

Neutral Citation Number: [2011] EWHC 2862 (Comm)

Case No: 2010 FOLIO 1377

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 08/11/2011

Before :

MR. JUSTICE TEARE

Between :

PACIFIC BASIN IHX LIMITED
- and -
BULKHANDLING HANDYMAX AS

Claimant

Defendant

Michael Nolan (instructed by **Swinnerton Moore LLP**) for the **Claimant**
Julian Kenny (instructed by **Ince and Co. LLP**) for the **Defendant**

Hearing dates: 24 and 25 October 2011

Judgment

Mr. Justice Teare:

1. This is an appeal from an award dated 14 December 2010 made by three LMAA arbitrators, Mr. Clark, Mr. O'Donovan and Mr. Sheppard. The appeal has been brought with leave of the Court pursuant to section 69 of the Arbitration Act 1996. It concerns the risk of attack by pirates on merchant vessels in the Gulf of Aden and centres upon the true construction and implementation of the CONWARTIME 1993 clause which had been incorporated into a time charter of the vessel *Triton Lark*, a geared bulk carrier, built in 2005, with 5 holds, a summer deadweight of 56,025 mt. and a speed of about 14 knots.
2. The Claimant ("Pacific") chartered the vessel from the Defendant ("Bulkhandling"), the disponent owner of the vessel, and instructed the vessel to carry a cargo of potash in bulk from Hamburg to China via Suez and the Gulf of Aden. Bulkhandling refused to proceed via Suez and the Gulf of Aden on account of a risk from pirates and instead proceeded via the Cape of Good Hope. The extra cost of proceeding via the Cape was US\$462,221.40. The tribunal held that the extra costs should be borne by Pacific as charterer. Pacific submits that such decision was wrong in law.

The chain of charters

3. The head owners, Triton Navigation BV had let the vessel to Klaveness Chartering on the NYPE form dated 14 July 2006 on terms which incorporated the CONWARTIME 2004 which in all material respects contained the same wording as CONWARTIME 1993. Klaveness in turn entered into a Pool Participation Agreement dated 14 July 2006 with Bulkhandling on the same terms as the Head Owners/Klaveness charter.
4. Bulkhandling chartered the vessel to Pacific on the NYPE form dated 29 August 2008 at the rate of US\$53,000 per day.
5. Pacific voyage chartered the vessel on the GENCON form to K & S Kali GmbH to carry 44,000 tonnes of bulk potash from Hamburg to Zhanjiang. The charter included the VOYWAR 2004 clause, parts of which are for all material purposes the same as CONWARTIME 1993.

The terms of the charter between the Claimant and the Defendant

6. The material terms are as follows:

Clause 8:

“The Captain shall prosecute his voyages with due despatch and...shall be under the orders and directions of the Charterers as regards employment and agency...”

Clause 75:

“BIMCO Standard War Risk Clause for Time Charters, 1993

Code Name: ‘CONWARTIME 1993’

(1) For the purpose of this Clause, the words:

(a) “Owners” shall include the shipowners, bareboat charterers, disponent owners, managers or other operators who are charged with the management of the Vessel, and the Master; and

(b) ‘War Risks’ shall include any war (whether actual or threatened), act of war, civil war, hostilities, revolution, rebellion, civil commotion, warlike operations, the laying of mines (whether actual or reported), acts of piracy, acts of terrorists, acts of hostility or malicious damage, blockades (whether imposed against all vessels or imposed selectively against vessels of certain flags or ownership, or against certain cargoes or crews or otherwise howsoever), by any person, body, terrorist or political group, or the Government of any state whatsoever, 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.

(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 (whether of land or sea) or any waterway or canal, where it appears that the Vessel, her cargo, crew or other persons on board the Vessel, in the reasonable judgement of the Master and/or the Owners, may be, or are likely to be, exposed to War Risks. Should the Vessel be within any such place as aforesaid, which only become dangerous, or is likely to be or to become dangerous, after her entry into it, she shall be at liberty to leave it.

(3) The Vessel shall not be required to load contraband cargo, or to pass through any blockade, whether such blockade be imposed on all vessels, or is imposed selectively in any way whatsoever against vessels of certain flags or ownership, or against certain cargoes or crews or otherwise howsoever, or to proceed to an area where she shall be subject, or is likely to be subject to a belligerent right of search and/or confiscation.

(4)

(a) The Owners may effect war risks insurance in respect of the Hull and Machinery of the Vessel and their other interests (including, but not limited to, loss of earnings and detention, the crew and their Protection and Indemnity Risks), and the premiums and/or calls thereof shall be for their account.

(b) If the Underwriters of such insurance should require payment of premiums and/or calls because, pursuant to the Charterers' orders, the Vessel is within, or is due to enter and remain within, any area or areas which are specified by such Underwriters as being subject to additional premiums because of War Risks, then such premiums and/or calls shall be reimbursed by the Charterers to the Owners at the same time as the next payment of hire is due.

(5) If the Owners become liable under the terms of employment to pay to the crew any bonus or additional wages in respect of sailing into an area which is dangerous in the manner defined by the said terms, then such bonus or additional wages shall be reimbursed to the Owners by the Charterers at the same time as the next payment of hire is due.

(6) The Vessel shall have liberty : -

(a) to comply with all orders, directions, recommendations, or advice as to departure, arrival, routes, sailing in convoy, ports of call, stoppages, destinations, discharge of cargo,

delivery, or in any other way whatsoever, which are given by the Government of the Nation under whose flag the Vessel sails, or other Government to whose laws the Owners are subject, or any other Government, body or group whatsoever acting with the power to compel compliance with their orders or directions;

(b) to comply with the order, directions or recommendations of any war risks underwriters who have the authority to give the same under the terms of the war risks insurance;

(c) to comply with the terms of any resolution of the Security Council of the United Nations, any directives of the European Community, the effective orders of any other Supranational body which has the right to issue and give the same, and with national laws aimed at enforcing the same to which the Owners are subject, and to obey the orders and directions of those who are charged with their enforcement;

(d) to divert and discharge at any other port any cargo or part thereof which may render the Vessel liable to confiscation as a contraband carrier;

(e) to divert and call at any other port to change the crew or any part thereof or other persons on board the Vessel when there is reason to believe that they may be subject to internment, imprisonment or other sanctions.

(7) If in accordance with their rights under the foregoing provisions of this Clause, the Owners shall refuse to proceed to the loading or discharging ports, or anyone or more of them, they shall immediately inform the Charterers. No cargo shall be discharged at any alternative port without first giving the Charterers notice of the Owners' intention to do so and requesting them to nominate a safe port for such discharge. Failing such nomination by the Charterers within 48 hours of the receipt of such notice and request, the Owners may discharge the cargo at any safe port of their own choice.

(8) If in compliance with any of the provisions of sub-clauses (2) to (7) of this Clause anything is done or not done, such shall not be deemed a deviation, but shall be considered as due fulfilment of this Charter Party.

The facts giving rise to the dispute

7. The arbitrators recounted the relevant communications between the parties in paragraphs 8-46 of their reasons. They may be summarised as follows:

8. On 7 November 2008 Mr. Chesman of Pacific emailed the master of the vessel with the details of the cargo, a cargo of potash in bulk, to be carried from Hamburg to Zhanjiang in China. On the same day Mr. Kohashi of the head owners emailed Mr. Mikkelsen of Bulkhandling stating that the shortest route was via the Suez Canal which would require the vessel to pass through the Gulf of Aden “where ...pirates situation has not been solved.” He requested Mr. Mikkelsen to provide the charterers’ routing and their thoughts about pirates. Mr. Mikkelsen passed on the request to Pacific, adding that on 28 October 2008 there had been four attacks by pirates. Three had been unsuccessful but the fourth, on a bulk carrier, had been successful. The vessel had been hijacked and her crew had been taken hostage in an unknown location in Somalia.
9. On 11 November 2008 Pacific replied to Bulkhandling. Pacific said that the vessel was fixed on a voyage from Hamburg to Zhanjiang, China, and “we intend for the ship to transit the Suez Canal.” Pacific passed on information to the effect that of the vessels hijacked the majority had been taken from an area of “high risk”, that the safest route was to hug the north side of “the safe MSPA channel”¹, that no vessels had been hijacked at night and that those vessels most susceptible to hijacking were those with a low freeboard and transit speeds of less than 20 knots. Hijacking odds were said to be 1 in 275 vessels transiting the Gulf of Aden. This reply was passed on to the head owners.
10. On the same day the head owners asked Bulkhandling if they had any vessel which had taken the route via the Cape of Good Hope in order to avoid pirates. Bulkhandling replied that they had had no such vessel and attached a bulletin issued by MARAD² concerning pirates and the precautionary measures which could be taken to “minimise the risk of piracy attacks.” Bulkhandling observed: “.....we do feel that proceeding through the Gulf of Aden should be safe.”
11. The head owners requested that the route be changed to the Cape of Good Hope. Bulkhandling said as follows to Pacific:

“In accordance with clause 75 of governing c/p and in view of the fact that pirates risk in Gulf of Aqaba is still large we can not accept Chrs’ request which will expose vsl and crew members on board to serious risk of pirates attack.”
12. Pacific replied and referred to the increased naval presence in the Gulf and the close support security system introduced by the EU consisting of 2 warships and the placing of security teams on vessels. Pacific said that they had been transiting the Gulf for the last 6 months without incident. However, they offered to approach their charterers for permission to transit via the Cape of Good Hope.
13. On 12 November 2008 the head owners offered to pass through the Gulf of Aden on 5 conditions, the fourth of which was that there be an additional master on board paid for by the charterers and the fifth of which was that if the vessel were seized by pirates the charterers would compensate the owners for loss of hire. Bulkhandling passed on this offer to Pacific.

¹ Maritime Security Patrol Area, designed to provide protection and support to merchant ships transiting the area.

² United States Maritime Advisory Body

14. On 13 November 2008 the head owners passed on to Bulkhandling a report from the master of a bulk carrier which had passed through the Gulf of Aden safely on 12 November 2008. The master noted that a tanker had been hijacked on 10 November and that it was very risky for vessels with low freeboard and a speed of less than 15 knots.
15. On 14 November 2008 the vessel sailed from Hamburg. Pacific replied to Bulkhandling's offer rejecting the fourth and fifth conditions. Negotiations continued but each party maintained its position.
16. On 17 November 2008 the master emailed the head owners, expressing the anxiety and concern of the crew as to transiting the Gulf of Aden and requesting that the vessel transit via South Africa. He also advised that the deviation point for Suez/Gulf or Cape of Good Hope was 1100 on 18 November 2008. Bulkhandling made arrangements for the vessel to bunker at Gibraltar.
17. On 18 November 2008 the head owners sent two emails to Bulkhandling. The first attached a report that Odfjell were now sending their vessels around the Cape of Good Hope. The second noted that *Triton Eagle*, when steaming 550 miles off the Somali coast, saw a speed boat being launched from a mother vessel. *Triton Eagle* quickly changed course and moved away "before the pirates could start to chase her." Later that day the head owners suggested to Bulkhandling that the vessel be instructed to proceed via the Cape of Good Hope. Bulkhandling emailed Pacific as follows:

"Reference previous exchanges head owners have now stated that given the prevailing situation and pursuant to the provisions of CONWARTIME they refuse to proceed to and transit the Gulf of Aden. They "insist Chrs to instruct the vsl to proceed to disport via Cape of Good Hope." In the light of the above it is plain that owners written consent as required by cl 75(2) has not been obtained and that alternative orders must be given. Please provide these forthwith. We reserve all our rights."
18. On 19 November 2008 Pacific replied that their instructions remained unchanged. Later that day the head owners emailed to Bulkhandling an IMB³ warning for all ships transiting the Gulf of Aden which reported that a bulk carrier and a fishing vessel had been hijacked by pirates on 18 November 2008. It said:

"All ships are strongly advised to maintain a strict 24 hours visual and radar watch even though they are in the maritime Security Corridor in the Gulf of Aden. Early assessment /detection will allow ships to take evasive measures to prevent boarding and request for assistance. "
19. On the same day Mr. Mikkelsen received a Weekly Piracy Report for 11-17 November 2008 which noted 7 piracy attacks of which two were on bulk carriers and were unsuccessful. The report concluded:

³ International Maritime Bureau

“Gulf of Aden/Red Sea: Somali pirates are now targeting vessels in the northern Somali coast in the Gulf of Aden. These pirates are now firing automatic weapons and Rocket Propelled Grenades (RPG) in an attempt to board and hijack vessels. Once the attack is successful and the vessel hijacked, the pirates sail towards the Somali coast and thereafter demand a ransom for the release of the vessel and crew. All vessels transiting the area are advised to take additional precautionary measures and maintain strict 24 hours radar and anti piracy watch using all available means. Watch keeping crews should look out for small suspicious boats converging on vessel. Early sighting and accurate assessment will allow Master to increase speed and manoeuvre to escape pirates and at the same time request various Authorities/Agencies for assistance.”

20. At 1537 on 19 November 2008 Head Owners emailed Bulkhandling:

“Owners understand Chrs gave instructions to the Master to proceed to Suez and via GOA after Gibraltar notwithstanding Owners clear refusal to go into the GOA area. Chrs should be aware that it is Owners’ and master’s responsibility to select the quickest and safest route for the carriage of the present cargo to China. The only safe route is round the Cape. Owners are not prepared to go via GOA, it is manifestly unsafe. Owners are therefore proceeding round the Cape.”

21. On 20 November 2008 the vessel left Gibraltar at 0450, after taking on bunkers. The master emailed as follows:

“This is to inform all concerned parties that as per instructions from our owners, Triton Navigation BV, MV Triton Lark will take safe route from Gibraltar via Cape of Good Hope to disport Zhanjiang, PR China.”

22. Pacific emailed Bulkhandling noting that the vessel was proceeding via the Cape of Good Hope and holding Bulkhandling responsible for all additional hire bunkers and other additional costs.

The arbitration

23. In the arbitration Bulkhandling claimed for unpaid hire and Pacific counterclaimed for the additional expenses incurred by reason of the vessel having proceeded via the Cape of Good Hope.
24. At the hearing it was not disputed, on the basis of contemporary material and expert evidence, that the risk of a vessel being hijacked was about 1 in 300 transits; see paragraph 71 of the Reasons.
25. The arbitrators said that if it had been necessary to do so they would have held that the risk of hijacking had escalated since 29 August 2008, the date of the charterparty between Bulkhandling and Pacific, and that both the market and Bulkhandling

perceived a greater risk in November 2008 than in August 2008; see paragraph 98 of the Reasons.

26. A statement from the master of the vessel was in evidence. However, the arbitrators were unable to make a finding as to what his judgment of the situation was other than to say that he and the crew, perhaps understandably, preferred the “no risk” situation of a voyage via the Cape; see paragraph 82 of the Reasons.
27. So far as the head owners were concerned the arbitrators held, based upon the correspondence, that they approached the problem more from a commercial than a humanitarian point of view. They were interested in “insuring themselves against any possible risk of hijacking with all the stress, disruption and expense this would cause, hence the five conditions”; see paragraph 80 of the Reasons.
28. Mr. Mikkelsen of Bulkhandling, the disponent owners, gave evidence to the arbitrators. He said that he thought it was likely that the vessel would be hijacked if she went through the Gulf; see paragraph 84 of the Reasons. The arbitrators held that he acted largely as a conduit between head owners and Pacific; see paragraph 97 of the Reasons. It appears that he himself accepted that there were several steps he had not taken. Thus, amongst other matters he had not done, he had made no formal risk assessment, he had made no enquiries about joining a convoy, he had not analysed the statistics concerning hijacked vessels and he had not investigated whether security personnel could be put on board the vessel; see paragraph 93 of the Reasons. The arbitrators found, however, that the information he had received was in “graphic” and “dramatic” language; see paragraph 96 of the Reasons. In this respect they mentioned the information received on 13 November 2008 from the master of another vessel (see above, paragraph 14) and the weekly piracy report for the week of 11-17 November 2008 which he saw on 19 November 2008 (see above, paragraph 19). They concluded that the information available to him enabled him to conclude that there was a serious risk of hijacking, that this was an objectively reasonable conclusion to draw, that he had reasonably informed himself so as to form a judgment and that his judgment was formed in good faith; see paragraph 97 of the Reasons.
29. The arbitrators concluded that Bulkhandling were entitled to refuse to obey the order to proceed to China via Suez and the Gulf of Aden pursuant to CONWARTIME 1993. Bulkhandling were not obliged to have the vessel proceed to Suez (because that was prohibited by CONWARTIME 1993) or wait at Gibraltar until a lawful order was given (because that was not commercially realistic); see paragraph 105 of the Reasons. Thus there was no deviation in proceeding via the Cape of Good Hope; see paragraph 107 of the Reasons. Bulkhandling were therefore awarded the agreed sum of US\$462,221.40.

The issues of law

30. Pacific have submitted that the arbitrators erred in law in their construction of sub-clause (2) of CONWARTIME 1993, in particular, as to
 - i) the meaning of the words “may be”;
 - ii) the reasonable judgment of the owners;

- iii) whether the clause gives the owners a discretion and if so whether they are obliged to make proper enquiries before exercising it.
31. Pacific have further submitted that the arbitrators erred in law in holding that the passage round the Cape of Good Hope was not a deviation.

The history of CONWARTIME 1993

32. Both parties accepted, though for different reasons, that the court could properly take into account the BIMCO⁴ Special Circular no.6 dated 28 July 1993 which gave a short account of why CONWARTIME 1993 was drafted. In my judgment it may properly be taken into account in construing the clause because it is part of the background material reasonably available to both parties. The circular explains that the War Risk clauses in use in 1993 had been drafted many years previously and were in some ways out of date and inadequate for contemporary conditions. In 1991, following the first Gulf war, BIMCO decided to revise the CONWARTIME and VOYWAR 1950 war risk clauses bearing in mind the following “overriding priorities”:
- i) The master is responsible for the safety of the ship, crew and other persons on board, and for its cargo. He must keep them out of harm’s way, if possible, and he must be given the tools to do so.
 - ii) These tools must have careful regard to all three interests, and must be no more than what are reasonably necessary to allow the master to do his job. They must be fair, and there must be no opportunity for making financial gain out of what is a disaster to the adventure.
 - iii) The experiences of the last 30 years must be drawn upon to produce Clauses which, like their predecessors did in their time, reflect the contemporary world. In particular, the vessel’s flag is no longer a reliable guide; the problem has to be considered as concerning a vessel, a crew and a cargo.
33. The Documentary Committee of BIMCO formally adopted the new drafts in Singapore on 31 May 1993.
34. Counsel did not refer me to the previous form of CONWARTIME (though reference was made to the previous form of VOYWAR) or to any previous decision on the true construction of CONWARTIME 1993 which was relevant to the issue before the court on this appeal.

The first issue of law; the meaning of “may be, or are likely to be, exposed to War Risks”

35. It is first necessary to note how sub-clauses (1) and (2) of the CONWARTIME 1993 fit together. Sub-clause 1(b) defines “War Risks”. Thus with regard to acts of piracy they are defined as “acts of piracywhich, 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.” Sub-clause (2) makes provision for the circumstances in which orders cannot be given by the charterers on account of war risks. Thus, the vessel “shall not be ordered toany place....where it appears that the Vessel, her cargo, crew or other persons on board

⁴ Baltic and International Maritime Council

the Vessel, in the reasonable judgment of the Master and/or the Owners, may be, or are likely to be, exposed to War Risks.” Reading the two clauses together has the following effect with regard to acts of piracy:

The vessel shall not be ordered toany place....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 acts of piracywhich, 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.

36. Thus 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 first, and probably the most important, issue argued on this appeal, was the meaning of the words “may be, or are likely to be, exposed to War Risks” in sub-clause (2). They give rise to difficulty because they do not clearly state what the degree of risk must be. Is it sufficient that there be a possibility that the vessel will be exposed to acts of piracy ? Must it be more likely than not that the vessel will be exposed to acts of piracy (a test suggested by Mr. Nolan on behalf of Pacific) ? Or is it sufficient that there is a real likelihood (which may be less than an even chance) that the vessel will be exposed to acts of piracy ? Or must there be a strong or substantial possibility (an alternative test suggested by Mr. Nolan), a real risk (a test suggested by Mr. Kenny on behalf of Bulkhandling) or a serious risk (the test adopted by the arbitrators) that the vessel will be exposed to acts of piracy ?
37. In considering the true construction of the clause I have kept in mind that the right of a charterer to give directions as to the employment of the vessel is a “key right” of the charterer; see *The Hill Harmony* [2001] 1 Lloyd’s Rep. 144 at p.150 per Lord Bingham. It follows that any limitation on that right must be clearly expressed.
38. Sub-clause (2) 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 of 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. The question therefore is what degree of possibility or probability must be shown by the master or owner that the vessel will be exposed to acts of piracy. I do not consider that the phrase “may be, or are likely to be exposed to War Risks” can reasonably be construed as requiring that one of two different degrees of possibility or probability must be shown, the one being expressed by the phrase “may be” and the other by the phrase “likely to be”. Such a construction would or may be confusing and the clause is intended to be implemented, not by lawyers, but by a master or owner responsible for the safety of ship, crew and cargo. The reasonable construction, in my judgment, is that the phrase “may be, or are likely to be, exposed to War Risks” is intended to express a single degree of possibility or probability. Bearing that in mind the natural construction of the phrase is that “may be” is to be understood as “likely to be”, the word “or” being used in the sense of “that is”.

39. What then does “likely to be” mean? In the context of the CONWARTIME 1993 form (and bearing in mind that the draftsman had in mind that the master is responsible for the safety of the ship, crew and cargo) I do not consider that such a phrase would be reasonably understood by the parties as requiring that it must be more likely than not that the vessel will be exposed to acts of piracy. A requirement that the master or owner must form a reasonable judgment that it is more likely than not that the vessel will be exposed to acts of piracy may well be difficult to satisfy. Yet there may be a real danger that the vessel will be exposed to acts of piracy and the master and owner would be bound to proceed into the area of such risk. I do not consider that that would be a reasonable construction of a clause designed to enable the master to keep the vessel out of harm’s way, notwithstanding that the charterer’s right to give directions as to the employment of the vessel is a “key right”.
40. Given that the words to be construed are “likely to be” I consider that the parties’ intentions are best captured by the concept of a “real likelihood” that the vessel will be exposed to acts of piracy. The adjective “real” reflects the need for the likelihood to be based on evidence rather than to be a fanciful likelihood based on speculation. Whilst “a real likelihood” includes an event that is more likely than not to happen it can also include an event which has a less than an even chance of happening.⁵ A bare possibility would not be included because the phrase “likely to be” suggests a degree of probability rather greater than a bare possibility. The degree of probability inherent in a “real likelihood” is or can be reflected in phrases such as “real danger” or “serious possibility.”⁶ The context and purpose of the CONWARTIME 1993 (to enable the Master to exercise his responsibility to keep the vessel, crew and cargo out of harm’s way) persuades me, and I so hold, that “real likelihood” is to be understood in the sense of a real danger.
41. The arbitrators held that the phrase “may be, or likely to be” connoted a serious risk that the vessel will be exposed to acts of piracy. Whilst my preference is for the concept of a real likelihood because it more closely reflects the language used by the parties, there is probably little, if any, difference between a serious risk and a real likelihood. However, Mr. Nolan submitted that the arbitrators had not understood serious risk in the sense of a real likelihood. He submitted that the arbitrators, by construing the phrase “may be, or are likely to be” as connoting a serious risk *in the sense of an important one, demanding of attention*, had focussed on the quality or nature of the event of which there was a risk rather than on the likelihood of the risk materialising. Instead of asking whether there was a serious chance that the vessel would be exposed to acts of piracy, the arbitrators asked themselves whether there was a chance that the vessel would be exposed to the risk of a serious event, namely, being exposed to acts of piracy.
42. Mr. Kenny accepted on behalf of Bulkhandling that the arbitrators had taken into account matters other than the probability of a risk occurring including the

⁵ “Likely” does not necessarily mean more likely than not as a matter of language. It can include a degree of probability considerably less than an even chance; cf the speech of Lord Reid in *The Heron II* [1969] 1 AC 350 at p.382-3 when explaining the phrase “not unlikely” in the context of remoteness of damage in the law of contract. The OED gives as one meaning of likelihood “a good chance.”

⁶ As a matter of language phrases such as real danger or serious possibility can equate to likelihood; cf the speeches of Lords Morris. Pearce and Upjohn in *The Heron II* [1969] 1 AC 350 at pp.399,414-415 and 424-425 when dealing with remoteness of damage in the law of contract, though Lord Reid thought to the contrary at p.390.

prominence or visibility of the risk (in the sense of what has been written about it), the seriousness of the threatened harm and the importance of the risk in the eyes of commercial people. He submitted that the arbitrators were correct to imply this *qualitative* test.

43. The arbitrators dealt with this question in paragraph 76 of the Reasons. They first said that the question – whether there was a serious risk of a bulk carrier being hijacked while transiting the Gulf - cannot be satisfactorily answered on a statistical basis. They then referred to the OED definition of serious as *important, demanding consideration*, which they found helpful. They concluded as follows:

“Clearly the hijacking risk was important and certainly demanded consideration, as was demonstrated by the amount that was written about it, and Owners’ reaction to it. Accordingly we do find that there was in this sense a serious risk of being hijacked by pirates when transiting the Gulf.”

44. It seems to me that the arbitrators understood “a serious risk” to be a risk of an important event, demanding of consideration. However, on my construction of the phrase “may be, or are likely to be”, that phrase connoted a serious risk in the sense of one of which it could be said that there was a real likelihood or real danger that the vessel would be exposed to acts of piracy. There is a difference between the two which is neatly summed up by Mr. Nolan’s contrast between a serious risk that an event will occur, in this case being exposed to acts of piracy, and a risk that a serious event, being exposed to acts of piracy, will occur.
45. The importance of the risk in the sense of the harm it threatens is of course relevant to the definition of “War Risks” within sub-clause 1(b) of CONWARTIME 1993. In the context of the present case the war risks are “acts of piracy ...which in the reasonable judgment of the Master and/or the Owners, *may be dangerous or are likely to be or become dangerous* to the Vessel, her cargo, crew or other persons on board the Vessel” (emphasis added). If the threatened harm is of a serious or important type then the qualifying test of dangerousness in clause 1(b) is likely to be satisfied. By contrast the phrase “may be, or are likely to be, exposed to War Risks” in sub-clause 2 requires an assessment as to whether there is a real likelihood of the vessel being exposed to acts of piracy. Thus there is no requirement in sub-clause (2) to consider importance in the sense of the importance of the harm threatened by exposure to acts of piracy or in any other sense.
46. I have therefore reached the conclusion that although the arbitrators adopted the concept of a serious risk as expressing the meaning of “may be or are likely to be” (which it would be difficult to say was the wrong legal test), they understood and applied that test in a manner which was not warranted by the true construction of the clause. They therefore erred in law.
47. Before leaving this part of the case there are two further submissions made by Mr. Nolan with which I should deal. He submitted that the phrase “may be” meant “has the (present) ability” to be exposed to war risks whereas “likely to be” meant likely to be exposed to war risks in the future. The two phrases were said to reflect, first, that a vessel may be in an area of war risk and, second, that the vessel may be en route to an area of war risk. This was an ingenious attempt to give meaning to both parts of the

phrase “may be, or are likely to be, exposed to War Risks” and derived support from the second meaning of “may” in the Oxford English Dictionary and from the wording of sub-clause (2) which provided that the vessel “shall not be ordered to or required to continue to or through any ...place.” However, I consider that such a construction is too complicated a construction to give to a clause which is intended to be implemented, not by lawyers, but by a master or owner responsible for the safety of ship, crew and cargo. It also requires meaning to be given to the phrase “has the ability to be exposed to War Risks” which is not itself free from doubt as to the degree of the contemplated risk.

48. Mr. Nolan had a further criticism of the arbitrators’ approach. He submitted, as was common ground, that what must be exposed to War Risks is *the* vessel which has been chartered as opposed to *any* vessel. He submitted that the arbitrators had overlooked this distinction and directed their attention to whether there was a risk that vessels in general were exposed to War Risks. It is true that much of the language used by the arbitrators does not reflect this distinction clearly or at all. Thus in paragraph 76 the arbitrators referred to the question whether there was a serious risk of *a bulk carrier* being hijacked while transiting the Gulf. However, I am not persuaded that on a fair reading of the award as a whole the arbitrators had failed to have this distinction in mind. The arbitrators had noted in paragraph 78 of the Reasons that Mr. Nolan had posed the relevant question as follows: “Have Bulkhandling shown that in the reasonable judgment of the Master or the Owners, the Vessel, her cargo, crew etc. “may be or are likely to be exposed” by Pacific’s order to War Risks....” (The emphasis appears in the Reasons.) In paragraph 97 the arbitrators said: “We consider Mr. Nolan’s question (see para.78 above) is answered affirmatively – with it being Bulkhandling’s judgement as Disponent Owners within the definition of “The Owners” in sub-clause (a) which is the relevant judgement.” That indicates that the arbitrators had directed their mind to a judgment by Bulkhandling in relation to the chartered vessel, as opposed to vessels or other bulk carriers in general. In any event, there is no finding in the Reasons that *Triton Lark* differed from other bulk carriers in any material respect, for example by reference to her speed or freeboard, matters which were thought to affect the risk of being attacked.

The second issue of law: was the Owners judgment reasonable ?

49. If, as I have concluded was the case, the arbitrators were wrong in law as to their understanding of the phrase “may be, or are likely to be, exposed to War Risks” then it must follow that their conclusion that Bulkhandling formed a reasonable judgment must also be wrong in law.
50. Mr. Nolan had a further point. He submitted that the tribunal asked themselves whether the Owners *could* have reasonably concluded that there was a serious risk that the vessel would be exposed to acts of piracy instead of asking themselves whether the Owners’ judgment that it was likely that the vessel would be hijacked was reasonable.
51. Mr. Kenny said that it was apparent from paragraphs 78 and 96 of the Reasons that the arbitrators held that the Owners did in fact make a reasonable judgment.

52. I consider that the fair reading of the arbitrators' Reasons is that the arbitrators concluded that the Owners did in fact make a judgment. They said the judgment "was exercised in good faith" (see paragraph 97 of the Reasons) so that they must have concluded that there had in fact been a judgment. Whilst they said that the information in Mr. Mikkelsen's possession was "sufficient to enable him ...to conclude that there was a serious risk of hijacking" (see paragraph 97 of the Reasons) I also consider that they found that he did in fact conclude that there was a serious risk of hijacking because they refer to such a conclusion in paragraph 96 of the Reasons. The following paragraph 97 explains why they considered that such judgment was objectively reasonable.
53. I therefore do not consider that there is any further error beyond the application of the wrong legal test.

The third issue of law; was there a duty to make reasonable enquiries ?

54. Mr. Nolan submitted that where a contract allocates to one party a power to make decisions under the contract which may have an effect on both parties, a term will generally be implied that the power will be exercised honestly, rationally and not arbitrarily or capriciously and after making any necessary enquiries; see *Socimer International Bank v Standard Bank* [2008] 1 Lloyd's Rep. 558 at p. 575, the *Product Star (no.2)* [1993] 1 Lloyd's Rep. 397 at p.404 and *Government of Spain v North of England SS Co.* (1938) 61 Ll.L.Rep. 44 at p.58. He further submitted that the arbitrators had found that Mr. Mikkelsen had made very limited enquiries.
55. I was not persuaded that the line of cases to which reference was made applies in the present context. Assuming that CONWARTIME 1993 conferred a discretion or power on the Owners to make a decision which could effect both parties there was no necessity to imply any term as to how that discretion or power must be exercised because the clause said expressly that the Owner's judgment must be "reasonable". The effect of that clause is that the Owners must make a judgment. It must be made in good faith; otherwise it would not be a judgment but a device to obtain a financial gain. Further, the judgment reached must be objectively reasonable. An owner who wishes to ensure that his judgment is objectively reasonable will make all necessary enquiries. If he makes no enquiries at all it may be concluded that he did not reach a judgment in good faith. But if he makes those enquiries which he considers sufficient but fails to make all necessary enquiries before reaching his judgment I do not consider that his judgment will on that account be judged unreasonable if in fact it was an objectively reasonable judgment and would have been shown to be so had all necessary enquiries been made.
56. In the present case, although Mr. Mikkelsen acted largely as a conduit between head owners and Pacific, the arbitrators held that "he had reasonably informed himself so as to be able to form a judgement" (see paragraph 97 of the Reasons). That suggests that the arbitrators considered that he made all necessary enquiries. However, what were necessary enquiries depended upon the arbitrators' understanding of the phrase "may be, or are likely to be, exposed to War Risks". If, as I consider to be the case, their understanding was in error then their conclusion that sufficient enquiries had been made must also be wrong in law. However, that is not a further error but merely a reflection of the first and only error.

The fourth issue of law: were the Owners entitled to order the vessel to proceed to China via the Cape of Good Hope ?

57. Upon the assumption that he lost on the first three issues Mr. Nolan submitted that the Owners were not in any event entitled to order the vessel to proceed to China via the Cape of Good Hope. The only part of Pacific's order that it was not entitled to give was that which required the vessel to transit the Gulf of Aden. There was no danger from pirates in proceeding through the Mediterranean to Port Said at the northern entrance to the Suez Canal. Thus the vessel was bound to continue through the Mediterranean from Gibraltar. (Mr. Nolan noted that the head owners, in an email exchange with Bulkhandling on 19 November 2008, appeared to have accepted that this was so.) If that was wrong then the vessel was without orders and was bound to wait for fresh orders at Gibraltar. Sub-clause (8) of CONWARTIME 1993 did not permit the vessel to proceed to China via the Cape of Good Hope. It only permitted the vessel to refuse to obey the order which had been given to proceed through the Gulf of Aden. Proceeding via the Cape was contrary to Pacific's orders.
58. The arbitrators considered that proceeding to Suez was "prohibited" by CONWARTIME 1993 and that there was no realistic likelihood that head owners would have changed their mind about proceeding through the Gulf. Waiting at Gibraltar was not "commercially realistic" and was in "no one's interest". Mr. Nolan said that the first reason was wrong in law because nothing in the war risks clause prohibited the vessel from proceeding to Suez and that the second reason was wrong because how a vessel was traded was a matter for Pacific as charterers and was not a matter for Bulkhandling or indeed the arbitrators.
59. Mr. Kenny recognised that the reasons why the arbitrators' conclusion that there was no deviation in proceeding via Cape of Good Hope was right in law required to be spelled out in a little more detail than the arbitrators had done. He made two submissions. First, Pacific had given an order as to the vessel's destination, China, and an order as to the route, via Suez and the Gulf of Aden. The order as to the route was unlawful. The order as to the destination remained lawful and Bulkhandling were under a duty to prosecute the voyage with due despatch to China. That duty was fulfilled by proceeding via the Cape of Good Hope. There was no deviation. Second, he submitted that sub-clause (8), which provided that anything done or not done in compliance with sub-clause (2) shall not be deemed a deviation, meant that the decision not to proceed to Suez was something "not done" in compliance with, in the sense of pursuant to, sub-clause (2) and that the decision to proceed via the Cape was something "done" in compliance with, in the sense of pursuant to, sub-clause (2).
60. I am not persuaded that the arbitrators' reasoning, though brief, revealed an error of law. As commercial arbitrators they reached a firm conclusion on this part of the case expressed in terms which this court should be slow to overturn. I consider that their decision is explicable by reference to sub-clause 8 of CONWARTIME 1993 and by reference to Bulkhandling's duty to prosecute the voyage to China with due despatch. In circumstances where the arbitrators held that there was no realistic likelihood that agreement would have been reached permitting the vessel to transit the Gulf of Aden there was no commercial purpose in proceeding to Suez, notwithstanding that the vessel could have proceeded to Suez before being exposed to acts of piracy. The refusal of Bulkhandling to follow Pacific's order to proceed from Gibraltar to Suez was therefore something "done or not done" in compliance with sub-clause 2. Further,

in circumstances where Pacific had ordered the vessel to load and carry a cargo to China but where its order as to route was an order Pacific was not entitled to give, the vessel was not without orders and the decision to proceed to China via the Cape of Good Hope was in fulfilment of Bulkhandling's duty to prosecute that voyage with due dispatch.

Consequences of the arbitrators' error

61. Mr. Kenny submitted that even if the arbitrator's approach was in error a 1 in 300 chance of being hijacked by pirates was a serious risk that the vessel would be exposed to acts of piracy and so if the arbitrators had applied the right test they would have decided the case in the same way as they in fact did. By contrast Mr. Nolan submitted that a risk of 1 in 300 cannot sensibly be described as a serious risk and in any event what also had to be assessed was the effect on the risk of such steps as were available to reduce the risk, for example by joining a convoy.
62. The court has no jurisdiction to make findings of fact on an appeal under section 69 of the Arbitration Act 1996. The facts must be found by the arbitrators. It seems from the award that the arbitrators had evidence from experts and that steps to mitigate the risk of attack were discussed in evidence; see paragraphs 48, 73, 86 and 93 of the Reasons. In these circumstances I am minded to order that the award be remitted to the arbitrators to reconsider, in the light of this judgment and having regard to 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. However, both counsel indicated that they would make further submissions as to the appropriate order to make once they had studied the terms of my judgment. I shall therefore make no order for a remission until after the parties have studied the terms of this judgment.