THE GLOBAL SANTOSH: OFF-HIRE, ARREST AND THE LIMITS OF AGENCY

The Supreme Court has recently handed down judgment in NYK Bulkship (Atlantic) NV v Cargill International SA (The Global Santosh), finding the vessel was off-hire during an arrest occasioned by sub-charterers.

The decision clarifies the meaning of "agency" in respect of the acts under a charterparty for which a delegate can be held responsible. It may come as a surprise to ship owners to find that their vessel could be placed off-hire in circumstances where an arrest is occasioned by a party down the line in respect of a dispute to which they have no connection or control over.

Background

NYK Bulkship ("Owners") chartered the vessel to Cargill International ("Charterers") under a time charter. The charterparty contained a clause placing the vessel off-hire throughout any period the vessel was under arrest, subject to the proviso "*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*".

BY VICKI TARBET

Charterers voyage-chartered the vessel to Sigma Shipping Ltd ("Sigma"), who in turn sub-chartered her.

The vessel was arrested in Nigeria by Transclear SA ("Sub-Charterers"), who were understood to be sub-charterers somewhere down the line. The arrest was in respect of a claim Sub-Charterers had against the receivers of the cargo, IBG Investments Ltd ("Receivers"), for demurrage incurred under the sale contract. As it happens, Sub-Charterers actually sought to arrest the cargo but due to a mistake, the vessel was also included in the arrest order.

Charterers withheld hire relying on the first part of the off-hire clause, which provided for hire to be suspended during any period the vessel was under arrest. Owners disputed this, claiming hire on the basis that the arrest was occasioned by Sub-Charterers and Receivers, both of whom were Charterers' agents for the purpose of the proviso in the off-hire clause.

Earlier Decisions

In the London Arbitration (2011), the Tribunal found in Charterers' favour, that the situation did not fall within the proviso to the off-hire clause. The Tribunal focused on the relationship between Sub-Charterers (the arresting party) and Charterers and not that of Receivers and Charterers, concluding that Charterers had not consented to the arrest of the vessel and that Sub-Charterers were not performing discharge operations on Charterers' behalf, but even if they were, they would be doing so as a sub-contractor and not as their agent.

In the Commercial Court (2013), Field J found in favour of Owners, allowing the appeal. Field J accepted that Charterers' agents could include those further down the line to whom responsibilities under the charterparty had been delegated. Although Field J accepted the arrest of the vessel by Sub-Charterers was not something which had been done in the course of carrying out any delegated responsibilities, he went on to also consider the role of Receivers finding that the arrest was occasioned by an act (discharge) which had been delegated to Receivers.

In the Court of Appeal (2014), the Court focused on the need to apportion which side of the fence matters fell, owners or charterers. The Court held that to fall within the proviso, there was no need for the arrest to have been occasioned in the course of an agent actually performing a delegated responsibility. All that was required was for the cause of the arrest to be something that fell on Charterers' side.

Supreme Court Decision

The Supreme Court re-examined the agency issue, recognising that the clause was not concerned with agency in the strict legal sense, but that not everything a sub-charterer does can be considered to be the exercise of a right/performance of an obligation under the time charter. Here, Charterers had delegated discharge operations to Receivers. However, it was necessary to look at the issue under the terms of the time charter in question, which did not include any obligations as to when discharge should take place. Charterers continued to pay hire regardless. The Receivers' failure to discharge prior to expiration of laytime was not, therefore, something for which Charterers had any responsibility.

The Supreme Court drew a distinction between the Receivers' failure to carry out discharge operations and a defective performance of such discharge. Whereas Charterers would not be responsible for the former (a failure to discharge cannot be described as the performance of a delegated obligation), they could be responsible for the latter. In performing discharge, Receivers are carrying out an obligation of Charterers, making Charterers responsible for any acts or omissions during the course of such performance.

Impact of the Decision

Whether or not a vessel is off-hire during an arrest occasioned by parties down the line will always depend on the wording of the specific clause. However, the Supreme Court's decision has clarified the limits of agency, requiring there to be a connection between the act or omission that was the cause of the vessel's arrest and the function the agent was performing in his role as agent for the charterer.

THE WEHR TRAVE: A TIME CHARTER "TRIP" DEFINED?

We touched upon the High Court decision in SBT Star Bulk & Tankers (Germany) GMBH & Co KG v. Cosmotrade SA (The "Wehr Trave") [2016] EWHC 583 (Comm) during the "mock" session of our AGM seminar in May and it led to interesting further discussion with our members in attendance.

Background

The Wehr Trave was chartered on an amended NYPE form for: "*one Time Charter trip via good and safe ports and/or berths via East Mediterranean/Black Sea to Red Sea/Persian Gulf/India/Far East always via Gulf of Aden, with steels and/or other lawful/harmless general cargo.... Duration… minimum 40 days without guarantee…*"

Re-delivery was in the "*Colombo/Busan range including China not north Qingdao.*"

BY PAIGE YOUNG

The vessel was delivered in Algeciras on 16 October 2013 and proceeded to load cargoes at Stevastopol, Novorossiysk, and Constantza. The vessel then went on to discharge cargo at Jeddah, Sohar, Hamriyah, Jebel Ali, and Dammam. While the last cargo was being discharged in Dammam, the charterers ordered the vessel to proceed to Sohar to load a cargo for delivery at New Mangalore or Cochin. The owners considered this final order to be unlawful and the dispute was referred to arbitration, leading to a partial final award that was then appealed to the High Court.

The sole question before the High Court was whether or not the terms of the charterparty permitted the charterers to order the vessel to load a further cargo after the initial cargo had been discharged. In other words, what is the scope of the often-used phrase "one time charter trip"? Can charterers load cargo after fully discharging of the vessel?

High Court Decision

The owners put forward several arguments as to why the order to load a further cargo was unlawful including: (1) the charterparty was for one trip and to find otherwise would, in effect, create an open-ended charter which no owner would agree to; (2) the charter was from one range of ports to another range; (3) Sohar was not listed in the agreed range of load ports.

In his decision, Eder J. gave short shrift to the strict arguments of construction that owners relied on concluding that "there is no single definition as to what constitutes a trip." He reiterated that a time charter trip was still a time charter and not a voyage charter, with the principal benefit to the charterers being that they are not "irrevocably bound" by their voyage orders when given. Parties are accordingly free to define the parameters of a "trip" in a charter but must do so using clear words.

Under the terms of the charterparty, the Judge determined that the charterers could call at any ports they wished, provided that they fell within the relevant ranges and were not inconsistent with the contractual route. Indeed, "*the word "via" simply means "by way of"; and the word "to" simply denotes the contractual route*." Thus, those words did not impose a limitation on where cargo could be loaded or discharged and the Judge held in favour of the charterers.

Practical Considerations

The judgment makes it clear that the terms of a TCT will be broadly interpreted if not limited using clear words. Considering a hypothesized trip from "East Coast USA to West Coast Australia" the Judge simply stated that such a trip would have to be construed "in accordance with the charterparty" which obviously provides some scope for such a trip potentially appearing "open-ended." The Judge's remarks do little to add clarity but are a red light warning to owners. Getting the parameters of the trip clear is essential to planning future charters. Get it wrong and owners could be in breach of the next laycan or risk exposure to claims by the existing charterers. How to do this?

In the interest of certainty, contracting parties should employ clean and specific language when defining the parameters of the TCT. For example, the load and discharge ranges should be designated as such instead of simply stating "from" and "to". Alternatively, one could limit the number of cargoes to be shipped to "one cargo only". It is also notable in the instant case that the charterers had not yet reached the redelivery range when they ordered the vessel to load a further cargo. It is an open question whether further liftings would be deemed permissible if the vessel was already in the redelivery range. Ensuring ports of call are "always" in geographical rotation will prevent trading over and over within the same range before going to the redelivery zone. Setting an absolute maximum duration may also be sensible. Nordisk shall of course be pleased to assist in drafting clauses which limit the Owners' exposure in this respect.

NEWS FROM NORDISK

We are pleased to advise that we have further strengthened the Nordisk legal team by hiring another young and promising Norwegian lawyer: Benedicte Haavik Urrang

Benedicte is 27 years old and graduated from the University of Oslo in 2012. She also holds an LLM in maritime law from Southampton and has worked as an associate in leading Norwegian law firm BAHR's "Oil Services and Shipping Group". She will join us in August after having been employed at the prestigious legal secretariat of the Norwegian Supreme Court.