



## Contractual allocation of risk for drug smuggling in commercial shipping

Ships carry 90% of the world's goods to and from all corners of the globe. This makes commercial shipping a natural choice for traffickers to move their contraband to market. Hiding drug shipments in bulk cargo, ship void spaces, in containers and attached to the hull has been a problem for years and continues to challenge vessel operations. Our guest authors, discuss the legal position of the owner and charterer when the vessel is delayed or detained due to discovery of drugs secreted on the ship, using as an example, a cache found in the sea chest.

Published 29 November 2020

The information provided in this article is intended for general information only. While every effort has been made to ensure the accuracy of the information at the time of publication, no warranty or representation is made regarding its completeness or timeliness. The content in this article does not constitute professional advice, and any reliance on such information is strictly at your own risk. Gard AS, including its affiliated companies, agents and employees, shall not be held liable for any loss, expense, or damage of any kind whatsoever arising from reliance on the information provided, irrespective of whether it is sourced from Gard AS, its shareholders, correspondents, or other contributors.

## **Introduction**

Drug smuggling in the maritime sector continues to generate complex contractual disputes between owners, charterers, and cargo interests. It is crucial that these parties ensure that their contracts properly address and allocate liability accordingly, to avoid expensive and time-consuming disputes. With the maritime industry continually improving anti-narcotics operations around the world, traffickers are finding increasingly novel and ingenious ways to smuggle drugs. We explore the delays and losses that can be caused, and provide some practical advice to help mitigate any potential liability.

## **Developing risks**

A ship's sea chest in an underwater shell and fitted with a portable strainer plate provides a water intake reservoir from which the vessel's piping system can draw water. However, in recent cases, space has also been found for other uses: by cutting through the plate, narcotics can be stored inside for an entire voyage. Located on the hull and below the waterline, narcotics smuggling can be undertaken without the knowledge or cooperation of the crew. Divers can covertly cut open the area around the sea chest at the points of departure and destination without needing to rely on or pay off dock workers and crew, while also rendering conventional board and search techniques redundant.

For the shipowner, where the contraband is discovered by the authorities, the resulting delays can lead to loss of hire and claims from cargo interests. Subsequent fixtures may be missed as well as a result of detention/delays. Resolving these types of claims between competing interests (owners, charterers, sub-charterers etc.) can become particularly contentious if the charterparty lacks specific wording.

## **Liability**

Determination of liability as between shipowners and charterers is therefore critical and much turns on the specific wording agreed between the parties in their contracts. One issue that can arise is that many of the novel methods of smuggling narcotics were not foreseen when the relevant clauses were drafted and so, for example, the scenario envisaged above may not fall neatly within the charterparty clauses

One common clause is the BIMCO U.S. Anti-Drug Abuse Act 1986 Clause for Time Charter Parties 2013 and, where it has been incorporated, charterers will be generally liable for the costs and delays caused by narcotics concealed on board the vessel. However, while this clause is fairly precise in trying to apportion liability for time lost and fines incurred, there remains some ambiguity. For instance, the clause only addresses narcotics concealed "*onboard*", without determining whether this would include narcotics found in a sea chest.

## **Owners' position**

Absent clear provisions as to apportionment of liability, parties can be left scratching around trying to find arguments elsewhere. Owners, for example, may argue that the trafficking arose out of compliance with charterers' voyage orders to proceed to a particular port. As a result, they would argue that they are entitled to be indemnified for compliance with such orders. Alternatively, owners may try to argue that the charterers ordered the vessel to an unsafe port, albeit if the drugs were in fact found at that port, that would perhaps indicate safe port practice.

## **Charterers' position**

Charterers, on the other hand, may point to the owners' seaworthiness obligations. If these are limited by the incorporation of the Hague/Hague-Visby Rules to the exercise of due diligence to make the ship seaworthy before and at the beginning of the voyage, that would make charterers' case more difficult. For example, a covert operation by divers, perhaps at night, concealing drugs in or around the hull is not easily discoverable by the exercise of due diligence. Charterers may also look to argue in this scenario that it is owners' obligation to comply with both flag and port state laws and regulations.

If charterers can demonstrate that it was good practice to arrange for underwater inspections and videotaping, or the welding shut of the sea chest, it may assist in any argument that the owner has failed to sufficiently maintain the hull or comply with their seaworthiness obligations. Constructing such an argument would, however, be challenging if the vessel had all her documentation in order and had complied with all local regulations or international standards.

Where there is no satisfactory express contractual provision enabling one party to pass on the losses incurred to another, losses may lie where they fall. Likewise, whether the vessel is to be considered on or off-hire during the period of delay will depend on the relevant off-hire clauses.

## **Cargo claims**

Where goods carried are perishable and there are delays caused by the finding of drugs on or attached to the ship, cargo claims can materialise. These may be brought against either owners or charterers, depending on which party issued the bills of lading. Either way, liability for any cargo damage will largely depend on the terms of the bills and, as above, issues as to whether the carrier exercised due diligence to make the ship seaworthy are likely to be relevant.

Whether cargo claims can be passed from owners to charterers, or vice versa, is often a complex question. It can be simplified by the careful incorporation of suitable charterparty clauses into the bills of lading.

## Conclusion

The implications of drug smuggling go far beyond the initial fines and criminal sanctions, and can have wide ranging commercial impacts under charterparties and bills of lading. Given the prevalence of such activity at certain ports, and the increasingly novel ways in which drug traffickers are conducting their illegal activities using ships, it is recommended that shipowners, charterers, and shippers ensure that clearly worded provisions are incorporated into their charterparties and bills of lading to ensure that disputes do not result from contractual ambiguities.

Whilst the use of the BIMCO U.S. Anti-Drug Abuse Act 1986 Clause for Time Charter Parties 2013 provides some guidance, a variation of this clause or a more bespoke clause may provide greater contractual certainty. Depending on the contractual apportionment of liability, it may also be prudent for owners and managers to arrange underwater inspections and videotaping prior to departure from a high-risk port, in addition to usual anti-smuggling precautions. Additionally, when anchored in such a port, it may be appropriate to maintain a continuous watch with the specific purpose of identifying any smuggling related activity.

*We thank Campbell Johnston Clark solicitors for their advice and remind our readers that the views stated are those of the authors.*

The information provided in this article is intended for general information only. While every effort has been made to ensure the accuracy of the information at the time of publication, no warranty or representation is made regarding its completeness or timeliness. The content in this article does not constitute professional advice, and any reliance on such information is strictly at your own risk. Gard AS, including its affiliated companies, agents and employees, shall not be held liable for any loss, expense, or damage of any kind whatsoever arising from reliance on the information provided, irrespective of whether it is sourced from Gard AS, its shareholders, correspondents, or other contributors.