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Charterers In The Middle - Mind The Gap

It is common in the chartering business for a vessel to have three or more parties in the charterparty chain. Some charterers in the middle may be under a misconception that, as a party in the middle of the chain, they may simply pass claims up or down the line and that their exposure is minimal.

The purpose of this article is to highlight the exposures of charterers in the middle and recommend precautions which charterers should exercise to avoid or minimise their risks.

Essential clauses

Whether the charterparty in question is a time charter or voyage charter, it is important for charterers in the middle to check the terms carefully to ensure that the essential provisions concerning the following are back-to-back up and down the chain. These include (among other things) governing law, arbitration clause, Clause Paramount, safe port warranty, general average, cargo liquefaction, war risk/non-permitted trading areas and other indemnity provisions.

It is important to note that not all standard charterparty forms contain the necessary protective clauses. For example, there is no clause paramount in Gencon 94. Charterers in the middle may put themselves in a dire position if there is a clause paramount in the charter up the chain but none in the sub-charter. In the absence of a clause paramount, the one-year time limit under Hague-Visby Rules will not be applicable; the charterers in the middle are at risk of receiving a cargo claim from sub-charterers after the relevant time bar under the charter up the chain has expired.

Having arbitration clauses which are not back-to-back is another recipe for disaster. If the charterparties provide for different seats of arbitration, the arbitrators in references up and down the chain are likely to be different. Not only will it be difficult (if not impossible) to have the two references dealt with concurrently or consolidated, there is also a risk that the two panels may reach inconsistent decisions.

For time charterers who also time charter out, it is especially important to make sure bunker specification and warranties are entirely back to back. These claims are often high value and it is vitally important that such claims can be passed down the charterparty chain to avoid liability exposure.

Time-charter in, voyage-charter out

There are greater risks for charterers in the middle to fall into gaps where the charters up and down the chain are a time charter and a voyage charter respectively, and hence with rather different terms. Problems which are often seen include the following:

1. Time loss

Some voyage charters include extensive laytime/demurrage exceptions. Charterers in the middle should note that, whilst laytime has stopped counting under the sub-charter, the vessel may nevertheless remain on hire under the charter up the chain, which means they may end up bearing the time loss themselves.

2. Force majeure clauses

Force majeure provisions are often seen in voyage charters, but rarely found in time charters. If such provision is included in the sub-charter but not the head charter, there is a risk that sub-charterers may be excused for e.g. failing to provide any cargo for shipment, whereas charterers in the middle remain obliged to perform the charter up the chain.

3. Cargo claims

Most time charters for dry bulk vessels incorporate the Inter-Club Agreement (ICA) for the purpose of apportioning liability for cargo claims. In contrast, provisions which impose responsibility for cargo claims on charterers are rarely found in voyage charters. If the charterers in the middle are held liable under the ICA, they will not be able to pass the claim on to the voyage charterers unless they can prove that the damage resulted from a breach of contract by the voyage charterers.

4. COVID-19

Due to the Covid-19 pandemic, issues relating to deviation for crew change and quarantine delay at loading/discharge ports often arise between parties. If Owners are allowed to deviate for crew change under the time charterparty, then it is important that the charterers in the middle are also allowed to deviate under the voyage charterparty. The same applies to any quarantine delays. If the time charterparty requires hire to remain payable during quarantine periods, then charterers in the middle should make sure that laytime or demurrage shall continue to run during quarantine periods.

Even if all major terms are back-to-back

Even if the charterparties up and down the chain are both time charters with similar terms, it should be noted that the position of the charterers in the middle may not necessarily be entirely back-to-back, especially in relation to a performance warranty and hold cleanliness upon delivery. If for example the delivery under the sub-charter takes places months (or more) after delivery under the head charter, and if the sub-charterers make a claim for underperformance, it is possible that the charterers in the middle may be liable without recourse to the head owners. This is because a speed and consumption warranty (unless stated to continue throughout the duration of the charter) applies only on the CP date or latest the start of the charter. If therefore the commencement of the head charter well predates that of the sub-charter, charterers in the middle will not be able to pass an underperformance claim up the chain. It might be possible to make a claim if they can prove that the underperformance resulted from owners' failure to

properly keep the vessel in a thoroughly efficient state during the service, but proving such failure is a lot more difficult than establishing a failure to reach warranted speed and consumption.

Even if the position of charterers in the middle is entirely back-to-back, and even if the governing law and arbitration clauses up and down the line are identical, the charterers in the middle should note that there are still risks of costs exposure if the disputes are referred to arbitration. If for example owners bring a claim against charterers who in turn bring a claim against sub-charterers, there is less to worry about if the head owners' claim is successful, because the charterers in the middle can then pass the claim down and claim the costs in the head reference against sub-charterers as damages. However, if the sub-charterers manage to defeat the claim, charterers in the middle will not be able to seek an indemnity for their own costs and costs liability in the sub-reference against owners up the chain; in such case the real cause of their loss will be deemed to be their decision to bring a failed claim against sub-charterers, rather than a breach by owners up the chain.

The above demonstrates that there are risks to charterers in the middle who assume that they may simply sit back and pass claims and liabilities up or down the chain. It is recommended that efforts should be made to make the charterparty terms as back-to-back as possible or ensure that the potential risks are adequately compensated for by hire/freight rates.

Skuld is ready to assist members and clients in understanding their contractual liabilities under existing charterparties and protecting and improving their position in future fixtures. Our dedicated in-house lawyers and claims handlers work closely with our charterer and trader clients to ensure fast and professional responses. Assistance for disputes with head-charterers or sub-charterers, as well as many other types of disputes can be given under Skuld's FD&D service product.

Should you have any comments or questions, then please do not hesitate to contact us at any time.

Source of Information: The Skuld P&I Club