Shipping

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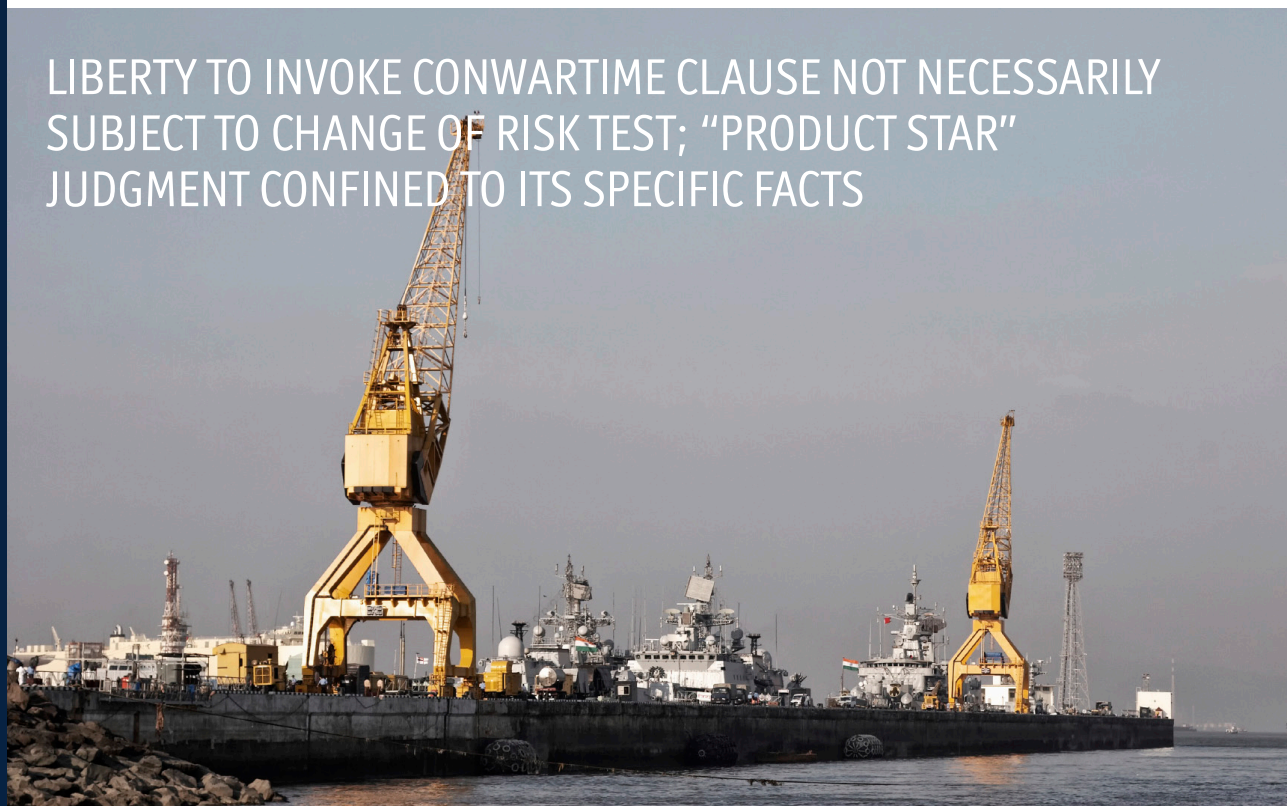
LIBERTY TO INVOKE CONWARTIME CLAUSE NOT NECESSARILY SUBJECT TO CHANGE OF RISK TEST; "PRODUCT STAR" JUDGMENT CONFINED TO ITS SPECIFIC FACTS



On 11 July 2012, Teare J handed down a judgment that is significant for shipowners, time charterers and their legal advisors when dealing with the liberty in the CONWARTIME Clause to reject a voyage order because of the exposure to war risks, including the risk of piracy. Since the Court of Appeal decision in the "PRODUCT STAR No. 2"[1], it has often been argued that there should be a twofold test: the first limb is whether it appears in the Owners' reasonable judgement that there is a real likelihood of exposure to war risks; the second limb is whether there has been a material increase in that risk between the date of the charterparty and the date of the voyage order. Analysis of the first limb is by no means an easy matter. The second limb adds a layer of complexity and gives rise to potential inconsistencies in a chain of charters where there are significant differences between the dates of the respective charters. Teare J's judgment will be welcomed because it appears to remove the need for the second limb of the test by confining the judgment in the "PRODUCT STAR" to its specific facts and rejecting it as a judgment of general application.

1. Product Star No. 2 [1993] 2 Lloyd's Rep. 397.

Background

The case before Teare J concerned a chain of three materially back to back time charters for "PAIWAN WISDOM". Each charter contained the CONWARTIME 2004 Clause which states:

"The Vessel, unless the written consent of the Owners be first obtained, shall not be ordered to ... any port, place, area or zone ... where it appears that the Vessel ... in the reasonable judgement of the ... Owners, may be ... exposed to War Risks ..."

The sub-sub charterparty was concluded on 25 March 2010. On 23 April 2010, the sub-sub Charterers gave an order for a laden voyage from Hoping, Taiwan to Mombasa, Kenya. The order was relayed up the chain of charters to the Head Owners. They rejected it. The basis for the rejection (which was relayed down the chain) was that it exposed the crew to the risk of piracy. The Owners invoked the liberty in the CONWARTIME Clause, which covers acts of piracy as a war risk. This resulted in a dispute under all three charters and the matter was referred to arbitration.

Part of the Charterers' case in arbitration was that the Owners were precluded from relying on the liberty in the CONWARTIME to refuse the order because there had been no material increase in the risk associated with the voyage instructions in question between the date of the Charterparty and the date of the instructions. The Charterers relied upon the Court of Appeal's judgment in the "PRODUCT STAR". This point was determined as a preliminary issue. In a majority award, the Tribunal distinguished the "PRODUCT STAR" on its facts and disagreed that it was authority for the proposition that the liberty in the CONWARTIME can never be invoked unless the war risks in question have altered in kind or increased significantly from the risks existing at the time of the charter. The conclusion was that there was no requirement for such an increase in risk.

The Charterers were granted permission to appeal the relevant question of law under Section 69 of the Arbitration Act 1996.

The appeal

Before Teare J, the Charterers argued that the principles of the "PRODUCT STAR" judgment required the dangers presented by war risks at the time of the order to be greater than those existing at the date of the Charterparty. They argued that a war risks clause (such as CONWARTIME) must be read in light of the Charterparty as a whole and in its factual matrix, with the burden being upon the owners to show that they are entitled to invoke it. They pointed to the provisions of Clause 50 of the Charterparty, which required the vessel to trade within Institute Warranty Limits, and expressly excluded, allowed and/or imposed conditions on trade into certain countries, ports or places including a provision that expressly allowed the vessel to pass the Gulf of Aden, subject to H&M insurance authorisation. The Charterers argued that these provisions indicated that the parties had given detailed thought to the risks of trading to places in East Africa and agreed only to exclude Eritrea, Ethiopia and Somalia, but not Kenya. On that basis, it was submitted that the risk of acts of piracy when trading to Kenya prevailing at the date of the charterparty were allocated and paid for by the Charterers, and the Owners were therefore not entitled to invoke the CONWARTIME provisions and refuse the order to carry cargo to Mombasa. They submitted that it would not make commercial sense for trading to Kenya to be permitted at the outset of the charter period, but for Owners to be entitled to refuse to trade to Kenya if, on the second day of the charter period, they were given instructions to go there.

The Owners' response was that there is no suggestion in the words of the CONWARTIME clause that it only applies to war risks that have escalated since the date of the charterparty. On their face, they only require that the Owners form a reasonable judgment that the vessel may be or is likely to be exposed to war risks. There is nothing in the clause which states that the word "dangerous" only encompasses new or increased dangers. Further, the "PRODUCT STAR" is a materially different case both in respect of the factual matrix and the terms of the charterparty, where the war risk clause did not have the same structure or wording as the CONWARTIME clause. In particular, by contrast to the facts in the "PRODUCT STAR", the Charterers were not the state-owned carriers for the nation of Kenya. The charterparties were not entered into in order to fulfil COAs for the carriage of goods to or from Kenya. There was no discussion of voyages to/from Kenya when the charterparty was negotiated and concluded. The result was that, although the charterparty was for worldwide trading subject to specific exclusions, and Kenya was not one of those exclusions, the Owners had no reason to expect the vessel to be ordered to Kenya; nor that the Charterers would insist on such a voyage being conducted by a route to the north of Madagascar.

In addition, there was no objective reason to see the exclusion in Clause 50 in respect of Eritrea and Somalia to be related to piracy risks at all. Along with Ethiopia, both countries had long been excluded under many trading limits clauses because of long-standing instability, resulting in internal strife in each country, as well as on/off cross-border conflicts between them. These problems affected all three countries long before piracy became a concern in the region, just as it did in many of the other countries specifically excluded. The significance of these exclusions was not that they indicated that the Owners regarded the war risks (or other risks) current at the time of the charterparty to be unacceptable, let alone that they gave specific thought to piracy as distinct from other war risks. Owners wanted these countries excluded irrespective of whether or not they would be entitled to refuse orders under the CONWARTIME Clause or other contractual provisions.

The judgment

Teare J rejected the Charterers' contention in respect of Clause 50. Whilst he accepted that Kenya was within Institute Warranty Limits and

was not an excluded country, the CONWARTIME Clause provides that an owner may refuse to proceed to a place which is dangerous on account of war risks. It does not contain a requirement that the relevant war risks must have escalated since the date of the charterparty.

The words *"Passing Gulf of Aden always allowed with H&M insurance authorisation"* in Clause 50 indicated the Owners' agreement to pass through the Gulf of Aden. The Owners would therefore not be entitled to refuse, pursuant to the CONWARTIME Clause, to pass through the Gulf of Aden on account of there being a danger of an attack by pirates. That is because the CONWARTIME Clause must be read in the light of the charterparty as a whole, including Clause 50. Clause 50 contains an express agreement to pass through the Gulf of Aden and so it would be inconsistent with that express agreement to construe the CONWARTIME Clause in such a way as to permit the Owners to refuse to pass through the Gulf of Aden. The presence in the Gulf of Aden of naval forces and a convoy system explains why the Owners agreed to pass through the Gulf of Aden. That agreement is no warrant for construing Clause 50 as an agreement by the Owners that the vessel shall proceed to any port or place on the east coast of Africa (other than the excluded countries of Eritrea, Ethiopia and Somalia), where there is a risk of piracy but no naval forces or convoy system. The Charterers may direct that the vessel proceeds to Mombasa, but the Owners have liberty to refuse to proceed through the Indian Ocean to Mombasa if, within the meaning of the CONWARTIME Clause, there is a real likelihood of the vessel being exposed to acts of piracy on such route. The CONWARTIME Clause contains no requirement that any such likelihood should have materially increased from the date of the charterparty.

An important point of distinction between the facts in the "PAIWAN WISDOM" and the "PRODUCT STAR" is that the "PRODUCT STAR" had a specific term in its charterparty regarding the payment of war risk insurance by the charterers for the very place to which the vessel was ordered.

In conclusion, the "PAIWAN WISDOM" was not a case in which the Owners had, by the terms of the charterparty construed in its factual context, accepted the risk of piracy in trading to Mombasa, Kenya and they were in principle entitled to exercise the liberty on the CONWARTIME Clause to refuse the order to go there by reference to that risk.

The Appeal was dismissed and permission to appeal to the Court of Appeal was refused.

Analysis

This is a key decision for both Owners and Charterers to be aware of, as it clarifies the operation of the liberty in the CONWARTIME Clause. The case is also relevant to charters that do not incorporate the CONWARTIME Clause, as the wording in the "PRODUCT STAR" case itself was a bespoke war risks clause and CONWARTIME was not included. Every war risks clause must be interpreted in the light of the particular clause, charter wording and specific factual circumstances. However, there is apparently no general rule that the risks must increase/escalate for Owners to be entitled to refuse orders pursuant to the war risks clause.

In light of this case, Owners fixing vessels should continue to specifically exclude countries/ports they view as excessively risky. The rights exercisable by Owners under the war risks clause should be viewed as a fall back to these specific exclusions. Charterers will of course want to continue to reduce exclusions to a commercially achievable minimum and to specifically include countries/ports involved in any known trades. In this way, Charterers can seek to reduce the likelihood that Owners will be entitled to refuse orders under the relevant war risks clause.

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