Charterparty Indemnities – Express or Implied?

The charterers of any vessel will seek to engage the ship in the most profitable manner. This will occasionally result in competing interests where, in following charterers’ orders, the vessel becomes exposed to certain factors that may result in losses or damages being incurred by owners. Commercially therefore it makes sense that charterers should bear any consequences suffered by owners that arise out of their employment of the vessel.

The way this slight paradox is resolved contractually is through either an express indemnity contained in the charter party or an implied indemnity. Typically, express indemnities will be found in voyage charter parties and implied indemnities in time charter parties. The reason for this is the degree of control charterers have over the vessel. A voyage charter will be fixed for a one distinct voyage so that, at the time of the negotiation of the fixture, owners will be able to include specific express indemnities in the contract to cater for areas of concern relevant to the voyage.

Conversely, under a time charter, the vessel will be fixed for a defined period of time during which it is likely many voyages will be performed so the peculiarities of complying with charterers orders will not be necessarily be known. Hence an implied indemnity is typically incorporated into the charter.

The rationale for indemnities, such as the express indemnity found for example in Clause 9 of the Baltime form, or, alternatively, by an implied indemnity such as that that arises under the NYPE form, was set out in Triad Shipping Co v Stellar Chartering & Brokerage Inc [The “Island Archer”] [1993] 2 Lloyd’s Rep 388 where Cresswell J said:

“... Under a time charterparty the shipowner puts the vessel at the disposal of the charterer, who can choose for himself what cargo he shall load and where he shall send the ship, provided that the limits prescribed by the contract are not exceeded. When deciding who has to bear the consequence of a choice being made in one way rather than the other, it is reasonable to assume that the consequences shall fall upon the person who made the choice, for it is the charterer who had the opportunity to decide upon the wisdom of the selection he makes....”

Whether the indemnity is in the form of an express indemnity or is implied, its application will depend on a construction of the charter as a whole. A practical example of this can now be seen in some charter parties following the decision in Action Navigation Inc v Bozfgiere Di Navigazione S p A (The “Kosa”) [2005] EWHC 177 (Comm). In that case the vessel sat for 21 days at Visag under charterers’ order. Owners claimed that hull fouling had arisen as a result of charterers’ orders to call at Visag and would therefore fall within the scope of the implied indemnity. In rejecting this argument, arbitrators found that a delay to a vessel during discharge and the subsequent hull fouling the vessel sustained was reasonably foreseeable. The vessel was permitted to trade in warm waters and the delay was not unduly long such that the fouling could have been considered fortuitous. Therefore, when construing the charter as a whole, it was considered that the expenses in cleaning the hull were an ordinary expense and a risk that owners agreed to bear when fixing the vessel. That is in contrast to unforeseen liability, losses or costs incurred by owners as a direct consequence of complying with charterers’ orders when an indemnity will generally be implied.

Accordingly, hull fouling would not fall within the scope of the implied indemnity. As a result, many owners will now seek to incorporate clauses precluding charterers from presenting speed and consumption claims where, if an agreed length of stay in a port has been exceeded, fouling has occurred as a result of the vessel complying with charterers’ orders negating the need to rely on any implied indemnity.

In a recent appeal to the Supreme Court in Ene Kos 1 LTD v Petroleo Brasileiro SA [The “Kos 1”] [2012] UKSC 17 the issue of indemnities was again raised. In short the case involved the period of detention after the vessel had been legally withdrawn from the charterparty following charterers’ failure to pay hire. At the time of withdrawal, the vessel had been part loaded with cargo and there followed a period of 2.64 days where the cargo remained on board and charterers made attempts to convince owners to cancel their withdrawal notice. Ultimately the attempts failed and Owners presented a claim for the period of delay and the bunkers consumed. The decisions at first instance and subsequent appeal have been considered in previous articles.

The Supreme Court held that owners’ appeal on two grounds:

1. The court held unanimously that owners were entitled to succeed with their claim in bailment without having to show that there was any element of necessity in their actions. In arriving at this conclusion the court applied the decision in China Pacific SA v Food Corporation of India (The “Winson”) [1963] AC 399 (as had Smith J in his decision at first instance).

2. The court held by a majority that owners were entitled to recover under the terms of the indemnity contained in Clause 13 of the charter (the employment and indemnity clause – see below) for complying with charterers’ employment orders.

In his dissenting decision Lord Mance was reluctant to extend the application of the express charter indemnity. Citing Lord Hobhouse in Whistler International Ltd v Kawasaki Kisen Kaisha Ltd (The “Hill Harmony”) [2001] 1 AC 636, Lord Mance said that for any indemnity, implied or express, to apply there would need to be a direct causal link between the charterers’ orders and the consequences. That is, pursuant to cases such as The “While Rose” [1969] 1 WLR 1096, it was necessary to establish “an unbroken chain of causation”.

On the facts in The “Kos”, Lord Mance’s view was that the loss had not been caused by complying with the charterers’ orders. While it was true that owners had complied with charterers orders to load the cargo, this was not the proximate cause of the damages. It was the fact that the charter was at end following owners’ lawful withdrawal that caused the losses. Accordingly, he feared that one of the consequences of the decision of the majority could be to invite ever more ambitious claims within a general employment and indemnity provision. In a depressed market it is not inconceivable that these fears will materialise.

However, the majority’s view was that charterers’ order to load the parcel of cargo which was on board the vessel when it was withdrawn was an effective cause of owners’ loss. The need to discharge the cargo in owners’ time arose from the fact that the cargo had been loaded pursuant to charterers’ orders. In Lord Philip’s view there could be more than one effective cause for a loss and that, in the present case, there were two effective causes of owners’ expense and loss: the withdrawal and the fact that the cargo had been loaded.**

* Clause 13

The master (although appointed by owners) shall be under the orders and direction of charterers as regards employment of the vessel, agency or other arrangements. Bills of lading are to be signed as charterers or their agents may direct, without prejudice to this charter... charterers hereby indemnify owners against all consequences or liabilities that may arise from the master, charterer or their agents’ actions or omission. **
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