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Owners Beware - If the vessel is arrested by Charterer's agent, the word agent will be narrowly construed and all the risk will be on Owners!

In a recent case of *NYK Bulkship (Atlantic) NV (Respondent) v Cargill International SA (Appellant)* ("The Global Santosh") [2016] UKSC 20 where it overturned the decision of Court of Appeal [2014] EWCA Civ 403.

Earlier, on 22 December 2014 the Supreme Court (Lord Neuberger JSC, Lord Clarke JSC and Lord Reed JSC) granted Cargill International SA permission to appeal in The Global Santosh. The Court of Appeal's decision that was reported at [2014] 2 Lloyd's Rep 104 was notable for the potentially wide ranging ramifications in the time charter market of the extensive meaning the Court attributed to the phrase "charterers' agents" in context of scenario when a shipper or consignee, with no relation to the shipowner arrests a vessel at the discharge port.

In this case, NYK was the disponent owner of the m.v. *Global Santosh* ("the Vessel"). NYK time chartered the Vessel to Cargill on an Asbatime form (which is a variation of the NYPE 1946 form). Cargill then sub-chartered the Vessel to Sigma Shipping Limited under a voyage charter. The Vessel carried a cargo of cement in bulk from Sweden to Nigeria under a sale contract between Transclear SA ("Transclear") and IBG Investments Ltd ("IBG"). It is likely that Transclear was a further sub-charterer of the Vessel.

The charterparty between NYK and Cargill contained the usual array of off-hire clauses, including an additional clause 49, which read:

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. ...

The Vessel arrived at the discharge port on 15 October 2008 and tendered notice of readiness. Due to congestion in the port, however, she did not proceed to berth until 18 December 2008, that was nearly a delay of two-month. The congestion was caused at least in part by the breakdown of IBG's off-loader. From 18th December to 18th January the vessel was under arrest until a settlement was reached and thereafter the vessel could berth.

A dispute had arisen between Transclear and IBG in relation to demurrage, and Transclear sought to secure their claim for demurrage by arresting the cargo. Mistakenly, however, the Court's order also

directed the arrest of the Vessel, which was therefore prevented from berthing and discharging.

Time Charterer paid all the hire except the hire for the period during the vessel was under arrest by Transclear.

NYK succeeded in arbitration but suffered reverses in Commercial Court and Court of Appeal as it said that Transclear was on Charterers side of line, as Owners came in contact of Transclear because of the Time charterer. Owners world-wide were delighted to hear the judgment. Cargill is a big charterer and they took the case all the way to the Supreme court on the meaning of 'Charterers' agent'.

In Supreme Court, the reasons cited to overturn the case are as follows:

- The main purpose of clauses such as clause 49 is to protect the time charterer; therefore, such clause in respect of the scenario where the arrest or detention is caused by the charterer or their agents should be narrowly construed in favour of the Charterer.
- There was in this case no personal default on the part of Cargill as time charterer, as there was no duty to discharge at any particular time under the charterparty.
- Transclear and IBG were Cargill's 'agents' under the time charter for purposes of calling for and carrying out the discharge operations. That did not mean, however, that Cargill were responsible for everything that Transclear and IBG might do which resulted in detention of the Vessel .**There must be some nexus, i.e. connection, between the reason for the arrest and the function that they were performing as 'agent' of Cargill.**
- It was concluded that the arrest could not be regarded as having been occasioned by the time charterer's "agents" in the sense in which that word is used in the clause 49, and thereby Cargill's appeal was upheld in the Supreme Court.

FDD department based in Shanghai advice to Andrew Liu's client are:

- a) There is a real risk to Owners that in similar case the vessel can be arrested by shipper or a sub-charterer down the line. Owners should protect themselves in such a scenario either by a relevant clause in the charterparty or taking necessary insurance for delay.
- b) Please seek Club's advice immediately on arrest or contact FDD based out Shanghai immediately in such cases (if you do not have a cover or need a second opinion)
- c) Owners are reminded that in such cases court will do a detailed analysis of each parties' role and not a broad-brush approach as done by the Court of Appeal.

Source of Information: Andrew Liu & Co., Ltd www.andrewliu.com.hk