CHARTERERS AND SHIP ARREST

The Common Law Position vs The New BIMCO Arrest Clauses

INTRODUCTION

1 The purpose of this talk is to examine, from an English law perspective, the impact of ship arrests on the legal and contractual regime which exists between shipowners and their charterers.

2 In particular, we will examine the common law position in the following three scenarios:

(a) First, where the charterer is the party arresting the vessel.

(b) Secondly, where the vessel is voyage chartered and it is arrested by a third party.

(c) Finally, we will look at the position where the vessel is time-chartered and there is a third party arrest.

3 We will then compare this common law position to the contractual re-allocation of third party arrest risks which the new BIMCO arrest clauses, introduced on 14th June 2019, seek to effect.

SCENARIO 1: THE CHARTERERS ARREST THE SHIP

4 As any maritime disputes practitioner knows, it is not uncommon, particularly when a long-term period charter is coming to an end, for there to be a dispute regarding the final hire accounts, and for the time charterers to claim that a net sum is due to them – even after taking the owners' credit for redelivery bunkers into account.

5 If the sums concerned are significant, or if the charterers are worried that the owners plan to sell the vessel immediately after redelivery, the charterers will naturally want to secure their claim.

6 In such circumstances, the charterers might be tempted to arrest the vessel at the port at which she is due to be redelivered, on the basis that it is likely to be harder to track her movements after redelivery.

7 In most cases however, this would be a mistake on the charterers' part. Such an arrest would normally have to be effected prior to redelivery (most period charters provide that redelivery is to take place on "DLSOP" (dropping last outward sea pilot) at the redelivery port, at which point any arrest is likely to be impractical until the vessel is at her next port). In circumstances where the vessel is classically on hire, *"until the hour of her re-delivery in like good order and condition,"* [1] in the event the charterers arrest the vessel before she is redelivered, a stand-off may ensue with the owners refusing to accept delivery and claiming, instead, that the charterers are still obliged to pay hire.

8 This was the invidious position that the charterers of *The Dynamic* found themselves in.[2] In that case, the time charterers asserted various performance claims against the owners, following a main engine breakdown. The vessel arrived at the redelivery port, Myrtle Grove, on 28th July 1999 and was arrested by the charterers to obtain security for their performance claims, prior to the completion of discharge, on 2nd August. Discharge was finished on 3rd August, after which the vessel was shifted to Nine Mile Anchorage. She remained there, still under arrest, until 17th August until the arrest was lifted.

9 The Owners claimed that the vessel was on hire until her release on 17th August, whereas the Charterers' case was that the vessel had been validly redelivered at 12:20 on 3rd August, shortly after the completion of discharge.

10 The dispute was referred to arbitration, and the charterers' performance claims were dismissed by the arbitrator. The arbitrator held that as the arrest was the consequence of the charterers' deliberate act in arresting the vessel, she remained on hire and the charterers' purported redelivery was ineffective.

11 The owners relied on clause 60 of the charterparty which provided as follows:

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[1] See e.g. clause 4 of the NYPE 1946 pro-forma.
[2] *Ocean Marine Navigation Ltd v. Koch Carbon Inc: The Dynamic* [2003] 2 Lloyd's Rep. 693.

> *"Should the vessel be arrested during the currency of this Charter party at the suit of any persons having, or purporting to have, a claim against or any interest in the vessel, hire under this Charter party shall not be payable in respect of any period whilst the vessel remains under arrest or remains unemployed as the result of such arrest. However, if the arrest is the consequence of an act or omission by Charterers and/or their agents and/or their servants hire to continue."*

12 The arbitrator held that charterers could not rely on the off-hire provisions in the first sentence of this clause. It was, he said, primarily intended to regulate arrests by third parties, and therefore excused charterers only from their liability to pay hire in the event of an arrest which was in no way connected with them. Where the charterers had themselves arrested the vessel, this was arrest which was *"the consequence of an act or omission by Charterers"* within the scope of the second sentence of clause 60, and the vessel remained on hire.

13 On appeal to the Commercial Court, the charterers argued that the focus of clause 60 was on the cause of the arrest and not on the party effecting the arrest. They said that the identity of the arresting party was irrelevant: all the clause required was that the vessel be arrested by someone having (or purporting to have) a claim against the vessel. If this occurred, then hire ceased to be payable. The second sentence only came into operation if the underlying event which gave rise to the claim for which the vessel was arrested was the act or omission of the charterer or someone for whose acts or omissions the charterer was contractually responsible vis-à-vis the owners. As the charterers' claim here was based on the owner's alleged failure to comply with the contractual speed and performance warranty, the proviso to the default position that the vessel would be off-hire for the duration of any arrest did not apply.

14 This, admittedly rather fine, distinction, was robustly dismissed by Mr Justice Simon on appeal. His starting point was the well-worn aphorism to the effect that the default position in a time charter is that hire is payable continuously and it is therefore for the charterer to bring itself clearly within any contractual off-hire clause on which the

charterer may seek to rely.[3] From this vantage point, he concluded that the arbitrator was clearly correct to say that the clause was never intended to deal with an arrest by the charterer during the currency of the charterparty, and *"*[i]*f the charterers had wished to avoid paying hire when they had themselves arrested the vessel during the currency of the charterparty, then very much clearer words would have been required."* [4]

15 Accordingly, he held that the arbitrator's award on this point was plainly a decision the tribunal was entitled to reach and therefore could not be disturbed on appeal.

16 The Judge remitted the Award back to the arbitrator for a decision as to whether it could be said that the owners were compelled to accept redelivery on 3rd August on the basis that they had no legitimate interest in performing the charterparty (i.e. keeping the vessel on hire) once discharge was complete. The charterers had argued that this was a situation to which the principle in *White and Carter (Councils) Ltd v. McGregor* (HL) [1962] AC 413 applied. This is to the effect that if it can be shown that the party affirming the contract had no legitimate interest in performing it rather than claiming damages, that party will not be able to enforce the contract, e.g. by claiming the contract price, if its actions in doing so were "wholly unreasonable". The owner's argument had been that refusing to accept delivery and electing to keep the charter alive was not unreasonable in circumstances where they could not find alternative employment for the vessel whilst she was under arrest.

17 Whilst the ultimate outcome of the reference following remission is not known, today the answer to this point would be clear. In *The Aquafaith* [2012] 2 Lloyd's Rep. 61, Mr Justice Cooke held that the principle in *White and Carter* applied to time charters where the owners' ability to earn hire was not dependent on any performance by the charterers of their obligations, and that it was not unreasonable in the circumstances of that case (where the vessel had been redelivered 94 days early in a falling market) for the owner to maintain the fixture and claim hire.

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[3] See *The Mareva A.S.* [1977] 1 Lloyd's Rep. 368 at p. 381, per Kerr J and *Royal Greek Government v. Minister of Transport*, (1948) 82 Ll.L Rep. 196, per Lord Justice Bucknill at p. 199.
[4] At, p. 696, col. 2, para. 14

18 In circumstances where (unusually) there was no bespoke provision in the rider clauses stating that the vessel was to be off-hire in the event of an arrest, it is unlikely that any of the standard, pre-printed off-hire provisions would be engaged.

19 For example, although clause 15 of the NYPE proforma stipulates that one of the named off-hire events is *"detention by average accidents to ship or cargo"*, it is well established that this phrase means fortuitous occurrences which cause damage.[5] It is therefore unlikely to cover the types of claims for which a charterer would ordinarily wish to arrest a vessel.

20 Even if the catch-all, sweep up phrases customarily added to clause 15, i.e. "any other cause" or "any other phrase whatsoever" were effective to respond to any arrest, it would still be open to question as to whether the vessel was off-hire in circumstances where it was the charterers' own arrest which had caused the loss of time. In *The Laconian Confidence* [1997] 1 Lloyd's Rep. 139, Rix J held at p. 151 that where the charterer's own actions were the effective cause of the delay "[i]*t seems to me that there would be an implicit exclusion* [from the ambit of the off-hire provision] *of causes for the charterers were responsible."*

21 Accordingly, on the current state of the authorities, it would appear that as a matter of English law, a shipowner does not lose its right to continue to claim hire where the charterer arrests the ship prior to redelivery – no matter how justified the arrest.

22 This is probably explicable by reference to the conventional view that off-hire clauses operate (or not) mechanistically, with no reference to considerations of fault or breach of contract.

23 Where, however, the charterer arrests the vessel after the charterparty has come to an end after an effective and contractual re-delivery, there is no bar, contractual or

[5] *The Saldanha* [2011] 1 Lloyd's Rep. 187 at p. 189, and *The Laconian Confidence* [1997] 1 Lloyd's Rep. 139, and p. 144.

otherwise, on the charterers seeking to arrest the vessel. (Subject naturally to any applicable wrongful arrest regime in the jurisdiction in which the arrest is effected.)

SCENARIO 2: A 3RD PARTY ARRESTS A VOYAGE-CHARTERED SHIP

24 This was the situation in *The Adelfa* [1988] 2 Lloyd's Rep. 466. In that case, a cargo of maize arrived at Tripoli with minor condensation damage. As soon as this minor damage was observed by the cargo receivers, they refused to take delivery of the cargo and arrested the vessel.

25 The receivers' claim was upheld by the Libyan courts and judgment was granted imposing liability on the owners and the vessel *in rem* for US$3.7 million. There were then prolonged negotiations between the owners and the receivers with the owners eventually having to pay US$2.5 million to enable the vessel to leave the port. (In the meantime she was precluded from sailing by the arrest.)

26 In the ensuing arbitration, the owners claimed demurrage from the vessel's voyage charterers, as well as an indemnity for the US$2.5 million paid to the cargo interests. The demurrage claim was settled.

27 The claim for damages failed before the arbitrators because the umpire held that the charterparty had been frustrated when the Libyan court judgment was issued as this made discharge impossible, such that there was no operative repudiatory breach by charterers after this frustration.

28 This finding was upheld by Evans J on appeal. The owners' argument was that the charterers could not rely frustration because the arrest and ensuing delay was effectively caused by the receivers, for whom the charterers were responsible under the charterparty.

29 At p. 471, col 2 of the judgment, Mr Justice Evans dismissed this argument as follows:

"The … submission is that the charterers are vicariously liable for the delay caused by the receivers and their various actions described above. This argument in my judgment is misconceived. The

charterers having undertaken, subject to exceptions, that the cargo will be discharged within the agreed period, they will clearly be liable if this is not done, notwithstanding that the discharging operation has become the responsibility of the receiver or of some other party and the charterer plays no part in it himself. Even if this can properly be described as delegating the charterers' contractual duty, it does not follow that the charterer becomes responsible, vicariously or otherwise, for the receivers and all that they do, or fail to do. The charterer can only be liable when there has been a failure to achieve what the charterers undertook to the shipowner would be done. There was, of course, a failure to discharge within the laytime, for which the charterers are liable in damages or demurrage. The vessel was detained by her arrest and the subsequent judgment. There is no undertaking in the charterparty, express or implied, that cargo receivers will not arrest the vessel, or seek to do so, at the discharging ports."

30 The approach of Evans J in *The Adelfa* was approved of in *The Andra* [2012] 2 Lloyd's Rep. 587. In that case Mr Justice Popplewell confirmed that whereas a voyage charterer undertakes in a charterparty to discharge the cargo, and will be liable in demurrage or damages for detention if the cargo is not discharged, the charterer gives no undertaking that the cargo receivers will not arrest the vessel, and such an arrest is not attributable to charterers.

31 He endorsed the distinction drawn by Mr Justice Evans in *The Adelfa* between a failure to discharge, for which the charterer is liable because it is its personal contractual undertaking to the owners, and an arrest preventing the vessel from leaving the discharge port, in respect of which a voyage charterer gives no undertaking vis-à-vis the conduct of the cargo receivers.

32 This common law position is fundamentally altered by the new BIMCO arrest clause for voyage charters (released on 14th June 2019 and discussed further at the end of this paper) which reads as follows:

"BIMCO Arrest Clause for Voyage Charter Parties

(a) "Arrest" means the detention, seizure or restraint of the Vessel by order of a Court or government authority. The Owners shall promptly notify the Charterers of any Arrest and keep them informed of the Vessel's status.

(b) In the event of Arrest that is the result of an act, neglect or default of the Charterers, their sub-charterers, servants or agents, or by any other party connected to the employment of the Vessel under this Charter Party, then the Charterers shall take all reasonable steps to release the Vessel, including and without limitation the provision of security. In the event that the Charterers' security is not accepted, Owners may provide security against the provision of counter-security by the Charterers. All time actually lost thereby shall count as laytime or, if the Vessel is on demurrage, as time on demurrage.

(c) In the event of any other Arrest, then

(i) the Owners shall take all reasonable steps to release the Vessel, including and without limitation the provision of security;

(ii) time actually lost shall not count as laytime or, if the Vessel is on demurrage, as time on demurrage;

(iii) provided that the Vessel is ready to load, the Charterers shall have the right to delay loading cargo until the Vessel is released, and time actually lost as a result of Charterers' decision to delay loading shall count as half laytime or, if the Vessel is on demurrage, as half time on demurrage; and

(iv) provided that there is no cargo on board and the Vessel has not been released within 14 days of the Arrest, the Charterers shall have the option to cancel the Charter Party by giving written notice, unless security has been provided.

(d) The responsible party under sub clauses (b) or (c) shall indemnify the other party for losses directly arising out of the Arrest that are reasonably foreseeable.

Neither party shall be liable to the other party for any indirect or consequential loss or damage suffered by the other party in connection with the Arrest."

33 It will be immediately apparent that the definition of "arrest" in the clause is extensive. BIMCO's explanatory note emphasises that the arrests to which the clause responds are not limited to contractual claims, but include all incidents of detention, seizure or restraint of a vessel as long as they have been given effect by a court or

government authority. However, the clause does not apply to illegitimate detentions or seizures by, for example, pirates.

34 Sub-clause (b) expands the scope of a voyage charterer's common law responsibility for 3rd party arrest significantly. It imports into a voyage charter the common law test applicable to time charters developed by the Court of Appeal in *The Global Santosh* (but later overturned by the Supreme Court as discussed below) and obliges a voyage-charterer to assume the risk of third party arrest when the arrest falls within their sphere of responsibility. Significantly, this is to be determined without any requirement for an effective causal connection between the act leading to the third party's arrest and the performance of the charterer's functions under the voyage charter party. Contrary to *The Adelfa*, this means that acts by a sub-charterer, receiver, or other person or entity involved in the chain of contracts connected with the charter party which result in the arrest of the vessel, become the responsibility of the voyage charterer.

35 The voyage charterer will also then be required to take steps to obtain the release of the vessel, such as putting up security. This too goes far beyond the obligations imposed on a charterer at common law.

36 The final sentence clarifies that time actually lost as a result of an arrest by a third party falling within the charterers' sphere of responsibility will count as laytime or demurrage, as the case may be.

SCENARIO 3: A 3RD PARTY ARRESTS A TIME-CHARTERED SHIP

37 The position vis-à-vis owners and charterers where a time chartered vessel is arrested by a third party was canvassed before the Supreme Court in *The Global Santosh* [2016] 1 Lloyd's Rep. 629.

38 The facts of the case were that NYK, as disponent owners under a time charter with the head owners, chartered the vessel to Cargill. Cargill sub-chartered her to a sub-charterer. The vessel was employed to carry a cargo which had been sold by Transclear SA ("Transclear"), to IBG Investments Ltd ("IBG") under a contract of

sale on C&FFO terms. Transclear was (possibly) a sub-sub-charterer; IBG was not a sub-charterer of any sort.

39 Vis-à-vis Cargill, Transclear and IBG were third parties with whom it had no direct contractual relationship. Following a dispute between Transclear and IBG as to IBG's performance of the sale contract and liability thereunder for demurrage following a failure to unload within the permitted time, Transclear arrested the cargo at the discharge port, Port Harcourt in Nigeria, in support of its claim against IBG. By mistake, the arrest order was issued naming both the vessel and the cargo.

40 Like *The Dynamic*, the case concerned the meaning of an off hire provision. The effect of the arrest was that the vessel was prevented from berthing for a number of days. The dispute was ultimately resolved between Transclear and IBG and the vessel was discharged without further incident. Cargill contended that the vessel was off-hire under clause 49 of their charterparty with NYK for duration of the arrest. This provided as follows:

> *"Should the vessel be captured or seized 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."*

41 NYK's position was that that clause 49 was not effective to excuse Cargill from paying hire. Their argument was that Transclear were "agents" of the charterers and their conduct fell within the proviso. Cargill succeeded by a majority before a LMAA tribunal who held that at the time of arrest and in arresting the vessel, Transclear and IBG were not acting as Cargill's agent, vicariously discharging some obligation of Cargill. On appeal by NYK Cargill succeeded in part before Field J but lost in the Court of Appeal.

42 The Court of Appeal held that *"if a party (e.g. a sub-charterer) is a delegate of Cargill flowing from the sub-letting of the vessel, that party remains a delegate for the purposes of the proviso regardless of the legal nature of the act or omission (etc). Not every act or omission of the delegate will or need be in the course of performance of the delegated task."* Its approach was said to be

supported by the "commercial context" of the contract, which was the need to distinguish between those matters which fell on owners' side of the line and those which fell on charterers' side of the line.[6]

43 The Supreme Court reversed this, holding by a majority, as follows:

(a) References in a time charter to acts of the charterer's "agents" in the course of performance cannot necessarily be limited to persons doing those acts on the charterer's behalf in the strict legal sense of the term, or indeed to those standing in any direct legal relationship with him. As between the owner and the time charterer, the rights of the time charterer are made available to those further down the contractual chain, and some at least of the time charterer's obligations are satisfied by the acts of sub-contractors.

(b) In the context of a charterer's obligation to discharge, persons ultimately carrying out the relevant cargo handling operation (loading or discharging) are "availing themselves of the facility contractually derived either directly or indirectly from the charterers." They are, to that extent, the "agents" of the time charterers in the sense in that word is employed in a charter provision such as clause 49.

(c) However, not everything that a subcontractor does can be regarded as the exercise of a right or the performance of an obligation under the time charter. Where the range of matters for which the time charterer is responsible depends on what functions it has delegated to a sub-contractor, it is therefore always necessary to identify the precise extent of the delegation.

(d) The correct question was whether IBG, by omitting to discharge at any time before 15 January 2009, were vicariously exercising rights or vicariously infringing obligations under the time charter between NYK and Cargill. That could only depend on the terms of the time charter.

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[6] Relying on *The Doric Pride* [2006] 2 Lloyd's Rep. 175.

(e) In the present case, the only thing delegated by means of the chain of sub-contracts to Transclear and then on to IBG was the carrying out of Cargill's obligation to discharge the vessel.

(f) That obligation needed to be analysed carefully: under clause 8, Cargill was required to perform or procure to be performed whatever cargo handling operations occurred. This imported an obligation to ensure that cargo handling was done properly and to pay for it. But, as between it and NYK, Cargill had no contractual obligation to procure the vessel to be discharged at any particular time, and no contractual interest in the timing of the operation, being obliged to pay hire regardless of when discharge occurred.

(g) As between NYK and Cargill, such cargo handling operations as occurred, although carried out by Transclear or IBG, were carried out on Cargill's behalf, at their orders and expense under clause 8 of the time charter. This was the vicarious exercise of a task to be performed by Cargill under the time charter. Cargill was therefore responsible for the defective performance of cargo handling operations but not for a failure (by IBG) to discharge the cargo as that was not the vicarious exercise by IBG of some right of Cargill under the time charter. IBG were doing nothing in this period, as far as the vessel was concerned, and were therefore doing nothing on behalf of Cargill under the charterparty.

(h) In the context of the arrest proviso, the Court stressed that there must be some causal nexus between the occasion for the arrest and the function which Transclear or IBG are performing as "agent" of Cargill. There was none here.

(i) The Court was rejected the Court of Appeal's attempted distinction between matters falling with the owner's or the time charterers' spheres of responsibility or on one or other's 'side of the line'. This was akin to treating the delegation by a time charterer such as Cargill as extending to everything that arose out of Cargill's trading arrangements concerning the vessel and amounted to saying anything that the sub-charterers or receivers may choose to do which results in the arrest of the vessel, becomes the responsibility of the

time charterer if the occasion for doing it would not have arisen but for their having come in at the tail end of a chain of contracts which the time charterer initiated. That approach was held to be "impossible to justify".

RE-INTRODUCING "SPHERE OF RESPONSIBILITY": THE NEW BIMCO ARREST CLAUSES

44 Prior to the decision in *The Global Santosh*, the Court of Appeal's 'sphere of responsibility' approach: i.e. dividing up the risk and allocation for responsibility for, inter alia, delay to a vessel under time charter based on some notional appreciation of what it is that an owner and a charterer should bear given their respective commercial interests in the use of the vessel had been a pervasive one – and one particularly popular with owners.

45 Time charterers however were wary of incurring a potentially open-ended responsibility for the acts of third parties said by owners to be their "agents". This is particularly so in view of the fact that there are many other common charterparty provisions in which the same term is used.

46 The carefully balanced approach to the allocation of risk contained in the Supreme Court's majority judgment in *The Global Santosh* has now been set aside in the new BIMCO arrest clauses (released on 14th June 2019). These resurrect the concept of assumed or notional spheres of responsibility for assigning financial liability for the consequences of third-party arrests.

47 The new BIMCO arrest clause for time charters reads as follows:

"BIMCO Arrest Clause for Time Charter Parties

(a) "Arrest" means the detention, seizure or restraint of the Vessel by order of a Court or government authority. The Owners shall promptly notify the Charterers of any Arrest and keep them informed of the Vessel's status.

(b) In the event of Arrest that is the result of any act, neglect or default of the Charterers, their sub-charterers, servants or agents, or by any other party connected to the employment of the Vessel under

this Charter Party, then the Vessel shall remain on hire. The Charterers shall take all reasonable steps to release the Vessel, including and without limitation the provision of security. In the event that the Charterers' security is not accepted, the Owners may provide security against the provision of counter-security by the Charterers.

(c) In the event of any other Arrest, the Owners shall take all reasonable steps to release the Vessel, including and without limitation the provision of security, and should the full working of the Vessel be prevented, the Vessel shall be off-hire for the time thereby lost.

(d) The responsible party under sub-clauses (b) or (c) shall indemnify the other party for losses directly arising out of the Arrest that are reasonably foreseeable.

Neither party shall be liable to the other party for any indirect or consequential loss or damage suffered by the other party in connection with the Arrest."

48 BIMCO's explanatory note makes it clear that risk allocation under the clause is expressly based on the "sphere of responsibilities" approach taken by the Court of Appeal, but later rejected by the Supreme Court in *The Global Santosh* as *"impossible to justify"*.

49 It appears that the BIMCO drafting subcommittee took a conscious decision not to follow the approach of the majority of the Supreme Court in *The Global Santosh,* i.e. that there must be a nexus between the cause of the arrest and the delegated function that the agents perform under the charter party in their capacity as agents of the Charterers.

50 BIMCO claim that *"*[t]*he "sphere of responsibilities" test has been chosen because it provides a less complex and therefore more practical way of allocating responsibility and was felt to be more in line with market expectations. As with the knock for knock principle, which has been described as "a crude but workable allocation of risk and responsibility", the "sphere of responsibilities" test will not always be entirely fair but is intended to minimise disputes and reduce the number of claims."*

51 This reasoning is unconvincing. It is commercially fair for charterers to be responsible for third party arrests where these arise when the arresting party is performing a

function which is properly the charterer's responsibility. However, the effect of the clause is to expand considerably the circumstances in which the charterers will be responsible for a third party arrest, and is tantamount to the imposition of strict responsibility.

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