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RECOVERY OF UNPAID SUMS UNDER A TIME CHARTER

Owners' lien on sub-freights and intercepting freight under a bill of lading – an update

Under a time charterparty, owners may obtain a valuable benefit through a lien clause which allows owners a lien on sub-freights for sums which have fallen due but remain unpaid by the time charterer.

In light of the Court of Appeal judgment in *Dry Bulk Handy Holding Inc and Anr v Fayette International Holdings Ltd and Anr (The "Bulk Chile")* [2013] EWCA Civ 184, it may be time to review again both the meaning and effect of a clause giving a lien on sub-freights and owners' rights in respect of freight under a bill of lading issued by owners as carrier.

1. Introduction

A lien on sub-freights in order to recover unpaid amounts due from the charterer is a right commonly allowed to an owner under a time charter. The 1946 NYPE form includes the following provision as standard at clause 18:

[T]he Owners shall have a lien upon all cargoes, and all sub-freights for any amounts due under this Charter …

The first part of this provision deals with lien over cargo but we will not examine here the nature of that lien or the practicalities surrounding its exercise. That is a separate and distinct right from the right of lien over sub-freights and for the purposes of this article we will be looking only at the rights afforded to an owner under the latter part of the clause.

2. The nature of a lien on sub-freights

The right of lien over sub-freights afforded in the NYPE clause is a contractual lien granted by the charterer to the owner. Where there are outstanding sums due from the charterer to the owner, the charterer has agreed that the

BY JOANNA EVJE

owner shall have the right to intercept a payment from a third party (i.e., sub-charterer) to the charterer.

The English courts have over the years taken varying views as to the nature of the right that charterers have given. It has often been treated as being an equitable assignment of a debt which is perfected as a legal assignment by the giving of proper notice by the owner to the sub-charterer, but this view has not always been endorsed. The courts have instead tended to focus on the effect of the clause, which is accepted to be that the third-party sub-charterer is bound by the charterer's agreement to give the owner this right and, in appropriate circumstances as outlined below, is required to pay directly to the owner. The owner is then under an obligation to account for any surplus monies received above and beyond the debt owed in the head charter.

In order to give a more practical demonstration as to how this works, for the purposes of this article, let us take an assumed scenario as follows:

Head owners (A) enter into a period time charter for the vessel to time charterer (B) on the *NYPE 1946* form. Time charterer (B) in turn enters into a voyage charter for the vessel to sub-charterer (C).

3. The requirements for exercising owners' lien effectively

Where the owner (A) is owed a debt by the time charterer (B) under the head charter and wishes to exercise his right of lien over freight due from sub-charterer (C) under the voyage charter, A must give appropriate notice to the payor (C). That notice should be given in terms that notify C that there is a claim against B, that there is a right of lien in the head charter, what debts are covered by that lien right and that payment must now be made to A directly.

One very important factor to remember is that the owner's notice must be given before the sub-freight is paid by C to B. Once that debt has been paid there is no longer anything for A to intercept and the lien notice will not be effective in respect of that payment. Provided the debt is due in the head charter, the payment under the sub-charter from C to B does not need to be due. The lien notice may relate to sums which will fall due in the future. This principle has recently been confirmed in the *Bulk Chile* case ([2013] EWCA Civ 184).

Provided the notice is given at the right time and contains the necessary information, C will be bound to comply with the notice and honour A's demand. If C ignores a good notice given by A and simply pays to B, C is likely to be liable to pay twice.

4. Sub-sub-freights and lien rights in chains of charterparties

The above scenario assumes that only three parties are involved in the charter chain. It is often necessary to examine the position under a longer charter

chain (for example if the sums payable by C to B are insufficient to satisfy A's claim against B, A may be left looking to intercept other (more substantial) payments further down the chain).

Let us therefore also look at what happens in the following extended scenario:

Head owners (A) enter into a period time charter for the vessel to time charterer (B) on the *NYPE 1946* form. Time charterer (B) in turn enter into a voyage charter for the vessel to sub-charterer (C). Sub-charterer (C) enters into a sub-voyage charter with sub-sub-charterers (D). The time charter is based on the *NYPE 1946* form and the voyage charters are based on the *Gencon 1994* form (containing the standard lien provision at clause 8 giving a right of lien over sub-freights).

As a matter of English law, it is accepted that parties in a chain of charters can assign (each charterer to their respective owner) their own right to receive payments.

In our scenario, C has the right to receive freight under the voyage charter from D but C has assigned that right to B via the *NYPE* lien clause (giving B a right to exercise lien over sub-freights payable to C). B has in turn assigned to A (i) the freight due to B from C under the voyage charter and (ii) the right to receive the sub-freight under the sub-voyage charter from D. By this route, A is able to exercise lien over the freight due from D to C and thereby reach freights due much further down the charter chain.

The important principle to remember is that there must be an unbroken chain of lien rights through the sub-charters. If A and B have agreed a lien clause but there is no such clause as between B and C then the chain is broken and A will not be able to demand payment from D.

5. The Bulk Chile decisions

The scenario in *The Bulk Chile* was slightly different in that there was a chain of time charterparties on the *NYPE 1993* form, followed by a voyage charter at the end of the chain.

Time charterer B failed to pay hire under the head charter with A and A therefore sent notices of lien to sub-time charterer C (for sub-hire) and to voyage charterer D (for sub-freight). After receipt of the lien notice, D nevertheless paid freight to C. A then sued both C and D.

Until the first instance decision in *The Bulk Chile* ((2012) EWHC 2107), there had been some uncertainty as to whether the reference to "sub-freights" in the *NYPE 1946* form was sufficient to cover sub-hire. In the case of *The Cebu* ([1983] 1 Lloyd's Rep 302) it was held that "sub-freights" should be read to include time charter hire. However the opposite conclusion was reached in *The Cebu (No.2)* ([1990] 1 Lloyd's Rep 316), limiting the reading of the clause to sub-freights only and not sub-hire. The fact that there were two first instance decisions out there reaching different conclusions gave rise to disputes as to how the 1946 clause should operate.

In his first instance decision in *The Bulk Chile*, Andrew Smith J followed the decision in *The Cebu (No.2)* and found that under the *NYPE 1946*, the charterer has only assigned a right to sub-freights and not sub-hires. In the context of that case, A's notice of lien was, as a result, not effective as against C (who owed hire to B) but was effective as against D (who owed freight to C).

The result would have been different had the parties contracted on the *NYPE 1993* form which includes in the lien clause an express right to receive "*sub-freights and/or sub-hire*". A's notice of lien would then have been effective both against C (for the hire due to B) and against D (for the freight due to C).

6. Freight under bills of lading

The other key point that was addressed by both the High Court and the Court of Appeal in the *Bulk Chile* case was when a shipowner may be entitled to demand payment of bill-of-lading freight to himself directly.

In addition to a lien on sub-freights, A may have rights under the bill of lading if A has issued the bill as carrier. Where an owner issues a bill as carrier, they are party to that bill-of-lading contract and, as a result, have corresponding rights and obligations under that contract.

In *The Bulk Chile*, the courts were examining whether the owner was entitled to receive the freight payable under the bill, even though the bill stated on its face that freight was payable "as per charterparty", which was a reference to a charterparty between C and D under which D was obliged to pay to C.

The starting-point under a carrier's bill is that an owner effectively gives instructions that the freight

due to the owner (A) under the bill of lading contract between A and D should be paid to the voyage charterer (C). A in turn receives hire from the head time charterer (B). Provided B pays the hire which is due to A, A does not then interfere with the payment of freight from D to C.

The question which arose in *The Bulk Chile* was whether, in circumstances where B does not pay hire to A, A may reverse the "instruction" that D should pay freight to C and require D instead to pay directly to A. The Court of Appeal (upholding the High Court decision by Andrew Smith J) held that the owner was entitled to freight from D under the bill of lading. By serving notice of lien, A had effectively reversed the instruction to pay to C and had required D to pay to A directly instead.

The effect of the judgment was that D, having already paid freight to C for performance of the voyage charter (despite previously receiving notice from A), also had to pay freight to A under the bill of lading. Payment to C did not discharge D's obligations to A under the bills of lading.

7. Some common practical issues

In circumstances where an owner has an agreed lien right over sub-freights and sub-hires, he may still experience considerable difficulties in enforcing that right practically. One of the main problems for an owner may lie in identifying who the sub-charterers or sub-sub-charterers may be further down the chain and what is payable (and when) under those sub-contracts to which the owner is not a party. In addition, since there is no contract between the owner and the sub-charterer, there may be questions as to the appropriate jurisdiction for pursuing a claim against the sub-charterer for failing to comply with the notice of lien.

Sub-charterers also face difficulties. They will be the party holding the sub-freight or sub-hire, knowing they have to pay the money to someone but not knowing to whom to pay. If they pay the wrong party they will be at risk of having to pay twice. They also face the risk of refusing to pay their disponent owners based on a lien notice received from head owners which ultimately proves not to be valid. That failure to pay hire to disponent owners could lead to withdrawal of the vessel or suspension of services under that time charter with possible far-reaching consequences. In many situations, these problems are resolved by an agreement between the three parties (owners, charterers and sub-charterers) to pay the disputed sum into an escrow account out of which either owners or charterers can obtain payment once the dispute between them is resolved. If that avenue is not available, a sub-charterer may have to initiate interpleader proceedings whereby the disputed sums are paid into court and the owner and charterer must then establish their entitlement to those moneys.

In summary, the concept of a charterer granting an owner a right to exercise lien over sub-freights or sub-hires is not an entirely straightforward one, nor is its exercise. Owners will equally be required to comply with certain formalities if seeking to intercept freight under a bill of lading and charterers will need to use caution in determining whether or not to comply with such a notice. We would advise members to make contact with Nordisk in circumstances where these issues arise so that we can assist in finding both practical and legal solutions.

HIRE, WITHDRAWAL AND TERMINATION

The "Astra" and the "Fortune Plum"

Introduction

Since the crash in the market in 2008, an owner frequently has to assess his options in the face of a failure by a charterer to pay hire in accordance with the charterparty requirements. All the standard charterparty forms include clauses setting out the requirements as regards payment of hire and the owner's option of withdrawing the vessel in the event of non-payment. However, given the potentially draconian consequences for an owner of "getting it wrong", it is important that the owner's legal position under the clause is understood and that there is proper application of the principles to the facts.

There are two recent English High Court cases (*Kuwait Rocks Co v AMN Bulk Carriers Inc [2013] EWCH 865 (Comm) (the "Astra")* and *White Rosebay Shipping SA v Hong Kong Glory Shipping Limited [2013 EWCH 1355 (Comm) (the "Fortune Plum"*)) which provide some guidance on this area of the law.

This article will provide a short reminder of the principles dealing with the obligation to pay hire, withdrawal and termination and then will look at the two cases and provide a short comment on how and to what extent these provide helpful guidance to an owner and/or clarify the position.

Reminder of the principles

The obligation upon a charterer to pay hire on or before the due date is an 'absolute' one. In other words, the charterer is in default if he fails to make the payment for whatever reason. There is no requirement that the non-payment be deliberate or due to negligence in performance of the charterparty. The general rule is that a charterer must pay each instalment of hire in full. However, a charterer does have the right to make deductions from hire in three circumstances: (a) where the charterer has an express right of deduction under the charterparty, (b) where the charterer is

BY SCARLETT DIXON

entitled to an adjustment of hire following a period of off-hire, and (c) where a charterer has a claim for damages which he is permitted to set off against hire (this applies principally where the owner's breach of the charterparty has deprived the charterer of the use of the ship or prejudiced the charterer in his use of the ship). In the event of non-payment or reduced payment, the burden is on the charterer to bring himself within one of the above three categories.

Failure to pay the full amount of hire without justification will, in most standard form charterparties, give rise to drastic consequences, namely the owner's right to withdraw the vessel, thereby bringing the charterparty to an end. It may also (depending on the wording of the charterparty) give the owner the right to suspend services whilst the payment remains outstanding. Further, non-payment may give rise to a right for the owner to terminate the charterparty and to claim damages for loss of bargain.

The difference between withdrawal of the vessel, thereby bringing the charterparty to an end, and termination of the charterparty is as follows: withdrawal of the vessel is a contractual right given to the owner in the event of any single non-payment of hire by the charterer in accordance with the terms of the charterparty. As set out above, there is no requirement of fault on the part of the charterer. If the owner exercises his right of withdrawal, then he is entitled to recover the hire both earned and payable as at the date of withdrawal. However, in the absence of a separate and concurrent right to terminate, the owner will not be entitled to claim damages in addition. The right to terminate for non-payment of hire will arise if either (i) the obligation to pay hire is a condition of the charterparty, or (ii) where the obligation is not a condition, the charterer's failure to pay hire amounts to a repudiation of the charterparty. In other words, the owner will have to show that the charterer's failure to pay is either a sufficiently serious breach of a term of the charterparty or an unambiguous representation that the charterer will not or cannot perform his obligations under the charterparty (i.e., a renunciation). It is the assessment of what amounts to a renunciation which usually gives rise to concern from an owner's point of view. Where the right to terminate arises, the owner may terminate the charterparty (rather than simply withdraw under the charterparty clause) and claim damages for loss of bargain. Where the right to withdraw the vessel or to terminate for non-payment of hire arises, the owner will have a reasonable time in which to give notice of the exercise of the right to withdrawal or termination (as applicable). However, if the owner delays unreasonably then he may be held to have waived his right and to have "affirmed" the contract. Although what amounts to a "reasonable time" depends on the circumstances in each case, the owner will usually be required to react quickly. *The Fortune Plum*, considered further below, touches upon some of the issues faced by an owner in respect of timing of notices.

Payment of hire as a condition – The Astra

In light of the above, an owner will often want to be able to terminate the charterparty for non-payment, as opposed to simply withdrawing the vessel, as he will then be able to claim damages for any loss suf-

fered (principally this will be where the termination occurs in a falling market). Up until the decision in *The Astra*, it was widely accepted that a single non-payment of hire did not in itself provide grounds for termination (as opposed to withdrawal). However, earlier this year Mr Justice Flaux at first instance in *The Astra* made a long obiter statement to the effect that the payment of hire under a time charter was a condition and not an intermediate term. In other words, in his view, a single default in payment would entitle a shipowner to terminate the charterparty and claim damages for any loss suffered as a result.

His conclusion was reached following a review of previous obiter statements from judges in the Court of Appeal and the House of Lords from which he found support for his views. Whilst he was considering the hire payment clause in the NYPE form, his view was expressed to apply to all similarly worded payment provisions (i.e., those where there is a right to withdraw for non-payment). He put forward three reasons in support of his conclusion. First, the fact that there was an express right to withdraw within the payment clause, irrespective of whether the non-payment was repudiatory or not, showed that the parties considered the clause to be an essential stipulation. Any breach of such a stipulation went to the root of the contract, which is a traditional criterion for labelling a term a "condition". Second, the fact that in mercantile cases there was a general rule that where there was a time limit for doing something under the contract, then time was of the essence. This was another key criterion for labelling a term a "condition". His final reason in support was that considering the payment of hire (with or without an anti-technicality clause/grace period) as a condition provided certainty to both an owner and a charterer, such certainty being of key importance to businessmen in commercial transactions.

The charterparty under consideration in *The Astra* contained an anti-technicality clause, as is the position under most charterparties these days. In the judge's opinion, however, the obligation to pay hire timely would also be a condition if there was no such anti-technicality clause (although he accepted there was House of Lords authority to the contrary).

Whilst the judge in *The Astra* undoubtedly sought to clarify the position and provide some certainty when interpreting such clauses, this was unfortunately not proved to be the case. First, the comments of the judge were obiter as the case was decided on different grounds (the charterers were found to be in repudiatory breach of the charterparty). As such, the judge's decision on this issue does not set out a new legal principle. Second, this is only a first instance decision and is therefore, in any event, not binding on any court at the same level or a higher court considering the same issue. As such, and until the issue has been considered and affirmed by a higher court, the conclusion of the judge is to be viewed with caution.

The risks for an owner when considering termination – The Fortune Plum

The second recent case on the topic highlights the difficulties for an owner when assessing whether a series of under- or non-payments by a charterer is sufficient evidence that the charterer has effectively declared an intention not to perform the contract and, if so, what steps the owner can take in the face of this breach to ensure he is not seen as having affirmed the charterparty before he seeks to terminate it.

The parties entered into a charterparty on an amended NYPE form with hire payable on a monthly basis. At first the charterers paid the hire but late, then they paid less than the full amount and in instalments. Finally they began not to pay the instalments at all. The owners exercised a lien over sub-freights and sub-hires and also issued a statutory demand on the charterers claiming over USD 1 million in overdue hire (which if not paid within the timeframe allowed, allowed the owners to apply to the court to put the charterers into bankruptcy). On 7 November 2011, following the expiration of the statutory demand without any payment from the charterers, the owners considered the charterers to have renounced the charterparty on the basis that the non-payment against the demand clearly showed an intention on the part of the charterers not to perform their obligations under the contract. On 9 November, the vessel arrived at the discharge port and began discharging. By 11 November, the owners had decided to terminate the charterparty and on 12 November told the master that this was the case and that upon completion of discharge he was to sail to anchorage and wait further orders. On 14 November,

upon completion of discharge, the owners purported to terminate the charterparty for charterers' non-payment. Charterers responded that the withdrawal was wrongful and that the owners were themselves in serious breach of the charterparty by withdrawing without justification.

The tribunal held that the period between 7 and 11 November was a reasonable period to which the owners were entitled in order to consider their options. However, once they had made up their mind on 11 November to terminate the charterparty, their decision to complete the cargo operations before informing charterers of the termination was an affirmation of the charterparty by conduct. Whilst the tribunal could understand the owners' commercial reasons for wanting to wait until discharge was complete, applying the legal principles to the owners' conduct led the tribunal to one conclusion only: the owners had chosen to forego their rights. This was even the position where the conduct of the owners at the relevant time had been under a strict reservation of rights. In this respect the tribunal held that a reservation of rights could not protect the owners in circumstances where they had acted (by the continued discharge) in a manner wholly inconsistent with their accrued right to terminate. As such, the tribunal held that the owners had affirmed the contract on 11 November and that their subsequent termination of the charterparty on 14 November was a serious (i.e, repudiatory) breach entitling charterers to terminate the charterparty and claim damages.

The court upheld the tribunal's decision and held that there had been no error in law in the tribunal's approach in its finding that there had been an affirmation by owners. The court did state that, while a different tribunal might have found differently on the basis of the same facts, this particular tribunal had not erred in applying the law, and had not reached a conclusion that no reasonable tribunal could have reached. Accordingly, the court held that there was no basis to allow the appeal on the issue of affirmation.

The court did however allow the owners' appeal on the issue of continuing renunciation. The owners argued that the tribunal had failed to consider the principle that where, following affirmation by the innocent party (the owners), the repudiating party (the charterers) continues to declare (by words or by conduct) an intention not to perform the contract (i.e., continuing renunciatory behaviour), then the innocent party may later treat the contract as at an end. The court agreed. It held that, on the basis that the tribunal had found that the owners committed a repudiatory breach on 14 November (when they terminated the charterparty) due to their affirmation by conduct on 11 November, the tribunal had failed to consider whether the charterers' behaviour in the period between 11 and 14 November was a continuing renunciation allowing the owners to terminate the charterparty when they did so on 14 November. The court set aside the award and it has been remitted to the tribunal.

This case highlights the potential pitfalls for an owner in such a situation. An owner must not only first assess whether a charterer's repeated non-payment is renunciatory behaviour, he must then take a decision on whether to terminate or not within a reasonable time (during which time he may continue to perform his obligations under the charterparty). However, if he decides to terminate, he must be careful not to act in any way inconsistent with that decision prior to effecting termination, even if there are clear commercial and/or practical reasons for doing so. The risk is that the owner will be taken to have affirmed the charterparty and any termination thereafter will be a repudiatory breach on his part. Furthermore it is clear that taking any inconsistent action even under a strict reservation of rights is unlikely to save the owner.

The court's findings in relation to the continued renunciation point are potentially good news for an owner who has inadvertently affirmed a charterparty. If he can show that post the affirmation and before the termination the charterers continued to declare (by words or by conduct) an intention not to pay the charterparty, the owner's later termination may still be held lawful, thus entitling him to recover damages for loss of bargain.

The recent cases demonstrate that there are a number of challenges facing an owner in the face of single and multiple non-payments of hire and that, until there is further clarification, an owner should seek prompt legal advice when such a situation arises.

AUSTRALIA / VOYAGE CHARTERS

Foreign arbitration awards are enforceable

In our Annual Report for 2012, at page 10, we commented on the Australian judgment that had changed the recognition of foreign arbitration clauses in voyage charters in Australia and noted that the decision, which had been widely criticised, was subject to appeal with judgment expected imminently.

By way of reminder, in *Dampskibsselskabet Norden A/S v Beach Building & Civil Group Pty Ltd [2012] FCA 696*, the Federal Court of Australia refused to enforce a London arbitration award obtained by vessel owners against an Australian charterer on the grounds that the foreign jurisdiction clause, pursuant to which the London arbitration proceedings had been commenced, was unenforceable by reason of section 11 of the Australian COGSA (please see the Annual Report for more detail).

On 18 September 2013, the Federal Court of Australia Full Court reversed the decision and concluded that a voyage charter was not a "sea carriage document" for the purposes of section 11 of the Australian COGSA. The arbitration agreement in the voyage charter was not therefore void and the London arbitration award was enforceable in Australia.

The Court's reasoning was driven by a number of factors including: (1) the traditional line drawn between charterparties (generally a contract for hire of a ship) on the one hand and sea carriage documents (contracts for the carriage of cargo) on the other; (2) a clear and longstanding acceptance that international commercial disputes, including those arising out of charterparties, may be referred to international arbitration; and (3) an acceptance that while the interests of shippers are more evidently appropriate for statutory protection, experienced owners and charterers did not require the same protection.

This recent judgment is more consistent with the expectations of the international shipping community. The decision will allow voyage charterers and owners to continue to refer their disputes to international arbitration.

BY SCARLETT DIXON

SUB-LET, ASSIGNMENT, RELEASE AND SIMILAR CLAUSES

With particular emphasis on offshore charters

A typical feature in most charterparties, is that the charterers have liberty to sub-let the vessel and/or assign the charterparty to a third party. In the offshore sector, where the oil companies typically have their own standard charter forms, charterers may not only be entitled to sub-let or assign, but may also have a right to "loan" the vessel to a third party, "transfer" the contracts, "release" the vessel to a third party etc. The wider variety of charterers' rights to utilise the vessel in the offshore sector reflects how the development and operation of offshore oil fields are organised, where vessel capacity may be shared between operators of different licences etc.

BY KNUT ERLING ØYEHAUG

Based on our day-to-day experience where we encounter a wide variety of charterparties, it seems that the potential consequences of accepting the various clauses may not always be apparent. In this article, we will discuss some main principles, and comment on some clauses we have encountered which may involve unexpected challenges.

The most common right, which is found in all segments of shipping, is charterers' right to sub-let (or sub-charter) the vessel. Given the concept of "privity of contract" in English law, a sub-let from charterers to a third party does not create any contractual relationship between the owners and the sub-charterers. However, an express right to sub-let avoids any discussion as to whether there is an implied right to sub-let in the absence of an express provision.

A number of charterparties also provide the charterers with a right of assignment to a third party, sometimes limited to related companies but other times to third parties in general. English law recognises a difference between an assignment and a novation. The former transfers the benefit of a contract

from one party to a third party. Where an assignment is permitted, there are generally no formalities to observe, such as a requirement to give notice to the non-assigning party (usually the shipowner), unless such formalities are specifically required by the contract. There is some logic to this, as an assignment will not transfer the burden of a contract, only the benefit. The assigning party, therefore, will remain liable to the non-assigning party for performance of its obligations. It should, therefore, make little or no difference to the non-assigning party as he can still look to the original party for performance.

However, under a novation, both the burden and the benefit shift to a third party. Although this is often treated as a transfer, in fact, a novation serves to extinguish the original contract and replace it with another contract, between the new parties, on identical terms. As a novation will affect the non-novating party's rights (he can no longer look to the novating party (novator) for performance), English law requires that notice of the novation be given to the non-novating party. As a new contract is being created, that contract will require consideration (the novatee must give something of value) unless the contract is to be executed by deed. (Under English law a deed is a particular type of agreement which must be in a specific form. Unlike a normal contract where a simple signature is sufficient to bind the parties, a deed requires certain formalities to be observed when it is executed. Deeds do not require consideration and claims under a deed are subject to a longer limitation period (12 years) than normal contractual claims (six years).)

Whether an assignment clause is intended to create privity of contract between the owner and the assignee (i.e., a novation) is a question of construction. In certain circumstances, a clause may be construed to the effect that the owner is deemed to have authorised the charterer to conclude, on the owner's behalf, another identical charter with a third party. It is suggested (in *Voyage Charters*, 3rd ed., para. 83.3) that if charterers have a liberty to assign the charterparty in addition to the liberty to sub-let, and provided there is no requirement that the original charterer shall remain responsible in case of assignment, this will indicate an intention that the original charterer drops out and is replaced by the assignee. Provided the assignee consents to becoming a party to the charterparty, the law does not prevent this intention from taking effect.

BY TOM PULLIN

Clauses allowing sub-let and assignment often require that "*the original Charterers shall always remain responsible to the Owners for due performance of the Charter Party" (Supplytime 2005,* clause 20 (a)). In the case of a sub-let, this proviso merely confirms what would otherwise apply, and in the case of assignment it makes it clear that it is only the benefits of the contract that are assigned and that the original charterers are not released in respect of their obligations.

Another common restriction on charterers' right to assign or sub-let is that it is made "*subject to the Owners' prior approval*", often combined with a requirement that such approval "*shall not be unreasonably withheld*" (e.g. *Supplytime 2005*, clause 20 (a)). Defining the meaning of "*reasonable*" is not straight forward, but in a Commercial Court decision in 2011 (*Porton Capital Technology Funds and others v. 3M UK Holdings Ltd* [2011] EWHC 2825 (Comm)) the Commercial Court provided some helpful guidance. The Court stated that the burden is on the party requesting consent to show that the refusal is unreasonable, that what is reasonable depends on the circumstances of each case, that it only needs to be reasonable in the circumstances (not generally), that the party whose consent is required is entitled to take into account his own interests, and that he does not have to balance his own interests with those of the party requesting consent.

With these general principles as background, we shall now comment on some more special provisions encountered in the offshore sector.

Where a charterer is entitled to "sub-let" the vessel, there is sometimes a requirement that the sub-let has to be to someone "*not competing with the Owners*". This is the case both in *Supplytime 2005* (where the requirement also applies to "*assigning or loaning the Vessel*") and in certain oil company contracts.

BY IAN FISHER

Some clauses allow not only sub-letting and assign-

ing, but also "loaning" of the vessel to a third party (e.g. *Supplytime 2005*). The exact meaning of "loan" or "loaning" is not clear, but generally is meant to cater for situations where another party is allowed to use the vessel on a different contractual basis than a straightforward sub-let or assignment, e.g., operators of adjacent oilfields agreeing to share vessel capacity. The specific meaning must be determined in each case. In *Supplytime 2005*, "loaning" is subject to the same requirements as sub-letting and assignment,

i.e., that it shall not be to companies competing with owners, and shall be subject to owners' approval, which shall not be unreasonably withheld etc.

In one oil company standard charter, charterers are not only permitted to assign but also to "*re-assign (whether on one or several occasions)*" the charterparty to "*any other person*". Presumably, this means that charterers, after having assigned the vessel to a third party, may thereafter "re-assign" the vessel to another third party in direct continuation. Possibly, it also covers A assigning to B, who re-assigns to C.

Another oil company charter states that the charterers may "*transfer*" the contract to their "*affiliated or associated companies, or … Joint Venture Partners*". This wording alone is not clear as to whether the original charterers shall remain responsible under the contract. However, the contract goes on to say that the "*transferee shall be deemed to replace Charterers and assume all rights and obligations*". This seems to make it clear that the original charterers are released and that the transferee has taken over the charter (similar to a novation), but somewhat surprisingly, the same provision then goes on to say that "*however, Charterers always to remain ultimately responsible for fulfilment and payment to Owners …*". Apparently, therefore, the end result is an assignment where the original charterers are not released from the obligations under the charterparty. To avoid uncertainty, it would be preferable to delete the second sentence (referring to "*all rights and obligations*").

Another variation is the following: "*Neither Owner nor Charterer may assign or sub-let this Charter Party .. to any third party, without the prior consent of the other party, which will not be unreasonably withheld …*". Pausing there, the wording so far is straightforward, perhaps with the exception that a "sub-let" from owners would be an unusual concept. The clause then states that notwithstanding the above, the "*Charterer may assign its rights and obligations to its co-venturers, joint operators, other operators or affiliated companies of Charterer*". This apparent right to novate to related companies is not subject to owners' approval (although English law would imply an obligation to give notice). Then the clause ends by saying that "*This charterparty shall inure to and be binding upon the respective successors and assigns of the parties hereto*". This language would seem to create a right to novate the charterparty rather than simply a right to assign the benefit.

One rather unusual arrangement is found in

another oil company contract, where the charterers have the right to "*require owner to perform alternative work for other operators*". Whether this is meant as an amendment to the general scope of work of the contract, or as an alternative to sub-letting, assignment etc., is not clear. However, in the same contract, charterers also have a general right to "*assign, sub-contract or transfer any or all of its rights or obligations"*, without any need for prior approval from owners or similar restrictions. By accepting such a provision, owners must be prepared to accept that the charterparty may be transferred to any other third party, on the basis that the original charterers are released from the obligations, and that the new charterers can "*require owner to perform alternative work for other operators*". Whether the reference to "alternative work" may also include work of a different nature than the agreed scope is perhaps arguable, but we think not.

In some cases, charterers' right to assign/novate the charterparty to a third party is contingent upon the requirement that "*Charterer can demonstrate that the third party assignee has the financial strength required to fulfil Charterer's obligations under the Charter*". Provided charterers fulfil their obligation to demonstrate financial strength, it is perhaps not obvious that the original charterers are released from the time of the assignment, but this would seem to be a fair interpretation of the parties' intention.

As a final example of the intricacies found in some of these clauses, we quote the following (taken from an oil company contract):

"*Charterer shall have the right to release any Vessel(s) and may redeliver the Vessel to Owner for the purpose of releasing to any third party. The points of delivery and redelivery are to be agreed between Charterer and Owner. … Following any release, Charterer agrees to accept the Vessel back on term charter in direct continuation at the end of the period of release. Owner agrees to credit Charterer the full hire rate (or part thereof if the charter hire rate is less than the term charter rate) due under the Charter Party whilst the Vessel is released to and on hire to any third party."*

Such a clause raises a number of questions. Is the charterparty suspended and replaced with another charterparty during the period of release? The first part of the clause suggests so, but the last part indicates that hire remains payable under the original charter, since owners are to credit the original charterers with hire earned under the (release) charter. Is the requirement that the parties agree the "*points of delivery and redelivery*" an unenforceable "agreement to agree"? Do the terms and conditions of the original charter apply to the third party, or can the vessel be made available to the third party on any terms and conditions? In the latter case, are owners entitled to be indemnified and held harmless by the original charterers as if the original charter were still in place?

The above examples illustrate that a wide variety of clauses are in use, and that owners' legal position may vary quite substantially in the various circumstances. Although charterers' need for flexibility may be described as a "fact of life", particularly in the offshore industry, it is worth considering to what extent clauses of this nature are acceptable. One should also bear in mind other potential consequences, such as the need to notify underwriters that an assignee should be included as co-insured etc.

ARBITRATION OR COURT?

Some comments from a practical point of view

1. Introduction

Every year, we initiate a substantial number of arbitration and court proceedings, particularly in London and New York. A considerable number of these proceedings are closed shortly after they are initiated (particularly in the case of arbitration), simply because the initiation of legal proceedings, in itself, is enough to make the debtor pay. In a number of cases, we see that the ability to initiate proceedings in an efficient and cost-effective manner contributes significantly to the achievement of a swift and favourable result for our member. This is particularly so when it comes to straightforward claims, such as claims for unpaid demurrage, hire, freight, damages for detention etc.

BY PAIGE YOUNG

By the time a claim is referred to us, the parties have typically been corresponding about it for quite some time. In most cases, the claimant will have threatened to take the matter to arbitration before we become involved. The instructions given to us are often to put the debtor on notice that unless the claim is paid within a certain number of days, the member will initiate legal proceedings. Regrettably, we are from time to time prevented from doing so, simply because the law and jurisdiction clause of the contract in question is legally insufficient, impractical and/or not cost-effective.

The question of where one can initiate proceedings if there is no agreement as to jurisdiction is a difficult one, and will often depend upon local law, typically the law at the place of the registered address of the parties. Issues like these come under the heading "private international law", and the answers will to a large extent depend upon the rules applicable at the domicile of the claimant. Since it is not possible to give a full overview, or to provide general answers, in respect of such issues, they are not discussed in this article.

In the following, we comment on some of the typical situations we encounter from time to time. These comments should not be taken as a "complete guide" to dispute resolution in the various forums dealt with below, but simply as notes about some

practical points that are well worth bearing in mind.

2. Forum vs law

A law and jurisdiction clause should, at the very least, include two provisions:

- Choice of law
- Choice of jurisdiction (the venue where the proceedings shall be held).

As will be seen in the following, as far as arbitration clauses are concerned, the clause should ideally also include provisions about the procedure to be followed if one of the parties wants to litigate a dispute.

3. Enforcement of arbitration awards vs enforcement of court judgments

When deciding whether to opt for arbitration or court proceedings, it is worth considering possible obstacles to the enforcement of a potential award or judgment against the opponent.

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (often known as the "New York Convention") has been ratified by some 149 countries around the world http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html. The aim of the convention is to prevent discrimination against foreign arbitration awards (with regard to conflicting jurisdiction provisions and enforcement) and it obliges the convention states to ensure that such awards are recognised and generally capable of enforcement in their jurisdictions in the same way as domestic awards. An ancillary aim of the convention is to require courts of the convention states to give full effect to arbitration agreements by requiring local courts to deny the parties access to court proceedings in contravention of an arbitration agreement. The convention should make it possible to enforce an arbitration award handed down in any one of these 149 convention states within any other convention state. Unfortunately, not all convention states observe the convention in the manner intended. As a result, it can be very difficult, if not impossible, to enforce awards in practice in some of these states. For example, some states make it unduly onerous to comply with the requirement under the convention for the arbitration agreement to be in writing.

BY MAGNE ANDERSEN

As far as judgments handed down by courts are concerned, there is no similar worldwide regime in place. The Lugano Convention and EU law may be relevant in some cases, but do not apply as widely as the New York Convention. One therefore often has to resort to applying a bilateral agreement between the states in question, if such an agreement exists.

4. English High Court

The English High Court is world famous for its efficiency and quality when it comes to dispute resolution, and has been so for centuries. It is worth mentioning, however, that in order to pursue a claim before the High Court, one will have to involve English solicitors based in England. This is because the English courts require the solicitors who are "on record" as acting for a party to be based within the jurisdiction. Solicitors (subject to a few exceptions) do not have rights of audience in the higher English courts. This means that it will also be necessary to instruct a barrister to present the case to the court. Even if the claim is straightforward, our in-house lawyers (even those qualified in England) are simply not allowed to run High Court proceedings.

This will inevitably have the consequence that the costs of pursuing even a small and straightforward claim before the High Court will be considerable. Hence, we recommend that any dispute resolution clause that provides for disputes to be referred to the High Court should also specify an alternative procedure for smaller claims. The Small Claims Procedure of the London Maritime Arbitrators' Association ("the LMAA") will be a safe choice.

5. Arbitration in London

At the outset, it is worth emphasising that a matter will not be subject to arbitration unless the parties have actually agreed that this will be the case. Such agreement can be made either when the contract is entered into or at a later stage. However, an opponent that is unwilling to pay its debt is unlikely to agree to refer a matter to arbitration in order to ensure the cost-effective handling of the dispute. Accordingly an arbitration clause should be agreed at the time the contract is concluded.

An arbitration clause can be very simple. While

there are a number of other issues that it is advisable to address in an arbitration clause, the following will in fact suffice: *"Arbitration in London. English law to apply."* There are, however, practical problems in relation to this formulation as discussed below. In the following, we will also discuss which provisions will apply where the clause in question is silent in respect of the constitution of the tribunal, the number of arbitrators etc.

to apply to the High Court to have the sole arbitrator appointed, ref. the Arbitration Act 1996 Section 18. This is a quite costly exercise. The application to the High Court may only be made by English solicitors based in England, and the application must be served on the defendant in its home jurisdiction in accordance with the laws of that jurisdiction. In our experience, the cost of an application is typically in the region of GBP 8,000 – 10,000, but can

5.1 No agreement made in respect of the number of arbitrators/the parties are to agree on a sole arbitrator

Where there is no agreement as to the number of arbitrators to be appointed, the tribunal shall consist of a sole arbitrator, ref. the Arbitration Act 1996 Section 15(3).

If there is no agreement in respect of the appointment procedure for the sole arbitrator, it follows from the Arbitration Act 1996 Section 16(3) that "*the parties shall jointly appoint the arbitrator not later than 28 days after service of a request in writing by either party to do so*". In practical terms, this means that the debtor can postpone the appointment of the arbitrator and thereby the constitution of the tribunal simply by not responding.

The parties are free to agree what is to happen in the event of a failure by one party to agree to the appointment of a sole arbitrator. However, when there is no such agreement in place, the claimant has

be considerably higher where the defendant's home jurisdiction specifies complex procedures for service of proceedings. Depending on where the defendant company is domiciled, the process of properly serving documents can take months.

In order to avoid the involvement of the High Court, the arbitration clause should provide that the party who requested the appointment of an arbitrator in the first place may unilaterally appoint a sole arbitrator in cases where the opponent has not replied within a specified number of days. If so, the appointing party can simply appoint an arbitrator with binding effect on the other party without having to pay anything other than the arbitrator's appointment fee. However, in order to forego accusations of partiality, vigilantism etc., which may create problems when the award is to be enforced, it will be advisable to let a third party do the actual appointment.

The clause could read as follows:

"The reference shall be to a sole arbitrator. If a dispute

has arisen, either party may give notice to the other party requiring him to join in appointing a sole arbitrator. If the parties have not within 14 days of the said notice agreed on a sole arbitrator, either party may apply in writing to the Honorary Secretary of the London Maritime Arbitrators' Association ("LMAA") for the appointment of a sole arbitrator by the President of LMAA."

5.2 Parties are to agree on the number of arbitrators (i.e., there is no agreement in that respect in the arbitration clause)

Very occasionally we come across clauses that cater for the parties to agree on the number of arbitrators to be in the tribunal or even to agree on the identity of two or three arbitrators. Such an "agreement to agree" is not enforceable, unless the parties actually agree on the number of arbitrators.

5.3 The tribunal is to consist of two arbitrators

If the clause provides for the tribunal to consist of two arbitrators, but does not specify the procedure for appointment, the Arbitration Act 1996 Section 16(4) will govern the appointment procedure. This sub-section provides that "each party shall appoint one arbitrator not later than 14 days after service of a request in writing by either party to do so".

If the other party fails to appoint an arbitrator within 14 days, Section 17 of the Arbitration Act will come into play. This provision reads as follows:

"Power in case of default to appoint sole arbitrator.

(1) Unless the parties otherwise agree, where each of two parties to an arbitration agreement is to appoint an arbitrator and one party ("the party in default") refuses to do so, or fails to do so within the time specified, the other party, having duly appointed his arbitrator, may give notice in writing to the party in default that he proposes to appoint his arbitrator to act as sole arbitrator.

(2) If the party in default does not within 7 clear days of that notice being given—

(a) make the required appointment, and

(b) notify the other party that he has done so,

the other party may appoint his arbitrator as sole ar*bitrator whose award shall be binding on both parties as if he had been so appointed by agreement.*

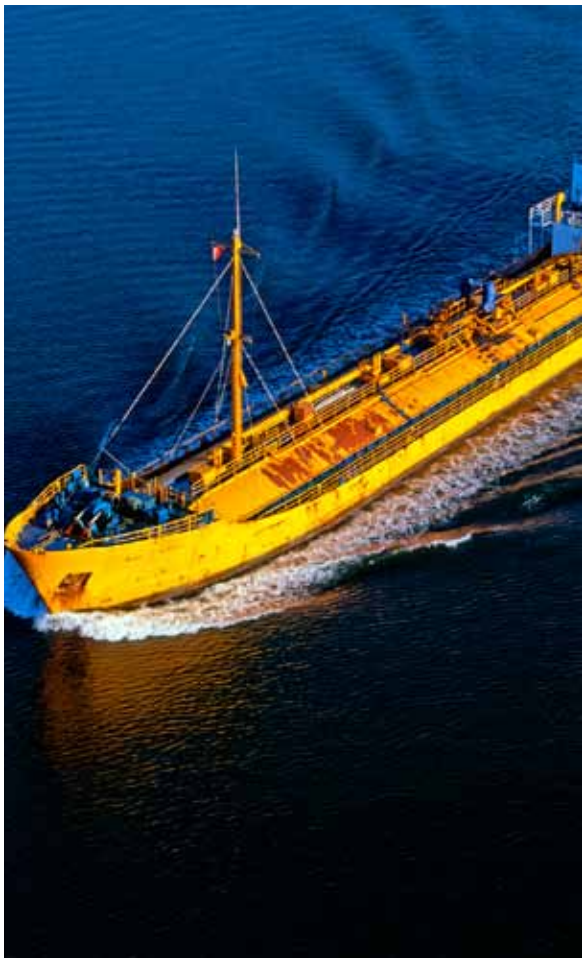
(3) Where a sole arbitrator has been appointed under subsection (2), the party in default may (upon notice to the appointing party) apply to the court which may set aside the appointment."

5.4 The tribunal is to consist of three arbitrators

If the clause has no provisions in respect of the appointment procedure and the parties have agreed that the tribunal shall consist of three arbitrators, default provisions are set forth in Section 16(5). This provides that "each party shall appoint one arbitrator not later than 14 days after service of a request in writing by either party to do so", and further that "the two so appointed shall forthwith appoint a third arbitrator as chairman of the tribunal." If the second party does not appoint his arbitrator as required, the first moving party will be entitled to appoint his arbitrator as catered for in Section 17 of the Arbitration Act quoted above.

5.5 The tribunal is to consist of two arbitrators and an umpire

If the tribunal is to consist of two arbitrators and an umpire, the fall-back provision of the Arbitration Act is also that "*each party shall appoint one arbitrator*



within not later than 14 days after service of a request in writing by either party to do so", ref. Section (6). Once again, if the second party does not appoint his arbitrator as required, the first moving party will be entitled to appoint his arbitrator as catered for in Section 17 of the Arbitration Act.

5.6 Application of the LMAA terms

The LMAA terms are a detailed set of procedural rules. Although compliance with the rules is recommended, unlike the Arbitration Act, they will only apply if there is agreement to this effect. In practice this means that they are not applicable unless (a) the parties agree to their application, or (b) the arbitrator(s) accept the appointments subject to the LMAA terms (which is invariably the case).

5.7 LMAA Small Claims Procedure

The LMAA Small Claims Procedure ("SCP") is specifically designed for dealing with smaller claims. Its aim is to ensure that claims are processed rapidly and costs kept to a minimum. No one can refer a dispute to be dealt with under the LMAA Small Claims Procedure unless this has been agreed between the parties. The SCP can be agreed to take effect by inserting a clause as follows:

"In cases where neither the claim nor any counterclaim exceeds the sum of USD 100,000 the arbitration shall be conducted in accordance with the LMAA Small Claims Procedure current at the time when the arbitration proceedings are commenced."

All Small Claims arbitrations are decided (usually without a hearing) by a sole arbitrator and there is no right of appeal from the arbitrator's decision. The arbitrator's fee is capped (currently at GBP 3,000) and, in the event that a party is successful, they are only entitled to recover their costs from the other side up to a capped amount (currently GBP 4,000).

6. US courts

Contracts that do not have an arbitration clause may nevertheless state that the contract is subject either to "US Law" or, more specifically, "US Federal Maritime Law" or the law of a particular US state. The majority of Nordisk's US cases are subject to New York jurisdiction.

While several Nordisk attorneys have current bar licenses from the state of New York, Nordisk as a general policy recommends that local counsel be involved in any US Court proceedings. US procedural law (choosing which court to appear before and making assorted motions once a case has commenced) can be a veritable minefield to navigate and, given that Nordisk's specialty is the underlying substantive maritime law rather than local law, our members' interests are best protected when we employ local litigators to assist. Consequently, the costs of pursuing a claim in court in the US can be equivalent to the UK.

7. US arbitrations

7.1 Arbitration in the US

We see a fair number of cases each year involving contracts that are subject to New York law and arbitration, often designating the Society of Maritime Arbitrators ("SMA") Rules. Nordisk has had positive experiences with several of the prominent SMA arbitrators in recent years and, as opposed to other prominent forums (notably the UK), New York arbitrators often do not charge their appointment fee until pleadings are submitted. Thus, where commencement of arbitration (appointing an arbitrator) is used successfully as a mechanism to apply pressure on a party to pay an outstanding debt, in New York we find that there will often be no charge by the arbitrators for this service.

Unlike the Arbitration Act 1996 in the UK, the Federal Arbitration Act does not provide a default mechanism for the constitution of a Tribunal if such details are not included in an arbitration clause, i.e., a clause that simply reads, "Law and Arbitration US/NY". If the arbitration clause does not designate either the number of arbitrators or a process for appointing them, the claimants can end up in the US courts for months simply trying to establish a tribunal. Consequently, when a US arbitration clause is going to be included in a contract it is prudent to ensure that the number of arbitrators is designated as well as a process for appointing them, or in the alternative, include the number of arbitrators and incorporate the Rules of the SMA.

7.2 SMA Shortened Arbitration Procedure

The utilisation of the SMA Shortened Arbitration Procedure, which is similar to the LMAA Small Claims Procedure in the UK, can reduce costs and

streamline the handling of small disputes. The SMA recommends the following language to be included in US arbitration clauses:

"*Notwithstanding anything contained herein to the contrary, should the sum claimed by each party not exceed US $_____ (insert amount, exclusive of interest on the sum claimed, costs of the arbitration, and legal expenses), the dispute is to be governed by the "Shortened Arbitration Procedure" of the Society of Maritime Arbitrators, Inc. (SMA) of New York, as defined in the Society's current Rules for such procedure, copy of which is attached hereto."*

The benefits of an SMA Shortened Arbitration are an expedited process, a sole arbitrator and a USD 3,500 cap on arbitration fees (unless there is a counterclaim, in which case the cap is USD 4,500). Another advantage of the SMA Shortened Arbitration over the LMAA Small Claims Procedure is that under the LMAA Small Claims Procedure the cost of the arbitration (GBP 3,000) is paid upon appointment of the arbitrator, as opposed to the SMA Shortened Procedure where the fee is paid at the end of the arbitration - once the fees have been earned. Thus, if a matter settles, the cost of the Shortened Arbitration in New York will not have been paid up front and there may be some savings to the claimant.

When choosing to employ a Shortened Arbitration under the SMA Rules, one should note that shortened arbitrations proceed on documents alone and discovery can only be conducted at the discretion of the arbitrator. Thus, it is only recommended for small, straightforward claims.

7.3 UNCITRAL & American Arbitration Association ("AAA") Arbitrations

In larger contracts we very occasionally see arbitration clauses invoking the UNCITRAL Arbitration Rules and designating the AAA as an administering body. There is little need to go into extensive detail regarding such clauses but, as a word of warning, the AAA charges a "filing fee" for commencing arbitrations that can be as high as several thousand dollars, depending on the amount that a claimant is seeking to recover. While the more formal AAA processes can be advantageous for the handling of large disputes, the SMA is a simpler and cheaper mechanism for the resolution of smaller disputes.

8. Contradicting law and litigation clauses

Quite often, we come across fixture recaps and charterparties incorporating more than one law and litigation clause. Insofar as these clauses are not "rivalling" clauses, there is no problem, but if they provide for a different choice of law or jurisdiction, or different procedures for the constitution of an arbitration tribunal, it may not be possible to reconcile the clauses, and the conclusion may be that there is actually no agreement in respect of law and/or jurisdiction. The parties will then be back to square one, and the claimant may have to initiate proceedings at the place of business of the defendant.

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