The ZouZou: no insurance cover for ship detained under Venezuelan anti-smuggling laws

Guy Blackwood QC and Benjamin Coffer

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The Commercial Court handed down judgment today in ***Piraeus Bank v. Antares ("The ZouZou")*** [2022] EWHC 1169 (Comm). The decision concerns mortgagees' interest insurance and the standard exclusions in a war risk policy.

Guy Blackwood QC and Benjamin Coffer appeared for the successful insurers, instructed by Jonathan Evans, Craig Boyle-Smith and Ingrid Hu of Kennedys LLP.

The claim arose out of the detention of the vessel "ZouZou" in Venezuela following an allegation that the crew were attempting to smuggle diesel oil. The vessel was detained for about 14 months and then released. Four members of the crew were subsequently tried and acquitted. The owners of the vessel claimed for a constructive total loss under their war risks cover, but the war risks underwriters avoided the policy on the grounds of material non-disclosure by the owners, unrelated to the detention.

The Claimant bank was the mortgagee of the vessel, and had taken out mortgagees' interest insurance (or 'MII') with the Defendant insurers to protect its interest as assignees and loss payees under the owners' policies. Following the avoidance of the war risks policy, the bank sought to recover from the Defendants under the MII. The bank's claim was for about USD 71 million plus interest.

The Defendants successfully argued that there was no MII cover because the loss would not have been covered by the war risks policy, irrespective of the avoidance. There would have been no cover under the war risks policy because that policy contained exclusions for any loss "*arising out of action taken by any state or public or local authority …under the criminal law of any state … or on the grounds of any alleged contravention of the laws of any state*". These exclusions are similar to, although potentially wider than, the standard exclusion which appears in the Institute War and Strikes Clauses for detainment "*under quarantine regulations or by reason of infringement of any customs or trading regulations*".

The bank's primary argument was that these exclusions did not apply because the detention of the vessel had been unlawful under Venezuelan law. The bank argued that the Venezuelan public prosecutor had been under a duty to procure the release of the vessel once it became apparent that the detention was no longer necessary for the criminal investigation, and that the prosecutor's failure to do so rendered the detention unconstitutional.

The evidence of Venezuelan law took up most of the trial, but was ultimately irrelevant: Mr Justice Calver held, following the Court of Appeal's decision in ***The Anita*** [1971] 1 Lloyds Rep 487, that a *bona fide* error of Venezuelan law on the part of the public prosecutor would not take the detention outside the scope of the exclusions, unless the error was perverse or politically motivated (which had not been alleged by the bank).

In any event, the Judge held that the detention had not been unlawful as a matter of Venezuelan law. In reaching that conclusion he relied on the findings of Venezuelan law made by Flaux J in ***The B Atlantic***. Those findings were admissible as evidence of Venezuelan law under section 4(2) of the Civil Evidence Act 1972, a seldom-used provision which allows a party to rely on English decisions as to foreign law as a sort of precedent.

The Judge also rejected the bank's fall-back argument that the exclusions in the war risks policy only applied where the owners of the vessel were themselves accused of an offence. A similar argument had been rejected by Hamblen J in ***The B Atlantic*** in connection with the equivalent exclusion in the Institute War and Strikes Clauses.

The bank argued that even if the loss would have been excluded from the war risks policy, it was nevertheless entitled to recover in full for a CTL under the MII policy. The bank's argument was essentially that the MII wording provides cover for any loss or damage caused by the owners or their servants or agents, if there is subsequent non-payment by the owners' insurers.

The bank relied principally on the wording of one of the insuring clauses in the MII wording, which provided cover for loss or damage "*Which occurs by virtue of any alleged deliberate, negligent or accidental act or omission or any knowledge or privity of any of the [the owners or their servants or agents] including the deliberate or negligent casting away or damaging of the vessel or the vessel being unseaworthy or inadequately equipped, manned or certified (including but not limited*

to the requirements set out in Conventions and or by Class Societies)". The bank argued that the clause was applicable because the detention of the vessel had been caused either by an intentional act on the part of the crew in attempting to smuggle the fuel, or alternatively their accidental or negligent conduct in allowing diesel to be loaded in such a way as to create the impression that they were attempting to engage in smuggling.

The Judge rejected that argument. The insuring clause required an "alleged" act or omission, which meant an allegation made by the owners' insurers. The purpose of the clause was to indemnify the bank where the owners' insurers decline cover on the basis of their allegation that the loss of or damage to the Vessel had been caused by the owners or their servants or agents – in other words, where it was the alleged involvement of the owners or their servants or agents in the loss which resulted in there being no cover under the owners' insurance. That would be the position, for example, in a scuttling case, where there would be no fortuity.

Of particular note for practitioners who deal with MII cover in practice was the Judge's decision that it was unnecessary for the bank to tender their own notice of abandonment under the MII policy, separate from the notice of abandonment tendered by the owners under the war risks policy. The Judge agreed with the insurers that the interest insured by the policy is the bank's interest in the owners' policies as assignee and loss payee, rather than the bank's interest in the vessel as mortgagee. The bank was therefore not required to abandon the vessel in order to claim a constructive total loss.

As the bank's claim was dismissed, it was unnecessary for the Court to go on and consider whether the bank would have had to give credit for the residual value of the vessel, which had been returned to it prior to the commencement of proceedings. That interesting question will have to be resolved on another occasion.

Guy Blackwood QC

"Guy has a top class legal brain combined with an unbelievable ability to assimilate the facts of a case. He is a master cross-examiner and has a huge work ethic." (Legal 500, 2022)

Guy has a comprehensive commercial practice, which includes large contractual disputes, international arbitration, insurance & reinsurance, banking & finance, civil fraud, energy & utilities, public international law including bilateral investment treaty arbitration, commodities and shipping.

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"Benjamin Coffer is really clear-sighted, strategic, pragmatic, commercially aware and extremely thorough in his advice." (Chambers UK, 2022)

Ben's broad international commercial practice has a particular emphasis on shipping, insurance / reinsurance and commodities. He appears regularly as sole and junior counsel in the Commercial Court and before arbitral tribunals.

Ben was named Shipping Junior of the Year 2019 at the Chambers & Partners Bar Awards and was shortlisted for Shipping Junior of the Year for the Legal 500 UK Awards 2020.

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