

Words matter: Another case on the importance of accurate drafting

29 July 2024  Lauren Wilkinson

In the recent case of *Hamilton Corporate Member Ltd v Afghan Global Insurance Ltd* [2024] EWHC 1426 the High Court ruled that a seizure exclusion in a policy wording was not limited to acts by government authorities and, therefore, applied to the seizure of a warehouse by the Taliban.

Background

The second and third defendants were owners and operators of an Afghanistan warehouse that was subject to an armed seizure by the Taliban, causing a loss of possession and control. Following the seizure, the defendants sought indemnity under their insurance policy issued by the reinsured Afghan Global Insurance Ltd (AGI). AGI was the first defendant in the case.

The claimant reinsurers of the two policies (primary and excess) denied cover and sought summary judgment for a declaration of non-liability and summary dismissal of the second and third defendants' counterclaim for a declaration of liability.

The policy wording

Both policies incorporated the AFB political violence wording. The claimants denied liability, asserting that the seizure exclusion was engaged. They also argued that the reinsurances covered property damage only, not deprivation loss consequent upon seizure.

The defendants argued that the seizure exclusion was restricted to government authority acts, and that this did not extend to the Taliban, meaning that the exclusion did not apply. They also argued that cover extended to deprivation loss.

The seizure exclusion

The seizure exclusion in the policy was as follows:

"[1] Loss or damage directly or indirectly caused by seizure... 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..."

The defendants argued that this exclusion only applied to government authorities, either because:

1. "by law, order, decree, or regulation of any governing authority" must be taken to qualify all of the wording which comes before it; or
2. "seizure" was to take its meaning from its position in the clause, so that being alongside "confiscation, nationalisation", etc. would suggest government acts.

The court disagreed, finding that the use of "nor", commas and different causal language had the effect of splitting the exclusion into three parts, as shown in square brackets above. In other words, part 1 of the exclusion was not limited by what featured in part 2.

When considering the defendant's second argument, the court held that given its ordinary language meaning, "seizure" concerns 'all acts of taking forcible possession either by a lawful authority or by overpowering force'. "Seizure" was not therefore limited to acts of government or sovereign power. The court did not accept that "seizure" should take its meaning from its position in the clause, as the

wording was clear, and there was a lack of a common characteristic with the surrounding words in part 1, arising from the variety of actions.

The factual matrix

The defendants further submitted that despite the clear wording of the exclusion, when viewing the exclusion in light of the commercial purpose of the reinsurance policies and the relevant factual matrix, argued to have been known to the parties and insurance market, the exclusion was only intended to exclude seizure by a governing authority.

The court held that, without evidence to prove otherwise, solely because facts included in the matrix were known, such as that the Taliban were active, wished to overthrow the Afghan government and may wish to seize the warehouse, did not mean that reinsurances intended to give cover. Such knowledge could equally have led to the exclusion being included.

Further, despite some political wordings evolving from marine market clauses which exclude seizure by government authority, the exclusion was not equivalent to such wordings, and instead was comprised of additional and omitted words, suggesting that a different objective was sought by the drafter.

Finally, the matrix point that the distinction between political risk and political violence markets should be considered to construe the exclusion did not determine the drafter's intention, or justify disregarding the clear wording. Exclusions vary by policy, and the exclusion must be considered against the wording as a whole. The broad generalisations that the difference between the two markets concerned not the type of loss, but who causes it (actions by the governing authority for political risks and challenges to the governing authority for political violence) were incorrect.

The reinsured interest

The court held that the reinsurance interest being "In respect of Property Damage only as a result of Direct physical loss of or damage to the interest insured" was distinct from deprivation loss. Further, the policy wording specified that the damage had to be to the "Insured's Physical assets". Therefore, the policies intended to cover political violence risks and consequent property damage only, not political risks and consequent deprivation loss.

Consideration for insurers

This is another in a series of cases in which the court's starting point has been to look at the strict meaning of the words used, and not to infer intention without very good reason for doing so (whether or not such approach favours the insured or the insurer in any given case).

This case serves as another reminder of the importance of ensuring that words are used carefully to reflect the precise underwriting intention, and not to rely on assumptions as to intention or market norms.

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