English law - CONWARTIME 1993 explained

The English High Court has recently come to a decision as to whether the owners of the TRITON LARK were entitled to reject charterers' orders concerning the routing that the vessel undertook by reason of the risks of piracy in the Gulf of Aden.

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The English High Court has recently reviewed war risk clauses in a decision that is significant for Members trading in the pirate-infested waters of the Gulf of Aden.

The facts

In this case there was a chain of charters, mostly time charters on the NYPE form, but with a voyage charter at the end of the chain on a Gencon form. The charterparty which governed the relationship of the parties to the dispute in question was on a NYPE form and incorporated the provisions of the CONWARTIME 1993 clause.

Bulkhandling, the defendants in the High Court proceedings, chartered the TRITON LARK to Pacific Basin, the claimants, in August 2008. In November 2008 Pacific Basin ordered the vessel to sail from Hamburg to China with a cargo of potash in bulk. Pacific Basin gave voyage instructions that the vessel should proceed via Suez and through the Gulf of Aden. Discussions took place between the parties with the owners agreeing to undertake that voyage via that route, subject to a number of conditions; however, by the time the vessel had arrived at Gibraltar no agreement had been reached and the owners refused Pacific's instructions and proceeded via the Cape of Good Hope. The additional costs incurred by the charterers amounted to a sum in excess of USD 450,000.

The matter was referred to London arbitration where it was determined in favour of the owners. Accordingly, the charterers, Pacific Basin, appealed to the High Court.

CONWARTIME 1993 provisions

The CONWARTIME clause in issue stated:

"BIMCO Standard War Risk Clause for Time Charters, 1993 Code Name: ‘CONWARTIME 1993' (1) For the purpose of this Clause, the words: ... (1)(b) ‘War Risks' shall include any ... acts of piracy ... which, in the reasonable judgment of the master and/or the owners, may be dangerous or are likely to be or to become dangerous to the Vessel, her cargo, crew or other persons on board the Vessel." (2) "The Vessel, unless the written consent of the Owners be first obtained, shall not be ordered to or required to continue to or through, any port, place, area or zone... where it appears that the Vessel, her cargo, crew or other persons on board the Vessel, in the reasonable judgment of the Master and/or the owners, may be, or are likely to be, exposed to War Risk..."

The High Court decision

The judge, Teare J, held that the provisions of the clause, when read together, meant that the "master or owners must form a reasonable judgment, first, that the vessel, her cargo or crew may be, or are likely to be, exposed to acts of piracy and second, that such acts of piracy may be dangerous or are likely to be or to become dangerous".

The judge determined that the words "may be, or are likely to be" in sub-clause (2) of the CONWARTIME clause 1993 did not connote two different degrees of possibility - it was intended to express a single degree of possibility; the correct test was whether there was a "real likelihood". A "real likelihood" was something: - based on evidence rather than speculation, or - an event where there is a less than even chance of the event happening, but - is not a bare possibility.

The arbitrators had determined that the words in question in sub-clause (2) meant a "serious risk" rather than "a real likelihood" - although there was, as the judge commented, little, if any, difference between the terms, but he determined that the arbitrators had applied the tests in the

wrong way. The tests were either: i. a serious risk that an event will occur (in this case being exposed to acts of piracy) or; ii. a risk that a serious event (being exposed to acts of piracy) will occur.

The judge determined that the former was the correct test to be applied but the arbitrators had applied the latter test.

At a subsequent hearing the judge was asked to clarify the meaning of "exposed to acts of piracy" in the above test and went on to say that "the question to be addressed by an owner or master, when ordered to go to a place, is whether there is a real likelihood that the vessel will be exposed to acts of piracy in the sense that the place will be dangerous on account of acts of piracy". What was dangerous was a question of fact for the arbitrators to assess on the evidence before them, so the matter was accordingly remitted back to the arbitrators.

Conclusion

The ruling indicates that a master may refuse orders to go to an area if at the time the decision is made there is a "real likelihood" that the relevant place is or will be dangerous for the vessel on account of a war risk when the vessel arrives there, with reference to the prevalence and severity of the risk.

It is interesting that The TRITON LARK appears to be the first decision on CONWARTIME 1993. It provides some useful clarification, especially given the extent that the clause is in use and, further, that the provisions in question are also reflected in the CONWARTIME 2004 and VOYWAR 2004 provisions. The judgement will obviously affect a considerable number of parties and especially those involved in trade in areas of the world where acts of piracy are common place; so parties should review their position if they anticipate being exposed to such risks.

Footnotes

[1] *Pacific Basin IHX Limited v. Bulkhandling Handymax AS (The TRITON LARK)* [2012] EWHC 70 (Comm) and *Pacific Basin IHX Limited v. Bulkhandling Handymax AS (The TRITON LARK)* [2011] EWHC 2862 (Comm).

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