

Oldendorff GmbH & Co KG -v- Sea Powerful II Special Maritime Enterprises and Others (The “Zagora”) QBD (Comm Ct) [2016] EWHC 3212

In circumstances where original bills of lading are not available at the discharge port, it is still common commercial practice for the cargo to be discharged to the receiver against a letter of indemnity (“LOI”) conditional on delivery of the cargo to the receiver named in the LOI. The matter can be more complex where agents are involved within a chain of LOIs. The English High Court recently considered an action pertaining to a chain of LOIs where the claimants argued that the LOI was not enforceable as the cargo was not delivered to the nominated receiver. The question that the Court had to consider was whether in the above circumstances the party that did in fact take delivery of the cargo from the ship did so as agent on behalf of Owners or on behalf of the party identified in the LOI to take delivery.

Facts

The matter concerned a cargo of iron ore carried on board the M/V “ZAGORA” on a voyage from Koolan Island in Western Australia to Lanshan in China.

SCIT Trading Ltd (“SCIT Trading”) agreed to sell 70,000 mt of iron ore on CFR terms to Xiamen C & D Minerals Co Ltd (“Xiamen”). Clause 9 of the sale contract provided that the agent at the discharge port be appointed by the buyer, Xiamen. Xiamen subsequently agreed to sell the cargo to an associated company, Cheongfuli Company Ltd, who in turn agreed to sell the cargo to Shanxi Haixin International Iron and Steel Co. Ltd (“Shanxi”). Clause 9 of that contract also provided for the discharge port agent to be appointed by the buyer, Shanxi. Shanxi appointed Rizhao Sea-Road Shipping Agency Co. Ltd (“Sea-Road”) as agent. SCIT Trading was responsible for arranging the vessel to carry the cargo. Pursuant to the terms of the contract of affreightment between SCIT Trading and SCIT Services Ltd (“SCIT Services”), the latter assumed responsibility for the transportation of cargoes sold by SCIT Trading. SCIT Services thereby concluded a voyage charter with Oldendorff Carriers which expressly provided for the agent at the discharge port to be the charterer’s agent and also that in the event that an original bill of lading was not available at the port of discharge the owners or Master would discharge and release the cargo against an LOI. Under a long-term agreement between

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Oldendorff Carriers and Oldendorff GmbH & Co KG, the latter agreed a time charter trip on NYPE form with owners the ZAGORA (the “Owners”) pursuant to which the charterers were to provide and pay for agents and that the charterers were to issue an LOI in the event that an original bill of lading was not available at the discharge port.

By way of preparation, in the event that a need for an LOI arose, Oldendorff requested the Owners to provide a copy of their standard LOI wording for delivery of cargo without production of a bill of lading. The Owners’ form of LOI which was passed down the line to Xiamen left the name of the person to whom delivery was to be effected blank. Xiamen then specified Sea-Road as the party to whom delivery was to be made before passing the form of LOI on to Shanxi Haixin. However, when Xiamen provided SCIT Trading with the requested LOI Xiamen identified itself as the party to whom delivery was to be made. It was that form of LOI that was passed up the line, and ultimately issued by Oldendorff to Owners.

Discharge and Arrest

On the vessel’s arrival at Lanshan the cargo was discharged without production of an original bill of lading against the Charterers’ LOI to a representative of Sea-Road who said that he was there to handle discharge on behalf of Xiamen. However, when the vessel returned to the port of Lanshan eight months later she was arrested by the Bank of China on the grounds that they were holders of the original bills of lading, that they had not been paid and that as the cargo had been discharged without production of the original bill of lading the discharge was wrongful. Owners called upon Oldendorff pursuant to the terms of the LOI to obtain release of the vessel. Claims for indemnities under the related LOIs were made down the chartering chain. SCIT Services denied that it was under any liability to indemnify Owners on the basis that discharge of the cargo into the possession and control of Sea-Road did not amount to delivery to Xiamen and therefore did not engage the LOI. They maintained that Sea-Road simply took custody of the cargo as agent for the Owners and/or Oldendorff. Xiamen also denied that it was under a liability to indemnify as it neither nominated Sea-Road as its agent for the purpose of taking delivery of the cargo or instructed SCIT Trading or SCIT Services to deliver the cargo to Sea-Road. An interim mandatory injunction was obtained by SCIT Trading against Xiamen but as Xiamen took no action Oldendorff provided security to obtain the release of the vessel reserving its rights to argue that the LOI had not been engaged. Various actions were brought and Oldendorff issued proceedings against the Owners.

Decision

The judge, Teare J, had to determine whether Sea-Road took delivery as agent on behalf of Xiamen or whether it took custody of the cargo as agent on behalf of the Owners. First, he outlined the distinction between discharge (movement of cargo from the ship “over the ship’s rail” ashore) and delivery (transfer of possession of cargo and when the shipowner has divested itself of any ability to deal with the cargo which can prevent the consignee from



obtaining possession). Whilst discharge and delivery may occur at the same time they need not do so.

Teare J concluded that Sea-Road was acting as an agent on behalf of Xiamen on the following grounds:

- (i) The provision in Clause 9 of the sale contracts pursuant to which the buyer was to appoint discharge port agents whereby the ultimate buyer, Shanxi Haixin, had nominated Sea-Road and the same nomination was passed up the charterparty chain.
- (ii) Although Xiamen identified itself as the party to whom delivery was to be made in the LOI it provided to SCIT Trading, when Xiamen passed the requested form of LOI to Shanxi Haixin it expressly identified Sea-Road as the party to whom delivery was to be effected in the absence of an original bill of lading.
- (iii) Whilst Sea-Road may have acted as agent for Owners in minor matters, it did not follow that all their actions were done on behalf of Owners. In particular, Owners had no interest in discharging the cargo into the possession of Sea-Road as its own agent because that would only have the effect of the cargo lawfully remaining in the Owners' possession.

Teare J held that Owners were entitled to an indemnity pursuant to the LOI and that all the indemnities down the chain to Xiamen were enforceable.

Conclusion

Notwithstanding that the above case is fact specific, the judgment reiterates the principle that an LOI against which cargo is discharged to the receiver in the absence of original bills of lading is likely to be enforceable where the factual matrix suggests that even in circumstances where an LOI is passed down a chain of agencies the indemnity is in fact provided by or on behalf of the receivers.

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