

EVERYONE is under pressure to cut costs and minimise expenditure, not least the intermediate charterer trying to make a living chartering a ship and then sub-chartering her at a higher rate. The business is one of fine margins and costs must be kept to a minimum.

So when he is in the middle of a back-to-back chartering chain and there is a dispute in the offing between the head owner above him and the sub-charterer below him in relation to deductions from hire, his understandable inclination is to ensure that he has passed all the deductions up to the head owner and all the head owners protestations of unpaid hire down the line and let everyone else sort it out.

After all, he has no axe to grind. He thinks he is just a link in the chain and this is really a dispute between the head owner and the sub-charterer (or, if there are further sub-sub-time-charterers, whoever is at the bottom of the chartering chain). If the sub-charterers deductions turn out not to be justified, then so be it, the sub-charterer can pay him the balance of hire and he will pass it on (with any variations due to different charter rates etc.). If they are justified, then he has already passed on the deductions so is not out-of-pocket. Why should he spend time and money on other peoples battles? The cheapest place to be is sitting firmly on the fence.

How protected is he? What if the head owner decides several years down the line to pursue the deductions from hire? The intermediate charterers obligation to the head owner remains to pay the hire in full less properly supported, permitted deductions. This obligation is independent of whether the sub-charterer has paid hire to him. It is not enough

A stitch in time protects an intermediate charterers' rights in relation to deductions from hire. CHARLES BAKER and WILL CECIL explain steps an intermediate charterer can take to protect his position when hire disputes arise.

for the intermediate charterer to say that he is merely passing the deductions up the line.

One consequence of the intermediate charterer's position as a conduit for documents passing up and down the chartering chain will be that he may well not have any documentation of his own to evidence the deductions. He will be reliant upon the sub-charterer, who may himself only be a further link in the chain, to provide this. It only requires one link in the chain to be broken (eg: by a party disappearing or becoming insolvent) for him to be unable to obtain access to further evidence.

By contrast, all that the head owner will have to do is show the existence of a charterparty and evidence of the charter period. The passing of time will not make this task appreciably harder.

The intermediate charterer may find himself in the unenviable position of having to defend an arbitration several years down the line for these deductions, without access to the evidence that he needs. If, as a consequence, he has to pay the balance of hire, together with the costs

of the arbitration, this will be very expensive, particularly if his immediate sub-charterer has disappeared and the intermediate charterer can no longer re-claim from him any balance of hire paid to the head owner.

Deductions from hire can either be made because they are allowed under the express terms of the charterparty or (if not prohibited under the charterparty) may be possible by way of an equitable set-off. The important point for present purposes since the NANFRI decision is that a deduction need only initially be "a reasonable assessment in good faith". The evidence initially required by a charterer to satisfy himself that a deduction is indeed, bona fide, may be very different from the sort of evidence that he will need to prove the deduction should the matter ever be arbitrated.

These deductions may still be under discussion at the end of the charterparty when the final hire statement is produced. Discussions may drag on inconclusively without actually being settled and the intermediate charterer's position will be made worse if, in the initial posturing, the head owner commences arbitration, thereby avoiding any time bar that may be imposed by the charterparty or by statute. The head owner will then be entitled to resume the arbitration at any time in the future subject to the intermediate charterer's right to strike out the head owner's claim for want of prosecution, which is an order that arbitrators are reluctant to make.

So what can an intermediate charterer do? There are a number of steps that he should consider taking to protect his position, not only when a dispute arises, but also before that, when negotiating the terms of the charterparty.

For example, when negotiating

(ex Lloyd's Lit)



The intermediate chartering of a ship is a business of fine margins

the charterparty terms, he should consider:

- agreeing to a short contractual time bar (eg: one year) for arbitration proceedings to be commenced failing which claims will be time barred, together with an arbitration clause that incorporates arbitration rules providing for a strict timetable, eg: the LMAA FALCA Rules for claims under US\$250,000. Both of these provisions will reduce the risk that a claim for balance of hire will be revived by the head owner at some distant point in the future.

- Including in the arbitration clause a provision that, in the event of any arbitration being commenced regarding matters which also form the subject of a dispute under another concurrent charterparty in respect of the vessel, both parties agree to consent to a request made by the other party to consolidate the arbitrations. If such a provision is included in both of the charterparties to which the intermediate charterer is party, he will be able to require that those arbitrations are consolidated, thereby protecting his position on costs.

In the absence of such a provision, the intermediate charterer will not be able to insist that the two arbitrations be consolidated, as this would require the consent of all the parties to the two arbitrations. If the arbitrations are not consolidated then an arbitrator cannot make one party pay the costs incurred in another arbitration. The intermediate charterer will be successful in one of his arbitrations, but he will be unsuccessful in the other and will probably have to pay his own and the other party's costs of one of the arbitrations to which he was a party! Once arbitrations have been started, parties at the end of the chain may be reluctant to agree to consolidation, thereby risking having to pay all the other parties costs.

So if the arbitrations are not consolidated (and it is not sufficient that they are just heard concurrently before the same tribunal), the intermediate charterer will almost inevitably lose out on costs.

Once the charterparty has commenced and a balance of hire dispute appears to be brewing, the intermediate charterer should consider:

- Ensuring that the final hire accounts are actually settled, if possible;

- Ensuring that the sub-charterer has properly evidenced the deductions, not only to enable the intermediate charterer to pass them on based on his own 'reasonable assessment in good faith' but so that sufficient evidence is available to support the deductions should the matter ever come to arbitration. This will include comprehensive receipts for disbursements and, for other deductions, proper documentary evidence together with, if necessary, witness statements and expert reports.

If the sub-charterer will not co-op-

erate, the intermediate charterer will need to force him to do so, either by applying for an interim final award against the sub-charterer for the balance of hire or by considering whether he can exert pressure on the sub-charterer by exercising a lien on sub-freights or bill of lading freights for the balance of hire;

- Investigating whether it will be possible to obtain security from the sub-charterer for the intermediate charterer's claim for balance of hire;

- If arbitration has been commenced by the head owner, attempting to agree with all the parties in the chain that the same arbitrators should be appointed in all the arbitrations and the arbitrations consolidated. As explained above, this will have an effect on costs. At the least, the arbitrations should be heard concurrently before the same tribunal to minimise costs and avoid the risk of the intermediate charterer being caught between two inconsistent awards.

An intermediate charterer should not assume that, just because he is in the middle of the chain and has passed deductions up the line and adopted the owner's position down the line, he is protected. In addition to the risk of the vessel being withdrawn by the head owner and the associated financial consequences to the intermediate charterer, he will be exposed to the possibility that his sub-charterer either disappears or becomes insolvent.

If he wants to protect himself against a large exposure at some point in the future, he should make sure that his house is in order before, or at the very latest very soon after, re-delivery of the vessel.

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