Costs Recovery In Charterparty Chain Arbitrations

Costs awards in Charterparty chain arbitrations can leave the party in the middle (the Charterer under the head charterparty) seemingly unfairly out of pocket. Provided the charterparties are on back-to-back terms, theoretically at least, both arbitrations should have the same finding of liability (with the result that the Charterer loses one arbitration but succeeds in the other). However, whilst in the successful arbitration the charterer is likely to have its own recoverable costs awarded, it is usually unable to recover in that arbitration the costs it incurred and those awarded against it in the unsuccessful arbitration. In such a situation the charterer is likely to feel hard done by. Arguably, the costs, along with liability, should move along the chain.

This problem can be avoided by consolidating the sub and head arbitrations. Following consolidation the Charterer effectively drops out of the picture and the arbitration continues between the parties at the top and the bottom of the chain. Unfortunately, consolidation requires the agreement of all the parties involved which is often difficult to obtain in practice.

Following the decision of Mr. Justice Geff (as he then was) in "The Antelope", it is accepted that arbitrators in a head arbitration cannot include in the costs awarded the costs incurred by the successful party in corresponding litigation. That said, it is equally well established, following the Court of Appeal decision in the 19th Century case of Hammond v. Bussey, that costs in one dispute can be recovered in another if they can be claimed as damages for breach of contract. However, as with any damages claim, success depends on satisfying the tests of causation and remoteness.

The High Court recently considered this very issue in Vrmata Marine v. Eastern Rich Operations - "The Vakis T".

The Owners of "The Vakis T" appealed an arbitration award in which the Charterers were awarded as damages their costs in the corresponding sub-arbitration.

The Owners had commenced proceedings against the charterers in respect of damage to the bottom of the vessel which they alleged had been due to Charterers' failure to nominate a safe port. Charterers commenced corresponding proceedings against the Sub-charterers whilst claiming indemnity from the Owners in respect of their costs, and the Sub-charterers' costs, of the sub-arbitration. No consolidation took place, but the two arbitrations were heard concurrently on liability issues.

At the hearings it became clear that the owners' case was spurious. The tribunal held that unseaworthiness was, in fact, the cause of the damage. This resulted in the Owners discontinuing their claim with the Charterers doing the same down the line. The tribunal allowed the Charterers to amend their counterclaim and plead a positive case of unseaworthiness with the resulting damages being their own costs and the costs recovered by the Sub-charterers in the sub-arbitration. The tribunal found for the Charterers.

Whilst acknowledging that claims to recover damages in chain arbitrations usually fail to satisfy the tests of causation and remoteness, the tribunal felt that this was an unusual case. It was noted that, whilst usually it was appropriate simply to protect time by commencing sub-arbitration proceedings and then await the outcome of the head arbitration proceedings before deciding to pursue an indemnity claim down the line, this option was not available to the charterers in this instance. This was because the Sub-charterers needed to be brought into the case in order to obtain "crucial evidence". The tribunal felt that the commencement of the sub-arbitration was a reasonable course of action and did not break the chain of causation between the breach of seaworthiness and the damage claimed - without the sub-arbitration the "crucial evidence" could not have been obtained.

Langley J, sitting in the High Court, reversed the tribunal's decision, finding it to be bad in law because the right tests for neither causation nor remoteness had been applied.

Unimpressed by the "break in the chain of causation" test applied by the tribunal, Langley J referred instead to "commonsense" and whether the breach of the seaworthiness obligation "was the "effective or dominant" cause of the loss by way of costs incurred and payable in the sub-arbitration" 54. He held that the real cause of the loss was not the unseaworthiness of the vessel but the spurious claim brought by the Owners which the Charterers brought down the line against the Sub-charterers.

With regard to the test for remoteness, which the tribunal had addressed solely by reference to foreseeability, Langley J endorsed the test put forward by counsel for the Charterers, which read as follows:

"Liability in costs on the part of [the Charterers] to a sub-charterer would have been within the reasonable contemplation of the parties at the time of concluding the charterparty as a not unlikely result of the owners breaching the charterer by delivering the vessel in an unseaworthy state. 45"

Thus, while satisfying the test for remoteness, the Charterers' claim failed on the grounds of causation. 46

Langley J did not address the issue that had seemed very much at the forefront of the tribunal's reasoning: without the sub-arbitration the Charterer would not have been able to obtain the evidence required to defeat the owners' claim. This places the Charterer in the middle in a difficult situation.

Hopefully, however, the Charterer's predicament is somewhat improved by recent developments in English law relating to pre-action disclosure. Where a charterer finds itself facing a claim under a head arbitration in respect of which there is crucial evidence available only to the party to any potential sub-arbitration, it may be open to the charterer to apply for immediate disclosure of the evidence in question. To make such an application would require only the appointment of the tribunal to hear it. No further procedural steps should be needed at that stage. As that evidence is likely to determine whether the charterer proceeds with the sub-arbitration, any tribunal would give serious consideration to making an award for such pre-action disclosure (Black v. Sumitomo).
With regard to the recovery of sub-arbitration costs, an argument which has been advanced in the past but in respect of which there is no clear judicial authority is that the costs of the sub-arbitration form part of the costs of the head arbitration in that they are part of the evidence gathering exercise of the head arbitration. It is unclear from the judgment in “The Vakls T” if this point was pleaded. A similar point was pleaded by Mr. Rox QC (as he then was) in the “The Vmiera (No. 2)”6. The House of Lords, with Lord Goff giving the lead decision, were unimpressed with this line of argument but no conclusion was reached on the point. Therefore, the door is not yet closed on this argument and it remains to be seen whether it may be raised in future proceedings.

In conclusion, “The Vakls T” underlines the difficulties facing a Charterer in the middle of a charterparty chain. Where faced with a claim, the Charterer in the middle needs to consider its options very carefully before commencing proceedings up or down the line. Full-scale sub-arbitrations are not always necessary and may result in the Charterer incurring considerable unrecoverable losses despite the seeming absence of culpability on its part.

1. [1961] 2 Lloyd’s Rep. 204
2. (1880) 20 QBD 79
3. Langley J at Para 11
4. It should be noted that the test for causation used by Langley J is outdated and perhaps incorrect in light of the House of Lords Decision in Fairchild v. Glenhaven [2002] 3 All ER 305. However, had the test as set out by Lord Hoffman in Fairchild been used the result would very probably have been the same.
5. Langley J at Para 13
6. Langley J held that as his findings would have made the outcome of the arbitration clear there was no need to remit the award to the tribunal for reconsideration: doing so would only result in more costs being incurred.
7. [2002] 1 Lloyd’s Rep. 693. This decision concerned the issue of pre-action disclosure in High Court proceedings, but should equally be applicable to arbitration (cf. Rule 10 of the Second Schedule of the LMAA Rules).