness indicative of COVID-19. Port authorities and those working in ports should also be requested to comply with measures introduced by visiting ships as a response to COVID-19.

Unless it involves crew change or receiving emergency medical attention, governments are recommended to consider temporarily restricting shipboard personnel to the ship while in port. In case of medical emergencies, seafarers should be provided with access to medical treatment ashore.

Governments should also limit the interactions between shipboard personnel and entities in the port to those critical and essential operation and supply of the ship, and at the same time, provide those working in ports with information in relation to WHO's advice on the protection against COVID-19 and appropriate protection equipment.

Conclusion

The Recommendations strike the balance between containing Covid-19 and maintaining maritime activities, and governments around the world should be united in adopting these recommendations. However, it remains to be seen whether and which governments will adopt the Recommendations.

For enquiries, please contact our Litigation & Dispute Resolution Department:

E: shipping@onc.hk
T: (852) 2810 1212
W: www.onc.hk
F: (852) 2804 6311
19th Floor, Three Exchange Square, 8 Connaught Place, Central, Hong Kong