



## **Implied indemnity – a note to ship operators**

Ship operators usually understand the concept of “implied indemnity”. However, the limits on it are less well understood and can cause misunderstanding in discussions regarding claims.

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The misunderstanding is understandable – rarely does the commercial mind ponder invisible indemnities. This note is written in the hope it will assist operations desks with the implied indemnity, clarifying some of its limits and helping operations desks to better resolve their claims.

## Basic principle

The basic principle is well understood. Under a time charter, owners must follow charterers' employment orders. In return, if there is no express indemnity clause, English law will imply an indemnity into the charterparty: charterers must indemnify owners for the consequences of following charterers' employment orders.

An indemnity is a powerful thing. Generally, owners do not need to prove breach of a charterparty clause to claim indemnity under an employment clause. Owners only need to prove causation *i.e.* that charterers' order caused the loss.

The implied indemnity is therefore potentially a very broad and onerous liability, so it is subject to important limitations.

## Two main categories

Not everything that happens on a voyage can be blamed on charterers, simply because they gave the initial voyage order. It is the limitations on the implied indemnity that are less well understood and that cause argument. They arguably fall into two categories:

1. Charterers are generally not liable when their order did not cause the loss, *i.e.*, causation ("**Limitation 1**")
2. Charterers are generally not liable for risks that owners have agreed in the charterparty to accept ("**Limitation 2**").

*The Island Archon* [1994] 2 Lloyd's Rep. 227.

Usually, much turns on the issue of "*causation*" *i.e.*, Limitation 1.

## Limitation 1: causation

There needs to be a strong causal link between charterers' order and the loss / damage.

*The White Rose* [1969] 2 Lloyd's Rep. 52.

Operations desks can form a first blush opinion on causation. The basic questions are (i) was charterers' order the "*effective cause*" of the loss, or was there another, more proximate, cause; and / or (ii) were there any "*intervening acts*" which became the "*effective cause*"?

## Examples

If these questions feel too abstract, below are some examples discussed in the authorities. It is suggested, however, that each case is fact specific, and much turns on causation in each case:

### *Navigation*

There is often a question of whether a navigational error caused the loss.

*The Hill Harmony* [2001] 1 Lloyd's Rep. 147.

If so, owners cannot recover under the implied indemnity because the loss was caused by navigational issues, not charterers' order.

### *Ordinary expenses*

Owners cannot usually recover under the indemnity for expenses incurred in the ordinary course of navigation – examples discussed in the authorities include the cost of ballasting and the cost of transshipment. Again, these are usually not considered to have been caused by charterers' order.

*The Aquacharm* [1980] 2 Lloyd's Rep. 237., cited in *The Island Archon* [1994] 2 Lloyd's Rep. 227.

### *Weather*

Owners cannot usually recover for damage caused by heavy weather – such damage is too remote and usually cannot be said to have been caused by charterers' order.

*The Aquacharm* [1980] 2 Lloyd's Rep. 237.

## **Limitation 2: owners' risks**

An implied indemnity will not cover risks that owners have expressly or impliedly agreed to bear by the charterparty.

Identifying these risks can be a difficult science. However, owners may face arguments that (i) express clauses in the charterparty allocate the loss concerned; and / or (ii) certain trades or ports carry certain known risks, which the parties could have reallocated if they wanted. The latter in particular usually requires an involved analysis.

## **Is there an implied indemnity?**

Finally, it should not always be assumed that an implied indemnity exists. Whilst not a hard and fast rule, an indemnity is less likely to be implied into a voyage charter, or a time charter trip, than into a time charter, on the basis that owners are more likely to have accepted the risks of the voyage / trip.

*The Island Archon* [1994] 2 Lloyd's Rep. 227.

## **Conclusion**

I hope the above will assist operations desks with implied indemnity claims, who may in particular find it helpful to consider causation (Limitation 1).

Identifying “a risk which the shipowner has agreed to run” in the charterparty (Limitation 2), or whether an implied indemnity exists, are a less obvious exercises and require analysis of the charterparty and / or trade, with which an operations desk may need more assistance.