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Costs in multi-party litigation – intermediate charterer's drop out and streamlining arrangements

Notwithstanding back to back charterparties an intermediate charterer can still be found liable for the costs of a counterparty and unable to pass that liability on to another party. To minimise these risks a drop out or streamlining agreement should be considered at an early stage.

By way of background, in the VAKIS T [2004] 2 Lloyd's Rep. 465 the owner brought a claim against the head charterer for damage to the ship caused by its calling at an allegedly unsafe port. The head charterer similarly commenced proceedings against its sub-charterer who had access to evidence vital to defend the owner's claim. The owner's allegations were held to be spurious; the ship had never docked at the allegedly unsafe port and the cause of the damage was the unseaworthy condition of the ship. The intermediate charterer was therefore liable for the sub-charterer's costs and sought to pass on that cost liability to the owner. Although the tribunal found in favour of the intermediate charterer the High Court overturned the decision. The Court found that the claim, as between the intermediate charterer and sub-charterer, was without foundation and therefore failed on the grounds of causation. It was consequently not possible for the intermediate charterer to pass on the sub-charterer's costs to the owner.

Being back to back therefore is not an entirely risk free position.

Under English law arbitrators cannot order the consolidation of arbitral references (unlike cases which are subject to English High Court) therefore invariably multiple reference can be on-going under several charterparties. Different arbitrators can also be appointed which can lead to inconsistent decisions both at an interlocutory or substantive stage of the proceedings.

Consolidation agreements between the parties can minimise costs and avoid delays. In appropriate cases, Members and their advisers are encouraged to conclude such agreements or engage in dialogue in order to avoid unnecessary costs. The parties in a charter chain can agree that one or more parties can "drop out" of the litigation. Such agreements can be an effective way of minimising cost exposure for an intermediate charterer and reducing delays for the remaining parties. Alternatively, certain arbitrations in a chain can be "stayed" on the basis that the parties co-operate in the remaining reference(s).

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In more complex "streamlining" agreements the parties may agree to include some or all of the following:

- To bear their own costs and expenses incurred prior to the date of the agreement;

- To share costs and expenses going forward in relation to issues contemplated under the agreement. Such fees can be shared pro – rata to the monies at risk or to the number of parties to the agreement;

- To nominate a law firm to have the on-going conduct of the underlying dispute;

- To co-operate, including the provision of information, evidence (including making available all witnesses and experts) and disclosure of all relevant disclosable documents including survey reports, correspondence, witness statements and expert reports;

- To provide security and/or counter security where appropriate for the sums in dispute plus interest, and any liability for the recoverable costs payable in the underlying dispute, or to pay disputed sums or security into an interest bearing escrow account;

- To agree not to seek further security by way of arrest or attachment proceedings;

- To appoint the same arbitrators under all relevant charters, including any necessary third arbitrator or umpire;

- To stay intermediate disputes;

- To provide reasonable reporting of the progress of the underlying dispute;

- To agree a settlement mechanism where appropriate (e.g. the underlying dispute should only be settled upon terms agreed by all parties, with such agreement not to be unreasonably withheld) or to record the parties' agreement to be bound by a final arbitration award or judgment rendered in relation the underlying dispute; and

- To agree appropriate law and dispute resolution provisions which can order consolidation.

In order to minimise costs and delays Members are encouraged to consider consolidation of arbitral reference, or where appropriate, drop out, or streamlining agreements.

Yours faithfully,
THOMAS MILLER DEFENCE LTD

Managers