



***Atlas Navios – Navegacao Ld v Navigators Insurance Co Ltd and Others (The "B Atlantic") [2014] EWHC 4133 (Comm) - Drugs on vessels' hulls: an insured or excluded risk pursuant to the Institute War and Strikes Clauses Hulls 1/10/83?***

All too often commercial vessels are used by drug traffickers to transport drugs that are attached to vessels' hulls around the world. In the recent judgment of the High Court in the *B Atlantic*, the Court considered whether the detention of a vessel by authorities due to drug smuggling allegations, and eventual declaration of the vessel as a constructive total loss, is a covered or excluded risk. The Court found for the Owners of the vessel in that losses arising from third parties acting maliciously, such as drug traffickers attaching drugs to hulls in the absence of knowledge or implication of the Owners, are a covered risk under the Institute War and Strikes Clauses Hulls 1983.

**BACKGROUND**

Upon completion of loading operations in Lake Maracaibo, Venezuela on 13 August 2007, a routine underwater inspection was conducted whereby three bags of cocaine weighing 132kg were discovered to be strapped on the vessel's hull 10 metres below the waterline. The vessel was detained by customs by order of the local court on 16 August 2007 and the crew were arrested as drug smuggling constituted an offence pursuant to Article 31 of the Venezuelan 2005 Anti-Drug Law. On 31 October 2007 the Master and crew were charged with complicity in drug smuggling and the continued preventative detention of the vessel was ordered by the court. Eventually two crew members were convicted.

Following the lapse of over six months of detention of the vessel, the Owners served a notice of constructive total loss on the insurers which was rejected by the insurers. The insurers of the vessel did not allege from the outset that the crew or the Owners were implicated in the offence and it was accepted that the drugs were affixed to the vessel by members of a local drug cartel. On 18 June 2008, the Owners served a notice of abandonment of the vessel on the insurers which was also rejected. The Owners later abandoned the vessel and cargo to the Venezuelan court after all the attempts made by Owners to release the vessel from arrest failed, and the court subsequently ordered the confiscation of the vessel in August 2010.

The Owners claimed on the insurance policy but the war risk insurers denied liability on the grounds that the detention of the vessel was caused by the infringement of customs regulations, which was an excluded risk, and by the Owners' failure to put up security as demanded by the Venezuelan authorities, which was also an excluded risk. The Owners commenced proceedings against the war risk insurers claiming the insured value of the vessel and her equipment in the sum of US\$14,135,000 plus sue and labour expenses in the sum of US\$5,872,392. The Owners' case was that the proximate cause of the constructive total loss of the vessel was the acts of persons acting maliciously, which was an insured risk, and not the infringement of customs regulations or the failure to put up security of an unreasonable quantum as demanded by the authorities.

The clauses upon which the dispute turned provided as follows:

*"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 detention, 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 that the Vessel shall have been the subject of capture seizure arrest restraint detention 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 detention 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 stipulates 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."*

#### **DECISION**

A trial of preliminary issues on the construction of exclusion clause 4.1.5 was held in March 2012 where the Commercial Court found that, in order for insurers to bring themselves within the meaning of the exclusion clause they did not need to evidence that there was privity or complicity on the part of the Owners, crew or their agents and that the exclusion clause applied to exclude claims caused by an otherwise insured peril.

The High Court held that the Owners' claim for a constructive total loss of the vessel succeeded because the proximate cause of the loss of the vessel was a covered risk, namely the acts of persons acting maliciously in strapping drugs to the vessel's hull without the complicity of the Owners and crew. The Court considered that the exclusion clause did not have application under the facts because the detention of the vessel by customs authorities due to the infringement of customs regulations was not the proximate cause of the loss but a cause that arose subsequently to the proximate cause. Detention of the vessel by customs authorities due to malicious acts of members of the local drug cartel remained the dominant proximate cause of the loss.

The Court further considered that an implied limitation on the wording of the exclusion clause had to be applied in that the exclusion clause could not apply where the infringement of

customs regulations had been occasioned by the acts of third parties acting maliciously (see clause 1.5). Having found that the loss of the vessel was caused by an insured peril, the Court confirmed that the vessel became a constructive total loss pursuant to clause 3 of the Institute War and Strikes Clauses on 13 February 2008, and that at the time that the Owners served a notice of abandonment on 18 June 2008, the vessel had already become a constructive total loss.

In regards to the insurers' alternative exclusion argument that the detention was caused by the Owners' failure to put up the security demanded by the local court (see clause 4.1.6), the Court held that the exclusion did not apply under the circumstances, as the Owners were only liable to put up reasonable security. In negotiating with the Venezuelan authorities the Owners made every effort to put up reasonable security but to no avail. The exclusion, therefore, was not found to apply.

Lastly, the Court considered the Owners' claim for sue and labour costs and held that the Owners were entitled to recover sue and labour costs incurred prior to and after the date on which the notice of abandonment was served on the insurers. Expenses such as legal expenses and running costs of the vessel during the detention were recoverable provided they had been incurred following and during the detention of the vessel for the purpose of releasing the vessel from detention.

The Court also found that sue and labour expenses incurred after the notice of abandonment was served were also recoverable even though, by the rejection of the Owners' notice by the insurers, the insurers were deemed to have agreed to put the Owners in the same position they would have been in as if a writ had been issued on the same day. However, as the vessel remained in the grip of the insured peril due to the continuing detention of the vessel, the Court held that sue and expenses incurred after the notice was served on the insurers were recoverable. Certain sue and labour expenses would not, however, be recoverable if the insurers could show that expenditure was incurred for a purpose other than extracting the vessel from the grip of the insured peril.

#### **COMMENT**

The judgment is helpful in its clarity on the limitation that will be afforded to the construction of exclusion clauses. Further, the Court's view on the recoverability of sue and labour expenses incurred by the Owners after the tender of a notice of constructive total loss on insurers assists in clarifying what was, up to now, a grey area of law. Whilst academic views on the matter have leant towards the non-recoverability of such losses, on the basis that the assured's duty to sue and labour comes to an end when a notice of constructive total loss or abandonment is served on insurers, the Court in the *B Atlantic*

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