

ADVISER

THE “B ATLANTIC” JUDGMENT AND THE IMPLICATIONS FOR SHIPOWNERS

The outcome of the *B Atlantic (Atlasnavios-Navegação v Navigators* [2014] EWHC 4133 Comm) in the English Courts has prompted us to consider the implications for our clients who may be concerned that they too might find themselves in a similar situation, through no fault of their own.

While a complex case, the essential facts are that the ship was confiscated by Venezuelan authorities, following the discovery of drugs fixed to the hull of the vessel. The owners claimed a constructive total loss from their war insurers, having been deprived of the use of their vessel for a continuous period of six months - the prescribed amount of time after which the assured was able to bring a claim under the detainment clause of their war policy.

War insurers disputed the claim on the basis that the vessel had been confiscated as a result of customs infringements, an excluded peril in the Institute War Clauses 1.10.83, which were incorporated into the insured's war policy. However, the court of first instance found in favour of owners on the basis that the malicious actions of third parties (probably a drug cartel), in affixing the drugs to the vessel, had led to an infringement of Venezuelan regulations and, in turn, the confiscation. The policy provided cover for “malicious damage”, “malicious mischief”, and “loss of the Vessel... caused by...any person acting maliciously”.

The insurers appealed, and it is the outcome of that hearing which is now causing concern.

The Appeal Court judges overturned the previous decision, ruling in favour of the insurers. The key component of their conclusions was that the loss arose from the following two separate causes:

- Malicious actions of the person(s) who, in affixing the drugs to the hull of the ship, knew that, if discovered, would cause endangerment for the vessel and the crew.

AND

- The infringement of local customs regulations arising from the concealment.

Legal precedents exist in English law relating to concurrent causes, which dictate that, where there are two proximate causes, one of which is covered and the other specifically excluded, and neither of which would have caused loss without the other, the insurer is entitled to rely upon the exception.

In this instance, the Appeal Court concluded that the infringement of the regulations (an excluded peril) could not have happened but for the malicious concealment of the drugs (a covered peril) and, as such, the insurers were entitled to rely on the excluded peril alone and deny coverage for the claim. As things stand, this shipowner now finds itself in the position of having no ship and no valid claim under its war or any other policy of insurance.

The court made it clear that at no stage was there any suggestion that the owners or the crew of the vessel had any involvement in the drug concealment.

CLIENT CONCERNS

This ruling will obviously give cause for concern to shipowners who will probably consider that the innocent misfortune of the owner of the *B Atlantic* could have happened to anyone. For many years and in a large number of countries, vessel owners and the crews they employ have reported suspicious behaviours around their ships in certain ports. Smugglers may use ships as a way to transport illegal goods between countries, and, if these actions are detected by authorities,

this will invariably lead to some form of judicial process arising from a contravention of the law, which, in turn, could lead to the vessel becoming seized. If a vessel remains confiscated beyond a period of time (usually 12 months, but often reduced to six months by policy endorsement or additional clause language), the insured may believe that it can present a claim for constructive total loss to its insurers, arising from the deprivation and the malicious actions of outside "agents".

However, it is quite clear from the ruling that an insured cannot rely on its war insurers paying for seizure by authorities arising from infringement of regulations, even if apparently caused by the malicious actions of others.

This is particularly true, we suggest, if the insured has a war policy which incorporates the unamended Institute War Clauses.

KEY CONSIDERATIONS FOR SHIPOWNERS

Clients should re-evaluate their insurance conditions and ask themselves if their policies could respond favourably in similar circumstances. Is the policy written on the same basis as the war policy held by the *B Atlantic's* owners? Are there any specific exclusions or other policy language which could work against them when examined in tandem with this Appeal Court judgement?

At our clients' invitation, Marsh is able to stress test the judgement in the context of existing insurance arrangements. We can review policies and offer an

opinion on whether any changes need to be discussed with clients' insurers. Our work has already shown us that the results of our analysis can throw up some interesting outcomes.

For instance, for an owner whose insurances are placed in the Norwegian market, subject to Norwegian law, and written on the Nordic (Marine Insurance) Plan 2013 version 2016, our review revealed that an event of a similar nature falling under these insurance conditions was likely to manifest as a claim for discussion under the client's hull and machinery policy. In our discussions with a major Nordic marine insurer, they shared our view, albeit with appropriate caveats; cases can only be judged on their own merits and, indeed, what might seem like a similar scenario for another owner might have subtle circumstantial differences, rendering a comparison invalid.

Finding solutions to insurance problems that result from legal decisions is a difficult undertaking. There are many factors to take into account. For instance, do we look at the problem in the narrow context of the specific facts of one case, or do we widen the review to consider potential alternative scenarios? Is it sensible to try and overcome future, unpredictable outcomes by amending the words in existing wordings or should we look to recommend companion products such as stand-alone drug seizure type covers, readily available to Marsh from several insurers?

Finally, we should highlight that the owners of *B Atlantic* might decide to take their case to the Supreme Court.

Marsh is ready to assist you further. Please contact:

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