MOOKDA NAREE: OFF-HIRE WHEN A VESSEL IS UNDER ARREST

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In *Navision Shipping A/S v Precious Pearls Ltd & Ors (the "Mookda Naree")*[1], the English Commercial Court recently considered whether a vessel was off-hire when she was arrested by a third party. The decision is an important reminder of the importance of careful drafting of off-hire provisions, and any applicable provisos, as well as a warning to charterers and sub-charterers that they may need to take proactive action in the event of an arrest.

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BACKGROUND

The relevant voyage was performed pursuant to a chain of charterparties:

- The owners agreed to charter m.v. Mookda Naree to time charterers.
- Time charterers then chartered the vessel to sub-charterers.
- Sub-charterers then chartered her to Cerealis for the carriage of a cargo of milling wheat.

The vessel arrived at Conakry, Guinea, the discharge port, in early December 2018 but on 15 December she was arrested by a third party ("SMG"). The vessel remained under arrest until security by way of guarantee was put up, and she was released on 12 January 2019. Importantly, the guarantee which eventually procured release of the ship, was funded by Cerealis.

Thereafter, a dispute arose under each of the head charter and the sub-charter as to whether, in each case, the vessel was on-hire or off-hire during the period of arrest.

In each case, owners and charterers argued about the application of the (bespoke) off-hire provisions in the charterparty, which (in various formulations) obliged charterers to continue to pay hire in circumstances where the vessel was arrested, or remained under arrest, by reason of charterers' act or omission.

In this case, the vessel was not arrested by any one of the charterers. However, the nature of SMG's claim which gave rise to the arrest implicated Cerealis. SMG's claim, in respect of which they arrested m.v. Mookda Naree, was for alleged short delivery of a cargo of wheat carried by another vessel, m.v. Supertramp, earlier in 2018. Unusually, SMG's claim had only a tenuous link to the arrested vessel, in particular:

- The vessel which had carried SMG's cargo, m.v. Supertramp, was not related to m.v. Mookda Naree;
- Likewise, SMG's cargo claim was not made against the owners of m.v. Mookda Naree, who had no involvement in the m.v. Supertramp cargo;
- The only connection between SMG's cargo claim and m.v. Mookda Naree, was that, at the time of the arrest, m.v. Mookda Naree's sub-sub Charterers were Cerealis, and Cerealis had been charterers of m.v. Supertramp when it carried the short-delivered cargo; and
- Cerealis were SMG's counterparty in the underlying sale contract by which SMG had purchased the cargo in respect of which they now claimed.

In those circumstances, Cerealis considered that SMG's arrest of m.v. Mookda Naree was wrongful. And in any event, Cerealis initially took the position that only the owners could secure the release of the vessel against SMG's unlawful arrest. In circumstances where owners were, apparently, unwilling to put up release security without first taking counter-security from charterers, the vessel remained under arrest. Only after some time did Cerealis accede to owners' request for support in putting up the necessary security, but by then an argument between owners and charterers, as to who should pay for the time under arrest, was inevitable.

The charterers under each of the head and sub-charter asserted that the vessel was off-hire from her arrest on 15 December 2018 until her release on 12 January 2019. Naturally, owners asserted the contrary. The disputes, up and down the charter chain, were referred to arbitration where it was decided:

- Under the head and sub-charter, the vessel was on-hire from 17 December 2018, because her detention from that date was caused by Cerealis' failure promptly to deal with or secure SMG's claim to prompt her release; and
- Under the head-charter (only), the vessel was also on-hire between 15-17 December because the time charterers accepted full responsibility for all "cargo claims" from third parties in West Africa under the charterparty.

The charterers and sub-charterers under the head and sub-charter appealed to the English Commercial Court.

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WAS THE VESSEL OFF-HIRE UNDER THE CAPTURE, SEIZURE, ARREST CLAUSE (17 DECEMBER – 12 JANUARY)?

The head and sub-charter each included a "*capture, seizure, arrest*" clause which put the vessel off-hire in the event of arrest or detention until the time of her release, "*unless such … detention or arrest [was] occasioned **by any act, omission or default** of the Charterers **and/or sub-Charterers** and/or their servants or their Agents*" (clause 47) (emphasis added). This is a fairly typical variant seen in time charters. The main purpose of such clauses overall is to place a ship off-hire if she is arrested or detained unless charterers or sub-charterers are responsible for that detention, and so it was for owners to show that sub-charterers' actions fell within the proviso.

The court rejected the principal argument that the proviso was confined to conduct by the sub-charterer in breach of its contractual obligations, holding that inaction in circumstances where a sub-charterer should reasonably appreciate it would be expected to act is naturally and fairly characterised as an omission.

Further, the proviso was not confined to cases where the sub-charterer had failed to do something it was *obliged* to do by reference to the sub-charter. Arguments to the contrary were a misreading of the Supreme Court's decision in *The Global Santosh*[2] , which concerned a slightly different off-hire provision that only extended to acts or omissions of "agents" and not "sub-charterers". In that case, a sub-charterer had caused the arrest of a vessel in relation to a demurrage dispute with the cargo receiver under the sales contract. In order to determine whether the actions of the sub-charterer and/or receiver could be considered to be the actions of the charterer's agent (such that the proviso to the off-hire clause would apply), the Supreme Court looked to the charterer's obligations under the charter. However, that did not mean that, since Cerealis was under no obligation in the sub-charter to deal with or secure SMG's claim, the proviso to the off-hire clause did not apply. The court noted that, if that were the case, the protection offered to an owner by the proviso would always be determined by reference to the terms of a sub-charter of which an owner will typically have no knowledge. This was a far less likely bargain to strike than one which provides the vessel will remain on-hire if a charterer or sub-charterer brings about an arrest or detention.

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COULD OWNERS CLAIM THE VESSEL WAS ON-HIRE UNDER THE TRADING EXCLUSION CLAUSE (15 DECEMBER – 17 DECEMBER)?

Unlike the sub-charter, the head charter also included clause 86 ('*Trading Exclusions*'), which provided that, when trading in West African ports "*Charterers to accept responsibility for **cargo claims** from third parties in these countries (except those arising from unseaworthiness of vessel) including putting up security, if necessary, to prevent arrest/detention of the vessel or to release the vessel from arrest or detention and vessel to remain on hire*" (emphasis added).

Owners argued SMG's claim satisfied this clause, meaning the vessel was on-hire for the entire period of arrest (and not just from 17 December 2018), and that they were also entitled to damages for expenses incurred in relation to the arrest. The arbitrators (in agreement) gave weight to the "natural language of the clause", finding that "cargo claims" referred to any claims made in respect of cargo, and was not limited to claims relating to cargo currently carried on the vessel.

However, the court disagreed, holding that SMG's claim, though it related to a cargo that had been carried to a West African port, was not a "cargo claim" within clause 86. Although "cargo claims" were dealt with under the ICA[3] (and in that context the term "cargo claims" was not limited to claims concerning cargo carried or ordered to be carried under the relevant time charter), this did not assist owners' construction of the clause. Rather, it was clear from reading the whole language of the charterparty that cargo claims were limited to those relating to the subject charterparty (with particular reference to a 'strikingly similar' clause relating to bagged rice cargoes traded in West Africa). In the judge's view, the same applied to clause 86.

The arbitrators' approach would lead to "startling" consequences. For example, a vessel would be off-hire if she was arrested for cargo claims against a sister ship (wherever in the world arising), so long as the claimants found and arrested her in a West African port. The parties simply could not have intended for the charterers to accept risks such as those.

It was therefore held that clause 86 was only applicable to claims concerning cargos carried under the relevant charter. The vessel was therefore off-hire when arrested until 17 December 2018. Accordingly, the time charterers' appeal under clause 86 was allowed, and the final award under the head charter was remitted to arbitrators for the purposes of the charterers being awarded off-hire between 15-17 December under the arbitration award.

CONCLUSION

It is commonplace for charters to include terms which oblige charterers to continue paying hire where they are responsible for an arrest. It may be equally commonplace, therefore, for charterers to assume that, if they do not themselves cause the arrest, the vessel will surely be off-hire. This case demonstrates, conclusively, that that is not the case.

Likewise, where the charterparty contains a clause which obliges the charterer to continue to pay hire where he has a connection with that arrest, such a clause may bite even where the arrest itself is apparently wrongful.

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Therefore, parties must exercise care when drafting charterparty clauses which make charterers responsible for hire during arrests for which they may be responsible. The clearer the language, the better. In this case, the off-hire clause applied to both the charterers and the sub-charterers (unlike in *The Global Santosh*). This distinction was key to the court's reasoning, and there is no doubt the respective owners struck a favourable bargain.

At the time of fixing, parties should consider whether the additional words 'sub-charterers' are suitable to the particular charter in question. It is advisable that parties down the charterparty chain consider adopting favourable wording on back-to-back terms.

As to the interpretation of the trading exclusions clause, the court's decision no doubt imposes some limits on their utility. The value owners attach to such wording in the context of the risk of arrest, will depend on whether courts in 'high-risk jurisdictions' continue to display a willingness to arrest vessels for unrelated claims against voyage charterers.

[1] [2021] EWHC 558 (Comm)
[2] [2016] UKSC 20
[3] The Inter-Club New York Produce Exchange Agreement 1996.

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