Disponent owners' contractual risks in a nutshell

Disponent owners can often be lulled into a false sense of security by assuming that their contractual position is risk free on the basis that they can simply pass up or down any liability. We shall first look at the position when the disponent owner is time chartering in and out on the same terms and then the situation where the disponent owner is time chartering-in and voyage chartering-out.

Back to Back charter: Disponent owner's risks when time chartering in and out on the same terms

Disponent owners often believe that their contractual position is risk free on the basis that they have entered into back to back charters. The presumption can be misconceived as owner's obligations on delivery and during the course of the charter are not the same. The four most common examples are with regards to cranes, speed and consumption, hull fouling and hold cleaning.

Cranes

In the NYPE 1946 charter for example, there are two different sets of obligations. Namely these are:

- Owners' obligations on delivery: "… Vessel on her delivery to be ready to receive cargo with clean-swept holds and tight, staunch, strong and in every way fitted for the service…" (Line 22).
- Owners' obligations throughout the CP: "That the owners shall provide and... maintain her class and keep the vessel in a thoroughly efficient state in hull, machinery and equipment for and during the service." (Clause 1).

Whilst owners' obligation on delivery is a "strict" one, the responsibility to maintain the ship is a "due diligence" obligation.

This means that unlike the situation when the cranes breakdown during the course of the charter, charterers do not have to prove fault or lack of maintenance if the ship's cranes do not work on delivery. All that needs to be demonstrated is that the crane(s) did not work on delivery.

As a result, the disponent owner may be in breach of his delivery obligations vis-à-vis the sub-charterer but may not have any recourse against the head owner as he will have to prove that head owners were in breach of their due diligence obligation to maintain the cranes. The legal costs and risk of proving a breach of a due diligence obligation are also greater as a lot of evidence has to be considered.

One way of avoiding such a situation is to incorporate a clause paramount in the sub-charter which renders the strict obligation to deliver the ship in a seaworthy condition into a due diligence obligation. (More details here: https://www.westpandi.com/globalassets/about-us/claims/claims-guides/20180123-defence---clause-paramount-in-a-nutshell.pdf.)

Speed and consumption

Unless the charter specifies that speed and consumption is a "continuing" warranty, this warranty only applies on delivery and not throughout the duration of the charter. The disponent owner could therefore find himself in a position where after a period of time, the ship he has chartered-in, does not perform as well as it did on delivery. If the description of the ship in the sub-charter is not changed to reflect the loss of performance, then disponent owners may find themselves in breach of the warranty towards their sub-charterers but with no real recourse against the owners (unless the disponent owner can prove a breach of owners' obligation to maintain).

If possible, it is therefore recommended for disponent owners to either request that warranty in the head charter

is a continuous one, or to state that the performance figures in the sub-charter are "without guarantee". If this is not possible then, the performance of the ship should be reviewed before entering into the sub-charter in order to accurately describe the ship.

Hull fouling

If fouling occurs during the currency of the charter this will invariably affect the performance of the ship. Unless the speed and consumption warranty is continuous, disponent owners will not be able to make an under-performance claim as the warranties are only given on delivery whereas the fouling occurred as a result of a natural consequence of the service of the ship during the charter. However, if, by the time the ship enters into service of the sub-charterers, the hull is already fouled and this affects the ship's performance, then sub-charterers will be able to put the ship off hire for any time lost as it will be considered a "defect to the hull" (The "Ioanna" [1985]).

Hold cleaning

Charterparties will generally state that the vessel will have to be delivered with holds cleaned up to a certain standard (e.g. "grain clean"). Failure to deliver the ship to the specified standard will render the owner in breach of contract.

However, this standard of hold cleanliness only applies when the ship has been delivered and does not apply during the course of the charter (intermediate hold cleaning).

Very often the charter will have a clause stipulating that the owners are not responsible for intermediate hold cleaning and that this will be for the charterer's account and risk. Even in the event that such a clause is not present in the charter, owners only have an obligation to maintain and render customary assistance. Owners are responsible for exercising due diligence to clean the ship with reasonable care, skill and speed. The crew are not regarded as skilled cleaning operatives and, therefore, there is a limit on what cleaning can reasonably be done whilst at sea. (More details here: https://www.westpandi.com/globalassets/about-us/claims/claims-guides/defence---hold-cleaning.pdf)

As a result, a situation can easily arise when disponent owners are in breach of delivering holds in breach of contract but being unable to pass on the liability to owners. Attention should therefore be paid to what hold condition is warranted on delivery to the sub-charterers, the previous cargo (whether it is dirty), the cargo to be loaded in particular if it requires a high standard of cleanliness and whether it is feasible to clean the holds in time.

Risks relating to disponent owner time chartering-in and voyage chartering-out

When a disponent owner charters in on a time charter and charters out on a voyage charter, disponent owners can find themselves at greater risk of not being able to pass on risks and liabilities up and down the chain.

Loss of time

The most obvious situation where disponent owners will not be able to pass on the loss of time to head owners is when time lost is not a Weather Working Day or the sub-charter is a berth charter in which case congestion is for disponent owner's account.

A time charterer may also find that the voyage has been naturally delayed without fault or an off-hire event, will still have to pay hire but will still collect the same freight.

A further example can be found where the voyage charter will have a clause for breakdown of the cranes whereby laytime will be adjusted pro-rate to the number of working cranes whether or not time is actually lost. Although this is an easy system to calculate time lost, this is not the way off hire is calculated in most time charterparties where the ship will be off hire for the time actually lost.

Another clause which will rarely exist in time charters is the "strike clause", which amongst other things suspends laytime. Lastly, voyage charters can be found to incorporate the terminal's laytime provisions.

The laytime provisions may state that if the ship arrives after the cancelling date, the laytime will only start upon loading and the terminal has discretion as to when the ship may berth. If these terms are not incorporated into the head charter then the loss of time will fall on the disponent owner with probably no recourse again the head owner, unless the delay was due to a breach of the charter.

Force majeure clauses

Unlike time charters, most voyage charters will include a "force majeure" clause where charterers will be excused from performing the charter due to the occurrence of an event which is external, unpredictable and irresistible. As a result, disponent owners will have no recourse against owners under a time charter for the losses suffered due to the force majeure event.

Specific port requirements

Some ports will request specific certificates or equipment. With regards to certificates, a ship only has to possess documents which are customarily required, or which may be required by the law of the vessel's flag or law and regulation of the port of call. However, under a time charter the ship can be traded to a wide range of ports and owners are not required to have certificates which are only particular to a certain port. A particular port may insist for example that the ship have lines which are longer than what is customarily necessary, resulting in disponent owners having to bear the cost of renting additional lines.

Other clauses

Some voyage charters will not include a clause paramount, making the seaworthiness obligation absolute as opposed to a due diligence obligation. (More details here: https://www.westpandi.com/globalassets/about-us/claims/claims-guides/20180123-defence---clause-paramount-in-a-nutshell.pdf.)

As a result, if the head charter contains such a clause, disponent owners may not have a recourse against owners if they exercised due diligence in making the ship seaworthy.

Very often a voyage charter will not include an ICA clause. This makes it harder for disponent owners to bring an indemnity claim against their charterers, even though they may bear a significant liability under the ICA regime. In effect, under clause 8 c) and d), head owners can claim an indemnity of 50% of the cargo claim if it was for shortage, over carriage or any other cause (other than seaworthiness or loading, stowing and discharging). If the voyage charter does not have an ICA clause, it may be very difficult for disponent owners to pass on this liability to their charterers. Even if the sub-charter does include an ICA clause, disponent owners may only be able to claim 50% of their own liability towards head owners.

Another example of potential exposure relates to stevedore damage, whereby many voyage charters will state that charterers will not be liable in case of damage to the ship due to stevedores.

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