

## **Who risks arrest? On or off hire after the *Global Santosh*<sup>1</sup>**

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### **Introduction**

1 Parties negotiating timecharters have long grappled with how to deal with the problem of ship arrest: for whose account is time wasted while the vessel is under arrest, the Owner's, with the ship being off hire; or the Charterer's, hire being earned throughout the arrest?

2 Various methods tried to allocate this risk. In *The Global Santosh*:

*"Should the vessel be captured or seized or detained or arrested by any authority or by any legal process during the currency of this Charter Party, the payment of hire shall be suspended until the time of her release, unless such capture or seizure or detention or arrest is occasioned by any personal act or omission or default of the Charterers or their agents..."*

3 A rough but ready line between "the Owners' side" and "the charterer's" side: if the vessel is arrested, then

[a] *prima facie* she is off hire until the arrest is lifted;

[b] moreover, the vessel is off hire for this period even if the charterers make use of her during that period;

[c] however, the Owners can reverse that default off hire position and claim hire through the proviso: the arrest was caused "by any personal act or omission or default of the Charterers or their agents."

4 Notional line: if the arrest results from something done (or not done) on the Charterers' side of the line, then the vessel remains on hire.

### **The facts and the central issue**

5 Supreme Court rejected that position - introduced a more complex analysis, favouring charterers by tightening the proviso.

6 Facts simple, at any rate for a market where charters and sub-charters up the carriage line typically overlay a sub-structure of sale contracts which themselves seek to allocate the risks of delay through demurrage clauses.

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<sup>1</sup> *NYK Bulkship (Atlantic) NV v Cargill International SA* [2016]UKSC20

- 7 The *Global Santosh* was time-chartered by NYK to Cargill who, pursuant to their liberty to sub-let, voyage chartered to Sigma for a voyage from Sweden to Nigeria with a cargo of cement. It seemed that Sigma sub-contracted the vessel to Transclear who in turn were Free Out C&F sellers to IBG. IBG were thus by this chain of sub-contracts engaged to discharge the cargo in Nigeria.

NYK

To

Cargill

To

Sigma

To

Transclear to IBG

- 8 IBG's off-loader broke down - vessel kept waiting at anchorage for two months. Hire paid during this period ("the first period.") Eventually the vessel was called into berth, but just before that, Transclear had obtained an arrest in support of their sale contract demurrage claim against IBG in respect of the delay during that first period; the intention was to arrest the cargo but in error the vessel too was arrested, even though there was no claim against the vessel or the Owners. So, strangely, the ship was arrested for a demurrage claim under a sale contract.
- 9 Being advised of the arrest, the port authority sent the vessel back to the anchorage where she remained for another month while IGB and Transclear agreed the terms of security ("the second period").
- 10 Eventually, vessel was called back to berth and discharged the goods. **The question was whether she was on-hire during the second period.**
- 11 Since the vessel was undoubtedly (albeit wrongfully) under arrest for the second period, the *prima facie* position was that she was off hire.
- 12 Owners relied on the proviso: arrest was occasioned by the act neglect or default of both Transclear and IBG who were Cargill's "agents" for these purposes. Common ground that neither

Transclear nor IBG was a “charterer’s agent” in the classic sense of an entity performing agency functions. The question was whether they (or either of them) were “agents” for the broader purposes of the proviso to the off-hire clause.

**The answers given by the arbitrators and the judges**

- 13 The four tribunals considering the question were split.
- 14 The **arbitrators** held by a majority of 2:1 that Transclear were not “agents” of Cargill since Cargill had neither authorised nor requested them to arrest the vessel; the majority overlooked entirely the case that IBG were “agents”: vessel **off hire**.
- 15 **Field J** held that, although Transclear were not acting as Cargill’s agents, IBG were, since the discharge of the cargo had been delegated to them and the arrest was the result of their acts, omissions or defaults in the course of performing the delegated task; thus the judge held that the case fell within the proviso: vessel **on hire**.
- 16 **Court of Appeal** held that *both* IBG and Transclear were Cargill’s agents since both had been engaged to perform the discharge and it did not matter whether their respective acts, omissions and defaults were “in the course of” performance of the delegated task; once they were identified as relevant actors in the discharge, the only issue was identifying their acts omission and defaults and whether they were causatively related to the arrest: they were, the proviso applied - vessel **on hire**.
- 17 The Supreme Court allowed the appeal by a majority, setting aside the decisions of both lower Courts, with the vessel being **off hire**.

**Lord Sumption’s view**

- 18 Two problems in the Owners’ claim.
- 19 The first problem was that during the first period of delay, as no goods at all were discharged, nothing was being done on Cargill’s behalf, as agents: “... *the defective performance of cargo handling operations is one thing. An absence of cargo handling operations is another.*” [28] He said that the inactivity during the first period could be relevant to the proviso “...*only if it amounted to a vicarious breach of some obligation of Cargill under the time charter...*” which he said it did not [28]. His analysis was that Cargill’s responsibility for IBG’s cargo handling operations “...*extended only to acts or omissions in the actual performance of those operations while they were in progress*” [28] and that the question was whether IBG, by simply omitting to discharge before the second period were “...*vicariously exercising rights or vicariously infringing obligations under the time charter*” [28].

- 20 The second problem was that the court was concerned not “...with responsibility for delay generally, but with responsibility for loss of time cause by the arrest of the vessel” [30]. Lord Sumption held that the arrest was occasioned by a dispute between Transclear and IBG about demurrage and “incurring or enforcing a liability for demurrage under a sub-contract could not possibly be regarded as the vicarious exercise of any facility made available to Cargill under the time charter” [30].
- 21 He rejected the view of Gross LJ in the Court of Appeal that the question was whether the arrest was occasioned by matters lying within the owner’s or the time charterer’s “sphere of responsibility.” [31] Stating that he found the distinction unhelpful, Lord Sumption reasoned that it was impossible to identify which acts or omissions down sub-contracted layers properly fell on the time-charterer’s sphere of responsibility: “[s]uch a test is impossible to justify, since it depends simply on the status of the sub-charterer or receiver, and would not necessarily require any nexus between the acts leading to the arrest the performance of functions under the charterparty.”
- 22 He therefore held that it was not enough merely that Cargill’s trading arrangements made it possible for Transclear and IBG to become involved and thus provide the occasion for their demurrage dispute since this did not provide a sufficiently tight nexus between the charterer’s functions under the charterparty and the acts leading to the arrest. [31]
- 23 The tighter that nexus needs to be, the likelier it is, of course, that the meaning is suffocated from a proviso which the market had struck as a ready if rough allocation of the risk of arrest as between Owners and Charterers.
- 24 Lord Sumption nailed his colours to the charterer’s mast quite early on in the judgment [12] when he commented, without authority, that the main purpose of arrest off-hire clauses such as that in issue was to protect the time charterer and the proviso in such clauses are “generally narrowly construed and cases in which it applies are not necessarily expected to arise very often.”

#### **Lord Clarke’s dissenting view**

- 25 Lord Clarke agreed that it was necessary “for the owners to show that the particular acts which caused the vessel to be arrested were done in the capacity of Cargill’s agents, ie by way of vicarious enjoyment of Cargill’s contractual rights or vicarious performance of its obligations, pursuant to its express rights ... to give orders and directions as to employment and agency.” [42]
- 26 Lord Clarke rejected Lord Sumption’s distinction between the “defective performance of cargo handling operations” and “the absence of cargo handling operations” as too narrow [48]. It was not right to distinguish between the time when the vessel is discharging and the time when she is waiting to discharge, presumably under the effective orders of Cargill so to do: an absence of cargo handling operations is just as much a defective performance of them [48].

- 27 His view made commercial sense since the Owners were in no way responsible for the events giving rise to the arrest and since it would be bizarre if Cargill were entitled to demurrage for the delay to the vessel which was not on-hire [52]. In essence Cargill were in charge of discharging which they delegated to Sigma, Transclear and IBG and it was the way that the latter two carried out that discharging that caused the vessel to be arrested.
- 28 Moreover, as for the nexus between the charterer's functions under the charterparty and the arrest, a nexus which Lord Sumption said was absent, Lord Clarke drew the clear linkage between those functions and that arrest at paragraph 43 of his judgment. As Lord Clarke noted, Cargill as charterers, had control over the persons who become involved with the vessel (their identity and their creditworthiness), whereas the Owners had none.

### **Concluding remarks**

- 29 The result of the Supreme Court judgment is only too clear: if a vessel, chartered on similar terms as *the Global Santosh*, is arrested as a result of the acts of persons other than the Charterers themselves, the Owners are unlikely to keep the vessel on-hire unless those acts are identifiably done in the course of performing the Charterers' own specific chartered functions. While the nexus of agency does not need to be so tight as to render the pro-owner proviso nugatory, the nexus between charterer's functions and the arrest does need to be very tight, to the Owner's clear detriment.

- 30 After the judgment in *The Global Santosh*, it is possible to envisage various factual situations generating difficulty.

31 (a) arrest by a bunker supplier:

(1) A supplier of bunkers to the chartered vessel stemmed by Cargill arrests the vessel for the unpaid price: plainly within the proviso.

(2) A supplier of bunkers to the chartered vessel stemmed by Cargill's sub-charterer arrests the vessel for the unpaid price; plainly within the proviso.

(3) A supplier of bunkers to *another* vessel timechartered by Cargill arrests the chartered vessel for the unpaid price of those bunkers; plainly within the proviso.

(4) A supplier of bunkers to *another* vessel timechartered by Cargill's *sub-charterer* arrests the chartered vessel for the unpaid price of those bunkers. By Lord Sumption's reasoning, it would seem that this is not within the proviso, but why should this be the case?

32 (b) arrest by a stevedore

(1) A stevedore contracted by Cargill to discharge the chartered vessel arrests her for non-payment of the agreed charge for that work; clearly within the proviso.

(2) A stevedore contracted by Cargill to discharge *another* vessel operated by Cargill arrests the chartered vessel for non-payment for that work; clearly within the proviso.

(3) A stevedore contracted by Cargill's sub-charterer to discharge the chartered vessel arrests her for non-payment of the agreed charge for that work; within the proviso.

(4) A stevedore contracted by Cargill's sub-charterer to discharge *another* vessel chartered by that sub-contractor arrests the chartered vessel for non-payment for that work. Once more, Lord Sumption's reasoning would seem to produce the result that this is not within the proviso. Again, however, the question arises whether it makes commercial sense to distinguish between this situation and the first three.

33 (c) A contractual/delictual claimant

(1) A third party with a claim against Cargill in relation to the chartered vessel (not arising from any breach of charter by NYK, e.g. cargo loss oversight by bad handling) arrests the chartered vessel; plainly within the proviso.

(2) A third party with a claim against Cargill in relation to *another* chartered vessel arrests the chartered vessel; plainly within the proviso.

(3) A third party with a claim against Cargill's sub-charterer in relation to the chartered vessel (not arising from any breach of charter by NYK as above) arrests the chartered vessel; ought also to be within the proviso.

(4) A third party with a claim against Cargill's sub-charterer in relation to *another* chartered vessel arrests the chartered vessel. Lord Sumption's reasoning would leave this outside the proviso but again on what basis?

34 Crux of the debate here is whether an admittedly rough and ready dividing line between Owners' and Charterers' "spheres of responsibility" is more commercially attuned and acceptable to the market than a somewhat, with respect, esoteric distinction between non-performance and bad performance, a distinction which is particularly hard to explain when the proviso in issue expressly relates to acts, defaults *and omissions*.

35 The question now is: what can shipowners do to protect their right to hire?

[a] They might provide that it should be a 'net loss of time' clause, remembering that, on the facts of *The Global Santosh*, the arrest of the vessel caused no net loss of time since there was also the arrest of the cargo.

[b] Another solution could be to reverse the *prima facie* burden so that a vessel arrest does not put the vessel off-hire unless it is due to the act omission or default of the Owners (or one might add, or associated ship owners).

[c] If that is too radical, one could amend the proviso to read "*unless such capture or seizure or detention or arrest is occasioned by any [personal] act or omission or default of the Charterers or of persons to whom chartered functions have been delegated*".

Clearly much effort needed where answer had been thought simple.