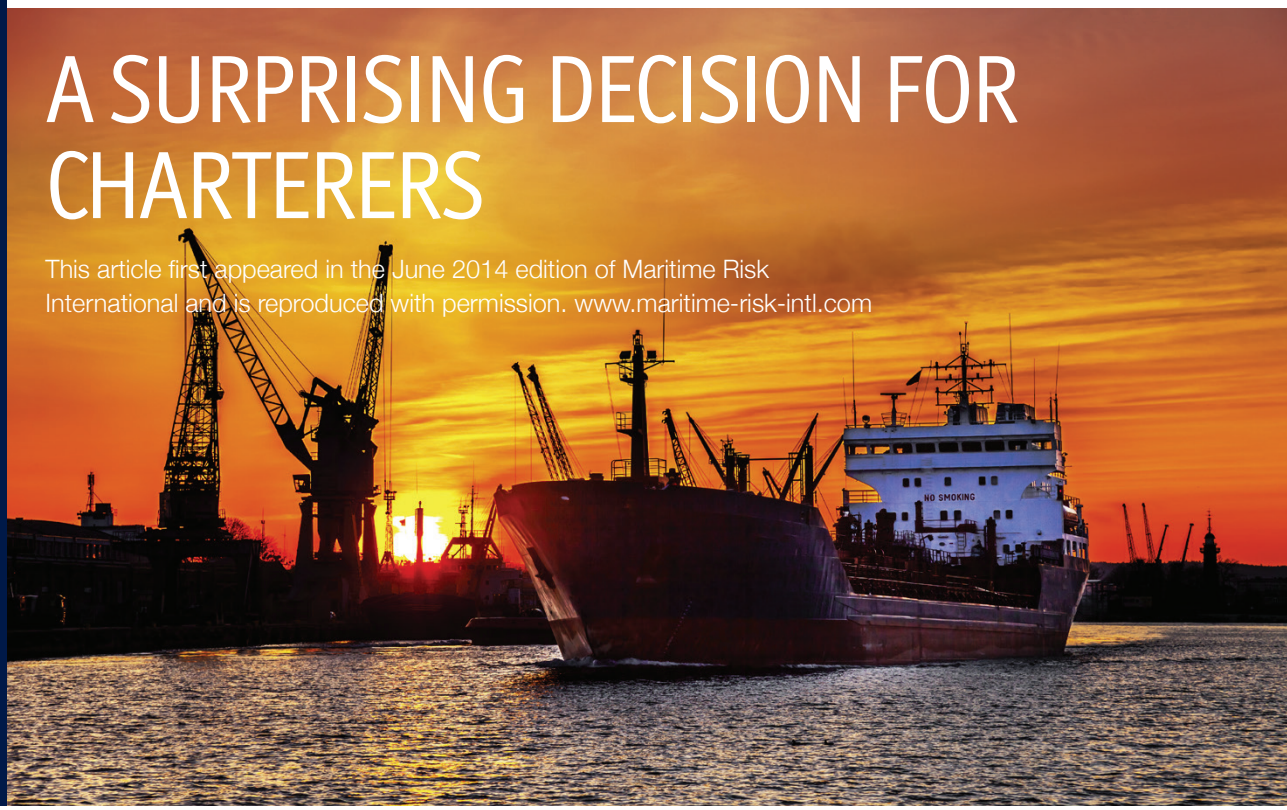
Shipping

July 2014

# A SURPRISING DECISION FOR CHARTERERS



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**Brian Perrott and Alice Marques of Holman Fenwick Willan, recently represented Cargill International in the UK Court of Appeal in relation to a dispute that focuses on the construction of an off-hire provision in an amended NYPE form which itself allocates the risk of delay between owners and charterers.**

In a judgment of some significance the Court of Appeal has held that charterers are under an obligation to continue paying hire if the chartered vessel is arrested by any party who could be said to be charterers 'agent' or 'delegate'.

## Background - facts

Under a charterparty dated 11 September 2008 on an amended NYPE form, NYK Bulkship (Atlantic) N.V (NYK) time-chartered the *MV GLOBAL SANTOSH* to Cargill International SA (Cargill).

In turn, Cargill had sub-chartered the vessel to Sigma Shipping Ltd. Transclear SA (Transclear), who were assumed to be a sub-voyage charterer, sold a cargo of cement to IBG Investment Ltd (IBG) and IBG were named as the notify party on the bill of lading. In accordance with the contract of sale, IBG were responsible for unloading the cargo and were liable to Transclear for any demurrage incurred as a result of delays incurred in the discharge of the cargo.

The cargo was to be discharged at Port Harcourt, Nigeria. After suffering delays as a result of congestion, once the vessel was finally called to berth, she was sent back to anchorage because Transclear had obtained an arrest order against the cargo for a demurrage claim against IBG. By mistake, the vessel had also been named in the arrest order. As a result of the arrest order, the cargo could not be unloaded from the vessel.

Cargill, as time-charterers, withheld hire from NYK for the period of time the arrest order was in place in accordance with the following clause in the charterparty:

*49. Should the vessel be captured or seizure (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. Any extra expenses incurred by and/or during the above capture or seizure or detention or arrest shall be for Owners' account.*

NYK took the view that the proviso *"unless such…arrest is occasioned by any personal act or omission or default of the Charterers or their agents"* applied, and that hire continued to be payable during the duration of the arrest order.

## Background – Tribunal's award and Field J's judgment[1]

NYK submitted before the LMAA Tribunal that "*agents*" included sub-charterers and receivers who were performing the tasks of charterers. As a consequence, NYK submitted that IBG was Cargill's agent in relation to unloading the cargo, and that the arrest of the vessel had been "*occasioned by*" IBG's failure to unload the vessel within the stipulated time (which gave rise to Transclear's demurrage claim) and IBG's failure to pay and/or secure Transclear's demurrage claim. Further, NYK submitted that Transclear was Cargill's agent and that the arrest of the vessel had been "*occasioned by*" Transclear obtaining the arrest order to secure its demurrage claim.

1 [2013] EWHC 30 (Comm)

After suffering delays as a result of congestion, once the vessel was finally called to berth, she was sent back to anchorage because Transclear had obtained an arrest order against the cargo for a demurrage claim against IBG. By mistake, the vessel had also been named in the arrest order.

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NYK further relied on Rix LJ's judgment in the *DORIC PRIDE* and attempted to make a distinction between matters which are owner's responsibility and matters which are charterer's responsibility under the charterparty.

However the Tribunal rejected NYK's approach and held that there was no evidential basis for finding that Cargill had consented to Transclear arresting the vessel, nor was there evidence that Transclear was performing Cargill's obligations in respect of discharge. Transclear's actions in arresting the vessel was found not to be in the capacity of "agent", but on its own behalf.

NYK appealed to the High Court under section 69 Arbitration Act 1996, maintaining the submission that those beneath Cargill in the charterparty chain had been delegated the performance of Cargill's responsibilities under the charterparty and were therefore Cargill's "*agents*" for the purposes of the proviso. NYK continued to rely on Rix LJ's judgment in the *DORIC PRIDE* and submitted that the question "why was there a demurrage claim?", could only be answered by reference to Cargill's employment of the vessel for trading purposes, and that as a consequence, the arrest was "*occasioned by*" Cargill's agents.

Cargill responded to NYK's appeal by maintaining that the proviso in clause 49 only applies to acts, omissions or defaults that occur in the course of performing some *delegated* task, which was accepted by Field J who held that Transclear's arrest of the cargo and vessel was not an act done in the performance of a delegated task.

However, Field J considered that the Tribunal had failed to consider (i) whether the acts, omissions or default of IBG (referred to above) occurred while IBG was under an obligation, as a delegate of Cargill, to unload the vessel and (ii) if yes, whether the arrest was "occasioned by" said acts, omissions or default of IBG.



Field J held that IBG *had* become a delegate of Cargill in respect of the obligation to unload pursuant to clause 8 of the Charterparty, which provides that "*Charterers are to perform all cargo handling at their expense*" and that IBG's failure to unload within the laydays specified in the sale contract between IBG and Transclear was an act, omission or default in the course of performing the obligation to discharge, as delegated from Cargill.

Field J remitted the question of causation as to whether IBG's acts, omissions or defaults "*occasioned*" the arrest, to the Tribunal.

## Court of Appeal's decision[2]

Both NYK and Cargill were granted permission to appeal to the Court of Appeal.

Cargill repeated their submission made before Field J that the proviso to clause 49 only applied when the acts (or omission) occurred in the course of performing some *delegated* task of the charterer. If it were otherwise, how could sub-charterers and receivers be considered to be 'agents' of Cargill?

Cargill also submitted that the proviso only applied where the act (or omission) of the 'agent' under the sub (or separate) contract could be matched with an obligation that charterers owed to owners. In this case Cargill had no obligation as time charterer to unload the vessel within a specified period of time, unlike IBG who were obliged to unload within a specified period of time failing which demurrage accrued. For these reasons, neither IBG nor Transclear had been performing any delegated obligation of Cargill's and therefore the proviso did not apply to the facts of this case.

NYK relied on Cargill's express contractual liberty to sub-let the vessel and submitted that the word 'agents' in clause 49 was to be construed broadly which matched the broad risk allocation between parties to a time charter of the risk of delay. NYK maintained that, in this case, the arrest had been occasioned by an act (or omission) of a party on Cargill's 'side of the line' (a reference back to Rix LJ's judgment in the *DORIC PRIDE*) and therefore hire continued to be payable.

The Court of Appeal held that 'agent' in clause 49 can be read as 'delegate' and that there is no reason to limit the proviso to situations where delegates are performing delegated tasks. Further, the Court of Appeal found that the dispute between Transclear and IBG arose out of Cargill's trading arrangements for the vessel and delay as a result of such dispute was therefore properly for Cargill's account (subject to any residual questions of causation which have been remitted to the Tribunal).

...where an arrest is caused by matters on owners' 'side of the line', or by the acts of unconnected third parties (port authorities, for example), the vessel would be off hire. Where, however, an arrest is caused by the actions of a party down the charter string as a result of charterers' own trading arrangements for the vessel, the obligation to pay hire continues.

The Court of Appeal's construction of clause 49 can be summarized as follows: where an arrest is caused by matters on owners' 'side of the line', or by the acts of unconnected third parties (port authorities, for example), the vessel would be off hire. Where, however, an arrest is caused by the actions of a party down the charter string as a result of charterers' own trading arrangements for the vessel, the obligation to pay hire continues.

## Comment

Charterers are likely to be surprised with the Court of Appeal's decision - actions (or omissions) of a contractually unconnected party (e.g. a receiver) may cause severe delay, yet the charterer must continue to pay hire unless the third party can be said to be an 'agent' or 'delegate' of owners, or an unrelated party to either owners or charterers (e.g. port authority).

Further, under clause 18 of the standard NYPE time charter, charterers must not suffer or permit any lien or encumbrance over the vessel incurred by themselves "*or their agents*". The Court of Appeal's broad definition of the charterers' 'agents' arguably applies to this clause. If so, then a charterer may be obliged to put up security to release a vessel arrested by reason of a claim against or by their sub-charterer, in a dispute that has nothing do with the charterer, and at the same time continue to pay hire.

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2 [2014] EWCA Civ 403

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