

Case No: 2011 FOLIO 1225
2011 FOLIO 1315
2011 FOLIO 1344

Neutral Citation Number: [2012] EWHC 1888 (Comm)

IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/07/2012

Before :

MR. JUSTICE TEARE

Between :

TAOKAS NAVIGATION SA

Owners

- and -

**KOMROWSKI BULK SHIPPING KG (GmbH &
Co)**

Charterers

and

KENT LINE INTERNATIONAL LTD.

**Sub-
Charterers**

-and-

SOLYM CARRIERS LTD

**Sub-Sub-
Charterers**

Malcolm Jarvis (instructed by **Stockler Brunton**) for the **Sub-Sub-Charterers, Solym Carriers Ltd.**

Charlotte Tan (instructed by Holman Fenwick Willan LLP) for the **Sub-Charterers, Kent Line International Ltd**

Christopher Wood (of Winter Scott LLP) appearing for the **Charterers, Komrowski Bulk Shipping KG (GmbH & Co)**

Robert Bright QC (instructed by **Reed Smith LLP**) for the **Owners, Taokas Navigation SA.**

Hearing dates: 31 May 2012

Judgment

Mr. Justice Teare :

1. This is an appeal on a question of law pursuant to section 69 of the Arbitration Act 1996 arising out of an award on a preliminary issue made by Messrs. Sheppard, Martin-Clark and Siberry QC dated 16 September 2011. The arbitrators in fact made three such awards in references arising out of three charterparties of the vessel PAIWAN WISDOM on materially identical terms. The lead Appellant is the sub-sub charterer Solym Carriers Ltd. and was represented by Mr. Malcolm Jarvis. The lead Respondent is the owner Taokas Navigation SA and was represented by Mr. Robert Bright QC. The intervening charterers, Komrowski Bulk Shipping and Kent Line, were represented by Mr. Christopher Wood and Miss Charlotte Tan who took no active part in the hearing beyond passing the respective submissions up and down the chartering line.
2. For the purposes of the argument the terms of the charterparties were taken from the charterparty between Kent Line as disponent owners and Solym Carriers as charterers. It was dated 25 March 2010 and was on the NYPE 93 form. It provided for a charter period of 11-13 months trading via safe ports from delivery at Hakodate dock, Japan. The vessel was delivered on 22 April 2010 and the Charterers' instructions for the first voyage were given on 23 April 2010. They were for the vessel to proceed to Hoping, Taiwan and there load a cargo of cement clinker for discharge in Mombasa, Kenya. The Owners refused to perform those voyage instructions in reliance on the CONWARTIME 2004 clause.
3. The most material terms of the charterparty were:

Clause 5 Trading Limits

The Vessel shall be employed in such lawful trades between safe ports and safe places within (See Clause 50).

Clause 50 Trading limits / exclusions

Vessel always to trade within I.W.L., Charterers' option breach of L.W.L. subject to Owners' underwriters approval and invoice (Owners will assist to obtain the rate lower or approximate to London scale. it is however WOG), always afloat at any time of tide, Charterers' option NAABSA, always via safe port(s)/berth(s)/anchorage(s) excluding:

Abkhazia, Angola, Cambodia, C.I.S. Far Eastern ports, Eritrea, Ethiopia, Georgia but the port of Poti is allowed, Great Lakes, Haiti, Lebanon, but Iraq will be allowed as soon as situation normalizes, Israel, Liberia, North Korea, Serbia, Somalia, Syria is allowed provided vessel is not flying Liberian flag, Yemen, Zaire, places subject to U.N. sanctions, areas prohibited by vessel's war risks underwriters due to war-like activities, and places which may be excluded by the authority of the vessel's flag. Passing Gulf of Aden always allowed with H&M insurance authorization.

Cuba is included in the trading of the vessel but to be redelivered to the Owners free of any U.S.A. ban.

No direct trade between People's Republic of China and Taiwan.

Clause 94 – BIMCO War Risks Clause for TimeCharters 2004

Code Name: CONWARTIME 2004

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

(i) "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

(ii) "War Risks" shall include any actual, threatened or reported: war; act of war; civil war; hostilities; revolution; rebellion; civil commotion; warlike operations; laying of mines; 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.

(b) 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 becomes dangerous, or is likely to be or become dangerous, after her entry into it, she shall be at liberty to leave it.

.....

(d) (i) The Owners may affect 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 costs therefore shall be for their account.

(ii) If the Underwriters of such insurance should require payment of premiums and/or call because, pursuant to the

Charterers' orders, the Vessel is within, or is due to enter and remain within, or pass through any area or areas which are specified by such Underwriters as being subject to additional premiums because of War Risks, then the actual premiums and/or calls paid shall be reimbursed by the Charterers to the Owners at the same time as the next payment of hire is due, or upon redelivery, whichever occurs first.

(e) 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 the actual bonus or additional wages paid shall be reimbursed to the Owners by the Charterers at the same time as the next payment of hire is due, or upon redelivery, whichever occurs first.

(f) 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,

.....

(h) If in compliance with any of the provisions of sub-clauses (b) to (g) 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.

4. When refusing to perform the instructions to proceed to Mombasa, Kenya the Owners referred to "recent developments in Indian Ocean in respect of piracy." They also referred to "piracy getting more severe and extending further along the coast/waters of East Africa." Although there was some negotiation concerning the terms upon which the Owners might agree to go to Mombasa no final agreement was reached because "background is that the political and local situation regarding piracy in the Indian Ocean has become so uncertain and risky for owners and owners' insurance companies."
5. The Charterers had to charter another vessel to perform the voyage at a cost of US\$815,000.
6. The question of law determined by the arbitrators and in respect of which leave to appeal has been granted is as follows:

"Whether, on the true construction of the Charterparty of the PAIWAN WISDOM between the Claimant (as charterers) and

the Defendant (as disponent owners) dated 25 March 2010, the Defendant is precluded from relying upon on the CONWARTIME 2004 clause to justify its refusal to proceed on a voyage to Mombasa ordered by the Claimant on 23 April 2010 in the event that there was no material change in the risk (otherwise encompassed within the words of the CONWARTIME 2004 clause) of proceeding with that voyage between the date of the Charterparty and the date of the order?"

7. The arbitrators, by a majority, determined that the answer to that question was No.
8. The factual matrix considered by the arbitrators included the following:
 - i) There was no suggestion that the Owners were aware, when entering the charterparty, that the vessel was likely to be employed on one or more voyages to Kenya; paragraphs 56-57 of the Award.
 - ii) When the charterparty was concluded the shipping community was aware of the threat of piracy in some parts, at least, of the Indian Ocean; paragraph 61 of the Award.
 - iii) The risks inherent in passing through the Gulf of Aden were ameliorated by the presence of naval forces and the convoy system; paragraph 61 of the Award.
9. For the purposes of the appeal it was assumed:
 - i) that the Owners' liberty to determine that there was a real likelihood that the vessel would be exposed to acts of piracy (in the sense that the approach to Kenya would be dangerous on account of acts of piracy)¹ was exercised in good faith; and
 - ii) that there had been no change in the likelihood that the vessel would be exposed to acts of piracy on the approach to Kenya between the date of the charterparty (25 March 2010) and the date of the voyage instructions (23 April 2010).
10. Mr. Jarvis, on behalf of the Charterers, submitted, in the course of an able and careful argument, that the answer to the preliminary issue was Yes. On a true construction of the charterparty there had to be a material change in the relevant war risk after the date of the charterparty before the liberty to refuse to obey the Charterers' order could be exercised. His construction of the charterparty was supported by the dissenting reasons of Mr. Shepherd and by an article in *Shipping and Trade Law* dated 23 January 2009 by Anna Ellevsen, the documentary affairs officer of BIMCO, who is a Swedish lawyer.
11. The starting point of Mr. Jarvis' argument was the decision of the Court of Appeal in the *Product Star (No.2)* [1993] 1 Lloyd's Rep. 397. It was common ground that the decision in that case established three principles, as follows:

¹ See *Triton Lark* [2012] 1 Lloyd's Rep. 151 and 457

- i) A war risks clause must be read in the light of the charterparty as a whole and in its factual matrix.
 - ii) Even though war risks clauses are not, strictly speaking, exceptions clauses the burden is on the Owners to show that they are entitled to invoke them.
 - iii) Where the Owners have, by the terms of the charterparty construed in its factual context, accepted a particular War Risk involved in trading to a port or area, the liberty to refuse to trade to such port or area is not available unless the Owners can establish that there has been an increase, or escalation, in the relevant War Risk since the date of the charter.
12. Mr. Jarvis submitted that the third principle is of general application and is applicable, for example, when an owner relies upon an express or implied indemnity in respect of the consequences of complying with the charterers' orders. The indemnity does not extend to risks which the owners have agreed to bear.
- “What risks or costs the owners have agreed to bear may depend on the construction of other relevant provisions of the contract, or on an informed judgment of the broad range of physical and commercial hazards which are normally incidental to the chartered service, or on some combination of the two.”
(per Lord Sumption in *ENE Kos 1 v Petroleo Brasileiro SA* [2012] 2 WLR 976 at paragraph 11.)
13. The same principle, Mr. Jarvis submitted, is to be seen in *The Island Archon* [1994] 2 Lloyd's Rep. 227 at p.236 col.2 and p.238 col.2.
14. With regard to this particular charterparty Mr. Jarvis noted that the trading limits in clause 50 expressly excluded Eritrea, Ethiopia, Somalia and expressly permitted “passing Gulf of Aden”. He submitted that the reference to the Gulf of Aden was an implicit reference to the risk of piracy and indicated the Owner's willingness to bear that risk as part of the services for which they were to be paid hire. Clause 50, he submitted, made clear that the parties, having considered the question of piracy, had given detailed thought to where the vessel might go in East Africa. Only Eritrea, Ethiopia and Somalia had been excluded. Kenya had not been excluded. It followed that the Owners had accepted the risk of piracy in proceeding to Kenya. He further submitted that a construction which permitted trading to Kenya on Day 1 but which entitled the Owner to refuse to trade to Kenya on Day 2 (without any material increase in risk) makes no commercial sense. He also said that it would be astonishing if the vessel were instructed to perform a voyage from, say, the Black Sea to Kenya and, having transited the Gulf of Aden (and without any material increase in risk), could then stop and refuse to go any further.
15. I am unable to accept Mr. Jarvis' submissions as to the effect of clause 50.
16. There is no doubt that Kenya was within the vessel's trading limits under the charterparty. Kenya is within the Institute Warranty Limits (“IWL”) and is not numbered within the excluded countries. However, clause 94, the CONWARTIME 2004, provides that an owner may refuse to proceed to a place which is dangerous on

account of a war risk. CONWARTIME 2004 does not contain a requirement that the relevant war risk must have escalated since the date of the charterparty.

17. The words “Passing Gulf of Aden always allowed with H&M insurance authorisation” in clause 50 indicate the Owners’ agreement to pass through the Gulf of Aden. The Owners would therefore not be entitled to refuse, pursuant to CONWARTIME 2004, to pass through the Gulf of Aden on account of there being a danger of an attack by pirates. That is because CONWARTIME 2004 must be read in the light of the charterparty as a whole. 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 CONWARTIME 2004 in such a way as to permit the Owners to refuse to pass through the Gulf of Aden.
18. 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 CONWARTIME 2004, there is a real likelihood of the vessel being exposed to acts of piracy on such route. CONWARTIME 2004 contains no requirement that any such likelihood should have materially increased from the date of the charterparty.
19. Mr. Jarvis accepted that the present case was different from the facts of the *Product Star No.2*. However, it is instructive to see why, on the construction of the charterparty in that case, it was held that the owners were only entitled to refuse to obey an order on account of war risks if “the risks had so far increased that in their discretion they considered such voyages to have become dangerous.”
20. In that case the owners had refused to proceed to Ruwais in the UAE on account of war risks in the Gulf near Ruwais making entry there dangerous. Notwithstanding that the war risks clause did not expressly require any increase in war risk above that which existed at the date of the charterparty it was held that the owners had accepted the risks of proceeding to UAE ports and that such risks did not make those ports dangerous within the meaning of the war risks clause. There had to be an increase in the danger beyond that which existed at the date of the charterparty.
21. The court noted (at p.400 col.2) that the vessel had been chartered for the purpose of carrying oil from the UAE and so would often be trading there. The court also noted (at p.404 col.2) that the charterers were to pay war risk premiums for trading “mainly United Arab Emirates waters (ieRuwais.....)”. The court was thus able to reach this conclusion (at p.404 col.2):

“Although at the time when the charter-party was made the whole of the Gulf, including UAE waters, constituted a war risk zone, the owners were, by the combination of cll. 10 [the trading limits clause], 40(2) [the war risk clause] and 50 [the war risk premium clause] accepting that in the circumstances prevailing at the date of the charter-party the risks of

proceeding to UAE ports and loading there were not such as they would consider “dangerous” so as to render the discretion under cl.40(2) exercisable.”

22. It is immediately apparent that *Product Star (No.2)* was a case in which both the factual matrix and a specific term regarding the payment of war risk insurance by the charterers for the very place to which the vessel was ordered enabled the court to reach the conclusion it did. By comparison with that case there is, in the present case, as the arbitrators noted, no suggestion that the Owners were aware, when entering the charterparty, that the vessel was likely to be employed on one or more voyages to Kenya. Further, there is no equivalent of clause 50 which provided for the payment by the charterers of war risk premium in respect of trading, in particular, to Ruwais in the UAE.
23. There are provisions in the charterparty for the payment of war risk insurance by the Charterers (see clause (d)(ii) of clause 50) but none which provides for the cost of war risk insurance for going to a named place.
24. Thus the present case is not one in which the Owners have, by the terms of the charterparty construed in its factual context, accepted the risk of piracy in trading to Mombasa, Kenya.
25. So far as “commercial sense” is concerned I do not accept that there is a lack of commercial sense in a construction of the charterparty which permits trading to Kenya on Day 1 but which entitles the Owners to refuse an order to trade to Kenya on Day 2. Whilst trading to Kenya is permitted CONWARTIME 2004 enables the Owners or master to avoid danger from War Risks which may be encountered en route to Kenya.
26. Nor am I persuaded that Mr. Jarvis’ example of a voyage from the Black Sea to Kenya which is stopped after the vessel has passed through the Gulf of Aden shows that his submission must be correct. It is possible that issues of waiver may arise in a case where instructions to proceed to a named port are accepted. The present case is not such a case. The Owners refused to accept the Charterers’ instructions before any cargo was loaded and in any event their instructions did not require the vessel to proceed through the Gulf of Aden.
27. For these reasons I consider, as did the majority of the arbitrators, Mr. Siberry QC and Mr. Martin-Clark, that the answer to the Preliminary Issue is No. The appeal must be dismissed.