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Clarity of the Role of Agents and Undisclosed Principals Under Letters of Indemnity

The judgment provided on 18 September 2024 in *Yangtze Navigation (Asia) Co Ltd & anor v. TPT Shipping Ltd & ors (The "Xing Zhi Hai")* [2024] EWHC 2371 (Comm) provides welcome clarity to the shipping industry regarding who is liable under letters of indemnity in circumstances where there is a disputed agency relationship at play.

Background

The 'Second Defendant', TPT Forests Ltd (**TPT Forests**), entered log marketing and sales agency agreements (**LMSAAs**) with the 'Third to Fifth Defendants' (the **Exporters**) to market and sell the Exporters' logs as their agent. In connection with this role, the LMSAAs provided for the possibility of the logs being transported onboard vessels chartered by the 'First Defendant', TPT Shipping Ltd (**TPT Shipping**), an affiliate of TPT Forests. This arrangement between the affiliates was documented under a shipping services agreement (**SSA**), in which it was stated that TPT Forests was entering the SSA as agent for the Exporters.

TPT Shipping entered three voyage charters to transport the Exporters' logs from New Zealand to India. At the port of discharge, in the absence of the bills of lading (which had named TPT Shipping as the "Shipper"), TPT Shipping issued letters of indemnity (**LOIs**) to the 'Claimants', the vessel owners Yangtze Navigation (Asia) Co Limited and Berge Bulk Shipping Pte Ltd (**Owners**). TPT Forests was not mentioned in the LOIs.

The bill of lading holders proceeded to sue the Owners, alleging misdelivery of the logs. In response, the Owners sought to bring proceedings against TPT Shipping as the charterer and issuer of the LOIs.

However, when TPT Shipping went into liquidation, the Owners expanded the proceedings to include TPT Forests as well as the Exporters.

The Owners' Claim

The Owners' claim against TPT Forests rested on two assertions:

Firstly, they alleged that, notwithstanding that TPT Shipping was the party who had entered the voyage charterparties with the Owners, TPT Forests was the actual charterer of the vessels as the undisclosed principal of TPT Shipping. Therefore, notwithstanding that TPT Shipping had provided the LOIs in its own name, it had done so for and on behalf of its undisclosed principal TPT Forests.

Secondly, relying on correspondence between TPT Shipping and TPT Forests disclosed during the proceedings, the Owners alleged that TPT Forests has expressly authorised TPT Shipping to issue the LOIs on its behalf, again as undisclosed principal.

The Role of Undisclosed Principal

The doctrine of the undisclosed principal is well established, and the principles of the doctrine were not contested in this case. Where 'Party A' agrees to act as agent for 'Party B', and Party A then enters a contract with a third party, Party B could be treated as the 'undisclosed principal' of Party A if it was clearly agreed (expressly or implied by conduct) that Party A was entering this contract on Party B's behalf. The benefit and risk for Party B of being the undisclosed principal is that it can sue and be sued in connection with a contract entered by Party A as its agent, unless prohibited by the terms of such contract¹.

¹ Lord Denning MR in *Teheran-Europe v Belton* [1968] 2 All ER 886 at [889]–[891]: "It is a well-established rule of English law that an undisclosed principal can sue and be sued upon a contract, even

though his name and even his existence is undisclosed, save in those cases when the terms of contract expressly or impliedly confine it to the parties to it."

The Ruling

The judge rejected the Owners' argument that TPT Forests, as undisclosed principal, was the actual charterer of the vessels with reference to the terms of the contracts between the various parties, none of which the judge determined established that TPT Shipping was acting in any capacity other than principal in respect of the contracts to which it was a party. The judge referred to the terms of the SSA between TPT Forests and the Exporters, which established that TPT Forests only ever intended to act as an agent, not principal, for the Exporters, and there was no evidence available to call this, or the position that TPT Shipping intended to act as charterer, into question. Furthermore, it was acknowledged that the charters were in place before TPT Shipping knew whose cargo was to be shipped onboard the vessels, undermining the assertion that the charters were entered by TPT Shipping under the authority of TPT Forests.

It was acknowledged that a system was in place whereby TPT Shipping sought the approval of TPT Forests before issuing the LOIs in favour of the Owners. However, in and of itself, this was not taken as proof that TPT Forests had agreed to be bound by and be liable for the LOIs issued by TPT Shipping as its undisclosed principal. The judge accepted that TPT Forests had a legitimate commercial reason for giving such approval, since the cargo onboard the vessels represented security for TPT Forests in connection with the payments due to it, and, once the cargo was discharged, the security over that cargo would fall away. Ultimately, it was accepted that within the corporate structure, TPT Shipping had been established to clearly insulate the rest of the group, including TPT Forests, from the chartering risks associated with the group's shipping business, and it would run counter to this if, in the absence of clear evidence to the contrary, TPT Forests was deemed to have accepted liability under the charterparties and LOIs.

The Owners' claim was dismissed.

Conclusions

The judgment re-affirms the position that the courts are unwilling to hold a party liable for the acts of another party as an undisclosed principal without clear evidence of an agency relationship under which the supposed agent agrees and intends to act for and bind the principal. The documented contractual position is the starting point – if this does not set out a clear intention to create an agency relationship, compelling evidence is needed to overrule the terms of the contracts.

This will be of particular comfort to corporate groups, who can be assured that the distinct corporate personality of their affiliated companies will not be challenged without clear evidence to the contrary. The fact that one party is an affiliate of another does not mean that an agency relationship necessarily exists between the two, as it is quite legitimate for groups to set up corporate structures insulating certain entities from certain risks, which would be undermined if the insulated party were deemed to be the undisclosed principal of the other. Potential claimants faced with an impecunious defendant should not assume that the defendant was necessarily acting as the agent of a less cash-strapped affiliate where the commercial scenario involves multiple entities from the same group.

In this case, the contracts between the various parties clearly set out their respective roles, without any indication of an agency relationship between TPT Shipping and TPT Forests, and their conduct did not contradict this documented position.

Furthermore, one party seeking the approval of another before entering a contract, such as TPT Shipping seeking TPT Forests' approval for the LOIs, is not sufficient evidence to establish an agency relationship under which the approver is the undisclosed principal, as different parties can have legitimate commercial interests in goods, in this case a valid interest in protecting a security position.

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