

Global Santosh

On 11 May 2016, the Supreme Court issued their judgment in the *Global Santosh* case.

The case concerned the interpretation of an off-hire clause which provided that if the vessel was arrested or detained, the payment of hire would be suspended until the time of her release, unless the arrest or detention was “*occasioned by any personal act or omission or default of the Charterers or their agents*”. The key issue was whether the receivers or sub-charterers were an “agent” for the purposes of this clause. The Supreme Court held, by a majority of 4 to 1, that they were not charterers’ agents because the events which gave rise to the arrest did not occur as a result of the receivers or sub-charterers exercising a delegated right under the time charter.

Facts

Global Santosh loaded a cargo of cement in Sweden for discharge in Nigeria, in fulfilment of a sales contract between sub-charterers and receivers. Due to congestion at the discharge port, the vessel had to wait over 2 months to berth. 1 day before the vessel was due to berth, the sub-charterers obtained a court order for the arrest of the vessel as a means of enforcing their claim for demurrage against the receivers under the sales contract. That dispute was eventually resolved and the arrest lifted, after which the vessel berthed and discharged as normal.

Charterers had paid hire throughout the period the vessel was waiting to berth due to congestion but did not pay hire for the period of arrest. Owners claimed the vessel was on hire because the vessel was arrested by the sellers/sub-charterers who were charterers’ agents.

Judgment

The Supreme Court overturned the decision of the Court of Appeal and held that the vessel was off-hire. It was agreed that where sub-contractors were carrying out loading or discharging activities, they could be considered as charterers’ agents, as these are delegated activities which arose under the charterparty. However, not everything a sub-contractor does could be considered as an exercise of a delegated right.

There had to be some nexus (or connection) between the reason for the arrest and the function sub-charterers were performing. There was none here. The sub-charterers could not be said to be charterers’ agents when they arrested the vessel for the demurrage claim, a right which arose under an entirely separate sale contract, and therefore the vessel was off-hire.

Lord Clarke, in his dissenting opinion, took a wider view. He considered that because the arrest was broadly caused by the discharging operations, and because charterers were responsible for discharging under the charterparty, sub-charterers were acting as their agents when they arrested the vessel for something related to discharge and the vessel would therefore be on-hire.

Impact

Following the judgment, parties will have to consider very carefully whether the event giving rise to the arrest was something which was being carried out by a third party in his exercise of rights flowing from the time charter. It is no longer possible to take a broad brush approach as to allocation of responsibility for things falling within charterers' or owners' spheres of responsibility and this will likely mean a more detailed analysis of the facts will be necessary before any conclusions can be made as to whether the vessel is off-hire.

To mitigate against the uncertainties of whether a third party can be said to have been exercising a delegated right flowing from the charterparty, Members should consider amending their off-hire clauses so they expressly cover a wider category of third parties (e.g. sub-contractors, receivers, shippers) rather than just referring to "agents".

It would also be prudent to carry out the same exercise in respect of other charterparty clauses which refer to "charterers' agents" as the judgment could potentially apply beyond the scope of just the off-hire clause.

Further, Owners may wish to consider expressly setting out in their off-hire clauses that any time lost due to arrests related to cargo or cargo operations will be on hire.

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