

INDEMNITY CLAIMS ARISING UNDER CHARTERS.

Introduction – express and implied indemnities

In relation to time charters, Clause 8 of the NYPE 1946 Form (the Employment clause) and Clause 9 of the Baltime Form provide that the captain shall be under the orders and directions of the Charterers as regards employment [notes 1 and 2]. The relevant clauses in the NYPE form 1993 are 8 and 30 [note 3].

The master is not only entitled but may also be obliged to refuse the orders of the Charterers where those endanger the safety of his ship or her cargo. Nor should he deliver any cargo to a person who is not entitled to the cargo, nor should he follow invalid orders. The master is not bound to comply with the Charterers' orders to deliver the cargo without the production of the bills of lading. Although the master is under the orders and directions of the Charterers, the Owners remain liable for the negligence of the master, subject to any exceptions clause in the charterparty. If the Owners comply with the Charterers' orders and the Owners suffer a loss caused (effective cause) by the Charterers' orders then the Owners can often claim an indemnity, depending on the facts and evidence and the charterparty terms. An indemnity is not automatic and the facts and evidence is important.

Under the NYPE Form 1946 and any revisions in like terms there is no express indemnity given to the Owners unlike in the Baltime Form. However, an indemnity will normally be implied if the Owners suffer loss/ damage or incur liabilities which were effectively caused by complying with the Charterers' orders, unless by the terms of the charterparty the Owners consented to bear this loss etc. The classic case is that of *The Island Archon* [note 4]. It does not matter if the Charterers' order is lawful. Nor is it necessary to show any fault of the Charterers. However, in a voyage charterparty the Charterers' rights are more limited and an indemnity is implied more rarely as most of the Charterers' orders will be for the vessel to do what the Owners have already agreed that the vessel will do.

Liability for geographical risks – “The Island Archon”

The vessel was chartered on the NYPE Form for three years. She was ordered to ports in Iraq. Cargo claims were brought against the Owners based on unreliable short-landing and damage certificates which were nevertheless accepted as being conclusive by the Iraqi courts. The spurious cargo claims succeeded and the vessel suffered detention. The Charterers argued that they were not in breach of charterparty as they were entitled to give orders to discharge the cargo in Iraq. Both the High Court and the Court of Appeal decided that an indemnity should be implied as the risk of incurring liability for dubious cargo claims was not one which the Owners had agreed to bear under the charterparty. The risk was not notorious when the charterparty was entered into. The liability flowed directly from and was caused by the Charterers' order to carry the cargo to Iraq.

There will be no indemnity in respect of general navigational risks. There must be an effective causation between the instructions/ orders of the Charterers and the loss suffered. If there is an intervening event such as negligence of the master then a claim for an indemnity cannot be brought. Causation is a mixed question of law and fact.

Signing of Bills of Lading

The master normally has to sign Bills of Lading as presented. As the master is under the orders of the Charterers, this means that the Charterers or their agents normally have authority to sign bills of

lading on behalf of the master. The master has the right, and the duty, not to sign bills of lading which acknowledge that the cargo is in apparent good order and condition when in fact this is not the case. However, the master need not act as an expert surveyor. His duty is to note the apparent condition of the cargo with the diligence of a reasonably careful master. Problems also arise when the Charterers or the agents wrongly sign clean bills of lading. The master has a duty to inspect the cargo and to ensure that the bills of lading reflect its apparent condition on shipment. In practice there may be a pre shipment survey by qualified surveyors. Therefore, if the Charterers present clean bills of lading for damaged cargo, which would be seen to be damaged upon reasonable inspection then the Owners cannot claim an indemnity if the bills of lading are signed by the master without qualification. An example is the case of *The Nogar Marin*, involving a voyage charterparty on the Gencon Form [note 5].

Rusty cargo, clean mate's receipt – “The Nogar Marin”

The vessel was chartered on the Gencon form. A clean mate's receipt was presented by the Charterers and signed by the master for a cargo of iron rods in coils. However some of the coils were rusty. There was no survey. The master had inspected the cargo before loading. The ship's agents signed clean bills of lading based on the clean mate's receipt. The Owners subsequently were liable to the receivers for cargo damage. The Owners' claim for an indemnity against the Charterers failed. The master's negligent failure to check the condition of the cargo properly and to qualify the mate's receipt to ensure that the bills of lading would be claused was the effective cause of the Owners' liability to the receivers or the predominant cause. It was the master's task to verify the apparent condition of the cargo before signing documents and to qualify them if necessary.

The function of the mate's receipt under a charterparty is to delimit the authority which the master or the Charterers have to issue bills of lading. There is an implied requirement that a bill of lading should relate to the goods actually shipped and it should not contain a description of the goods which is known to be incorrect. Another example is the case of *The Boukadora* involving a voyage charterparty on the STB Voy Form [note 6]. There are two legal routes against the Charterers- an implied obligation or sometimes express to indemnify in certain cases or an implied warranty that the statements in the bills of lading are accurate.

Master's right to refuse to sign faulty Bills of Lading – “The Boukadora”

The Charterers presented bills of lading for a certain quantity of oil which the master maintained was greater than the quantity actually shipped. The master was correct. The master wished to qualify his signature to the bill of lading. The Charterers refused and the vessel was delayed while the cargo was re-measured. The Court decided that the master was entitled to refuse to sign an unqualified bill of lading. The inaccuracy in the bill of lading as to the quantity loaded was an irregularity within the meaning of Clause 20 (a) of the charterparty. The Owners were entitled to recover from the Charterers the losses incurred as a result of the delay.

We shall now consider some actual situations in which the Owners recovered an indemnity from Charterers.

Charterer's liability for the cargo's inherent characteristics – Vessel Z

The vessel Z was chartered on the NYPE 1946 Form. The vessel loaded various cargoes including a part cargo of citrus pulp pellets in Santos Brazil. Two days into the voyage to Amsterdam smoke was spotted coming from hold no 2 and then from hold no 7. The vessel deviated to Salvador and under

the guidance of surveyors the fires were extinguished and the damaged cargo removed. Expenses were incurred such as standby tugs, fire team, and surveyors. The damage to the vessel was repaired subsequently at the discharge port. Many samples of the cargo were taken and tested. Later the Owners' expert surveyor travelled to Santos subsequently to investigate the cultivation, processing, storage and loading of the CPP which was extremely helpful to all, particularly the arbitrators. The Charterers also employed an expert and both experts gave evidence at an oral hearing as to the method of carriage and the properties of the cargo used often as animal feed. At the hearing the Charterers withdrew their argument that the vessel was at fault, namely that cargo lights had been left on, cigarettes had been discarded or that heat from the exhaust system of a trimming bulldozer had caused the fires.

The Owners claimed all the losses resulting from the fire, such as repairs to the vessel, surveyors' fees, expenses, hire withheld from the Charterers by virtue of an implied indemnity. The arbitrators decided that the fires were internal cargo-related source of spontaneous combustion and any external sources were not responsible. It was the inherent characteristics of the cargo which had been loaded in accordance with the Charterers' orders which had caused the fires and the Owners' losses. The arbitrators had to decide the likely cause of the fire in the light of detailed expert evidence, and also witness evidence. There was nothing to warn a reasonably diligent master or chief officer or Owner that a cargo of CPP was likely to catch fire within 48 hours of departure, or at all. A proper watch was maintained on loading and it was impossible to spot a small amount of defective cargo. The arbitrators decided that the "culprit" of the fires was "dry heating"- a defect in the pelletisation process which created a parcel of overheated CPP which survives during storage and transportation at above critical temperatures until ignition. They preferred this to "wet heating"- which called for the involvement of excessive moisture and/ or oil content leading to heating by microbiological activity which leads in turn to oxidation of the oil content and thereafter to ignition.

What should ship staff be expected to detect? – Vessel OP

The vessel was chartered on the NYPE Form for a timecharter trip to Jordan. The vessel loaded a cargo of wheat by a conveyor/spout ex silo at Constanza and then completed loading at Agigea ex barges. Clean mate's receipts were issued and one clean bill of lading for the entire cargo was signed by the Master. At the discharge port of Aqaba many stoppages occurred due to foreign materials being found in the cargo, such as stones and wood. Indeed one gantry was stopped due to a large piece of steel being taken up from hold no 2 which deformed and broke the elevator's chain system necessitating repairs. Further stoppages occurred. It was found that the contamination lay in the cargo loaded at Agigea. The P & I Club gave a guarantee to the receivers for the damage to the gantry, repairs and extra labour etc which was later settled reasonably. The Owners claimed an indemnity for these sums from the Charterers. The Owners said that the Charterers were in breach by loading a cargo contaminated by foreign material which was not permitted by the charterparty. Alternatively, the Charterers were responsible for the acts of the stevedores at the loading ports. The Charterers contended that the Master/ Chief Officer failed in their duty to observe the contamination at the time of loading and to reject the cargo. They also argued that the Master should have ensured that the mate's receipts and bills of lading were claused accordingly referring to the case of *The Nogar Marin*. The Charterers argued that the ship's staff had not exercised caution under clause 49 of the charterparty [note 7].

The evidence of the chief officer was that at both loading ports it was very difficult to see the cargo through thick dust and breathing apparatus was used. The holds had been passed as clean and acceptable by the surveyors prior to loading. The loading operation was supervised by the foreman, watch officer and surveyor but they could not get close to the cargo. Two survey reports concluded

that the cargo was in good condition and mate's receipts were signed clean without remarks because no foreign material was observed. The arbitrators decided that clause 49 of the charterparty did not impose an absolute duty on the ship's staff to actually prevent foreign material being loaded but only to exercise caution.

The evidence was that the ship's staff took reasonable steps and therefore no liability rested on the Owners. The case of the *Nogar Marin* was much different in that there the cargo of wire rods in coils was obviously visible both on shore and in the holds. The arbitrators decided that the most likely source of the contamination was from the barges and the cargo in the barges could not be readily seen from the vessel. The arbitrators concluded that it would not be reasonable to expect the ship's staff to be able to examine the cargo being loaded so closely as to exclude every piece of foreign material. Indeed the surveyors present to supervise the cargo made no reports of having seen/ rejected any cargo. The arbitrators decided that the kernel of this issue is that the cargo provided by the Charterers and/ or their agents- the shippers contained material that differed from that in the charterparty- grains in bulk, and therefore was not a lawful cargo within the terms of the charterparty. Accordingly the Charterers were in breach and liable for all of the Owners' claims.

Clean Bills of Lading issued in spite of clauded mates' receipt – Vessel C

The vessel was chartered for a timecharter trip on the NYPE 1993 Form, with additional terms to load a cargo from ports in Turkey for discharge in a port in Yemen. A cargo of steel bars was loaded at Diliskilesi Turkey. The Owners' P & I Club commissioned a survey report which found some of the bars to be rusty oily and bent, the rust being caused by fresh water and the surveyors advised the master to clause the Mate's receipts. The master clauded the Mate's receipts but the Charterers issued clean bills of lading. At the discharge port of Aden damage was found, various surveys took place and the receivers brought a claim in the Yemen courts. The Court found in favour of the receivers, despite contrary arguments in the sum of US\$300,000. The Owners settled this claim reasonably amounting to US\$240,000 and claimed an indemnity for this sum from the Charterers plus the Club deductible paid and costs and expenses incurred in Yemen. The Owners' claim succeeded in full.

The Owners claimed an express or implied indemnity as the Bills of Lading did not reflect the Mate's receipts relying on the case of *The Boukadora*. Alternatively, an implied indemnity as the Bills of Lading were signed by the Charterers' agents following the Charterers' orders relying on the case of *The Island Archon*. Alternatively, clean Bills of Lading were issued when the Charterers were aware that the Mate's receipts had been clauded relying on the case of *The Nogar Marin*. The Charterers, relying on one survey report at Aden argued that the damage to the cargo was due to sea water ingress into hold No 1.

Based on the evidence and various survey reports both at the loading and discharge port the arbitrators had to decide the cause of the damage to the cargo. There were three possible causes. (1) pre-shipment- as detailed by the Master in the Mate's receipts. (2) During the voyage because of ingress of sea water into No 1 hold. (3) Atmospheric damage during the storage at discharge. Atmospheric damage was found not to be a factor. At the load port the pre-shipment survey found damage to the cargo, damage of which the Charterers were made aware through the master's clauding of the Mate's receipts. The damage was caused by fresh water and not sea water. The hose test before loading confirmed that the hatch covers were watertight. On the other hand, the Charterers relied on a survey report at the discharge port which referred to seepage of water from the forepeak tank into hold no1 through a pinhole in the collision bulkhead which caused the rust damage. The arbitrators pointed out that the Charterers, being in breach of Clause 30 of the

charterparty had signed clean bills of lading despite the Mate's receipts were claused with details of the damage to some of the cargo loaded and having been specifically instructed by the master that these remarks should be incorporated into the Bills of Lading [note 8].

The arbitrators decided that the onus was on the Charterers to show that the damage was caused exclusively during the sea passage, and not before the cargo was loaded. On the basis of the evidence the arbitrators decided that the Charterers had not discharged this burden. The survey report of the cargo before loading was unequivocal as to the damage to the cargo. The cargo damage which was the subject of the judgment of the court in Yemen was, on the balance of probabilities, caused before the cargo was loaded on the vessel. The Charterers were in breach of clause 30 by signing clean bills of lading. The Owners were entitled to an indemnity against the Charterers. Considering the various legal choices, the arbitrators decided that they preferred an implied indemnity following the legal authority of The Island Archon. In the present case, the Charterers signed clean bills of lading despite being instructed not to as a consequence of the claused Mate's receipts. All of the Owners' claims succeeded.

Mate's receipt signed under protest – Vessel M

The vessel M was chartered on the Vegoil 1950 Tanker voyage Form [note 9]. The vessel loaded various parcels of different vegoils from San Lorenzo and Parangua which were discharged at Pasir Gudang and Zhuhai and Huangpu. The vessel was arrested at Huangpu by one receiver alleging a shortage of soya bean oil at the previous port of Zhuhai. Security was provided by the Owners P & I Club and the vessel sailed. The cargo shortage claim was settled. The Owners claimed an indemnity from the Charterers for the settlement, fees and expenses and for the delay at Huangpu. The parcel of soya bean oil was commingled in various tanks and three bills of lading were issued by the Charterers for a total of 10,500 mt. The mate's receipts recorded shore figures for this parcel totalling 10,500 mts, but they were signed under protest by the master, who contended that the quantity was overstated. The receivers of only this parcel alleged a shortfall in delivery. The arbitrators had to decide whether there was a cargo shortage on loading or on discharge when compared against the bill of lading figure. Expert evidence was given on behalf of both parties setting out the history of the voyage and all the different parcels of different cargoes as loaded and discharged in the various ports. With regard to the shortfall in delivery, the arbitrators distinguished between measurement differences, being paper differences and quantity differences, being real differences. After hearing witness and expert evidence at an oral hearing the arbitrators decided that there was a shortfall in the quantity of soya bean oil discharged against the three bills of lading and this was reasonably estimated by the receivers to be 79,837 mt. They were satisfied that the quantity loaded was less than 10,500 mt by an amount corresponding to the alleged shortage at Zhuhai. It was a quantity and not a measurement difference. The settlement with the receivers was reasonable.

The Owners argued that their liability to the receivers of this parcel arose in consequence of such parcel being overstated in the bills of lading and this overstatement was an "irregularity in papers" for the purposes of clause 24. They said that the master and Owners had a duty to the end receivers to ensure that the quantity of cargo loaded on board is accurately determined and additional clause 1 did not detract from this. The shore figures overstated the amount of cargo actually shipped. The Owners relied on the case of The Boukadora. The Charterers said that the shore figures should be put in the bills of lading despite the fact that various surveys found the shore figures to have overstated the quantity shipped. The Owners argued that simply because bills of lading had to be in a particular form they must be accurate and it did not denigrate from the implied requirement that bills of lading as presented must relate to the goods actually shipped. In the present case although

the bills of lading provided for quantity weight etc unknown to the vessel this did not protect the Owners when they were sued by the receivers in China. Legal local evidence was produced.

The arbitrators decided that the Charterers' submission did not take account of the difference between measurement differences and quantity difference. The Owners had proven that the cargo shipped was less than the shore figure. Additional clause 1 did not compel the master to accept shore weights. The Owners still could rely on the Boukadora. The liability of the Owners to the receivers and expenses were all consequences of the fact that the master was required to sign mate's receipts and the Charterers or their agents issued bills of lading for a greater quantity of cargo than was shipped. The Owners recovered an indemnity from the Charterers plus the time at the demurrage rate when the vessel was under arrest.

Conclusion

A successful indemnity claim depends on the factual situation and the charterparty terms. One should collect the evidence, documents, witness evidence, survey reports. Often survey reports at the time, such as a pre- shipment survey of the cargo is very important and likewise survey reports at the discharge port when damage/shortage is found. In any claim brought in the courts or arbitration often an expert surveyor is employed to report as to the likely cause of the problem and give evidence, if need be. An indemnity is not automatic.

Yours faithfully

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(1) NYPE 1946 Form clause 8

"..... The captain (although appointed by the Owners), shall be under the orders and directions of the Charterers as regards employment and agency: and Charterers are to load, stow, and trim the cargo at their expense under the supervision of the Captain, who is to sign Bills of Lading for cargo as presented, in conformity with Mate's or Tally Clerk's receipts.
"

(2) BALTIME Form as revised 2001 clause 9 Master

"..... The Master shall be under the orders of the Charterers as regards employment, agency, or other arrangements. The Charterers shall indemnify the Owners against all consequences or liabilities arising from the Master, officers or Agents signing Bills of Lading or other documents or otherwise complying with such orders, as well as from any irregularity in the Vessel's papers or for overcarrying goods.

(3) NYPE Form 1993 clause 8 Performance of Voyages

" (a) The Master shall be conversant with the English language and (although appointed by the Owners) shall be under the orders and directions of the Charterers as regards employment and agency;.....

Clause 30 Bills of Lading

(a) The Master shall sign the bills of lading or waybills for cargo as presented in conformity with mates or tally clerk's receipts. However, the Charterers may sign bills of lading or waybills on behalf of the Master, with the Owner's prior written authority, always in conformity with mates or tally clerk's receipts.

(b) All bills of lading or waybills shall be without prejudice to this Charterparty and the Charterers shall indemnify the Owners against all consequences or liabilities which may arise from any inconsistency between this Charterparty and any bills of lading or waybills signed by the Charterers or by the Master at their request.....

(4) [1994] 2 Lloyd's Report 227 Court of Appeal.

(5) [1988] 1 Lloyd's Report 412 Court of Appeal. Clause 9 of the Gencon charterparty provided " The Captain to sign Bills of Lading at such rate of freight as presented without prejudice to this charterparty....." The Gencon 1994 charterparty clause 10 is quite different and provides, inter alia "The Charterers shall indemnify the Owners against all consequences or liabilities that may arise from the signing of bills of lading as presented to the extent that the terms or contents of such bills of lading impose or result in the imposition of more onerous liabilities upon the Owners than those assumed by the Owners under this charterparty." Therefore there is an express indemnity under the Gencon 1994 charterparty as opposed to the 1976 Form.

(6) [1989] 1 Lloyd's Report 393 Clause 20(a) of the STB Voy Form which is similar to Clause 20(a) of the STB Time Form provided that " Bills of Lading shall be signed by the Master as presented.... and the Charterer shall indemnify the Owner against all consequences.... which may arise from.....an irregularity in papers supplied by the Charterer or its Agents."

(7) Clause 49.... Owners are requested to assist Charterers by warning the master, officers and crew to exercise caution to prevent any foreign material from becoming intermixed with the cargo.

(8) Additional clause 30 Bills of Lading.

a. The master shall sign Bills of Lading or waybills for cargo as presented in conformity with Mates or tally clerk's receipts. However, the Charterers may sign Bills of Lading or waybills on behalf of the master, with the Owner's prior written authority, always in conformity with mates or tally clerk's receipts.

b. All Bills of Lading or waybills shall be without prejudice to this charterparty and the Charterers shall indemnify the Owners against all consequences or liabilities, which may arise from any inconsistency between this charterparty and any bills of lading or waybills signed by the Charterers or by the master at their request.

(9) Clause 24 Bills of Lading. Bills of Lading in the form appearing below for cargo shipped shall be signed by the Master or Agent as requested.... The Charterer shall indemnify the Owner....from all consequences or liabilities that may arise from the Charterer or its agents or the Master or vessel's agents signing bills of lading or other documents inconsistent with this charter or from any irregularity in papers supplied by the Charterer or its agent or from complying with any orders of the Charterer or its agent.

Additional clause 1. Bills of Lading Release Clause. Master and/ or agents immediately to sign and release upon completion of loading bills of lading marked “ clean on board as per surveyor confirmed shore weights”