RISK WATCH

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HAGUE OR HAGUE-VISBY RULES: CLAUSE PARAMOUNT

The Court of Appeal has recently held that the expression in a clause paramount 'the Hague Rules… as enacted in the country of shipment' can mean the Hague-Visby Rules.

A cargo of machinery and equipment was loaded on the *SUPERIOR PESCADORES* at Antwerp in January 2008 under a bill of lading with a clause paramount providing that: 'The Hague Rules… as enacted in the country of shipment… in respect of shipments to which no such enactments are compulsorily applicable, the terms of the said Convention shall apply'.

The cargo was damaged and cargo interests brought a claim in arbitration. It was accepted that as Belgium was a signatory to the Hague-Visby Rules, those Rules applied compulsorily. Cargo interests argued that, in accordance with Art. IV(g) of the Convention, the clause paramount served as an agreement for an increase in the applicable package limits: the gold value formulation of the Hague Rules under English law would give them a better recovery than the Hague-Visby Rules for certain parcels, depending upon the weights of the packages on the individual bills of lading. When the issue was first appealed to the Commercial Court, it found that the clause was not intended to operate so that cargo interests could apply different regimes to different bills of lading at will. It could only operate to apply one of the Conventions. Subsequently the Court of Appeal also found in favour of the owners but for different reasons.

Part of the Court of Appeal judgment read: 'Most maritime nations have adopted the Hague-Visby Rules; the UK did so as early as 1971 in the Carriage of Goods by Sea Act of that date. Can it really be the case that a Paramount Clause in a contract made over 30 years later in 2008 is still to be taken as incorporating the 1924 Rules rather than the 1968 Rules?' The Court found that it could not.

The Court reasoned that the Hague-Visby rules constituted an amendment to the Hague Rules and were not in themselves a completely separate code. Thus making it easier for the Court to find that 'the Hague Rules as enacted in the country of shipment' could mean the Hague-Visby rules. In doing so the Court denied cargo interests the option of higher limits under the Hague Rules.

As many bills of lading incorporate similar clause paramount wordings, this judgment is of some significance to the shipping industry.

Yemgas FZCO v Superior Pescadores S.A. [2016] EWCA

OFF HIRE DURING ARREST: *GLOBAL SANTOSH*

The English Supreme Court has recently given judgment in an important case concerning whether a ship will be off hire during an arrest.

Owners time chartered the ship to Cargill. Cargill voyage sub-chartered the vessel to Sigma. The ship carried a cargo of cement which was sold by Transclear (sub-sub-charterers under a voyage charter) to IBG. Under the sale contract, IBG were responsible for discharging the cargo and were liable to pay Transclear port demurrage if discharge was delayed.

As a result of the breakdown of IBG's unloader, the ship was at anchor for two months at the discharge port. The day before the ship was due to berth, Transclear obtained an arrest order on the cargo to secure their port demurrage claim against IBG. Due to an error, the arrest order also named the ship. The ship was therefore arrested and discharge was delayed by a further month.

Cargill put the ship off hire for the period of the arrest under the following clause:

'Should the vessel be captured or seized or detained or arrested… 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.'

Owners argued that Transclear and IBG were 'agents' of Cargill and, therefore, the ship remained on hire on the basis that the arrest had been occasioned by *'personal act or omission or default of the Charterers or their agents.'*

At arbitration, the tribunal held by majority that the ship was off hire on the grounds that neither Transclear or IBG were Cargill's agents. Furthermore, the arrest was for Transclear's benefit only and it was not for the benefit of Cargill or their agents. The arbitration award was appealed and at first instance the court reversed the tribunal's award. The court held that the ship was on hire on the basis that Cargill had delegated their charterparty obligation to discharge to IBG and the failure of IBG to discharge within the laydays of the sale contract was an *'act or omission or default'* of Cargill's agents.

The Court of Appeal upheld the judgment at first instance, but on a different basis. The Court of Appeal instead considered which sphere of responsibility or side of the line the problem fell on (broadly, owners being responsible for ship and crew matters, with charterers being responsible for cargo and trading matters). Was the problem on owners' or Cargill's side of the line? The Court of Appeal decided it was within Cargill's sphere of responsibility on the basis that the dispute had arisen due to their trading arrangements. The ship therefore remained on hire.

The Supreme Court has now allowed the appeal and re-instated the arbitration award: the ship was off hire during the arrest. The Supreme Court rejected outright the Court of Appeal's approach to determining the issue by making a distinction based on spheres of responsibility under a time charter on the grounds that it was too wide a distinction. The Court of Appeal's approach could lead to a time charterer always being responsible for the actions of a receiver or sub-sub-charterers merely because they were at the end of a charterparty chain. That was a position the Supreme Court sought to avoid.

(Continued overleaf)

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OFF HIRE DURING ARREST: *GLOBAL SANTOSH* (CONTINUED)

It was noted by the Supreme Court that Cargill, as time charterers, delegated some of their obligations to third parties such as sub-charterers and receivers. Additionally, both Transclear and IBG exercised obligations and rights that were Cargill's, and acted as 'agents' in doing so. The key question was whether Transclear or IBG had exercised a right or breached an obligation of Cargill's under their time charter with owners. Transclear had called on the cargo to be discharged; there was therefore no breach of Cargill's right in that regard. Importantly, IBG's delay in discharging was not a breach of Cargill's obligations (Cargill being on a time charter were under no obligation to discharge within a certain period). Similarly, IBG incurring a liability and Transclear enforcing that liability by means of arrest under their sales contract was deemed not to be an exercise by Cargill of any rights under the time charter with owners.

The Supreme Court's decision dismissed the approach of assessing whether the event giving rise to the arrest fell within charterers' or owners' 'sphere of responsibility' and has clarified the limits on the responsibility of the party to which certain tasks have been delegated by charterers. Each case will, however, turn on the specific drafting of the arrest clause in question.

DOES A BENEFICIARY UNDER A LETTER OF UNDERTAKING (LOU) HAVE A DIRECT RIGHT OF ACTION AGAINST A P&I CLUB TO INCREASE THE LEVEL OF SECURITY UNDER THE LOU?

On 10 May 2016 the High Court in London ruled, in the matter of *FSL-9 Pte and Nordic Tankers Trading v Norwegian Hull Club,* that the 'liberty to apply' clause in the LOU issued by the defendant P&I club does not give the claimant owners the right to apply to the court to require the defendant P&I club to increase the amount of its undertaking.

The case arose out of an incident in the Indonesian port of Padang on 9 October 2013. The chemical tanker *FSL NEW YORK* was damaged during loading and there was an escape of cargo. Both owners and charterers asserted claims against each other. Owners threatened to arrest ships owned by the group of which charterers were part. The charterers' P&I club, Norwegian Hull Club, provided owners with an LOU in the sum of US$3,500,000.

Pursuant to the terms of the charterparty, a London arbitration was commenced in December 2013. As the arbitral process progressed, owners formed the view that further security was required. On 12 October 2015, owners asked charterers for additional security of US$4,000,000. Owners made such a request on the basis that the original LOU allowed for adjustment if the security proved to be inadequate. It was not in dispute that the owners were under-secured. They relied on the terms of the LOU:

'It is agreed that both Charterers and Owners shall have liberty to apply if and to the extent the Security Sum is reasonably deemed to be excessive or insufficient to adequately secure Owners' reasonable Claims.'

The owners' request for further security was refused on 19 October 2015. Proceedings were begun by owners against the P&I club on 26 November 2015. The parties each issued summary judgment applications against the other. The owners argued that the words 'liberty to apply' normally referred to liberty to apply to a court and the use of such words in the LOU meant that the court had power to make such an order. The club argued that the court had no such power.

Mr Justice Blair held that the term 'liberty to apply', at least as used in the English jurisdiction, was normally to be found in a court order, and was there to give parties to existing proceedings the right to come back before the court in particular circumstances. However, the words were much less easy to give meaning to when contained in a contract. He also held that the English Admiralty procedure which would allow an application to the court might apply as between the parties to the particular dispute (in this case between the owners and the charterers) but it would not apply against the charterers' club, any more than it would apply against a bank if the bank, had provided a bank guarantee.

It was also held that the term 'Charterers' in the LOU could not be read as meaning 'charterers and/or the club'. This point was supported by the references to 'Charterers' elsewhere in the LOU which could only be a reference to the 'Charterers, and/or associated companies/ entities of the aforementioned'.

Mr Justice Blair was of the view that the LOU stated the maximum sum which the club committed to pay the owners. Whilst the owners could of course ask for an increase, and an increase might be refused at risk to the charterers, it was a different matter altogether to propose that the court could order the club to give it, which was the owners' case.

He further stated that it was inherently unlikely that a P&I club, or a bank, or other financial institution, would issue a financial instrument investing a court with the right to increase without limit its liability under the instrument upon the application of the beneficiary. This would have among other things possible implications for the institution's capital requirements or reserves.

It was concluded that:
1) This provision might enable owners to arrest charterers' assets if the security provided proved to be inadequate, and notwithstanding the prohibition against arrest or re-arrest provided for earlier in the LOU;

2) But the term 'liberty to apply' in the letter of undertaking did not give owners the right to apply to the court to require the defendant P&I club to increase the amount of its undertaking; and

3) The application to adjust the secured amount must always be directed to the parties in dispute, i.e. charterers and owners in this case.