

Drug smugglers cost to maritime sector

Tom Gorrard-Smith, of Clyde & Co, looks at a recent court decision in which the court ruled that detention arising from drug smuggling is an insured peril under Institute War and Strikes Clauses Hulls 1/10/83

Thwarting the efforts of traffickers transporting drugs by ocean is an increasingly difficult task for customs authorities worldwide. With traffickers using more and more creative measures to avoid seizure, the search methods now being adopted by authorities to stem the flow of drugs being carried by ships are now, in turn, increasingly extensive in their scope and often involve delays to vessels while divers are engaged to undertake underwater surveys.

In the last couple of years such underwater surveys have enabled authorities to make significant seizures, in particular in 2013 when 101kg of cocaine with a street value of €7,000,000 was found stuffed into a missile-shaped container attached to the hull of the *Delta Laguna*, a Dutch cargo ship that has sailed to Rotterdam from Venezuela. In the *Atlasnavios-Navegacao Ld v Navigators Insurance Co Ltd and Others (The B Atlantic)* [2014] EWHC 4133 (Comm) the issue as to whether shipowners could claim a constructive total loss in respect of a detention by customs authorities due to drug smuggling allegations was brought before the UK's Commercial Court in late 2014.

Background

In 2007 after the vessel, the *B Atlantic*, had completed loading of a cargo of coal in Lake Maracaibo, Venezuela for discharge in Italy a customary underwater inspection of its hull was undertaken by authorities. Three bags strapped to the hull containing 132kg of cocaine were discovered 10 metres below the waterline and the vessel was immediately detained by the authorities and the crew arrested. The court in Venezuela proceeded to charge the master and second officer with complicity in the drug smuggling and pursuant to local law ordered the continuation of the vessel's detention for an unspecified period.

After attempts were made by owners to release the vessel failed, it was abandoned by owners some two years later and was subsequently confiscated by the Venezuelan authorities pursuant to a court order. The vessel was insured for US\$14,135,000 under a war risks policy on terms of the Institute War & Strikes Clauses Hull 1/10/83 as amended and the owners proceeded to claim for the insured value of the ship in addition to sue and labour expenses in the sum of US\$5,872,392. War risk underwriters, however, denied liability on the grounds that the actions of the drug traffickers were not the proximate cause of the loss and instead asserted that the proximate cause of the vessel's detention was the infringement of customs regulations, an express excluded peril. The owners contended the detention arose due to the malicious act of a drugs cartel in attaching the drugs to the vessel and denied there was any infringement of customs regulations.

The owners commenced proceedings against war risk underwriters and the dispute turned on the construction of the following clauses:

"1. PERILS: Subject always to the exclusions hereinafter referred to, this insurance covers loss of or damage to the Vessel caused by ...

1.2 capture seizure arrest restraint or detainment, and the consequences thereof or any attempt thereat ...

1.5 any terrorist or any person acting maliciously or from a political motive

1.6 confiscation or expropriation.

2. INCORPORATION: The Institute Time Clauses-Hulls 1/10/83 (including 4/4ths Collision Clause) except Clauses 1.2, 2, 3, 4, 6, 12, 21.1.8, 22, 23, 24, 25 and 26 are deemed to be incorporated in this insurance in so far as they do not conflict with the provisions of these clauses ...

3. DETAINMENT

In the event the vessel shall have been the subject of capture seizure arrest restraint detainment confiscation or expropriation, and the assured shall thereby have lost the free use and disposal of the vessel for a continuous period of [6] months then for the purpose of ascertaining whether the vessel is a constructive total loss the assured shall be deemed to have been deprived of the possession of the vessel without any likelihood of recovery.

4. EXCLUSIONS

This insurance excludes

4.1 loss damage liability or expense arising from ...

4.1.5 arrest restraint detainment confiscation or expropriation under quarantine regulations or by reason of infringement of any customs or trading regulations

4.1.6 the operation of ordinary judicial process, failure to provide security or to pay any fine or penalty or any financial cause ..."

Clause 2 of the Institute War and Strike Clauses incorporated clause 13 of the Institute Time Clauses-Hulls 1/10/83 which stipulated that:

“13. DUTY OF ASSURED (SUE AND LABOUR)

13.1 In case of any loss or misfortune it is the duty of the assured and their servants and agents to take such measures as may be reasonable for the purpose of averting or minimising a loss which would be recoverable under this insurance.

13.2 Subject to the provisions below and to Clause 12 the underwriters will contribute to charges properly and reasonably incurred by the assured their servants or agents for such measures ...

13.6 The sum recoverable under this Clause 13 shall be in addition to the loss otherwise recoverable under this insurance but shall in no circumstances exceed the amount insured under this insurance in respect of the vessel.”

Preliminary issues

In March 2012 the Commercial Court heard the trial of preliminary issues on the construction of the exclusion clause in the policy and ruled that for war risk underwriters to bring themselves within the meaning of the exclusion clause it was not necessary for them to prove that the shipowners, the crew or their agents were complicit in the drug smuggling.

It was common ground between the parties the exclusion clause did not apply if an infringement of customs regulations was not reasonably arguably a ground for the arrest, restraint, detainment, confiscation or expropriation of the vessel as a matter of local law. Although the master and second officer were convicted, it was, however, accepted by war risk underwriters that the owners and crew were not, in fact, involved in the attempt to smuggle drugs out of Venezuela. Further, underwriters accepted the acts of drug smugglers could, in principle, fall within the scope of clause 1.5 of Institute War & Strikes Clauses which provides that “loss or damage to the Vessel caused by ... any person acting maliciously” is covered.

The Commercial Court's decision

The full trial was heard before the Commercial Court in October 2014 and in its judgment handed down in December 2014 the court held the owners' claim for a constructive total loss succeeded on the basis there was cover under the policy for malicious acts of the third parties who strapped the drugs to the hull of the vessel which it considered the proximate cause of the loss.

Persuaded by the Court of Appeal's approach in *Handelsbanken v Dandridge (The Aliza Glacial)* [2002] EWCA Civ 577, when interpreting a different exclusion in the Institute War & Strikes Clauses, the judge held that to apply clause 4.1.5 to every claim in which a customs infringement arose “would not accord with the spirit of the policy”. The judge ruled where a vessel was in breach of customs due to a “put-up job” – a malicious act of a third party without the involvement of the owners or crew – an implied limitation on the wording of the exclusion clause applied. The court therefore ruled the vessel become a constructive total loss on 13 February 2007, in accordance with clause 3 of the policy.

In relation to the alternative argument raised by war risk underwriters that the vessel's detention was caused by owners not putting up security, the court ruled the exclusion at clause 4.1.6 of the policy – which stipulated that losses arising from “failure to provide security” were an excluded peril – did not apply in these circumstances as the owners were only required to put up reasonable security. As owners repeated efforts to agree security with the Venezuelan authorities were repeatedly rebuffed the judge held that war risk underwriters could not rely on this exclusion where the security being demanded was simply not reasonable.

The court also ruled the owners were entitled to recover sue and labour costs incurred prior to and after the date that notice of abandonment was served by the owners on war risk underwriters. The judge decided not to follow the dicta of Rix J in *Kuwait Airways Corporation v Kuwait Insurance Co SAK* [1996] 1 Lloyd's Rep 664 and held that, as the vessel was still “in the grip of the relevant insured peril”, sue and labour expenses incurred after the notice of abandonment was issued by the owners were recoverable.

Comment

The Commercial Court's decision not to apply the exclusion clause to this situation is significant and follows a pattern by the English courts to adopt a holistic approach when applying exclusion wordings. Further, its approach in dealing with sue and labour expenses also clarifies an owners' obligation to sue and labour and right to claim for such expenditure does not cease upon issuance of a notice of abandonment. *MRI*