

SOUNDINGS

Is a charterer responsible for delays caused by arrests by its sub-charterers/agents?

On 11th May, 2016 the Supreme Court issued its judgment ([2016] UKSC 20) in the GLOBAL SANTOSH dispute, bringing finality to a string of appeals from the original arbitration award. This judgment clarifies the effect of arrests caused by the actions or omissions of time charterers' sub-contractors. The Supreme Court rejected the view that anything that sub-charterers or receivers might have done which resulted in the arrest of the ship was the responsibility of the time charterer. A "nexus between the acts leading to the arrest and the performance of functions under the time charter" was required for clause 49 to apply.

The facts

On 11th September, 2008 NYK time-chartered the GLOBAL SANTOSH to Cargill on an amended NYPE 1946 form for one time charter trip for the carriage of a cargo of cement from Sweden to Nigeria. Among the various off-hire provisions in the charterparty, the following clause 49 appeared:

"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. Any extra expenses incurred by and/or during the above capture or seizure or detention or arrest shall be for Owners' account."

Cargill had entered into a voyage sub-charter with Sigma Shipping Ltd. The cargo of cement was sold by Transclear SA to IBG Investments Ltd and was to be discharged at Port Harcourt. Under clause 8 of the head charterparty, Cargill was liable to NYK for the performance of loading and discharge, whereas under the voyage charterparty, Sigma was liable to Cargill. In the event, the obligation to discharge cargo fell upon IBG, under the terms of its sale contract with Transclear.

The GLOBAL SANTOSH arrived at Port Harcourt on 15th October, 2008, but due to congestion, did not berth until 18th December, 2008. However, the port authority then turned her away. It emerged that the Federal High Court of Nigeria had issued an order the previous day in response to an application by Transclear intended to secure a claim against IBG for unpaid demurrage. Due to a clerical error at the court the arrest extended not merely to the cargo, but also to the ship. The terms of the court order prohibited the discharge of the cargo.

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The GLOBAL SANTOSH therefore returned to the anchorage to await the lifting of the order. Discharge operations eventually took place between 15th and 26th January, 2009. Cargill placed the GLOBAL SANTOSH off hire for the duration of the arrest on the basis of clause 49 of the head charterparty. NYK claimed hire during this period in reliance on the “carve-out” provision in that clause: “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”. NYK commenced London arbitration against Cargill in order to recover its unpaid hire.

The arbitral and lower court decisions

In a majority award, the arbitral tribunal found that the “carve-out” provision in clause 49 was not sufficient to prevent the ship from being off-hire. NYK obtained permission to appeal to the Commercial Court, where Mr Justice Field found that IBG’s failure to discharge the cargo within the laydays allowed in its contract with Transclear and to pay demurrage was an act, omission or default in the course of its performance of Cargill’s delegated duty to discharge the cargo. Mr Justice Field ordered that the matter be remitted to the original tribunal to deal with the question of causation.

Cargill appealed this judgment, which was heard in the Court of Appeal in February, 2014. Cargill’s appeal was rejected, and the Court of Appeal found that the “carve-out” provision in clause 49 was broad enough to be applicable in NYK’s favour. In particular, the Court of Appeal opined that “the acts, omissions or defaults in question ... involved Cargill’s delegates and fell on

its side of the line”, making reference to “the familiar division between the owners’ and charterers’ spheres of responsibility”. Cargill appealed this judgment to the Supreme Court, which heard it in December, 2015.

The Supreme Court judgment

The Supreme Court overturned the findings of the Commercial Court and the Court of Appeal, and found in favour of Cargill in a 4-1 majority judgment. Considering the meaning of “agents” within clause 49, the Supreme Court held that the term was not used in its strict legal sense, but rather referred to parties to which a head charterer’s rights were made available down the contractual chain, or to parties which performed those of the head charterer’s obligations that were delegated to them. However, not every act of a subordinate party fell into these categories, and there had to be a sufficient connection between the cause of the arrest and the function which the subordinate party – whether Transclear or IBG – was performing as “agent” on behalf of Cargill.

The Supreme Court found that the arrest was not “occasioned by any personal act or omission or default of the Charterers or their agents”. Cargill was only liable for IBG’s acts or omissions during actual cargo handling operations, and had no obligation to procure discharge at any particular time. IBG’s failure to discharge the cargo between October, 2008 and January, 2009 was not a vicarious performance of Cargill’s rights or a vicarious breach of its obligations. The arrest arose from a dispute between Transclear and IBG over unpaid demurrage, which had no connection to any right granted to Cargill under the charterparty with NYK.

The Supreme Court's decision provides clarity regarding the liability of a party in respect of the performance of its obligations by a third party, whether in chartering or other commercial contracts.

The Supreme Court therefore rejected the Court of Appeal's "sphere of responsibility" approach, stating that the only manner in which Cargill's conduct had brought about the arrest was that its sub-charter to Sigma had permitted the involvement of Transclear and IBG, whose dispute had occasioned the arrest. The Supreme Court rejected the view that anything that sub-charterers or receivers might have done which resulted in the arrest of the ship was the responsibility of the time charterer. A "nexus between the acts leading to the arrest and the performance of functions under the time charter" was required for clause 49 to apply.

The consequences

The Supreme Court's decision provides clarity regarding the liability of a party in respect of the performance of its obligations by a third party, whether in chartering or other commercial contracts.

However, the outcome of the GLOBAL SANTOSH dispute is that the ship's owner has been deprived of hire for a lengthy period due to no fault of its own. Going forward, an owner is likely to want to seek protection from being placed off-hire when a ship is arrested due to an act or omission of the charterer or the parties performing the charterer's contractual obligations.

Use of the wording of clause 49 of the GLOBAL SANTOSH time charter (or variations upon it) is commonplace, but can no longer be seen as entirely suitable for protecting an owner's position. For this reason, an owner Member may wish to consider replacing clauses intended to have the effect of clause 49 with the following:

"Notwithstanding any other provision contained herein, if the vessel is captured or seized or detained or arrested by any authority or by any legal process during the currency of this Charterparty due to or in connection with any act or omission or default whatsoever (whether or not occurring in the course of exercising the Charterers' rights or performing the Charterers' obligations under this Charterparty) on the part of (1) the Charterers, or (2) their sub-charterers (which expression shall include any subsequent sub-charterers within a chain of sub-charters), or (3) any third party whatsoever (including without limitation shippers, receivers and stevedores) which is responsible for exercising the Charterers' rights or performing their obligations under this Charterparty, hire shall continue to be paid and bunkers consumed during this period shall continue to be for the Charterers' account. In addition, any extra expenses incurred by and/or during a capture or seizure or detention or arrest of this nature shall be for the Charterers' account."

If Members wish to discuss this judgment, or any of the issues arising from it, then they should contact the Managers.





GLOBAL SANTOSH

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