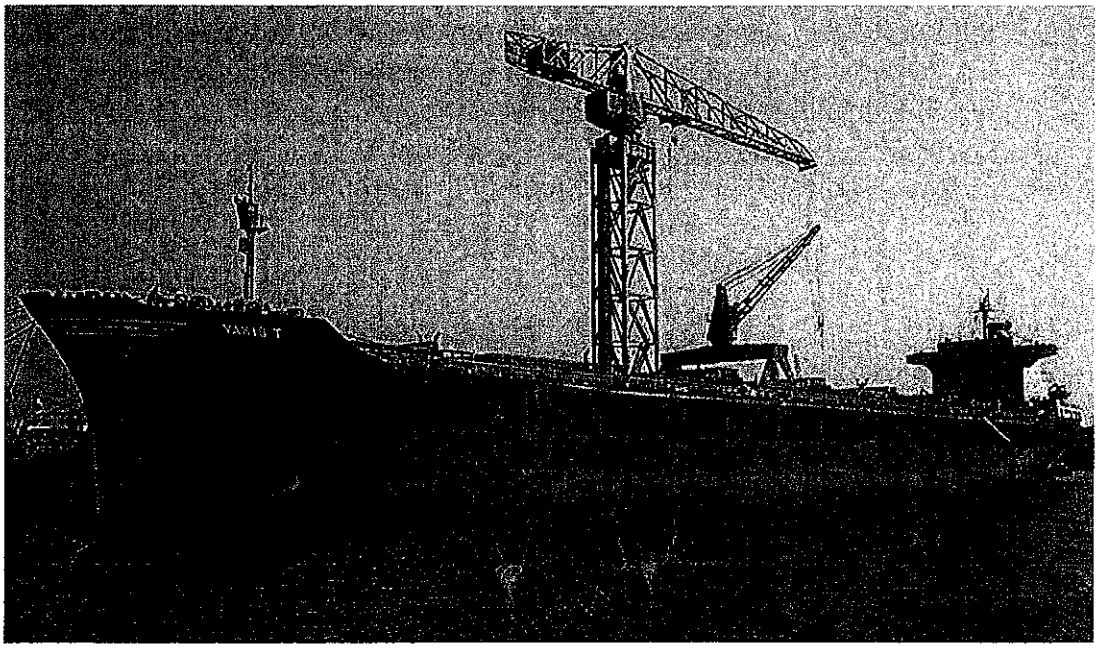
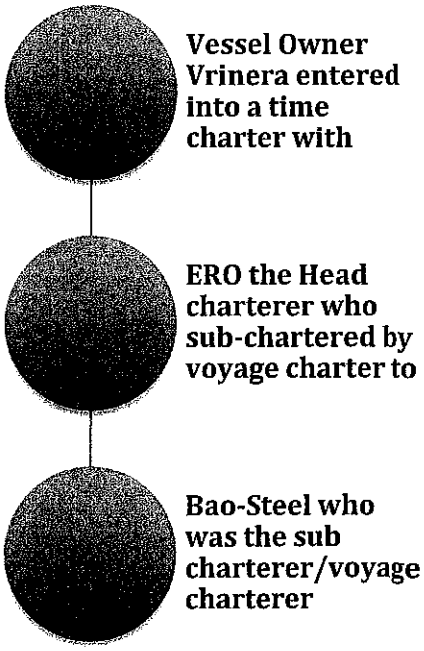
AMTAC PRESENTATION 21 NOVEMBER 2016

Julie Soars
Barrister, Arbitrator and Mediator
7 Wentworth Selborne Chambers

An example of a charterparty string or chain dispute: *The Vakis T* – a rust bucket, literally!





Summary of facts based on the *Vakis T*: *Vrinera Marine Company Limited v Eastern Rich Operations Inc.* [2004] 2 Lloyd's Rep 465 **[2004] EWHC 1752 (Comm)**
http://www.bailii.org/cgi-bin/format.cgi?doc=/ew/cases/EWHC/Comm/2004/1752.html&query=(the)+AND+(vakis)+AND+(T)

1. The Owner time chartered its vessel m/v "*Vakis T*" to ERO on a time charter. ERO sub-chartered the vessel to "Bao Steel" on a voyage charter.

2. 1999 - Owner commenced arbitration against sub charterer ERO claiming that bottom damage to the vessel had been cause by a breach of the safe port/berth obligation in the charterparty. ERO denied liability, said claim frivolous, vexatious and an abuse of the arbitral process and it put the Owner to proof of seaworthiness.

3. 2003 - ERO commenced an arbitration against Bao Steel alleging breach of the safe port/berth obligation in sub-charterparty. Bao Steel defended – vessel unseaworthy.

4. The two arbitrations were ordered to be the subject of concurrent hearings on liability issues under LMAA terms.

5. Issue – was the structural collapse of the bottom of the vessel caused by a grounding due to docking at an unsafe port or was it because of a of a catastrophic failure of the under frame rings in the lower part of the side ballast tanks due to unchecked corrosion.

6. At the hearing it became apparent on Owner's own evidence its case was spurious – the vessel had docked at a safe port. The undoubted cause of the damage was its unseaworthy condition at the start of the charterparty. Owner discontinued against charterer, charterer discontinued against sub-charterer.

7. Issue – appeal with leave on a question of law whether the costs of the arbitration brought by ERO against Bao Steel were caused by breach of the obligation of seaworthiness in the head charter or were too remote to be recoverable. Tribunal had held that ERO had needed to progress arbitration against Bao Steel to obtain evidence to use to defend Owners' claim of breach of safe port – conduct in pursuing arbitration was reasonable.

8. On appeal – common ground that the Tribunal applied the wrong legal test (break the chain of causation) – question what was the result when the correct legal test was applied – being whether or not as a matter of commonsense the breach of contract by Vrinera complained of (unseaworthiness) was the "effective or dominant" cause of the loss by way of the costs incurred and payable in the sub-arbitration. No sufficient link could be found and damages not claimable.

The problems that arise in string disputes are many and include:

1. Without consolidation expensive for the party in the middle to resolve the claims and no ability to pass liability down the chain;

2. Party in the middle may need evidence/documents from the party at the bottom to use against the party at the top (owner) but has no direct connection and difficult to obtain without commencing and progressing an arbitration;

3. Also a problem re legal costs – an innocent party can be found liable in the head arbitration and able to recover on the sub arbitration but there are question marks about the recoverability of legal costs up and down the chain.

4. What often happens in charterparty string or chain disputes is that even though the parties are different the arbitration clause may be the same or similar, which means the seat may be the same, the arbitral institution may be the same (often LMAA). If one or more of these things are different, then even more complicated issues arise.

Overview of the law/rules

Australian law would be relevant where it is the law governing the arbitration agreement – usually because Australian procedural law applies (seat or place of the arbitration is Australia)

1. **Re consolidation**: s24 IAA **[attached]** is an "**opt in**" provision which allows for consolidation of arbitrations by the tribunal on grounds that: (a) common question of fact or law; (b) rights to relief arise out of same transaction/series of transaction; or (c) for some other reason it is desirable to order

2. Examples of arbitration rules which "opt in" to a form of consolidation:

    (i) AMTAC Arbitration Rules – No!
    (ii) R14 ACICA 2015 Arbitration Rules https://acica.org.au/acica-rules-2016/
    (iii) Art 10 ICC Arbitration Rules http://www.iccwbo.org/products-and-services/arbitration-and-adr/arbitration/icc-rules-of-arbitration/
    (iv) Art 22.1(ix) and (x) LCIA Arbitration Rules http://siac.org.sg/our-rules/rules/siac-rules-2016
    (v) Art 19 CIETAC Arbitration Rules
    (vi) Art 28 HKIAC 2013 Rules http://www.hkiac.org/arbitration/rules-practice-notes/administered-arbitration-rules
    (vii) Art 8 SIAC 2016 Rules

Compare the position in the UK assuming English procedural law applies (seat or place of the arbitration is England

3. **Re consolidation/concurrent hearings** - S35 of the English *Arbitration Act 1996* :

   35 Consolidation of proceedings and concurrent hearings

   (1) The parties are free to agree–

   (a) that the arbitral proceedings shall be consolidated with other arbitral proceedings, or

   (b) that concurrent hearings shall be held,

   on such terms as may be agreed.

   (2) Unless the parties agree to confer such power on the tribunal, the tribunal has no power to order consolidation of proceedings or concurrent hearings.

4. According to LMAA commentary – this happens rarely. Different threshold issue.

5. But the London Maritime Arbitrators Association (**LMAA**) allows for the holding of concurrent hearings under para 14(b) of the *LMAA Terms (2006)* – which tends to get referred to colloquially as allowing consolidation 2012
   http://www.lmaa.london/uploads/documents/LMAAterms2006.pdf

   14. In addition to the powers set out in the Act, the tribunal shall have the following specific powers to be exercised in a suitable case so as to avoid unnecessary delay or expense, and so as to provide a fair means for the resolution of the matters falling to be determined:

   (b) Where two or more arbitrations appear to raise common issues of fact or law, the tribunals may direct that the two or more arbitrations shall be conducted with and heard concurrently. Where such an order is made, the tribunals may give such directions as the interests of fairness, economy and expedition require including:

   > *(i)that the documents disclosed by the parties in one arbitration shall be made available to the parties to the other arbitration upon such conditions as the tribunals may determine;*
   >
   > *(ii) that the evidence given in one arbitration shall be received and admitted in the other arbitration, subject to all parties being given a reasonable opportunity to comment upon it and subject to such other conditions as the tribunals may determine.*

6. LMAA commentary notes that it often happens that a strong of related contracts (eg. a head-charter, a sub-charter and a sub-sub-charter throw up similar issues which will lead to one or more parties to a number of arbitrations applying for the power granted by 14(b) to be used

Australia re joinder - this is not expressly dealt with in the IAA but is allowed for in some arbitration rules.

7. Examples of arbitration rules which allow for **joinder** are:

   (i) AMTAC Arbitration Rules– No!
   (ii) R15 ACICA 2015 Rules
   (iii) Art 7 ICC Arbitration Rules
   (iv) Art 22.1(viii) LCIA Arbitration Rules
   (v) Art 18 CIETAC Arbitration Rules
   (vi) Art 27 HKIAC 2013 Rules
   (vii) Art 7 SIAC 2016 Rules

8. **England re joinder** – no provision in the *Arbitration Act* or LMAA terms.