

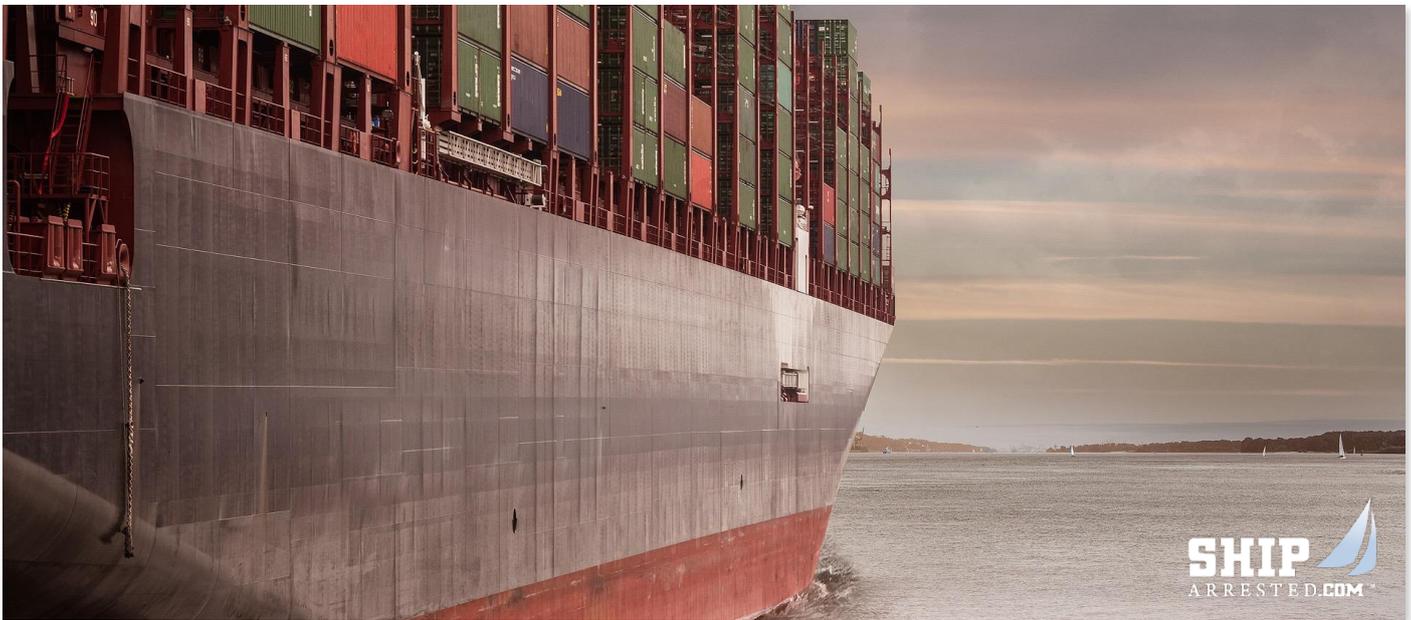
THE ARREST

news

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In this issue of *The Arrest News*, several scenarios of ship arrests in different jurisdictions are commented on by the editors. In *The STX Mumbai*, the Singapore Court of Appeal considered a ship arrest situation where the maturity date of a supply claim was brought forward by the supplier when the debtor became insolvent. In *The Res Cogitans*, the English Supreme Court deals with another case of the OW bunker saga and considers the implications of the agreed bunker supply terms. Finally, in *The Global Santosh*, giant trader Cargill and NYK owners disputed the construction of an off hire clause where the cargo and the ship had been arrested.

The STX Mumbai ([2015] SGCA 35; [2016] 1 Lloyd's Rep. 157)

The Court of Appeal has reversed a decision dismissing a claim against a ship owner at the preliminary stage. The appellant & original claimant was a bunkers supplying company who had an agreement to supply a number of vessels, two of which belonged to the referred owner.

Three days before the agreed payment date, the bunkers suppliers demanded immediate payment, due to insolvency of the ship owners controlling company and the likelihood of the owners defaulting the contractual payment. Payment was not made at the requested date and the claimants obtained an arrest warrant for the respondent's vessels. The suppliers were treating the contracted as repudiated on the basis

of anticipatory breach (it was virtually certain that they would default their payment obligations given the insolvency declaration of their group), despite having already performed their part of the contract (the physical supply of bunkers). The owners were successful in dismissing the suppliers claim, which was subsequently appealed.

The appeal was allowed giving reason to the suppliers that they were right in assuming that there was an anticipatory breach on part of the owners, despite the contract having been already executed on their part. The Court of Appeal held that the owners indication that payment would be performed in due time justified the assumption of anticipatory breach. Another issue

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found was that even though the general rule that insolvency by itself does not amount to anticipatory breach, the claim should not be preliminary barred before all the issues of the case may be properly considered at a full trial.

Link to complete decision transcript: [The STX Mumbai](#)

PST Energy 7 Shipping LLC v OW Bunker Malta Ltd “The Res Cogitans”. [2016] UKSC 23; [2016] A.C. 1034

Introduction

The Supreme Court decided whether a contract for the supply of fuel bunkers, which contained a retention of title clause and permitted the purchasing vessel owners to consume the bunkers during a credit period, was a contract for the sale of goods within the meaning of the Sale of Goods Act 1979 s.2(1), in *literals*:

A contract of sale of goods is a contract by which the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration, called the price.

This was an appeal on part of the owners against the decision from the Court of Appeal, which held that a contract for the supply of fuel bunkers was not a contract for the sale of goods within the meaning of the Act, as above.

The issues in dispute

The contract provided for the supply of bunkers with payment to be made within 60 days of the presentation of an invoice (credit period). It provided that until full payment was made, title remained with the bunker supplier, and that the buyer was in possession of the bunkers solely as the supplier's bailee, and would not be entitled to use the bunkers for any purpose other than for the propulsion of the vessel. The owners received and consumed the bunkers but defaulted payment.

The seller became insolvent and was in default against their original suppliers of the re-sold bunkers. The owners were concerned that they could be exposed to liability against both the seller and its suppliers, who had a reservation of title on the same terms as the immediate supplier of the vessel.

In arbitration, the owners contended that they had no liability to pay the seller for the bunkers, on the basis that the contract was a contract for sale within s.2(1) of the Act, meaning that the Act applied to the contract and they could defeat an action for the contract price, as the case was not within S.49, which set out circumstances in which a seller could bring an action for the price of goods. The arbitrators rejected that argument.

The owners have also argued that if the contract was a contract of sale, there was an implied term that the seller had performed its obligations to its supplier by making payment timeously.

The decision on the Supreme Court

The nature and form of the contract was one of sale. However, "sale" could be used in an expanded sense, since the general terms were stated to apply to all agreements and services "of whatever nature". Therefore, in the court's view, the contract did not have to be one of sale within s.2, meaning that the owners could have no possible defence under s.49 to the claim for the price as the owners tried to argue on Arbitration proceedings.

The court held that there was no implied duty as argued by the owners and such a duty was not necessary for the validity of the contract. Given the nature of the bargain, the seller's only implied undertaking regarding the bunkers was that they could permit it to be used in propulsion prior to payment. The seller had not needed to have title to the bunkers to give such permission; it merely needed the right to authorise use, which it had according to its contract with its previous supplier. Therefore the appeal was dismissed and the owners were liable for payment

under the contract established. Giving some light to an issue, which did not form part of the dispute, the Supreme Court held that recovery under a sale contract was not limited to the circumstances prescribed in s. 49, that is:

(1)Where, under a contract of sale, the property in the goods has passed to the buyer and he wrongfully neglects or refuses to pay for the goods according to the terms of the contract, the seller may maintain an action against him for the price of the goods.

(2)Where, under a contract of sale, the price is payable on a day certain irrespective of delivery and the buyer wrongfully neglects or refuses to pay such price, the seller may maintain an action for the price, although the property in the goods has not passed and the goods have not been appropriated to the contract.

(3)Nothing in this section prejudices the right of the seller in Scotland to recover interest on the price from the date of tender of the goods, or from the date on which the price was payable, as the case may be.

Conclusion

The decision provides some guidance, despite having received some negative judicial treatment, in clarifying that a party may be held liable, even where the seller did not have title when it transferred the goods, provided the circumstances above apply. Section 49 has also proved not to be a reliable defence against a claim for price.

It is worth noting the concern of the owners with respect of the seller's insolvency. A good practice is to have express provisions on the contract that discharge the owner upon payment to the direct supplier or the seller, as the parties find more appropriate.

Link to the complete decision: [The Res Cogitans](#)

NYK Bulkship (Atlantic) NV v Cargill International SA “The Global Santosh” [2016] UKSC 20; [2016] 1 W.L.R. 1853

Introduction

The Supreme Court decided whether a time-chartered vessel was off-hire during a period when she was under arrest and unable to discharge as a result of a dispute between the receiver of the cargo and a sub-charterer. The time charter party contained an off-hire clause where the arrest was "occasioned by any personal act or omission or default of the charterers or their agents". For this clause to apply there had to be some nexus between the occasion for the arrest and the function, which the receiver or the sub-charterer was performing as "agent" of the charterer, if it could be regarded as an act or omission on part of a charterer.

This was an appeal on the charterer's behalf against the decision on the Court of Appeal regarding the construction of an off-hire clause in a time charter with the respondent owner.

The disputed issues

The chartered vessel had been sub-chartered under a voyage charter. The receiver of the cargo on this voyage was responsible for unloading the cargo and was liable to pay demurrage to his seller if unloading was delayed. When the vessel arrived at port on 15 October 2008, she was held on anchor for almost two months because of congestion caused partly by problems with the receiver's discharging equipment. She was called in to berth on 18 December, but did not proceed due to an arrest order on the cargo to secure a claim for demurrage against the cargo receiver. The order mistakenly directed the arrest of the vessel. Discharge eventually took place in January 2009. The head charterer withheld hire for the period of arrest in reliance on cl.49 of the charter, which provided that the

vessel would be off-hire during any period of detention or arrest, unless such arrest was "occasioned by any personal act or omission or default of the charterers or their agents".

Owners had submitted in arbitration that the vessel's detention had been occasioned by the personal act or omission of an agent of the charterer, but the arbitrators disagreed. Owners successfully appealed. The Court of Appeal held that the delay fell within the chartered sphere of responsibility, because the dispute, which caused the delay, did not involve the owner and arose out of the charterers arrangements.

The Decision

The parties that caused the arrest were indeed "agents" of the charterer for some purposes. However, that did not mean that they were responsible for anything their agents might do which resulted in the detention of the ship. There had to be some nexus between the occasion for the arrest and the function that the agents were performing.

The arrest had been occasioned by a dispute between the seller of the goods shipped under this voyage charter party and the Receiver of such goods about demurrage. Incurring or enforcing a liability for demurrage under a sub-contract could not possibly be regarded as the vicarious exercise of any of the charterers functions under the time charter party. The proviso to cl.49 did not apply. The vessel was off-hire during the period of arrest.

Although the proviso to cl. 49 was, broadly speaking, concerned with matters for which the charterer might be regarded as responsible, that did not reveal what those matters were. The range of matters for which the time charterer was responsible depended on what functions he had delegated to a sub-contractor, it was necessary to identify the extent of the delegation. The Court of Appeal seemed to have regarded the delegation as extending to everything that arose out of the charterer's trading use of the vessel. That amounted to saying that anything the sub-charterer

did, which might result in the arrest of the vessel became the charterer's responsibility if the occasion for doing it would not have arisen but for their having initiated the chain of contracts. Such a test was impossible to justify, since it depended simply upon the status of the sub-charterer or receiver, and would not necessarily require any nexus between the acts leading to the arrest and the performance of functions under the time charter.

Conclusion

This decision provides an important limitation to the liability of a head charterer where such an off-hire provision is present.

The relevance of a nexus between the agents' acts and the functions delegated by the head charterer will force owners to change their usual approach, where they relied that any loss occurring by the charterer's use of the vessel will be at their liability and risk, as the Court of Appeal on this case had decided.

Owners may want to reverse the off-hire provisions by stating that any arrest or loss which is not the fault of the vessel will not trigger the off-hire provisions, instead of requiring that the breach be at the fault of the charterers or agents.

Link to the complete decision: [The Global Santosh](#)

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For bookings or enquiries please contact:

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