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Piracy Update: Conwartime, Piracy, and Owners' Obligations Revisited

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A recent decision of the Commercial Court in London (handed down on 8 November 2011) has clarified the limits of a ship owner's obligation under the Conwartime 1993 clauses to obey his charterer's orders to navigate waters rendered parlous because of the threat of piracy. Although the reasoning of Teare J in The Triton Lark[1] differs from the analysis we have previously adopted, ultimately both constructions arrive at the same practical result.

Conwartime

The Conwartime 1993 clauses have been incorporated in the majority of time charters concluded in recent times. By the terms of Clause 1, "War Risks" are defined to include "acts of piracy ... which, in the reasonable judgement 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".

Clause 2 provides inter alia as follows:

"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 ... area or zone ... where it appears that the Vessel ... in the reasonable judgement of the Master and/or the Owners, may be, or are likely to be, exposed to War Risks."

As we have previously advised, this clause is somewhat inelegantly drafted. In particular, it is not clear whether the phrase "may be, or are likely to be" is to be read conjunctively or disjunctively. In other words, there is ambiguity over whether it is necessary that, in the reasonable judgement of Owners, they may be and are likely to be exposed to War Risks, or

whether it is sufficient that Owners reasonably consider that they may be or are likely to be exposed to such risks. This is despite the fact that the punctuation in the relevant phrase suggests otherwise.

The disjunctive analysis

Previously, we had advised clients that it was necessary that Owners reasonably consider that they may be or that they are likely to be exposed to War Risks (including piracy). This construction is supported by the syntax of the clause, and also by the clear intuition that the terms "may" and "likely" convey different meanings.

On this construction, it is plain that the requirement that Owners "may" be exposed to piracy was the operative condition, in that all events that are likely may occur, but not all events that may occur are likely. It was thus critical to determine the meaning of "may be". This phrase, we considered, would (i) exclude risks that are contingent and very remote, and (ii) would not encompass risks that are purely fanciful. It was not necessary that such a risk be greater than an even probability, despite our view that "likely to be" would entail a risk of more than 50 percent, since on the disjunctive analysis "may be", and not "likely to be", was the operative condition.

In the result, Owners would not be required to follow a charterer's order to navigate waters that Owners reasonably considered would expose them to a real, and not merely fanciful, risk of piracy.

The conjunctive analysis?

In The Triton Lark, however, Teare J concluded that the phrase "may be, or are likely to be" could not reasonably be construed as requiring that one of two different degrees of probability must be shown. The Judge considered that such a construction would be confusing to those seafaring men to whom the clause is addressed: these are not lawyers trained in semantic hair-splitting. As such, the phrase in question must be read conjunctively, as expressing one condition only; i.e. as 'maybe, that is, likely to be'.

On this construction, and analogously to the analysis above, it is clear that the condition in clause 2 is governed by the phrase "likely to be", since all events that are likely to occur will

also be ones that may occur, but not vice versa. It was thus critical that the Judge determine the meaning of "likely to be", and this he did by reference to the House of Lords' decision in The Heron II.[2]

That case concerned the question of remoteness in damages, and particularly whether losses that were foreseeable at the time of contracting as a "not unlikely" result of a party's contractual breach were recoverable by the innocent party.[3] In his judgment, Lord Reid specified that the words "not unlikely" should be considered to connote a degree of probability considerably less than an even chance, but would not embrace consequences that were very unusual.[4]

Importing this analysis, and impliedly accepting that "not unlikely" and "likely" are coterminous, Teare J concluded that the term "likely" for the purposes of Conwartime Clause 2 should be read as extending to risks that are not merely fanciful or speculative, without the requirement that they be more likely than not,[5] with the result that the clause requires a real likelihood, in the sense of a real danger, that the Vessel will be exposed to acts of piracy. The decision has been subjected to some criticism in academic circles, and may well be the subject of an appeal.

Conclusion

Although the two analyses above differ, it is nonetheless plain that their practical result is the same. In both cases, Owners need not follow a Charterers' instructions if to do so would expose them to a real, and not merely fanciful, risk of piracy. As previously mentioned, the Court held that the test is still an objective one, i.e. the risk to that vessel, at that time. This is a question of fact for the original Tribunal. The case was remitted to the Arbitration Tribunal for further findings, and we understand the case will shortly be heard again in the Commercial Court. We shall monitor any further decision.

It is to be hoped that the further decision will also clarify the issue of "exposure to risk of piracy' in sub-clause (2), which Teare J said means that "the vessel is subject to the risk of piracy or is laid open to the danger of piracy", the meaning of "risk" still being open to a number of interpretations, including "danger or peril" or "risk or chance".

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1. Pacific Basin IHX Ltd. v Bulkhandling Handymax AS (The "Triton Lark") [2011] EWHC 2862 (Comm).

2. Czarnikow Ltd. v Koufos (The "Heron II") [1969] 1 AC 350.

3. Id., at 382-3.

4. Id., at 383.

5. The Triton Lark, at [40].

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