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A time charter chain in a rising market

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A case study in common time charter issues including: calculating the redelivery date and final hire due, withdrawal of the vessel from charter and the effect of withdrawal down the charter chain.

This news publication was put together with the assistance of Lewis Moore from Hill Dickinson who was instructed by Members in the case.

A recent Defence case for one of West's charterer Members in the middle of a time charter party chain highlights a number of "core" charter party issues, with some surprising results.

The charter party:

West's member was the time charterer in the middle of the charter chain. Both the head and sub charters provided:

- Redelivery of the vessel was to be latest 16 May plus any offhire periods, as long as charterers (in each case) gave notice at least 30 days before the charter party's original redelivery date.

- On redelivery, charterers (in each case) had the right to deduct the value of redelivery bunkers (the bunker prices were agreed in the charters) "*from the last sufficient hire payments*". The value of bunkers on delivery at the agreed charter party prices amounted to more than US$400,000 which was equivalent to more than two full hire instalments at the sub charter hire rate and just over three full hire instalments at the (lower) head charter hire rate.

- There was a right of withdrawal of the vessel from charter with a grace period of three clear banking days.

Events leading to the dispute:

On 28 February, sub charterers paid the 13th hire instalment based on a redelivery date of 20 April and making a deduction from hire in respect of part of the estimated bunkers on redelivery. Sub charterers' message read: "*Pls be advised that 13th hire for subj vsl was paid against attached hire SOA bss min CP duration considering projected next voyages after completion of present one, ….. In the meantime, charterers would like to assure Owners that in case of any changes with vessel's present itinerary, charterers will arrange the additional hire payment as always in advance and in due course. This hire payment shall not, for the avoidance of doubt, be construed as an exercise of Charterers option as to duration. Charterers shall revert in due course on an open basis as to the option for duration. Pls be guided accordingly.*"

Between 3-5 March the vessel's schedule slipped and updated voyage orders were sought down the charter chain. Sub charterers subsequently stated that they intended the vessel to perform a voyage from a Black Sea port either to the Persian Gulf or Singapore/Japan range (ie a front haul voyage) and that they intended to exercise their right to extend the charter party by adding off hire periods (in circumstances where owners had not agreed that there was any offhire periods). Owners, in response, did not consider that either voyage could be performed within the charter party period remaining, particularly since sub charterers had not nominated the final discharge port and owners stated that they refused to allow a front haul last voyage. Members passed this message down to sub charterers the same day.

Whilst owners and sub charterers continued to dispute the issue, on 13 March sub charterers sub-fixed the vessel "on subjects" to perform a final voyage to the Persian Gulf. The vessel was fixed "firm" on 15 March.

Owners withdraw the vessel from charter:

This dispute came to a head on 15 March when hire instalments were due under both charters but no payment was made by charterers nor sub charterers, each maintaining that they were entitled to deduct the value of the redelivery bunkers from hire due up to the anticipated 20 April redelivery date.

Owners served an anti-technicality notice on Members on 16 March for a stated amount of unpaid hire and Members served an anti-technicality notice on sub charterers (stating a different amount of unpaid hire) on the same day. This was followed by a notice of withdrawal on Sunday 25 March sent by owners to Members and sub charterers which Members also forwarded to sub charterers on 25 March. Members served their own notice of withdrawal on sub charterers on Tuesday 27 March.

The vessel, which was unloading at the time, completed discharge on 29 March.

Questions arising:

Charterers' last voyage orders and the expected redelivery date under both charter parties:

Q: *What test does the tribunal apply and what evidence does the tribunal look at when assessing whether charterers' last order was legitimate in that it would have enabled the vessel to be redelivered in time?* The tribunal held that the appropriate test is whether the estimated redelivery date was one which "*could reasonably be held by any intelligent charterer*" (*The Mihalios Xilas [1978]*).

Q: *What if sub charterers fix the vessel for a last (Pacific Gulf) voyage that owners are refusing to allow because owners calculate that the voyage will overrun the maximum charter party period – are owners entitled to argue that charterers' estimate of the redelivery date should be based on this refused Pacific Gulf voyage?* The tribunal held that, because owners were refusing to allow the vessel to perform a PG voyage as sub charterers had requested, owners were not then entitled to argue that a realistic redelivery date had to be based on the PG voyage. This was the case even though sub charterers had, in fact, fixed the vessel for a PG voyage.

Q: *What if the vessel's schedule subsequently slips – do sub charterers have an obligation to re-calculate the vessel's schedule and whether their intended last voyage will still enable the vessel to be redelivered before the latest date?* Owners also argued that sub charterers' last voyage order was unrealistic because there had been slippage in the vessel's schedule by up to 7 days. However, owners raised this argument for the first time at the hearing and the tribunal did not allow in owners' argument although it did comment (obiter) that, notwithstanding the slippage in the vessel's schedule, sub charterers' estimate of a 20 April redelivery date remained *"a reasonable assessment made in good faith"* in accordance with the test in *The Mihalios Xilas*, noting that the estimate was "*optimistic but not so much as to be unreasonable or unrealistic*" and pointing out that *"there is no one 'reasonable da*te' and that "*different views could be reasonably held*". This shows that charterers have a continuous obligation to assess whether their last voyage orders are realistic in terms of the estimated redelivery date for the vessel and that, where there is slippage in the vessel's schedule, charterers should reassess and, if necessary, give different last voyage orders.

Anti-technicality notices and withdrawal:

Because the tribunal held that the 20 April redelivery date that was given up the charter chain by sub charterers and Members was given in good faith and on reasonable grounds and that the amount of hire due was correctly calculated (based on this 20 April redelivery date), the tribunal held that there was no hire due but unpaid when owners served their anti-technicality notice on 20 March. Therefore, owners were themselves in repudiatory breach of the head charter and Members were in repudiatory breach of the sub charter by wrongly exercising the right to withdraw the vessel from charter for alleged non-payment of hire. Accordingly, the tribunal did not need to decide whether owners and Members had each exercised their right of withdrawal correctly or not. However, the award contains some useful (obiter) comments in this regard.

Q: *What information needs to be included within an anti-technicality notice?* In accordance with The Li Hai [2005], an anti-technicality notice "… will be sufficient as long as it

Q: *What if the grounds stated in the anti-technicality notice are wrong – does this invalidate the anti-technicality notice?* The tribunal held that owners' and Members' statement that sub charterers were only entitled to deduct hire from the last hire payment (singular) was wrong as this contradicted the charter party which expressly provided that, on redelivery, charterers (in each case) had the right to deduct the value of redelivery bunkers "*from the last sufficient hire payments"* (in the plural) and that this incorrect statement created a *"genuine ambiguity*" for sub charterers. The tribunal held that owners' and Members' anti-technicality notices were therefore invalid.

Q: *After serving an anti-technicality notice, how quickly do owners then need to withdraw the vessel before they are deemed to have waived their right to withdraw?* The tribunal referred to The Laconia [1977] where it was held that, where owners withdraw the vessel from charter, they

states unambiguously, one way or another, that payment has not been received and gives the charterer [X days/hours, ie the relevant charter party grace period] ultimatum to pay or lose the ship."

Q: *What if there is an error in the anti-technicality notice as regards the stated US$ amount owing – does this invalidate the notice?* The tribunal confirmed that an anti-technicality notice does not need to specify the amount of hire that is due. Instead, basis *The Lutetian* [1982], owners can leave it to charterers to calculate and pay the hire due. Therefore, since an anti-technicality notice does not need to specify the amount of hire that is due, the tribunal found that an anti-technicality notice that states the wrong amount does not, of itself, invalidate the anti-technicality notice.

Q*: What if, after the anti-technicality is served, the charterer pays some of what owners says is overdue - do owners need to serve a fresh anti-technicality notice?* No. The tribunal stated that this approach "*could lead to a string of anti-technicality notices while a charterer kept paying part only of the outstanding hire and retained the vessel in its service."*

must do so within "a reasonable time" and that "What is a reasonable time - essentially a matter for arbitrators to find - depends on the circumstances. In some, and indeed many cases, it will be a short time - vis. the shortest time reasonably necessary to enable the shipowner to hear of a default and issue instructions". Further, the tribunal held that, in order to determine whether owners have waived the right to withdraw the vessel, the tribunal looks at whether or not owners have delayed in withdrawing the vessel, not at whether or not charterers have relied on the length of time taken before owners withdraw the vessel. In this case, owners and Members each served their anti-technicality notice on 16 March and the 3 clear banking days under the anti-technicality notices expired on 21 March. Members withdrew the vessel on 27 March. The tribunal commented that for Members to wait until 27 March to withdraw the vessel was, in their opinion, "far longer than "reasonably necessary" in the circumstances of the case". Owners, on the other hand, purported to withdraw the vessel 2 days earlier than Members, namely on Sunday 25 March. The tribunal commented: "This does of course make [owners'] position somewhat stronger than that of [Members]", although also noting that owners' "continued performance of the Charterparty for in excess of a further 2 days (both of which were working days) after the assumed right to withdraw arose could be taken as evidencing their election not to withdraw the Vessel from the Head Charter". Whilst the tribunal did not need to come to a conclusion one way or the other on this point, it can be seen from this that owners should exercise their right of withdrawal very promptly – probably within a maximum of 3 days in most cases – or owners will run the risk of being held to have waived their right of withdrawal.

The middle charterer's position in a charter chain:

Q: *What is charterers' position vis a vis sub charterers where owners have withdrawn the ship from charter but charterers have not, either because charterers are not entitled to withdraw under the terms of their sub charter or because charterers have delayed and waived their right to withdraw?* Whilst owners served their notice of withdrawal on Members and sub charterers on 25 March and Members forwarded this notice on to sub charterers on the same day, Members did not ask sub charterers to treat owners' message as having come from Members. Accordingly, the tribunal found that the withdrawal of the vessel from the sub charter – had the withdrawal been valid – would only have taken place when Members served their own withdrawal notice on sub charterers on 27 March, not on 25 March (and see above). However, since the attempted/purported withdrawal of the vessel was invalid, the tribunal commented that it amounted to (an automatic) repudiatory breach of the sub-charter by Members.

The calculation of damages:

Q. *Where owners have withdrawn the vessel from charter wrongfully, can charterers claim damages from owners for the actual loss of profit that charterers have suffered or are charterers limited to claiming the difference between the charter and (higher) prevailing market rate?* After fixing the vessel "on subjects", on 15 March sub charterers fixed firm the vessel to sub sub charterers (with a laycan of 1-9 April) for an intended PG voyage. When Members subsequently served their withdrawal notice on sub charterers, sub charterers nominated a substitute vessel. Unfortunately, however, this substitute vessel's schedule subsequently slipped, causing her to miss her laycan and the fixture fell through. Both owners' and sub charterers' expert agreed that there was an available market when the charter party was terminated. In these circumstances, and even though sub charterers here had sub-fixed at a rate that was higher than the prevailing market rate, the tribunal held that sub charterers were not entitled to this (larger) damages claim and that sub charterers could only claim the "normal", market loss measure of damages, namely the difference between the charter and (higher) market rate.

Q: *For what period can charterers claim these market loss damages for?* The tribunal held that the period over which damages should be payable was from 25 March (Members' purported withdrawal of the vessel from charter) not up to 20 April or any of the likely actual redelivery dates (for either the Egyptian or PG voyages) but to 18 May, namely the maximum charter party period permitted to sub charterers, including added offhire periods. This, the tribunal found, was the correct period because this was the (maximum) charter period which sub charterers had lost by reason of the wrongful withdrawal from charter. Of course, if sub charterers had given an estimated redelivery date of 18 May, additional hire would have been due.

In this case, therefore, sub charterers were held to be entitled to have their cake and eat it: they were entitled to pay hire less estimated bunkers only up to their 20 April estimated redelivery date and yet were awarded damages up to the 18 May maximum charter party period (albeit "only" at the charter versus market rate).

Costs issues:

The arbitration was expensive for all parties, particularly for owners.

- There were three days of concurrent hearings, two witnesses of fact, two expert witnesses and a lot of law, giving rise to two awards with 57 pages of reasons. The Tribunal's fee for the two awards was £130,000. Head owners paid both;
- Sub charterers recovered from Members £265,000 costs, of which, £248,000 was paid by head owners. Members recovered a further £100,000 in costs from head owners;
- Sub charterers' claim against Members was for slightly over US$386,000. Members claimed against sub charterers a balance of account and an indemnity for the costs of discharge the cargo on board at the time of termination, totalling approx. US$350,00. Against this, sub charterers' net recovery in damages against Members was US$110,000, most of which was probably swallowed by sub charterers' own unrecovered costs. Members' net position overall was that they were out of pocket by approx. US$62,000.

  There was no real winner, but one massive loser.