Shipping

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CONWARTIME 2004 - WAS THE LONG WAY ROUND THE WRONG WAY ROUND?

Pacific Basin IHX Limited v Bulkhandling Handymax AS

Regrettably piracy attacks and hijacks of ships remain a significant threat to world shipping. A recent English High Court judgment provides guidance on the test to be applied when considering whether, under the terms of the CONWARTIME clause, a voyage or routing order given under a time charter is invalid and can be rejected because of the risk of piracy that it entails.

The Baltic and International Maritime Council ("BIMCO") produced the CONWARTIME and VOYWAR clauses to address the conflict between the charterer's entitlement to give directions as to the employment of the vessel and the responsibility of the owner and the master to avoid exposing the ship, cargo and crew to war risks, including the risk of piracy, in the performance of the charter.

The CONWARTIME clause states that (unless prior written consent of the owner is obtained) the charterer shall not order the vessel to transit a place, area or zone where it appears in the reasonable judgment of the master or the owner that the vessel, cargo or crew *"may be, or are likely to be, exposed to War Risks"*. The definition of War Risks includes *"acts of piracy....which, in the reasonable judgment of the Master and/or Owners, may be dangerous or are likely to be or become dangerous to the Vessel, her cargo, crew..."* There is a similar provision in BIMCO's VOYWAR clause which gives the owner the right to refuse to perform the contract of carriage if in the reasonable judgment of the master and/or owner, it appears that performing the contract of carriage, or any part of it, may expose or is likely to expose the vessel, her cargo or crew to war risks (including piracy).

The CONWARTIME provision was considered by Teare J. in *Pacific Basin IHX Limited v Bulkhandling Handymax AS* [2011] EWHC 2862 (Comm) on an appeal from an arbitration award. The main issue before the court concerned the nature of the test for determining whether, in the reasonable judgment of the master, the vessel

may be or is likely to be exposed to acts of piracy on the proposed voyage.

The case concerned a chain of charters of a geared bulk carrier, the "TRITON LARK". It arose in relation to the refusal of the disponent owner, Bulkhandling Handymax ("Bulkhandling"), to comply with the order of its time charterer (Pacific Basin) to carry a cargo of potash in bulk from Hamburg to China via Suez, which Pacific Basin had contracted to transport (as disponent owner) under the terms of a sub voyage charter on the GENCON form. The time charter included the CONWARTIME 2004 clause and the sub voyage charter included the VOYWAR 2004, parts of which were for all material purposes the same as the CONWARTIME clause. The order was refused on the grounds that the route via Suez involved transiting the Gulf of Aden which would expose the vessel, cargo and crew to the risk of attack by pirates. Instead the vessel went the long way round via the Cape of Good Hope to avoid the risk. This resulted in an extra cost of US$462,221.40 in hire and bunkers. Pacific Basin pursued Bulkhandling for the extra cost. The tribunal rejected its claim.

Teare J. held that the phrase *"may be, or are likely to be"* suggested a single degree of possibility or probability and that *"may be"* is to be understood as *"likely to be"*. He held that the meaning of the words *"likely to be"* is best captured by the concept of the term a *"real likelihood"* that the vessel will be exposed to piracy and that:

- The likelihood must be based on evidence rather than speculation.
- It includes an event that is more likely than not to happen, but also an event which has a less than an even chance of happening.
- A bare possibility would not be included.

The degree of probability can be reflected in phrases such as "real danger" or "serious possibility".

The arbitration tribunal had construed the phrase *"may be, or are likely to be"* as connoting a serious risk that the vessel would be exposed to acts of piracy. Teare J. commented that there is probably little, if any, difference between a serious risk and a real likelihood, but he found that the arbitrators had made an error by adopting a *qualitative* test in determining whether there was a serious risk. The arbitrators said that the question could not be satisfactorily answered on a statistical basis. Instead, they concluded that the risk of a hijack was important and certainly demanded consideration and therefore in that sense they found that there was a serious risk of being hijacked. Teare J. considered that their understanding of "a serious risk" to be a risk of an important event, demanding consideration, was wrong because, on his construction, the phrase *"may be, or are likely to be"* connoted a serious risk in the sense of one for which it could be said that there was a real likelihood or real danger that the vessel would be exposed to acts of piracy.

It was common ground that the risk of the vessel being hijacked was about 1 in 300 transits. Teare J. declined to make a finding as to whether, if the arbitrators had applied the right test, a 1 in 300 chance of being hijacked by pirates was a sufficiently serious risk. Instead he remitted the matter back to the arbitrators to reconsider, on the evidence adduced by the parties, the question whether, in the reasonable judgment of Bulkhandling, there was a real likelihood, in the sense of a real danger, that the vessel would be exposed to acts of piracy.

Teare J. commented that the CONWARTIME is "a clause which is intended to be implemented, not by lawyers, but a master or owner responsible for the safety of ship, crew and cargo". It is not easy to reconcile that comment with the distinction that he drew between (a) a serious risk that an event will occur, in this case being exposed to acts of piracy, and (b) a risk that a serious event, being exposed to acts of piracy, will occur, ruling that (a) was the correct test and (b) was the wrong test. Masters, owners and operators working under pressure will probably find it far easier to assess whether the voyage order exposes them to a serious risk in the sense applied by the tribunal than the quasi-statistical analysis that appears to be inherent in the assessment stipulated by Teare J. of whether the order gives rise to a real likelihood of the vessel being exposed to acts of piracy.

It is important to note that the *"real likelihood"* test does not require the master or owner to form a reasonable judgment that the vessel may be or is likely to be *attacked* by pirates. It requires the master or owner to form a reasonable judgment that the vessel may be or is likely to be *exposed* to acts for piracy. Exposure to acts of piracy means that the vessel is subject to the *risk* of piracy or is laid open to the *danger* of piracy.

Other points

In summary, other points determined in the judgment were as follows:

- The master and the owner must direct their mind to making a judgment in relation to the vessel itself, as opposed to vessels or other bulk carriers in general, being exposed to a serious risk.

- The master's and owner's judgment must be exercised in good faith based on sufficient information to conclude that there is a serious risk of hijacking.

- If the refusal to comply with the order is a device to obtain a financial gain it will not be a judgment made in good faith.

- The judgment reached must be objectively reasonable. Making enquiries about the risk is important. If no enquiries at all are made it may be concluded that the owner did not reach a judgment in good faith. If he makes enquiries which he considers sufficient but fails to make all necessary enquiries before reaching his judgment it does not necessarily follow that it would be regarded as unreasonable if in fact it was an objectively reasonable judgment and would have been shown to be so had all necessary enquiries been made.

- The arbitrators' conclusion that there was no deviation in proceeding via the Cape, contrary to the charterer's order to take the route via Suez and the Gulf of Aden, was not wrong in law. It was not necessary for the vessel to proceed to Suez and wait for valid orders in circumstances where there was no realistic likelihood that agreement would have been reached permitting the vessel to transit the Gulf of Aden and therefore there was no commercial purpose in proceeding to Suez.

Conclusion

This judgment provides important guidance for owners, operators and charterers (as well as those advising them) on the validity of employment orders (and the entitlement to reject them) in relation to piracy risks in the context of charters which include a CONWARTIME or VOYWAR clause. It specifies that the test for the validity of the order depends on whether there is a real likelihood that the vessel, crew and cargo would be subject to the risk or danger of piracy if the Master were to comply with the order.

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