



# Who bears the risk of delay caused by arrest? Is it merely a matter of drafting?

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# The Problem

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Owners time charter to time charterers

One or more sub-charters or contracts:

- Time charters

- Voyage charters/ CoAs

- Bills of Lading

- Sale contracts

A dispute arises at the bottom of the chain

The vessel is arrested and time is lost

Who suffers the pain at the top of the chain?

## The issue will turn on the off-hire clause(s)

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Generally, “arrest” will be an off-hire event

But, there will be a proviso that the vessel is NOT off-hire where the arrest is the charterers’ fault, or the fault of its agents

Does the proviso apply, where the arrest is caused by the acts or omissions of remote parties down the contractual chain?

# *The “Global Santosh”* [2016] UKSC 20

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## THE FACTS: The contractual chain

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**NYK** time charter vessel to **Cargill**

Cargill sub-charter vessel to **Sigma**

Unclear relationship between Sigma and **Transclear**

Cargo shipped by Transclear under Sale Contract between Transclear and **IBG**

**NYK** *-cp-* **Cargill** *-cp-* **Sigma** *-?-* **Transclear** *-sale-* **IBG**

# THE FACTS: What happened?

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Cement cargo carried to Port Harcourt, Nigeria

IBG as receivers responsible for discharge (CFFO)

Delays due to congestion caused by IBG's defective unloader (**"unloader delay"**)

IBG liable for sale contract demurrage to Transclear

Transclear arrested cargo to secure demurrage claim. Transclear, by "obvious mistake" also arrested the ship

The arrest of the ship by Transclear caused further delay (**"arrest delay"**)

Cargill's response:

- (a) pay hire for unloader delay (no relevant off-hire provision)
- (b) argue that Vessel off hire for arrest delay

# THE CLAUSE

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## CLAUSE 49. Capture, Seizure, Arrest

“Should the vessel be captured or seized (sic) 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...**”  
(emphasis added)

### Questions:

1. Were Transclear and/or IBG acting as Charterers’ agents within the meaning of clause 49?
2. Were the relevant acts causing the delays acts, omissions, default within the meaning of clause 49?

## Decision ping pong

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Tribunal:	Success for Cargill (with a dissent)
Field J:	Success for NYK (partial remission)
Court of Appeal:	NYK again (on different grounds)
Supreme Court:	Cargill triumph (with a dissent)

# The Tribunal- NYK's arguments

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The proviso applied because:

- In arresting, Transclear acted as Cargill's "agents"
- IBG were Cargill's "agents" in respect of unloading. Arrest caused by:
  - Failure to unload within stipulated time
  - Failure to pay the demurrage claim
  - Failure to secure the demurrage claim

# The Tribunal- the decision

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Remarkably, did not address the IBG argument

Transclear not an “agent” of Cargill because:

1. Cargill did not expressly or impliedly consent to Transclear arresting the Vessel
2. Transclear was not performing Cargill’s obligation to load/discharge
3. Even if it was, it was doing that as (sub-)sub-contractor and not as agent
4. In carrying out the arrests, Transclear was acting on its own behalf in order to secure its demurrage claim that it had against IBG (Cargill did not have a demurrage claim against IBG)

## First Instance - Field J, [2013] EWHC 30 (Comm)

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“*Agent*” for the purposes of the proviso is to be widely construed. Includes delegates and sub-delegates.

“...parties such as sub-charterers or sub-sub-charterers or receivers to whom Cargill, by subletting the vessel, had delegated or sub-delegated the performance of its responsibilities under the Charterparty can be Cargill's agents for the purposes of the proviso, irrespective of the precise contractual relationship existing between the delegate and the party above him in the contractual chain.” (para 19)

## First Instance - Field J, [2013] EWHC 30 (Comm)

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BUT: the relevant acts/ omissions/ default of the delegate have to occur in the performance of the delegated task

Transclear's arrest was not an act done by Transclear as part of carrying out any responsibility delegated to it by Cargill

IBG's acts/ omissions- the failure to unload within the laydays and pay the resulting damage- **were** within the delegated task of unloading the cargo

Did those acts/ omissions "occasion" the arrest of the Vessel? This issue of causation remitted to the Tribunal

# Court of Appeal [2014] EWCA Civ 403

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Gross LJ, Gloster LJ, Sir Stanley Burnton

- Agreed that “agents” has wide meaning including delegates
- Rejected the argument that act/ omission/ default has to occur in the performance of delegated task
- ANY act/ omission/ default of delegate will count
- Subject, possibly, on a case by case basis, to a proviso where the act/ omission/ default is “*wholly extraneous or unrelated to sub-letting under the charterparty or inconsistent with its scheme...*”

# The “Side of the Line” Test

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Gross LJ endorsed *The Doric Pride* [2006] EWCA Civ 599 as the **relevant background to cl. 49** at [41]:

- “[33] . . . a basic distinction . . . entirely familiar to owners and charterers, [is] between those **matters which lie upon the owners’ side of responsibility, essentially the vessel and crew**, which the owners have to provide to the charterers, and **those matters relating to the charterers’ employment of the vessel and crew for their trading purposes**, which lie upon the other side of the line . . . .”
- “There can be no doubt in the present case that the acts, omissions or defaults in question, culminating in the detention or arrest of the vessel ... involved Cargill’s delegates and fell on its side of the line. NYK was not, in any sense, involved in the apparent dispute between Transclear and IBG as to the delay in unloading the vessel.”
- “While it is correct to say that **Cargill was under no obligation to discharge the vessel in any given time, the dispute in question arose out of its trading arrangements concerning the vessel.**”

# Court of Appeal [2014] EWCA Civ 403

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On that basis:

BOTH

- The arrest by Transclear; AND
  - IBG's acts/ omissions
- were within the proviso

Causation still remitted in relation to both

# The Supreme Court

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Sumption (Neuberger, Mance, Toulson); Clarke, dissenting

Accepted that “agents” could extend to delegates

“The real question concerns the scope of that “agency”. To what acts or omissions did it extend?”

Having posed the question.... No clear answer emerges- except that on the facts the proviso did not apply and Cargill succeeded.

# The Supreme Court

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Did Sumption in fact agree with Field J as a matter of construction?

Cargill under no obligation to discharge within any time period.

Therefore, IBG's *failure* to discharge did not put Cargill in breach.

“It follows that any responsibility of Cargill under the time charter for IBG's acts or omissions in the conduct of cargo handling operations at the port of discharge, extended only to acts or omissions in the actual performance of those operations while they were in progress.”

# The Supreme Court

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That looks like an acceptance that the act/ omission must be by the delegate in the performance of the delegated time charter right/ obligation.

Where Sumption differs from Field J is that Sumption holds that doing nothing (where there was no time charter obligation to discharge in a particular time) was not performance of any delegated right/ obligation.

# The Supreme Court

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Clearly rejected the CA “side of the line” as far too broad

“Gross LJ seems to have regarded the delegation as extending to everything that arose out of Cargill's “trading arrangements concerning the vessel”. ...What this amounts to is that anything that the sub-charterers or receivers may choose to do which results in the arrest of the vessel, becomes the responsibility of the time charterer if the occasion for doing it would not have arisen but for their having come in at the tail end of a chain of contracts which the time charterer initiated. Such a test is impossible to justify, since it depends simply upon the status of the sub-charterer or receiver, and would not necessarily require any nexus between the acts leading to the arrest and the performance of functions under the time charter.”

# The Supreme Court

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Sumption's rejection of "side of the line" and narrow approach to construction does not grapple with key commercial consideration of why Owners should be deprived of hire, where delay/ arrest had nothing to do with them

That commercial consideration is the clear driver of Clarke's dissent.

"The owners had no control over the process of delegation of sub-delegation. The delegation included delegation of the obligation to discharge... Why should the owners be responsible for the non-performance of the obligation...?" (Paragraph 53)

## Where are we?

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- Despite going to SC, no particularly clear answer to the construction issue
- Commercial arbitrators likely to construe/ apply proviso more widely in favour of Owners
- There is probably “wriggle room” to enable them to do so with “vanilla” wording
- Revisit the drafting of off-hire clauses

## An Owners' clause

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“...unless such capture or seizure or detention or arrest is occasioned by any personal act or omission or default of the Charterers or of any person to whom the performance of any right or obligation under this charter has been delegated (or sub-delegated) whether or not such act or omission or default occurs in the performance of the delegated right or obligation ...”

## A Charterers' clause

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“...unless such capture or seizure or detention or arrest is occasioned by any personal act or omission or default of the Charterers themselves [or their agents in performing the Charterers' rights and obligations under this charter on the Charterers' behalf] ...”



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