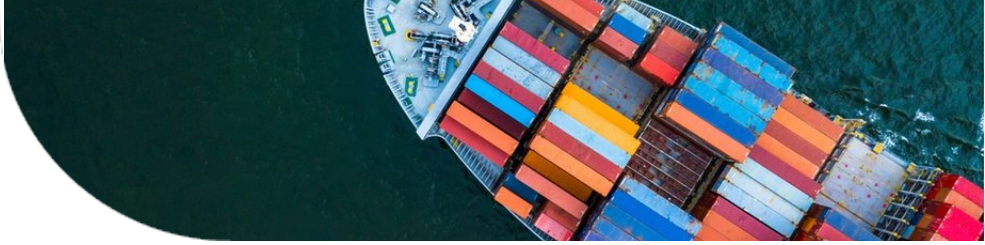

P&I Club – Letters of Undertaking and Arbitration Agreements

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In Lavender Shipmanagement Inc v Ibrahima Sory Affretement Trading SA ("The Majesty") – QBD (Comm Ct) [2020] EWHC 3462(Comm), the English court was required to decide whether a single P & I club letter of undertaking, which provided security for five separate cargo claims, under separate bills of lading, had inadvertently consolidated the claims, with the result that all of them had to be dealt with in one single arbitration.

The background to the dispute involved a familiar set of facts. The vessel "Majesty" had loaded bagged rice in Yangon, Myanmar for discharge at Conakry, Guinea. Five bills of lading had been issued for the cargo and each of the bills incorporated the terms of a voyage charterparty, which included a law and arbitration clause. The arbitration clause stated that disputes should be referred to arbitration in London and on LMAA terms. The clause also stated that if the claim/counterclaim did not exceed USD 100,000, the arbitration would be conducted under the LMAA Small Claims Procedure.

When the vessel arrived at Conakry various cargo interest brought claims for short, damaged and wet cargo, as well as a small claim for cargo, that had apparently been lost overboard on the voyage. One surveyor was appointed on behalf of all the cargo interests and that surveyor issued a report identifying the amount of damage/shortage/torn bags/mouldy/caked cargo. In that report, the surveyor did not identify which particular parcels of the cargo related to specific bills of lading. The loss was assessed for all the claims under the different bills of lading as USD 165, 28.96. There was also an Owners' surveyor in attendance but no figure was put on that surveyor on the alleged loss.

A letter of undertaking was provided the Owners P&I Club to the cargo claimants, by the ETIC SAS (ETIC). This LOU was issued during the discharge operations. Several months later a second replacement LOU was issued, which reduced the amount of security identified in the first LOU, from USD 365,270 to USD 280,000. The first LOU has been addressed to the receivers and their subrogated underwriters. The Charterers were not mentioned in the LOU.

The wording of the LOU issued by the London P&I Club was pretty standard wording. It stated:-

- The heading of the LOU referred to all five bills of lading.

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- The main body of the LOU provided - “IN CONSIDERATION OF the Owners of and other parties entitled to sue in respect of the above mentioned claims concerning the cargo referred to above (hereinafter together referred to as the “cargo owners”) refraining from taking action resulting in the arrest, or otherwise detaining or re-arresting any time hereafter, the [Vessel]…and of your refraining from commencing and/or prosecuting legal or arbitration proceedings in respect of the above claim (otherwise before the Court or Tribunal referred to below) against the said vessel and/or against her ship-owners…we, ETIC SAS, acting on behalf of the London P&I Club…hereby undertake to pay to you within 30 days receipt by us of your first written demand such sums as may be agreed by amicable settlement or a payment be adjudged by a final and un-appealable award or order of a properly constituted London Arbitration Tribunal, to be due in respect of the above cargo claim, provided that the total sum of our liability…shall not…exceed USD280,000…inclusive or interest and costs.

The cargo interests commenced arbitration proceedings in London, claiming damages of USD 165, 28.96. The arbitration notice listed each of the five bills of lading and then appointed an arbitrator in respect of claims arising in respect of shortage and/or non-delivery…pursuant to the contact of carriage contained or evidenced by each of the listed bills of lading. In addition, the arbitration notice said the appointment of the arbitrator was also pursuant to the terms of adhoc arbitration agreement contained in the letter of undertaking dated 5 April 2018, issued on behalf of the Owners Club. The notice then went on to say to the extent the LMAA Small Claims procedure applied to the claims, the Owners should confirm that within 14 days and agree to the cargo claimants arbitrator being appointed as the sole arbitrator. That invitation was without prejudice to their position the Small Claims procedure did not apply there was reference to it in the LOU.

The Owners’ insurers then appointed an arbitrator without prejudice their position that the cargo interest’s arbitrator had no jurisdiction to deal with all five disputes in one arbitration. They applied to have the arbitrators’ decide whether they did have that jurisdiction. They lost that challenge. The arbitrators’ decided they did have jurisdiction.

This was then followed by an application to the Court under section 69 of the Arbitration Act 1996. The court agreed with the arbitrators, the LOU was a valid notice submitting all of the cargo claims to a consolidated arbitration procedure.

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