

POLITICAL VIOLENCE INSURANCE – GETTING THE WORDING RIGHT

The Commercial Court has recently handed down judgment in *Hamilton Corporate Member and Others v (1) Afghan Global Insurance (2) Anham USA (3) Anham FZCO* [2024] EWHC 1426 (Comm). The judgment provides important guidance on the interpretation of political violence insurance policies, serving as a stark reminder of the complexities in this area, and the importance of getting the right cover in place.

BACKGROUND

Political risk and political violence insurance policies are increasingly being used by companies to protect themselves in a volatile global landscape. Policies rarely provide comprehensive cover, instead offering many different types of cover for particular risks. This means that when a loss arises, it may not be straightforward to determine whether the cause of the loss is insured.

This was the key issue in dispute in *Hamilton Corporate*, a case concerning political violence cover in the context of a seizure of a warehouse in Afghanistan by the Taliban. The Commercial Court considered how to construe the political violence policy in its judgment: it found that a close analysis of the wording of the policy was paramount and was not persuaded by arguments which relied on surrounding circumstances to interpret the wording.

FACTS

The claimant reinsurers (the "**Reinsurers**") issued two political violence reinsurance policies (the "**Policies**") in respect of a warehouse located in Afghanistan, which was used to distribute foodstuffs to the US military. The warehouse was owned and operated by the Second and Third Defendants (collectively known as "**Anham**"). Anham claimed to be the original insured under a policy allegedly issued by the First Defendant, Afghan Global Insurance ("**AGI**").

The warehouse was seized by the Taliban following the withdrawal of US forces in 2021 and Anham sought to recover an indemnity under the AGI policy for the full policy limit.

Reinsurers denied Anham's claim, and applied for summary judgment on their claim for a declaration of non-liability under the Policies and a summary dismissal of Anham's counterclaim for a declaration that Reinsurers were liable.

Key issues

- The Commercial Court's judgment sends a stark reminder of how important it is to ensure that appropriate cover is sought and expressly provided for in political violence policies.
- It is a relatively rare instance of the English courts considering how political violence policies are interpreted. Their sensitive subject matter, and international elements, mean that the majority of disputes under such policies are determined in confidential arbitration proceedings.
- The Court's key finding was that the proper construction of political violence policies (and indeed insurance policies more broadly) relies primarily on policy wording, not surrounding circumstances. The Court was not interested in examining the historic development of market wordings when determining how the policies should be construed.
- In this context, the meaning of "seizure" was confirmed as covering all acts of taking forcible possession either by a lawful authority or by overpowering force.
- The Court also rejected arguments that exclusion clauses should be construed narrowly in favour of the insureds, holding that they are not exemption clauses, but clauses which define the scope of cover.

THE COURT'S CONSTRUCTION OF THE EXCLUSION CLAUSE

In the first instance, the Court structured the Policies' exclusion clause into three separate parts as follows:

"This Policy DOES NOT INDEMNIFY AGAINST [1] Loss or damage directly or indirectly caused by seizure, confiscation, nationalisation, requisition, expropriation, detention, legal or illegal occupation of any property insured hereunder, embargo, condemnation, [2] nor loss or damage to the Buildings and/or Contents by law, order, decree or regulation of any governing authority, [3] nor for loss or damage arising from acts of contraband or illegal transportation or illegal trade."

The Court firstly noted that there was no presumption that the exclusion clause should be narrowly construed or construed against Reinsurers. The Court held that exclusion clauses form part of the definition of the scope of the cover and are not an exemption from liability for cover which would have otherwise existed.

The Court then carried out a forensic analysis of the clause, examining the language, grammar and syntax which had been deployed by the drafter. The Court found that each part of the clause was distinct: part 1 dealt with loss or damage by reason of acts of dispossession by anyone, and part 2 dealt with loss or damage by reason of acts of a governing authority. The wording in part 2 of the clause did not, as submitted by Anham, qualify the wording in part 1 such that the seizure had to be "*by...a governing authority*" (which, Anham submitted, did not extend to the Taliban).

MEANING OF "SEIZURE"

The Court rejected Anham's submission that the word "seizure" should derive its meaning from where it appears in the exclusion clause, namely next to the words "*confiscation, nationalisation*" etc. Anham argued that these acts typically concern the acts of a governing authority, making it clear that the exclusion only applies to seizure "*by a governing authority*". The Court disagreed – "seizure" should be given its natural and ordinary meaning, which had been established in settled authority as covering all acts of taking forcible possession either by a lawful authority or by overpowering force. Importantly, this was not limited to acts of a legitimate government or sovereign power. Despite Anham's submissions to the contrary, the Court could not find any justification to depart from the word's settled meaning in case law and its ordinary meaning in the context of the clause.

FACTUAL MATRIX AND COMMERCIAL SENSE ARGUMENT

Anham also submitted that the exclusion clause had to be construed by reference to the relevant factual matrix (including both what was factually known to the parties and the relevant insurance market background) and in light of its commercial purpose. Anham argued that the exclusion clause should be construed in light of clauses which were used in the marine market, namely clause 5.1.3 of the Institute Time Clauses Hull 1.11.95, and standard wordings such as the LMA 3030 terrorism wording. Anham sought permission from the Court to adduce expert evidence on these wordings, but the Court rejected this on the basis that Anham's submission was too general, lacked

evidence, and was contrary to the clear and unambiguous wording of the clause.

Anham also relied on a commercial sense argument, referring to the distinction drawn by the insurance/reinsurance market between the risk of action by a governing authority (such as expropriation and nationalisation), which is insured/reinsured by political risk policies; and civil disruption (such as strikes and riots) and challenges to the governing authority (such as insurrection and rebellion), which are insured/reinsured by political violence policies. Whilst this was not disputed by Reinsurers as a general proposition, the Court found that it did not provide an answer to what risks the drafter intended to cover, nor did it justify disregarding the clear wording of the provision. As such, there was no need to hear expert evidence on the point.

DEPRIVATION LOSS IS NOT PHYSICAL DAMAGE

The Court disagreed with Anham that there was cover for deprivation loss and found that only property damage was covered by the Policies. The Court again relied on the clear wording of the Policies, namely the interest provision, which provided cover in respect of "*Property Damage only as a result of Direct Physical loss of or damage to the interest insured*". The Court concluded that property damage was covered by reason of direct physical loss (total loss) or damage to (partial loss) the warehouse or its contents, not merely the loss of use/deprivation of the property. On this basis, the Court also rejected Anham's alternative argument that there was total loss as it had been irretrievably deprived of possession of its property, as irretrievable loss was not envisaged by the policy wording.

The Court also rejected Anham's submission that – because the indemnity could be calculated by reference to the costs of "replacing" the property – there was cover even where there was no property damage. The Court reasoned that the question as to whether a property is repaired or replaced in a physical damage policy will depend on the extent of the physical damage inflicted upon it by the war, riot etc. As such, the use of the word "replacing" (among others) was not inconsistent with the requirement for physical loss or damage.

In light of the above, the Court concluded that the Policies afforded cover in respect of political violence risks and consequent property damage, not political risks and consequent deprivation loss.

KEY TAKEAWAY

It follows from the judgment in *Hamilton Corporate* that the wording of political violence policies (and indeed insurance policies more generally) is paramount to the proper construction of policy provisions. The Court sends a clear message in its judgment that it will not readily accept arguments which are contrary to the clear wording of such provisions, even where surrounding circumstances may warrant this. It is therefore key that policy wording appropriately reflects the intended cover, as this is what will ultimately be relied upon if a dispute arises between the parties.

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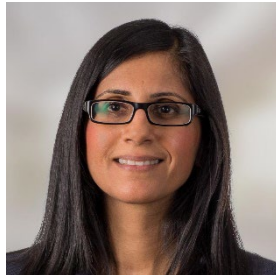
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