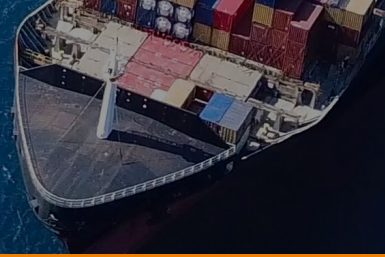


Deadly LOIs – Is Your LOI Worth the Paper it's Written on?©

Chirag Karia QC



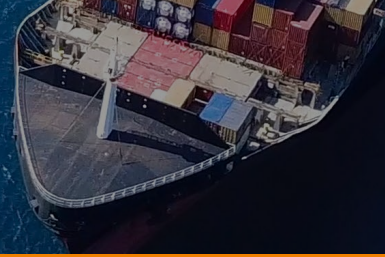
- ❖ Common practice, particularly in oil and oil product trades.
- ❖ *“It is perfectly clear law that a shipowner who delivers without production of the bill of lading does so at his peril.”* (**Sze Hai Tong Bank, Ltd. v. Rambler Cycle** (1959) (PC), Lord Denning)
- ❖ Practice to require LOIs from Charterers; but *“LOIs are not always enforceable, which means that your LOI may not even be worth the paper it is written on ...”* (UK Club).
- ❖ Risk of same result even if LOI is enforceable.
- ❖ No P&I cover, unless directors exercise their discretion in members’ favour.
- ❖ Risk of delivering to the “wrong” person & to the “right” person.

The Tenacity (2020) – the Facts

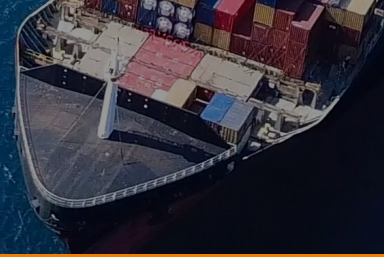
- ❖ Owners t/c NOC (an oil trader) v/c Gulf Petrochem FZC (“GP”) (large UAE company involved in distributing, manufacturing and refining oil and oil products).
- ❖ Gasoil carried from Kuwait to Hamriyah, UAE.
- ❖ Cargo delivered by 1 May 2020 w/o production of BLs against back-to-back LOIs issued by NOC to Owners & by GP to NOC.
- ❖ Gasoil’s purchase price of US\$11.5 million financed by Natixis Bank, which held the BLs.
- ❖ GP failed to pay Natixis due to severe financial difficulties following discovery of massive internal fraud.
- ❖ Chief Restructuring Officer appointed to GP in July 2020.

- ❖ Early August 2020, Natixis demanded delivery of cargo or US\$11.5 million from owners.
- ❖ Owners called on NOC's LOI.
- ❖ NOC called on GP's LOI.
- ❖ LOIs triggered if arrest "*threatened*".
- ❖ Did demand for cargo or money with express reservation of rights to enforce "*without further notice to you*" threaten arrest?
- ❖ Language used in claim letter "*must be construed in its relevant commercial context*".

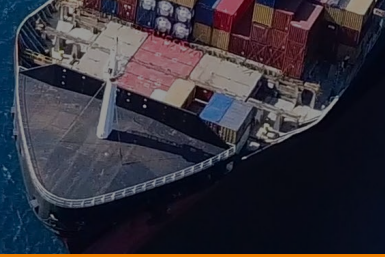
- ❖ NOC claimed it had relied on being back-to-back with GP and did not have the money to put up the approximately US\$13 million (inclusive of interest and costs) demanded.
- ❖ Equity “will not act in vain” – the Court will not make an order that cannot or will not be complied with.
- ❖ Very serious sanctions for failure to obey court order.
- ❖ *“It is unthinkable that a court should put a man at risk of imprisonment by making an order which it knows, at the time of making the order, is impossible of performance” (Udall v Capri Lighting Ltd (1988) (CA)).*
- ❖ Given that breach of an injunction is punishable by contempt, a court should only ever make an order *“with which the defendant can and reasonably ought to comply” (South Bucks District Council v Porter (2003) (HL), per Lord Bingham).*



- ❖ Burden of proving impossibility rests on defendant alleging it.
- ❖ Must provide evidence of assets and show what efforts have been made to provide as much security as can be provided, even if it is not the full sum required (per Foxton J).
- ❖ NOC offered and paid US\$250,000 towards security, and the court granted it permission to apply to set aside remainder of the mandatory injunction by proving it was impossible for it to provide further security.
- ❖ The Court allowed NOC's application and discharged the mandatory injunction based on impossibility due to impecuniosity.
- ❖ Owners left with only US\$250,000 security from their time charterers, NOC, in the face of a US\$11.5 million claim from Natixis.



- ❖ NOC and 3 other claimants applied for mandatory injunction requiring GP to provide full security to prevent arrest.
- ❖ GP in turn claimed impossibility due to impecuniosity, supported by a witness statement from its Chief Restructuring Officer.
- ❖ Court rejected GP's defence on the evidence and issued mandatory injunction requiring GP to post security to prevent arrest in related cases.
- ❖ GP failed to comply with mandatory injunctions, claiming impossibility under UAE law, etc.
- ❖ Summary judgment application vs GP on claim for damages to be heard in December 2021.



- ❖ Owners delivering without receiving the BLs do so at their peril.
- ❖ Most LOIs are enforceable.
- ❖ But only as good as the creditworthiness of the counterparty.
- ❖ Risk not only in delivering to “wrong” person, but even from delivering to the “right” person – the person the BL holder wants owners to deliver to.
- ❖ Mandatory injunction is a powerful remedy, but can’t get “blood from a stone”.
- ❖ Court will not order a party to do the impossible.
- ❖ Full disclosure and compelling evidence required to prove impossibility due to impecuniosity.

Thank you for listening

CHIRAG KARIA QC

chirag.karia@quadrantchambers.com

www.quadrantchambers.com

Quadrant House, 10 Fleet Street, London EC4Y 1AU

