Hire Deductions and Reductions:

Implications of Resorting to the Self-Help Remedy?

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In every time charter, the charterer periodically pays hire to the owner for the period the charterer uses the vessel. While the charter is ongoing, the charterer may have crossclaims against the owner for breach of performance warranty (see *Santiren Shipping Ltd v Unimarine SA (The "Chrysovalandou Dyo")* [1981] 1 Lloyd's Rep 159; *Federal Commerce and Navigation Ltd v Molena Alpha Inc and others (The "Nanfri", The "Benfri", The "Lorfri")* [1979] 1 Lloyds Rep 201 HL), loading less cargo (see *Compania Sud Americana De Vapores v Shipmair BV (The "Teno")* [1977] 2 Lloyd's Rep 289), etc. Apart from that, a charter may claim to be entitled to pay less hire on account of off-hire. This article discusses the right of the charterer to deduct the crossclaim amount from the hire as well as off-hire and related issues.

For the purposes here, crossclaims/off-hire claims can be classified into three categories. First, the vessel is off-hire, meaning no hire is due for the relevant period. Second, the vessel is not off-hire, but deduction for certain expenses is contractually allowed. Third, the vessel is not off-hire and the charterparty does not provide for deduction of any expenses, but the charterer is entitled to make deductions as a matter of law by the principle of equitable set-off. These scenarios are considered below.

Off-hire is a contractual matter. A vessel will go off-hire only upon the happening of an event that the charterparty specifically classifies as an off-hire event. Ordinarily, an off-hire clause in the charterparty will list the off-hire events (eg. cl 15 in NYPE

1946 form and cl 21 in SHELLTIME 4 form). An example of such an event is a breakdown of the vessel as a result of which some service time is lost. For the time lost, no hire is payable. Literally, this is not a case of 'deduction from the hire' but rather a case of 'no hire' for the relevant period. It is not necessary that there is any breach on the part of the owner as the vessel goes off-hire upon happening of the event as a matter of contract.

When the vessel goes off-hire, usually, the charterparty will provide that all additional bunkers consumed and expenses incurred in connection with the off-hire instance are on the owner (eg. cll 15 and 20 NYPE 1946 form and cl 7(a) SHELLTIME 4 form). The charterparty may expressly allow the charterer to deduct the costs of these bunkers consumption and expenses from the hire payable (eg. certain (but not all) off-hire instances in cl 15 NYPE 1946 form). If the charterparty does not expressly allow such deduction, then the charterer may avail itself of the principle of equitable set-off to make the deduction. It is not necessary for the charterparty to allow equitable set-off. Indeed, one resorts to the right to equitably set-off because the contract does not make a provision for the deduction.

Take this example, based on a modified SHELLTIME 4 form. The charterparty provides that the vessel will go off-hire when judicially detained for fault attributable to the owner (cl 21(a)(v)). The charterparty also provides that when the vessel is off-hire, the additional bunkers consumed and expenses incurred are on the owner (cl 7(a)). However, the charterparty does not provide that the charterer may 'deduct' the costs of such bunkers consumed and expenses incurred from the hire. The vessel has completed the charter service in 10 days. In between, the vessel was arrested and kept detained for a day because the master negligently damaged a pier there. During the one-day, the bunkers consumed and expenses incurred costed the charterer USD20,000. Now, as a matter of contract, the hire is payable only for nine days, i.e. USD270,000. This is the effect of the off-hire clause. From the due hire of USD270,000 the charterer will deduct USD20,000, hence pay a net sum of USD250,000 only. The deduction is made as a matter of law by the principle of equitable set-off as there is no contractual provision for the deduction.

To make an equitable deduction, there must be close proximity between the primary claim and the crossclaim. Here, the primary claim is that of the owner for hire. The crossclaim is that of the charterer, which can be for additional bunkers consumed and expenses incurred, underperformance, etc. It has been held that a cargo claim, bunker misappropriation claim (see *Leon Corporation v Atlantic Lines and Navigation Co Inc (The "Leon")* [1985] 2 Lloyd's Rep 470), bunker reimbursement claim (see *Century Textiles and Industry Ltd v Tomoe Shipping Co (Singapore) Pte Ltd (The "Aditya Vaibhav")* [1991] 1 Lloyd's Rep 573) and bunker cancellation fee claim (see *Western Bulk Carriers K/S v Li hai Maritime Inc (The "Li Hai")* [2005] 2 Lloyd's Rep 389 (HC); *Schelde Delta Shipping BV v Astarte Shipping Ltd (The "Pamela")* [1995] 2 Lloyd's Rep 249) do not have the close proximity with an hire claim, hence no equitable set-off for them. Performance claims are recognised to be in close proximity with the hire claim. Hence, a charterer may avail itself of the principle of equitable set-off to deduct the compensation due to it for the underperformance by the vessel (*The "Nanfri"*; *The "Chrysovalandou Dyo*").

However, in practice, a charterer paying less hire because it claims some off-hire or a charterer making a deduction from the hire by the principle of equitable set-off may run a risk, particularly if the market is in owner's favour. Suppose the charterer assesses the underperformance claim sum to be USD20,000. The owner assesses it to be USD15,000 or denies in totality any underperformance. The owner withdraws the vessel and enters into a 'without prejudice' agreement with the charterer for continued service but at a higher rate of hire. If a tribunal later decides the compensation due to the charterer for the underperformance was at least USD20,000 (i.e. no over-deduction), then all the additional hire paid by the charterer under the 'without prejudice' agreement will be refunded and the charterparty will be put back on the original terms.

However, if the tribunal decided that there was an over-deduction, the matter can be complex. There seems to be two schools of thought. One is that if there is an over-deduction, then the charterer has breached the agreement, irrespective of whether the deduction was made on the basis of a reasonable estimate. Thus, the owner was entitled to withdraw as it rightly did, and the 'without prejudice' agreement will stand

good. Of course, this will be different if the charterparty allows deductions to be made on reasonable estimate basis (eg. cl 9 SHELLTIME 4 form). Another school is that if the over-deduction quantified by reasonable assessment made in good faith, then the owner should not be entitled to withdraw. Lord Goff LJ in the Court of Appeal in *The "Nanfri"* (reported in [1978] 2 Lloyd's Rep) seems to lend support to the first school, while Lord Denning MR there seems to lend support to the second school. The view of Lord Denning MR seems to have gained popularity (see *SL Sethia Liners Ltd v Naviagro Maritime Corpn (The "Kostas Melas")* [1981] 1 Lloyd's Rep 18; *The "Chrysovalandou Dyo"* [1981] 1 Lloyd's Rep 159; *Owneast Shipping Ltd v Qatar Navigation QSC* [2011] 1 Lloyd's Rep 350).

Despite that, conceptually, it can be hard to justify the second school, because depriving the owner of the contractual right to withdraw when the due payment is not made after all the required notices and disentitling it to the right amount of hire merely because the charterer acted reasonably in making a wrong overassessment will be equivalent to re-writing the contract, which a tribunal should not ordinarily do.

The same analysis will apply in respect of the rights of the owner to suspend services by the BIMCO Non-Payment of Hire Clause 2006, which is normally added by the parties into their time charters under modified NYPE 1946 form.

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