WIN WIN: WAR RISKS INSURANCE AND FAIR PRESENTATION CONSIDERED BY COURT OF APPEAL

In the case of the WIN WIN[1], the Court of Appeal has reaffirmed a narrow construction of exclusion 1(e) of the American Clauses in the event of *"arrest, restraint or detainment under customs or quarantine regulations and similar arrests, restraints or detainment not arising from actual or impending hostilities"*. The Court also applied a fact sensitive analysis in determining the meaning of "senior management" for the purposes of an insured's duty of fair presentation under the Insurance Act 2015.

1. Delos Shipholding SA & Ors v Allianz Global Corporate and Specialty SE & Ors ("WIN WIN") [2025] EWCA Civ 1019

Background

On 13 February 2019, the capsize bulk carrier "WIN WIN" (the **Vessel**) completed bunkering operations in Singapore and was ordered to proceed to Singapore OPL (outside port limits) and await further instructions. The Vessel proceeded to anchorage in an area partly within and partly outside Indonesian territorial waters and which was generally understood to be Eastern OPL Singapore. Prior to February 2019, there had been no known instances of a vessel being detained by Indonesian authorities for anchoring in the area.

In February 2019, the Indonesian Navy unexpectedly arrested a large number of vessels for anchoring within territorial waters without permission. The Vessel was detained from 17 February 2019 until 9 January 2020 under various articles of the Shipping Law of Indonesia (Law 17/2008) which broadly requires vessels navigating territorial waters to obtain prior authorisation.

By a policy concluded on 29 June 2018, the appellants (**Insurers**) had agreed to insure part of the fleet of the NGM Group (including the Vessel) against war and political risks. The policy expressly incorporated the American Institute Hull War Risks and Strikes Clauses dated 1 December 1977 and their Addendum dated 1 April 1984 (the **American Clauses**).

War risks: first instance

The Insureds claimed under the policy asserting that the Vessel became a constructive total loss by virtue of being detained for a period longer than 6 months.

At first instance, Insurers denied the claim on four different grounds including that the claim fell within the following exclusion clause 1(e) of the American Clauses:

> *This insurance does not cover any loss, damage or expense caused by, resulting from or incurred as a consequence of:*
>
> *(…)*
>
> *(e) Arrest, restraint or detainment under customs or quarantine regulations and similar arrests, restraints or detainments not arising from actual or impending hostilities (…).*

Insurers argued that exclusion 1(e) applied on the basis that the detention of the Vessel fell within the words *"similar arrests, restraints or detainments not arising from actual or impending hostilities"*.

Dias J considered the meaning of the word *"similar"* within the exclusion and held that a detainment would be *"similar"* if the underlying purpose and objective of the detainment was materially the same as the underlying purpose and objective of a detainment under customs or quarantine regulations. Effectively, the inclusion of the word "similar" had the effect of excluding cover for arrests for breach of any regulation which in substance equated to a customs or quarantine regulation i.e. a law which, although not expressly labelled as a customs or quarantine regulation, had the same underlying purpose and objective. In support, Dias J referred to the construction of a corresponding exclusion in clause 4.1.5 of the English Institute War and Strikes Clauses 1/10/83 (the **English Clauses**) in the cases of *The Kleovoulos of Rhodes*[2] and *The Anita*[3].

On the facts, Dias J found that the arrest of the Vessel was not sufficiently similar to an arrest under customs or quarantine regulations to attract the operation of the exclusion.

War risks: appeal

On appeal, Insurers submitted that Dias J had erred in thinking that the wording of exclusion 1(e) was intended to achieve the same result as clause 4.1.5 of the English Clauses, which excludes *"arrest restraint detainment confiscation or expropriation under quarantine regulations or by reason of infringement of any customs or trading regulations"*.

Insurers advanced a wider construction of exclusion 1(e) which restricted cover for any detention under ordinary peacetime laws. Alternatively, on a narrower construction, Insurers submitted that both customs and quarantine regulations concern the control by states of the introduction of people or things into the state or its territorial waters. Accordingly, Insurers submitted that the term *"similar"* should be interpreted as covering any exercise by a state of control over its territorial waters.

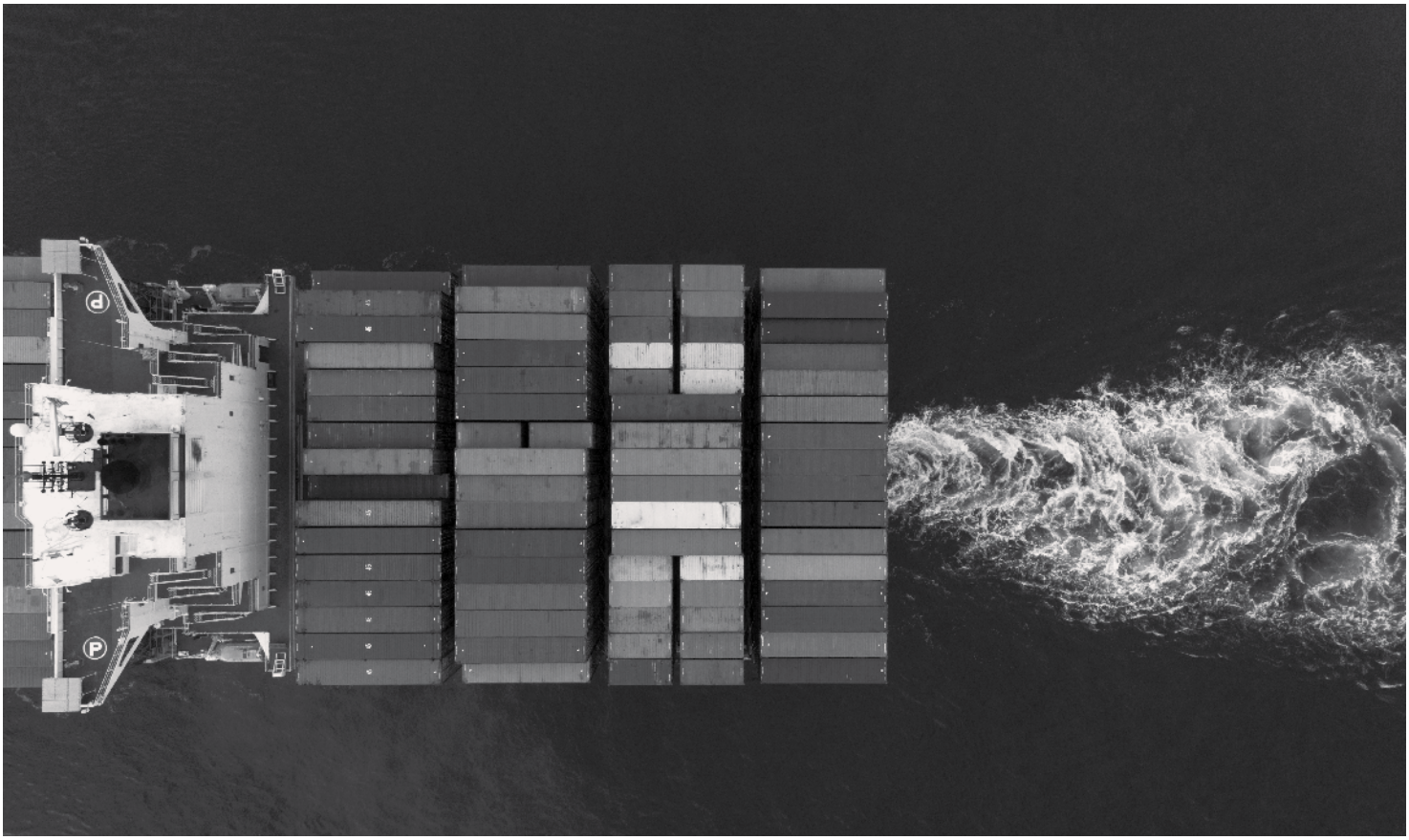
The Court of Appeal rejected both the wide and narrower construction advanced by Insurers. They held that Insurers' wider construction disregarded the need for the detention to have been made under a regulation which is similar to customs or quarantine regulations and rendered the reference to customs or quarantine regulations superfluous ". They separately rejected Insurers' narrower construction, that the construction should proceed on the basis that customs and quarantine regulations are members of the same *genus* (kind, type, class, category) of regulation, which was not the case.

The Court of Appeal held that exclusion 1(e) simply refers to two different kinds of regulations and extends to arrests under other regulations which have a similar purpose to either of them. Accordingly, the wording *"and similar"* in exclusion 1(e) refers to the detention under regulations which have a similar purpose to regulations concerning the import of goods or the protection of health. Detention under a regulation concerned with permission to anchor in territorial waters could not be regarded as falling within the wording of exclusion 1(e).

Interestingly, Males LJ remarked that no significance should be attached to the fact that clause 4.1.5 of the English Clauses exclude detentions arising "under" quarantine regulations but "by reason of" infringement of customs' regulations. Contrary to the finding of Dias J, the words "by reason of" are not wider in scope. Instead, Males J remarked that he considered the better view to be that *"[…] these are equivalent wordings and would be so understood by business people"*.[4]

The Court of Appeal dismissed Insurers' appeal on the construction of exclusion 1(e).

2. [2003] EWCA Civ 12
3. [1970] 2 Lloyd's Rep 365
4. [55]



The duty of fair presentation

A separate issue arose in this case because the Insureds did not disclose to Insurers that the sole director of the Vessel's registered owner – a one ship company and named insured under the policy - was the subject of criminal charges (which had by the time of judgment been discontinued). Insurers' position was that this amounted to a breach of the duty of fair presentation laid down in section 3 of the Insurance Act 2015), which gave them a complete defence to the claim.

The duty of fair presentation requires an insured to disclose to its insurer all material facts which it knows or ought to know (or at the very least disclosing sufficient information to put an insurer on notice that it needs to make further enquiries). When determining what material facts are known to an insured which is a company, English law looks to the knowledge of senior management or individuals responsible for insurance. Section 4(8)(c) of the Act defines senior management as *"those individuals who play significant roles in the making of decisions about how the insured's activities are to be managed or organised"*.[5]

When determining knowledge of senior management, a court will look at what they actually knew in the circumstances, and what they should reasonably have known upon a reasonable search of available information.

Fair presentation: first instance

Dias J held that the sole director of the Vessel's owner did not form part of the Insureds' senior management for the purposes of the Insurance Act because he could only act on instructions from other senior individuals within the NGM Group (to which the Vessel's registered owner belonged). He exercised no independent judgement and made no autonomous decisions. When acting, he only did so to carry out the decisions of the NGM Group and if a third party was dealing with the registered owner, they would have regarded themselves, in practice, as dealing with the NGM Group.

As it was only the sole director who had knowledge of the charges, and as the sole director was not considered to form part of senior management, the Insureds were held not to have actual knowledge of the charges.

As to whether senior management ought to have known of the charges, Dias J considered that a reasonable search would not involve making enquiries into whether there were any pending charges against the sole director. The sole director of the registered owner had a purely administrative function and knew nothing about the risk to be insured so making enquiries of this nature would have no purpose. Separately, the NGM Group had a long-standing relationship of trust and confidence with the sole director, which meant it would not be usual or reasonable to make enquiries of this nature.

Fair presentation: appeal

On appeal, Insurers submitted that a sole director of a corporate insured with no employees will always be part of senior management and that details of the charges should have been disclosed. Insurers argued that the registered owner had an administrative function and the sole director had a significant role in carrying this out.

Males LJ considered that Insurers were wrong to say that the registered owner had a purely administrative function. They also entered into

5. [68]

bills of lading and charterparties and the sole director had no role whatsoever in making decisions about acquiring contractual rights and undertaking liabilities under contracts of this nature. As a result, the Court of Appeal determined that the sole director did not form part of the Insureds' senior management, as defined in the Insurance Act, and, therefore, the Insureds' could not be deemed to have actual knowledge of the charges.

As to whether the Insureds' ought to have known about the charges, Males LJ agreed with Dias J that the making of reasonable enquiries did not require the sole director to be asked whether he knew of any circumstances which might affect the insured risk. The sole director had no operational role or function regarding the trading of the Vessel and would not have known anything about the risk to be insured. The Court of Appeal therefore considered that enquiries of this nature directed to the sole director would have been pointless.

Given that senior management at none of the Insureds had actual nor constructive knowledge of the charges, the Insureds were under no duty to disclose the charges to Insurers.

Conclusion

The Court of Appeal has upheld a narrow interpretation of the exclusion 1(e) of the American Clauses. It's construction of the American Clauses will be welcome news for policyholders as exclusion 1(e) will only be triggered in the event that arrest, restraint or detainment is causatively linked to customs or quarantine regulations or alternative regulations that share the same objective and purpose. A wider reading of this exclusion which sought to capture all manner of peacetime detentions has been rejected.

Given the limited authority on the Insurance Act 2015, the Court of Appeal's judgment will also be of wider interest to both (re)insurers and policyholders.

When determining who falls within the insured's "senior management" for the purposes of section 4(8)(c) of the Insurance Act and the duty of fair presentation, the Court's judgment provides helpful guidance that a sole director of a corporate insured with no employees need not necessarily be part of that insured's senior management. Conversely, Males LJ observed that *"[a] person may play a significant role in the making of decisions about how a company's activities are to be managed or organised without holding any formal position in, or being an employee of, the company"*[6]. The issue of who made up the Insureds' senior management in this case did not need to be decided, but it is clear that what is required is an "evaluative assessment" comprised of identifying an insured's activities, identifying who makes decisions about how those activities are to be managed and organised, and considering the extent of each individual's role in decision making. This does however mean in practice that there may be a level of uncertainty as to whose knowledge will be considered relevant to the insurance.

6. [95]

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