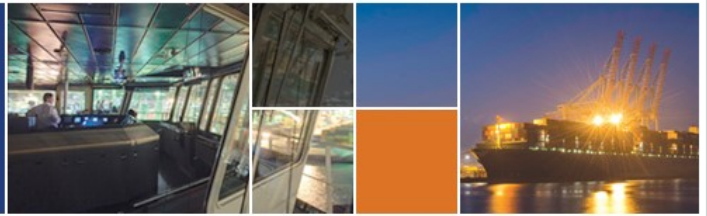




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The Global Santosh - Acts of Delegates & Off-Hire

May 2016

The Supreme Court has now handed down its much anticipated judgment in *NYK Bulkship (Atlantic) NV v Cargill International SA (The "Global Santosh")*, by a majority of four to one overturning the Court of Appeal.

The Commercial Court and Court of Appeal decisions are discussed at:

<https://www.steamshipmutual.com/publications/Articles/GlobalSantosh0613.htm>

<https://www.steamshipmutual.com/publications/Articles/globalsantoshappeal0814.htm>

At the centre of the dispute between the parties was a common charterparty provision providing for the vessel to be off hire during any period of detention or arrest unless this had been "*occasioned by any personal act or omission or default of the charterers or their agents*". The case raised questions of widespread interest concerning the scope of a contracting party's responsibility for the acts of third parties performing its contractual obligations – an issue the arbitrators and lower courts were far from agreed upon. The Supreme Court's judgment now provides welcome guidance in this area.



In summary NYK, as disponent owners, chartered the "*Global Santosh*" to Cargill for one time charter trip from Sweden to West Africa. Cargill had entered into a voyage charter with Sigma Shipping Limited under which they nominated the vessel to carry a cargo of bulk cement to Port Harcourt, Nigeria. The cargo was one of six shipments of cement sold by Transclear SA to IBG Investment Ltd and, under the 'free out' part of the sale terms, IBG were responsible for unloading the cargo and were liable to pay Transclear demurrage if unloading of the cargo was delayed.

In the event, the vessel arrived at Port Harcourt on 15 October 2008 but was delayed for over two months at the anchorage due to congestion, due in part to the breakdown of IBG's unloader. The vessel finally proceeded to the berth on 18 December but was turned back by the port authority because, on the previous day, Transclear had obtained an arrest order over the cargo in order to secure a claim against IBG for \$1.56million for demurrage which had by then accrued. By mistake, the arrest order also named the vessel.

Cargill withheld hire for the period that the vessel was subject to the arrest order, relying on an additional, typed clause (clause 49) pursuant to which the vessel was to be off-hire during any period of detention or arrest by any authority or legal process, unless the detention was occasioned by any "*personal act omission or default of the Charterers or their agents*". NYK disputed that the vessel was off hire, arguing that Transclear and IBG were agents of the Charterers and that their conduct thus fell within the proviso to the clause. The matter was referred to London arbitration.

By a majority the arbitrators held that at the time of the arrest, and in arresting the vessel, neither Transclear nor IBG were acting as an agent for the purpose of carrying out obligations of Cargill under the charterparty and that Cargill were therefore entitled to place the vessel off-hire. NYK appealed.

In the Commercial Court, Mr Justice Field held that the reference to "agents" in the clause at issue was not limited to agents in the strict legal sense (i.e. parties directly authorised by Cargill), but extended to those to whom Cargill, by sub-chartering the vessel, had delegated or sub-delegated performance of their obligations under the charter. Nonetheless their act, omission or default had to occur in the performance of the delegated task. Controversially, Field J went on to find that IBG's failure to unload the cargo within the lay days specified in the sale contract was an omission or default that had occurred in the course of performing the obligation to discharge as delegated. Both parties were granted permission to appeal.

Reversing the decision of the lower Court, the Court of Appeal held that there was nothing within the proviso to clause 49 which limited the acts or omissions referred to in that clause to those occurring in the course of performing the delegated task and that, 'if a party (e.g. a sub-charterer) is a delegate of Cargill flowing from the sub-letting of the vessel, that party remains a delegate for the purposes of the proviso regardless of the legal nature of the act or omission. Not every act or omission of the delegate will or need be in the course of performance of the delegated task.

Whilst the Court recognised that Cargill was under no obligation to discharge the vessel within any given time, it nevertheless found that the dispute in question arose out of Cargill's trading arrangements concerning the vessel which fell on the charterers' "side of the line". This, the Court considered, 'gives effect to the familiar division between owners' and charterers' spheres of responsibility'. As such the vessel was on hire. Cargill appealed.

The Supreme Court has now provided a helpful review of the law in this area (albeit with one of the five Law Lords dissenting). In its judgment the Supreme Court has considered the nature of a time charter which it characterised as '*a contract under which rights are enjoyed and obligations performed vicariously*'. Drawing on earlier authority it has confirmed that references to "charterers' agents" are not to be limited to those persons directly authorised to act on the charterer's behalf.

However, importantly, it noted that not every act of a sub-contractor can be considered as the exercise of a right or the performance of an obligation under the time charter. In the present case, whilst both Transclear and IBG were Cargill's agents for the purposes of the charter party the correct question was whether IBG, by omitting to discharge within the allowed time frame, were vicariously exercising rights or obligations under the time charter between NYK and Cargill. The Court held that incurring or enforcing a liability for demurrage under a sub-contract could not be regarded as the vicarious exercise of any facility made available to Cargill under the time charter. As such the vessel was off hire.

In reaching its conclusion the Supreme Court has expressly rejected the test applied by the Court of Appeal *viz.* whether the arrest was occasioned by matters lying within the owners' or the time charterer's sphere of responsibility, with Lord Sumption saying he did "*not find the distinction helpful in the current context*".

It is now relatively rare for charterparty disputes to reach the Supreme Court and so this latest decision will provide welcome guidance on the correct approach to be taken when interpreting this common charterparty provision dealing with loss of time when a vessel is detained or arrested by "*personal act omission or default of the Charterers or their agents*". The key would now appear to be to identify the relevant acts of the party said to be an agent or delegate of a charterer, and if the act or omission of that agent or delegate was in the performance of a relevant obligation

under the charterparty. In practice this may not be easy to determine.



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