Neutral Citation Number: [2022] EWHC 1169 (Comm)

Case No: CL-2020-000337

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/05/2022

Before:

MR JUSTICE CALVER

- -

Between:

PIRAEUS BANK A.E.	**Claimant**
– and –	
(1) ANTARES UNDERWRITING LIMITED (on its own behalf and on behalf of all members of syndicate no. 1274 at Lloyd's for the 2014 underwriting year of account) **(2) CHAUCER CORPORATE CAPITAL (NO. 3) LIMITED** (as the sole underwriting member of Syndicate no. 1084 at Lloyd's for the 2014 underwriting year of account) **(3) HARDY UNDERWRITING LIMITED** (as the sole underwriting member of Syndicate no. 382 at Lloyd's for the 2014 underwriting year of account) **(4) ENDURANCE CORPORATE CAPITAL LIMITED** (as the sole underwriting member of Syndicate no. 5151 at Lloyd's for the 2014 underwriting year of account) **(5) MSI CORPORATE CAPITAL LIMITED** (as the sole underwriting member of Syndicate no. 3210 at Lloyd's for the 2014 underwriting year of account) **(6) LIBERTY CORPORATE CAPITAL LIMITED** (as the sole capital provider of Syndicate no. 4472 at Lloyd's for the 2014 underwriting year of account and also as the sole capital provider of Pioneer PCM Consortium no. 9981 at Lloyd's for the 2014 underwriting year of account) **(7) ARGENTA UNDERWRITING NO. 3 LIMITED** (on its own behalf and on behalf of all members of Syndicate no. 2121 at Lloyd's for the 2014 underwriting year of account) **(8) SCOR UNDERWRITING LIMITED**	**Defendants**

(as the sole underwriting member of Syndicate no. 2015
at Lloyd's for the 2014
underwriting year of account)
(9) SKULD I LIMITED
(on its own behalf and on behalf of all members of
Syndicate no. 1897 at Lloyd's for
the 2014 underwriting year of account)
(10) FLECTAT LIMITED
(on its own behalf and on behalf of all members of
Syndicate no. 4444 at Lloyd's for the
2014 underwriting year of account and also on behalf of
all members of Syndicate no. 958 at Lloyd's for the 2014
underwriting year of account)
(11) APRILGRANGE LIMITED
(on its own behalf and on behalf of all members of
Syndicate no. 5000 at Lloyd's for the
2014 underwriting year of account)
(12) ARK CORPORATE MEMBER LIMITED
(on its own behalf and on behalf of all members of
Syndicate no. 4020 at Lloyd's for the
2014 underwriting year of account)
(13) NAVIGATORS INSURANCE COMPANY

- - - - - - - - - - - - - - - - - - - -
- - - - - - - - - - - - - - - - - - - -

Peter MacDonald Eggers QC and Sarah Martin (instructed by **Reed Smith LLP**) for the **Claimant**
Guy Blackwood QC and Benjamin Coffer (instructed by **Kennedys Law LLP**) for the **Defendants**

Hearing dates: 28 March 2022 to 7 April 2022

- - - - - - - - - - - - - - - - - - - -

JUDGMENT

This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 10:00 on 17/05/22.

Mr Justice Calver:

(A) THE ISSUE BEFORE THE COURT

1. This case concerns whether the prolonged detention of a vessel in Venezuela gave rise to a constructive total loss of that vessel under the owners' war risks policy and if so, whether the mortgagees under a mortgagees' interest policy of insurance can recover an indemnity in respect of their loss as assignees and loss payees under the owners' war risks policy.

(B) FACTUAL BACKGROUND TO THE DISPUTED LEGAL ISSUES

(1) THE PARTIES

2. Piraeus Bank A.E. ("**the Bank**") is a company incorporated in Greece, engaged in the business of providing banking and related services. It is the mortgagee of the vessel '*ZouZou*' ("**the Vessel**") and the assured under a Mortgagees' Interest Insurance Policy bearing unique market reference B0618 B49016030 ("**the MII Policy**").

3. The First to Twelfth Defendants are members of syndicates which underwrote insurance at Lloyd's for the 2014 year of account, and the Thirteenth Defendant is a U.S. insurance and reinsurance company, and they underwrote the MII Policy (collectively, "**the Insurers**").

4. The managers of the Vessel were Opera S.A, the latter having entered into a Management Agreement on 14 May 2013 with the owner of the Vessel, Doran Navigation Inc ("**the Owners**").

5. The Bank and the Owners entered into a first preferred mortgage dated 27 December 2013 (with addenda thereto dated 3 April 2014 and 22 August 2016) and a second preferred mortgage dated 27 December 2013 (with an addendum thereto dated 22 August 2016).

(2) THE WAR RISKS POLICY

6. By a certificate of entry dated 22 December 2014 issued by the Hellenic Mutual War Risks Association ("**the Club**"), the Vessel was insured against war risks on the terms and conditions set out in the rules of the Club in force at the relevant time ("**the Club Rules**"), for the period 1 January 2015 to 31 December 2015 ("**the War Risks Policy**"). The War Risks Policy also incorporated, and was subject to, the terms of two notices of assignment dated 20 January 2010 in favour of the Bank (as first mortgagee and second mortgagee). The War Risks Policy and certificate of entry stated that the Club Rules and all contracts of insurance were subject to the Marine Insurance Act 1906 ("**MIA**").

7. The War Risks Policy and certificate of entry also stated that a Letter of Undertaking dated 29 February 2012 from the Club to the Bank remained valid and in place. The Letter of Undertaking dated 29 February 2012 in respect of the first mortgage: (a) recognised and consented to the notice of assignment dated 20 January 2010 made by the Owners; (b) undertook to hold the benefits of the insurance and any renewal to the Bank's order; and (c) incorporated into the certificate of entry a loss payable clause under which "*claims payable hereunder exceeding USD 500,000 and those payable in respect of an actual, constructive, arranged, agreed or compromised total loss shall be payable to the First Mortgagee(s), and all other claims shall be paid to the shipowner unless and until the Association has received notice in writing from the First Mortgagee(s) of a default under the First Mortgage in which event all claims shall be payable to the First Mortgagee(s).*" By a separate Letter of Undertaking dated 29 February 2012, references to the first mortgage were replaced by references to an identically-worded second mortgage.

8. The Bank was accordingly the assignee of the War Risks Policy, which had an agreed value in respect of hull and machinery of US$44,000,000 and an increased value of US$11,000,000. The Vessel was therefore insured for a total value of US$55,000,000.

9. The War Risks Policy insured the Owners of the Vessel against loss or damage caused by (*inter alia*):

   i) "*capture, seizure, arrest, restraint or detainment, and the consequences thereof or any attempt thereat*" *(Rule 2A.2.2)*

   ii) "*any terrorist or any person acting maliciously, or from a political, religious or ideological motive*" *(Rule 2A.2.5); and*

   iii) "*confiscation or expropriation*" *(Rule 2A.2.7).*

10. The War Risks Policy contained a deeming provision under Rule 3.14.2, whereby if the Vessel was detained for more than 12 months, the Owners would be deemed to have been deprived of possession without any likelihood of recovery:

> "*If an Owner is deprived of the free use and disposal of an Entered Ship by capture, seizure, arrest, restraint, detainment, confiscation or expropriation ...*
>
> *3.14.2 if such deprivation lasts for a continuous period of 12 months, the Owner shall be deemed to have been deprived of the possession of the ship without any likelihood of recovery*".

11. The War Risks Policy also included the following exclusions:

> "*An Owner of an Entered Ship is not insured for any loss, damage, liability, cost or expense arising out of action taken by any state or public or local authority:*
>
> *3.5.1 under the criminal law of any state; or*
>
> *3.5.2 on the grounds of any alleged contravention of the laws of any state ...*".

(3) THE MII POLICY

12. Pursuant to the terms of the MII Policy, the Insurers agreed to insure the Bank to cover all vessels mortgaged to and declared by it under the policy during the period from 1 July 2014 to 30 June 2015 inclusive. The MII Policy incorporated Mortgagees' Interest Insurance Wording as *per* Master Cover no. B49001118 ("**the MII Wording**").

13. The Bank made a declaration dated 23 January 2015 under the MII Policy in respect of the Vessel as well as another vessel, *the Marios G*, for the period of 12 months from 20 January 2015 inclusive, subject to specified sums insured. The sums insured were amended by endorsement no. 140 dated 23 August 2015 with effect from 4 July 2015, so as to read:

USD 79,413,493.65	04/07/2015 to 29/08/2015
USD 79,028,493.65	30/08/2015 to 20/10/2015
USD 78,861,293.65	21/10/2015 to 30/11/2015
USD 78,476,293.65	01/12/2015 to 19/01/2016

14. The MII Policy contained the following description of the type of insurance:

"*TYPE: MARINE HULL INSURANCE/ MARINE LIABILITY INSURANCE*"

15. The MII Policy also contained the following definition of 'Interests':

> "*INTERESTS: 1) Mortgagee and/or Lessors and/or Innocent Owners Interest as Assignees and Loss Payees under the owners Policies and Club Entries (as defined in the Conditions hereto) to the extent of their outstanding indebtedness or interests, subject only to the maximum Sum Insured permitted hereon.*"

16. Pursuant to Clause 1 of the MII Wording, the MII Policy was "*to indemnify the Insured for loss of, or damage to, or liability arising in connection with the Vessel.*

i) *Which is prima facie covered by the Owners' Policies and/or Club Entries ... but in respect of which, there is subsequent non-payment ... by Underwriters of the Owners' Policies and/or Club Entries resulting from any act or omission of any one or more of the Owners and/or Operators and/or Charterers and/or Managers of the Vessel concerned and/or their Servants and/or Agents or anyone else held responsible (hereinafter together called the 'Relevant Parties') including any breach of warranty or condition whether express or implied or any misrepresentation or non-disclosure or alleged non-disclosure of any fact or circumstances of any kind whatsoever, or the application of any provision for a time limitation on the presentation of claims or*

ii) *Which occurs by virtue of any alleged deliberate, negligent or accidental act or omission or any knowledge or privity of any of the Relevant Parties including the deliberate or negligent casting away or damaging of the Vessel or the Vessel being unseaworthy or inadequately equipped, manned or certified ... or*

iii) *Which, by virtue of any act or omission, any breach or alleged breach of warranty or condition whether expressed or implied, any misrepresentation or non-disclosure, any deliberate, negligent, or accidental act or omission or any knowledge or privity of any of the Relevant Parties, including the deliberate or negligent casting away or damaging of the Vessel or the Vessel being unseaworthy or inadequately equipped, manned, certified (including but not limited to requirements set out in Conventions and/or by class societies) or having breached the stipulated geographical warranties or has deviated from the designated or usual and customary route which results in a compromise settlement by Underwriters of the Owners' Policies or Club Entries or*

iv) *Which arises following the occurrence of a Third Party claim in connection with the Vessel resulting in the exercise of a lien having priority over the mortgage of the Vessel in favour of the Insured, the amount of which is allegedly not recoverable from Underwriters of the Owners' Policies or the Club Entries by virtue of any act, error, omission or privity of any of the Relevant Parties or*

v) *In the event of the total Loss of the Mortgaged vessel which is allegedly not recoverable under either Owners' hull and machinery or war risk policies due to a dispute on the grounds that the loss has not been proved to have been*

proximately caused by a peril insured under those policies and is not otherwise excluded from payment by any exclusion or other provision therein or

vi) *In the event of any of the Owners Policies or Club Entries being cancelled, suspended or terminated under the provisions of a Hull Classification Clause or as a result of non-compliance with I.S.M, ISPS requirements or any other international convention, or any other cancellation, suspension or termination provision in the Owners Policies or Club Entries. (Such cancellation, suspension or termination of the Owners Policies or Club Entries will not be held to be a breach under the terms and conditions provided by this policy subject to no explicit consent of the Insured to any act or omission that would result in such cancellation, suspension or termination).*"

17. The measure of indemnity payable under the MII Policy, in the event of a valid claim, is calculated in accordance with Clause 4(i) of the MII Wording as follows:

"*(i) The indemnity payable hereunder shall not be determined by reference to the sound market value of the Vessel or Insurable value of the Vessel but shall be an amount equal to whichever is the least of either:-*

(a) the amount not paid under the Owners' Policies / Club Entries by reason of the circumstances specified in Clause 1 (COVERAGES) of the wording, or

(b) the Total Indebtedness due to the Insured at the time of payment under Clause 4(iii) hereof, or

(c) the sum insured stated in the relevant policy and/or stated in the declaration attaching hereto."

"'Total Indebtedness' includes all sums of money due and owing or to become due and owing by the Owners to the Insured under the Mortgage including:

any principal sum, interest, costs, commission, expenses and any and all other sums whatsoever due or to become due to the Insured from the Owners or for their account, whether alone or jointly with others, including any outstanding liabilities when incurred by the Insured for the Owners and all liabilities to the Insured or incurred by the Insured on the Owners behalf of any Bills, Guarantees or otherwise howsoever."

18. Clauses 4(ii) and (iii) of the MII Wording then provide as follows:

"*(ii) For the purpose of this Insurance there shall be deemed to be a non-payment by Underwriters on Owners' Policies and/or Club Entries after a reasonable period not exceeding 365 days has elapsed from the date which Owners or the Insured has demanded payment under the Owners Policy and/or Club Entries. The Insured shall formally present its claim hereunder when it has become apparent to the Insured that Underwriters have denied liability or failed to pay.*

(iii) The indemnity payable hereunder shall be paid within one calendar month of the date on which the Insured shall have presented its claim in writing to the Underwriters of this policy."

(4) THE DETENTION OF THE VESSEL AND THE ATTEMPTS TO HAVE IT RELEASED

(i) Circumstances giving rise to an allegation of fuel smuggling

19. I find the following facts as regards the detention of the Vessel in this case.

20. On 16 August 2015 the Vessel called at Puerto La Cruz, Venezuela, in order to load a cargo of high sulphur diesel oil ("**HSDO**").

21. Pursuant to a time charterparty between the Owners and Transportes del Alba Inc ("**Transalba**"), that was entered into (or extended) on 8 May 2015, the Vessel was chartered for a period of approximately 24 months for the carriage of all lawful merchandise, including clean petroleum products. Transalba is understood to be a joint venture between Petróleos de Venezuela S.A. ("**PDVSA**"), through its affiliated company PDVSA Cuba S.A., and Internacional Maritima S.A., a Cuban entity.

22. Pursuant to a sub-charter between Transalba and PDVSA also entered into on 8 May 2015, Transalba sub-chartered the Vessel to PDVSA for a period of approximately 24 months for the carriage of all lawful merchandise, including clean petroleum products.

23. The Voyage Orders dated 19 August 2015 show that the orders were to load, in Puerto La Cruz, 80,000 barrels (+/- 10%) of HSDO and 40,000 barrels (+/- 10%) of ultra low sulphur diesel oil and to carry the cargo to PDVSA's terminals at El Palito and Punta Cardon, Venezuela respectively. It was, therefore, a carriage to be performed internally within Venezuela.

24. After arrival at Puerto La Cruz, the Vessel discharged her previous cargo at the load port, and unloading operations were completed at 2030 hours local time on 20 August 2015, when the Vessel tendered notice of readiness.

25. At 0315 hours on 21 August 2015, the Vessel commenced loading the HSDO, which was completed by 0045 hours on 22 August 2015. However, during the loading operation, HSDO entered into the Vessel's No. 6 cargo tanks. The Cargo Distribution Plan prepared on 20 August 2015 shows that only tanks numbers 1 and 2 were intended to have fuel cargo in them.

26. After the completion of loading, the Vessel's Master sent an email to PDVSA and others, in which he stated, with reference to the HSDO, "*pls find below ships/bl figures with applied [Vessel Experience Factor] after loading at Puerto La Cruz*". The figures were as follows (with "NBBLS" meaning net barrels): "*SHIPS FIGURE: 88,563.05 NBBLS*" *and* "*B/L FIGURE: 80,158.0 NBBLS*", with the difference being "*8,405.05 NBBLS*" (which was in the order of a 10.486 percentage difference). The Master's message concluded with the request: "*Pls revert authorization / instructions to sign BL's*". PDVSA did not reply to this message.

27. On 22 August 2015, during an inspection performed by an inspector for the Autonomous Service of Measurements and Hydrocarbons ("**ASMH**"), a body which is

part of the Venezuelan Ministry of Oil and responsible for monitoring the procedure and operations relating to oil trading in Venezuelan shipping terminals and ports, it was noticed that the Vessel's No. 6 tanks had been loaded, despite their not having been nominated for loading. The apparent irregularity was reported to the PDVSA Protection and Loss Control Office, East Refinery ("**PLCO**"). On or about 0730 hours local time, the PLCO reported the apparent irregularity to the Bolivarian National Guard.

28. Venezuelan law enforcement officials accordingly became aware that there was HSDO unaccountably present in the Vessel's No. 6 tanks.

29. At 16:00 local time on 22 August 2015, 'Irregularity Minutes' ('*Acta de Irregularidad*') relating to "*Irregularity in the final inspection of the M/T ZouZou*", were issued by the Co-ordinator of the Guaraguao Terminal, Eastern Region of the ASMH, which concluded that "*an illegal loading is found on lateral tanks 6 with the volume of 12286 barrels*".

30. Later that day, Venezuelan law enforcement officials apprehended seven individuals in connection with the apparent irregularity in relation to the HSDO which had been loaded, comprising three employees of PDVSA who had been involved in the loading operation (Mr Victor Manuel La Rosa Vargas, Mr Miguel Jose Garcia Lopez and Mr Freddy Antonio Briceno Aguilera), the Vessel's Master (Mr Don Bastian Tio) and three other crew members (Mr Eric Ortilla Cortez (Chief Officer), Mr Jerusalem Untaran Salcedo (Second Officer), and Mr Marlon Javier Cabrera (Bosun)) (collectively, "**the Criminal Defendants**"). On the same day (22 August 2015), the Vessel was detained by the Bolivarian National Guard in Guaraguao, Puerto La Cruz.

31. On or about the same date, Clyde & Co (Venezuela) was instructed by the Vessel's P&I Club (the London Steamship Owners Mutual Insurance Association Ltd) to represent the Owners' interests locally, and in particular to seek to secure the Vessel's release.

32. The crew members' phones were seized on 22 and 23 August 2015.

33. On 23 August 2015, a documentary and physical inspection of the Vessel was conducted on behalf of the Venezuelan prosecutors ("**the Prosecutors**") and a technical report dated 24 August 2015 was prepared by a marine surveyor, Mr David Ramírez, for that purpose. This was "*a report on the condition of cargo tanks*", which found that "*a total volume of 75,347.19 barrels of high sulphur diesel product, and 11,861.35 barrels of the same product in port and starboard cargo tanks no. 6 were registered, which differs from the cargo distribution plan prepared before the start of operations*".

34. On 24 August 2015, Ms Osmarlenys Lopez, a surveyor from the ASMH, was interviewed at 1145 local time by Sub-Inspector Mario Bello of the Bolivarian Intelligence Service. Two other officers of the ASMH, "Rafael" and "Alfredo", were interviewed on 25 August 2015. In an interview statement dated 24 August 2015, Ms Lopez stated that when she went to inspect the Vessel at about 0120 local time on 22 August 2015, she noticed that besides the Vessel's No. 1 and 2 tanks, the Vessel's No. 6 tanks were also loaded. She stated that when she sought to measure the Vessel's No. 6 tanks, the officer of the Vessel asked her not to measure them, and subsequently, Mr Victor de La Rosa, the documentary supervisor and an employee of PDVSA, asked her not to say anything. She further stated that he said that his family had been threatened, and asked her to put the presence of HSDO in the No. 6 tanks down to being "*an*

operational problem, due to an accident with a broken stitch in the diesel line". Ms Lopez also stated that she understood that her colleagues, Leonardo Gamboa and José Alcala, had been offered bribes in connection with their investigation. This contrasts with the description given by the Master in his narrative statement of events dated 2 September 2015, where he notes that at 0306 local time on 22 August 2015, when asked by the chief officer if he could inspect the tanks, he told him that "*it is not necessary because only 1 p/s & 2 p/s are loaded and the rest were empty. But if they insist then do so by all means.*"[1]

(ii) The ensuing Venezuelan legal proceedings and Owners' attempts to have the Vessel released

35. Following an arraignment hearing held between 25-27 August 2015, in the Court of Control No. 2 of the Criminal Judicial Circuit of the State of Anzoategui, Venezuela ("**the Criminal Control Court**") Judge Molina ordered on 27 August 2015 ("**the Detention Order**") that:

i) The Criminal Defendants be detained for the alleged commission of the offences of (a) aggravated smuggling of fuel under Articles 3 and 20 of the Law on the Crime of Smuggling ("**the Anti-Smuggling Act**"); and (b) conspiracy to commit a crime (on the Bank's case) or criminal association (on the Insurers' case) under Article 37 of the 2012 Law Against Organized Crime Act ("**LAOC**"). No allegations of wrongdoing were made against the Owners;

ii) The crew member-defendants (Mr Tio, Mr Salcedo, Mr Cabrera and Mr Cortez) be detained under arrest on board the Vessel, and guarded by members of the National Guard, and that the PDVSA defendants be detained in a detention facility administered by the Bolivarian Intelligence Service (known as 'the SEBIN');

iii) The Criminal Defendants' bank accounts and assets be frozen, under Articles 585 and 588 of the Civil Procedure Code, Article 518 of the 2012 Organic Code of Criminal Procedure ("**the OCCP**"), and Article 56 of the LAOC; and

iv) The Vessel be made subject to "*preventive seizure*" under Articles 4.4 and 55 of the LAOC on the grounds that it was used as a means to carry out the alleged criminal activity; that it be at the order and disposal of the National Office Against Organised Crime (not the Prosecutors); and that it be mobilised to Pozuelos Bay, Venezuela under naval guard.

36. On 31 August 2015, the First Instance Criminal Control Court of Barcelona ordered that the Vessel be moved from berth No. 1 of the marine terminal of PDVSA Guaraguao, to No. 6 anchorage in Pozuelos Bay, where it would be anchored with the crew member defendants on board, under the custody of the Coast Guard.

37. On 4 September 2015, Clyde & Co (Venezuela) filed an appeal (on behalf of the accused Criminal Defendants) against the Detention Order to the Second Criminal Control Court of First Instance. Ms Cristina Mujica ("**Ms Mujica**"), an associate at

[1] On 27 August 2015, four Prosecutors filed a request to take 'Anticipated Evidence' from Ms Osmarlenys Lopez.

Clyde & Co (Venezuela), gave evidence before this court that the focus of the appeal was upon the fact that there was a "*total absence of criminality*" on the part of the Criminal Defendants. Ms Mujica explained that, in respect of the criminal offence of smuggling, the "*total absence of criminality*" (no criminal intent) was demonstrated by the fact that the material that was supposed to be smuggled (i.e. fuel) had never left the country. The Vessel was only granted a special permission of cabotage and, therefore, could not have been engaged in smuggling fuel from Venezuela.

38. During the 45-day preliminary investigation period allowed under Venezuelan law after the Detention Order, Clyde & Co (Venezuela) submitted a total of seven requests to the Prosecutors for evidence under Article 287 of the Venezuelan Criminal Procedure Code 2012[2]. On 25 September 2015, Clyde & Co (Venezuela) issued Requests 1, 2 and 3, requesting the Prosecutors to pursue certain lines of inquiry. On 28 September 2015, a fourth request was issued by Clyde & Co (Venezuela), and on 30 September 2015, a fifth request was issued.

39. On 30 September 2015, Mr Rodolfo Mata of the Orinoco Surveying Group C.A. ("**Orinoco**") conducted an inspection on board the Vessel, with assistance from the Vessel's Master and Chief Officer, but in which the Prosecutors did not participate. Orinoco issued a report of its findings on the same date ("**the Orinoco Report**"), which remarked upon the deviation of the HSDO into the No. 6 tanks as follows:

    i) According to the loading plan presented to the terminal, the Vessel's cargo tanks No. 1 and No. 2 were designated to receive the cargo of HSDO.

    ii) During the inspection it was found that the valves of the double segregation system that connected the common line for all tanks and line wing tanks marked with 'C0057' and 'C0058' were identified as closed with a visual signal used in the maritime field to enable the crew to identify from a distance whether a valve is open or closed, namely tying a hitch knot to the steer of the valve.

    iii) However, the mechanical device provided at the base of the valve, which indicated the actual position of the internal components of the valve, clearly indicated that despite the hitch knot being in closed position, the valve No. C0057 was "*100% open*" instead.

    iv) This condition "*eliminates … segregation*" and therefore threatens the loading process since "*if there is a defect in the seal itself, it would cause the deviation of the product to the No. 6 tanks*". The No. 6 tanks were not included in the loading plan for loading operations of the parcel of HSDO, nor for the parcel of low sulphur diesel oil.

[2] *"287. The accused, the persons that have been allowed to intervene in the proceedings and their representatives may request the Prosecutor to take actions to clarify the facts. The Public Ministry will carry them out if it deems them pertinent and useful, and shall record any opinion to the contrary for all subsequent effects."*

v) If that condition existed at the time of loading the HSDO, the Chief Officer may have wrongly inferred that the system was properly aligned when actually it was wrongly configured.

vi) The time taken for preparation and cleaning of the Vessel's cargo tanks before loading was "*relatively short*", and the crew is likely to have overlooked the need to check the valves and lines of segregation. According to the Chief Officer, the preparation procedure was carried out "*in [a] hurry because the ship was not undocked for cleaning as she will remain alongside for loading the next cargo*".

vii) If the deviation of the HSDO to the No. 6 tanks (described, collectively, as a "side tank") was not a mistake, but intentional, spreading the cargo in tanks which are distant from each other (No. 1 and No. 6) would be contrary to loading procedures, common loading practice and the Vessel's loading manual, because "*it represents a risk to the navigation*". This is something that all merchant marine officers with knowledge of "*load factor*" would avoid, since "*leaving the tanks closer to the amidships empty represents a risk to the structure of the Vessel as this causes great stress on it*."

40. On 1 October 2015, a sixth evidential request was submitted to the Prosecutors by Clyde & Co (Venezuela).

41. In an email dated 2 October 2015, it can be seen that the contemporaneous assessment of Clyde & Co (Venezuela) was that the Prosecutors were convinced that the crew had been involved in the smuggling of fuel.

42. On 5 October 2015, Clyde & Co (Venezuela) submitted a brief petitioning *the Prosecutors* for the release of the Vessel. However, Ms Mujica accepted in cross-examination that (as is also agreed by the expert witnesses) only the criminal judge (and not the Prosecutors) had the power to revoke, modify or lift a detention order, but that she was seeking to persuade the Prosecutors voluntarily to request the Court to release of the Vessel.

43. On 7 October 2015, a seventh evidential request was submitted by Clyde & Co (Venezuela) in order to file with the Prosecutors the Orinoco Report. On the same day, Clyde & Co (Venezuela) also submitted a brief requesting the dismissal of the case in respect of the accused crew members.

44. All seven of the requests for evidence submitted by Clyde & Co (Venezuela) refer to this phase being essentially of "*research and investigation*". A number of the requests, or at least parts thereof, required investigation of the Vessel:

i) Request 1 asked for a naval inspector to be assigned to survey the tanks of the Vessel and to verify the nature of the interconnections, and for a naval expert to be assigned in order to collect information from the electronic chart display and information system onboard the Vessel.

ii) Request 2 asked for a naval expert to be appointed to inspect, measure and gauge the cargo tanks, particularly the valves and pipes, and to conduct a detailed technical inspection of the cargo control room of the Vessel.

iii) Request 3 asked a naval expert to rebuild a trans-shipment vessel in order to determine whether it would have been possible to perform the manoeuvres required for trans-shipment.

45. Other requests for evidence submitted by Clyde & Co (Venezuela) included the following:

i) Request 1 also asked the Harbour Master of Puerto la Cruz Anzoategui for information concerning the sailing permit given to the Vessel; asked the Maritime Customs of the Anzoategui State division for information relating to the customs clearance given to the Vessel on 24 March 2015 and 16 April 2015; and asked the Harbour Master of Las Piedras in Falcon State for information concerning the departure permission given to the Vessel.

ii) Request 4 asked for a certified copy of the special permit relating to the cabotage trade given to the Vessel, certified copies of the required tax documents that gave rise to the temporary permit granted to the Vessel, and the job descriptions of the crew members, as well as for the translation of such documents from English to Spanish.

iii) Request 5 asked for a technical expert to verify the cell phones of certain of the defendants and also for enquiries to be made of the telephone operators Digitel, Movilnet and Movistar in respect of incoming and outgoing calls from the accused.

iv) Request 6 requested a certified copy of the bill of lading issued for the Vessel as of 22 August 2015 to determine the amount and type of product loaded on the Vessel, and also made enquiries as to the status of the main customs area in Puerto la Cruz.

46. Ms Mujica accepted that when she was making these requests, the view of Clyde & Co (Venezuela) was that the Vessel was essential to the investigation up to 9 October 2015:

> "*Q. At this point you can't possibly have thought that the Vessel was not essential to the investigation, can you, because you were asking for six separate investigations and surveys to be carried out on the Vessel, weren't you?*
>
> *A. At this point, and during the 45 days of investigation provided by the law, we do believe the Vessel is essential.*"[3]

(iii) The Accusation Brief and the factual position as at 9 October 2015

47. On 9 October 2015, the Prosecutors issued a joint Accusation Brief ("**the Accusation Brief**") which was filed on 10 October 2015, in which they formally charged the Criminal Defendants with the offences referred to in paragraph 35(i) above, and requested the Criminal Control Court to continue its preventive seizure of the Vessel. This was a "*foreseeable outcome*" to Clyde & Co (Venezuela), as noted in an email

[3] Day 2/20/2-9; Day 2/26/15-19.

from Mr Fernandez-Concheso (a partner in the firm's maritime team) dated 14 October 2015.

48. Before me, both parties called evidence from eminent professors of Venezuelan law. The Bank adduced evidence from Professor Gómez[4], and the Insurers adduced evidence from Professor Ortiz[5]. I found both expert witnesses to be thoughtful and helpful. Both of the expert witnesses were agreed that no further order of the Criminal Control Court was required in order to continue the seizure of the Vessel. Rather, in the absence of any application to lift the detention, it would remain in place.

49. It is common ground that at the date of the filing of the Accusation Brief, the Owners had not been charged with any offence, and there was no mention of any connection between the Owners and the alleged criminal conduct. However, the Accusation Brief expressly left open the possibility of charging additional persons (which could include the Owners):

> "*for the materialisation of this crime, the violation of technical processes that must be carried out to supply the Vessel with a product which is not nominated is necessary, which requires the participation of several people, who… allowed the fuel supply to be carried out in an illicit way… a fact that under no circumstances could be carried out by a single person individually. The Office of the Public Prosecutor therefore leaves the investigation open in order to identify other possible perpetrators or participants*". (emphasis added)

50. The Prosecutors also expressly made a reserve in the Accusation Brief, known as a '*reserva fiscal*', informing the Court that "*investigations continue to establish whether there is participation in the investigated facts*", and which the expert witnesses agreed would allow the Prosecutor to continue investigating in the criminal proceeding, to charge new persons (which could include the Owners) or to bring additional charges against those already accused.

51. In light of all these matters, it was put to Ms Mujica in cross-examination that, by the time of the issuance of the Accusation Brief on 9 October 2015, the Prosecutors could not possibly have carried out and concluded all of their investigations, including addressing all of the evidential requests submitted by Clyde & Co (Venezuela) and analysing the Orinoco Report (received just two days earlier), and that the Vessel must still have been considered essential to the investigation at this date.

52. Ms Mujica disagreed, stating that "*some [of] this diligence of investigation can be performed in a couple of days or weeks*". In support of this, the Bank's case was that:

    i) Some of the estimates were simply requests for paperwork from other bodies, or the presentation of paperwork, and would only have taken a couple of days;

[4] Professor of Law and the Associate Dean for Graduate Studies and Global Engagement at Florida International University.

[5] Professor of Law at two Venezuelan universities and Head of Public Law and Regulatory Law at InterJuris, a Venezuelan law firm.

ii) Minimal analysis was required by the Prosecutors in relation to the Orinoco Report as this was only 5 pages long and the relevant Article 287 Request summarised its findings and did not ask the Prosecutors to do anything with it;

iii) Preparing the trans-shipment simulation "*could take a couple of weeks [b]ut it could be performed*" (as *per* Ms Mujica's evidence) and that, as at 25 September 2015, when the relevant Request was made, there were precisely two weeks until the Accusation Brief was filed and there was also no suggestion in the Request that the trans-shipment simulation would necessarily require the continued detention of the Vessel;

iv) Insofar as the requests that would have required, or would appear to have required, the continued detention of the Vessel are concerned, none of these requests were made after 25 September 2015, and furthermore, the subject matter of at least two of these (i.e. Request No. 1, sub-request 5 (request for a naval inspector to survey the Vessel's cargo tanks) and Request No. 2, sub-request 2 (request for a naval expert to conduct measuring and gauging of the Vessel's cargo tanks)) had already been covered by an investigative measure completed in August 2015;

v) As regards the request to verify the mobile phones taken from the defendants, Professor Ortiz accepted that the Article 287 Request issued on 30 September 2015 indicated that *"the mobile phones … of the accused defendants were taken at the time of their arrests, so [the phones] weren't on the Vessel, they were with the prosecutor*". It also transpired, as stated in the Response to the Accusation Brief dated 2 November 2015, that the Prosecutors "*refused to carry out computer expertise (cross-checking of calls) and to request from the telephone operators (Digitel, Movilnet and Movistar) a detailed list of incoming and outgoing calls, on the erroneous grounds that these had already been carried out*"; and

vi) Each of the Article 287 Requests note at the bottom that "*We request this honorable office to order the practice of such proceedings, and get a better defense for my clients, before the conclusive act by the Public Prosecutor is filed*". Professor Gómez confirmed that the reference to "*the conclusive act by the Public Prosecutor*" was a reference to the Accusation Brief, meaning that Ms Mujica was requesting these to be performed before the filing of the Accusation Brief.

53. Ms Mujica further observed in her evidence that (as *per* her email of 17 October 2015) Clyde & Co (Venezuela) could "*file as many briefs as possible to the prosecutors and to the court to request the release of the Vessel since in strict legal terms the investigation is over and there shall be no need to maintain the detention of the Vessel*".

54. However, Ms Mujica conceded in cross-examination that the Prosecutors did pay attention to some of their requests, that Clyde & Co (Venezuela) did believe the Vessel was essential to the investigation when making the requests, and that the Vessel could be considered to still be essential to the investigation as at 9 October 2015[6].

[6] See paragraph 46 above.

55. Professor Gómez also accepted in cross-examination that, in order for the Prosecutors to carry out the surveys and the simulated trans-shipment as requested in the requests submitted by Clyde & Co (Venezuela), the Prosecutors would need to have access to the Vessel.

56. In relation to the '*reserva fiscal*' in the Accusation Brief, Professor Gómez gave evidence that this did not necessarily mean that the formal investigation was not closed. His evidence was that the filing of the Accusation Brief marked the conclusion of the preliminary investigation without establishing any connection between the Owners and the alleged crimes, since except for incidentally mentioning the Vessel as the place where the crime was committed (i.e. by using its tanks to store the alleged illicit fuel) and requesting the Court to use it as detention quarters for the arrested crew, the Accusation Brief said nothing about the possible involvement of the Owners in the alleged criminal activities or about the use of the Vessel for any illicit purpose. It was therefore his evidence and the Bank's case that neither the Owners nor the Vessel had any further relevance to the investigation from that point onwards and that the Vessel should have been released, since neither of the two grounds for preventive seizure under Article 55 of the LAOC (i.e. investigation purposes and final confiscation) could be maintained, on the basis that the investigation phase had concluded, and the investigation could never turn into a final confiscation since the Owners were never to be tried.

57. However, as the Insurers point out, since the Prosecutors (i) themselves requested the continued detention of the Vessel; (ii) expressly left the investigation open; and (iii) had been requested shortly before the filing of their Accusation Brief to investigate a whole series of further matters by Clyde & Co (Venezuela), some of which related to the role of the Vessel in the alleged offence, I consider that it is difficult for the Bank to sustain the contention that at that point in time the detention of the Vessel was no longer essential to the investigation.

58. Aside from the fact that the Prosecutors were likely to have needed it in order to carry out at least some of the various evidential requests of the Owners (not least the trans-shipment simulation) and to consider the Orinoco Report (which raised fundamental new issues concerning the way in which the fuel got into the cargo no. 6 tanks and which required, no doubt, careful study even if it was only 5 pages in length), crucially, the Accusation Brief also expressly records the fact that, at this stage, the Prosecutors decided to "*leave the investigation open in order to identify other possible perpetrators or participants*" (which Professor Gómez accepted in cross-examination could have included the Owners). Yet further, the "*reserva fiscal*" expressly referred to the fact that "*the investigations continue*" in order to establish the participants in the investigated facts. It appears to me, therefore, that at this stage the Prosecutors had not yet finally determined whether to charge the Owners, and if that happened, the Vessel might also be required for confiscation purposes after trial.

59. In an email some 3 weeks later and dated 29 October 2015, Clyde & Co (Venezuela) explained to the Owners why the Prosecutors remained suspicious as to the involvement of other parties on board the Vessel at the relevant time:

> "*What prompted the investigation was also that a specific officer of the Ministry of Energy and Mines declared that upon finding the excess, she had confronted PDVSA's terminal personnel who had first threatened her not to report the*

> *situation saying that it was common and being done all the time and secondly that they tried to bribe her. This declaration is extremely harmful. Prosecutors believe this shows that the Terminal personnel is involved in an offence to smuggle out the excess barrels and that without crew complicity the stolen product cannot be transferred to a fraudulent receiver. The belief is further aggravated by the fact that the same witness declares that the First Officer refused to show her that tank.*"

60. The foregoing analysis must also be viewed in light of the fact that there has not been disclosure of the full Prosecutors' file or all of the relevant documentation of Clyde & Co (Venezuela) concerning the merits (or demerits) of their various applications for the release of the Vessel.

61. Despite Professor Gómez's assertion that it was not necessary to see the full Prosecutors' file given they had the Accusation Brief "*which is a very comprehensive document*", Mr Blackwood QC for the Insurers fairly made the point that the Accusation Brief is not "*an encyclopaedic record of everything that the public prosecutors were doing*" and pointed to an email from Ms Mujica dated 18 September 2015 where she notes that she had met the Prosecutors that day who "*in the case of Zou Zou, have perform several surveys and gather most of the information… they are waiting for results from criminal labs, technical report, survey's reports, phones, GPS and the master's computer.*" As these results are not referred to in the Accusation Brief (the only survey reports referred to are the Orinoco Survey and the report of Mr Ramirez – see paragraph 33 above), it appears that the results of those other surveys referred to by Ms Mujica were still being awaited at the time of issue of the Accusation Brief. Indeed, Professor Gómez accepted in cross-examination that the Accusation Brief "*tells us nothing*" about all of Clyde & Co (Venezuela)'s requests for further inspection and evidence, and whether and which surveys and tests were being performed.

62. In all the circumstances I find that it cannot be concluded that the Vessel was no longer essential for the investigation as at 9 October 2015 (and the same conclusion must apply to the Bank's alternative, earlier date of 1 October 2015). Indeed, I consider that the Prosecutors justifiably considered that it remained essential to the investigation at that stage.

(iv) Circumstances leading up to the Owners' Motion for the release of the Vessel

63. After the filing of the Accusation Brief, the next stage in the proceedings was for the Preliminary Hearing to take place before the court. However, on 29 October 2015, the Preliminary Hearing was deferred from 5 November 2015 until 25 November 2015. Subsequently, it appears to have been adjourned further to 12 February 2016.

64. On 2 November 2015, Clyde & Co (Venezuela) (acting on behalf of the accused crew members) submitted a response to the Accusation Brief ('*Submission on the Nullity of the Accusation*') to Judge Molina of the Criminal Control Court. The response also included a request for the preventive seizure order against the Vessel to be lifted.

65. On 13 November 2015, Mr Omar Franco Otavi (acting together with Clyde & Co (Venezuela) on behalf of the accused crew members) submitted an application to the Criminal Control Court for (i) the local reclusion of the accused crew members and (ii)

the Vessel to be permitted to resume its cabotage operations, but this application was refused on 16 November 2015.

66. On 26 November 2015, Mr Idemaro Gonzalez Sulbaran ("**Mr Idemaro Gonzalez**"), Clyde & Co (Venezuela)'s local correspondent in Lake Maracaibo and head of the criminal team, filed with the Second Criminal Control Court of First Instance an appeal against the Detention Order on behalf of the Owners. In the Owners' appeal, Mr Idemaro Gonzalez set out an analysis as to "*the causes that demonstrate the lack of intentionality and non-participation of [the Owners] in the act which gave rise to the investigation*". In cross-examination, Mr Blackwood QC put to each of Ms Mujica and Professor Gómez that this analysis was not relevant to whether the Vessel was essential to the investigation, but that it was relevant to the factors concerning Owners' intention to participate in the offence contained in Article 59 of the LAOC[7]. Ms Mujica responded that "*Article 59 has nothing to do with it*" but at the same time accepted that, in this analysis, the Owners "*took reference from certain aspects of Article 59*". Professor Gómez accepted that it "*could be*" relevant to the factors in Article 59 of the LAOC, but qualified this by emphasising that Venezuelan lawyers are often "*carpet bombing the court by saying: by the way, I have nothing to do with this*" to make clear their position that they have no criminal liability for what has happened. He suggested that one should not read too much into such statements. I do not agree: as will be seen below, the approach taken in this appeal is consistent with that taken in all relevant filings with the court in relation to the requested release of the Vessel.

67. On 17 December 2015, the Court of Appeals of the Criminal Judicial Circuit of the Anzoategui State dismissed the Owners' appeal against the Detention Order.

68. On 12 February 2016, defence counsel for the Criminal Defendants attended the Criminal Control Court for the Preliminary Hearing, but the Prosecutors were not present. The preliminary hearing was accordingly postponed until 8 March 2016. On 8 March 2016, the preliminary hearing was postponed again because of the unavailability of the court file, it being located at the Appeals Court.

69. Between 11-13 March 2016, a partial crew change on board the Vessel – not including the Individual Defendants – took place. Six of the original crew members signed off, and two new crew members signed on. It is Ms Mujica's evidence that "*the crew's presence on board was affecting the strategy for the release of the Vessel*" and that "*moving them was something that it was necessary to do for there to be any possibility of the Vessel being released*".

(v) The Third Party Motion

70. On 24 May 2016, Clyde & Co (Venezuela) filed a Third Party Motion on behalf of the Owners with the Criminal Control Court applying for the Vessel to be released from preventive seizure ("**the Third Party Motion**").

[7] The text of Article 59 is set out in paragraph 147 below.

71. The Third Party Motion is an important document. It expressly refers to Articles 293 and 294 of the OCCP[8] as the basis for the motion, and also referred to the Owners' and charterer's lack of knowledge, intent and participation in the alleged crime as follows:

> "*it is impossible to think that my client or its charterer had any knowledge or participation in the events under investigation … Given therefore that it is proven that in their not being any aspect of a conviction against any director of the company that I represent, what would be appropriate in terms of the law would be to proceed with the release of the Vessel rejecting at the preliminary hearing the request so often made in this document*…
>
> *Your Honour, I shall point out the causes that demonstrate the lack of intent and non-participation in the events that gave rise to this investigation of my client* …
>
> *The actions of the accused [individual Defendants] led to the criminal investigation, where consequently the accusation was made against these citizens, being a highly personal human behaviour not attributable to my client, the principle of personal criminal responsibility necessarily being respected and stipulated in our Penal Code, and therefore the lack of intent of my client and its directors*…
>
> *Considering what has been stated in the previous chapters, it has been shown that my client did not participate in any way in the events under investigation, as well as the lack of intent in the execution of the fact that violated the regulation stipulated in the [LAOC] … Through the accusation and the criminal investigation carried out by the representative of the Office of the Public Prosecutor, it has been shown that there has been no type of participation by my clients in the events that are the subject of criminal proceedings, as duly explained in the third chapter of this document*".

72. The Third Party Motion also highlighted the Owners' reputation and prestige, by stating that "*my client maintained excellent commercial relations with the Venezuelan state enterprise (PDVSA)*" and "*The company I represent is a highly prestigious shipowner throughout the world and has not been involved in criminal acts of any kind; in Venezuela it has always maintained an impeccable conduct.*"

73. In cross-examination, Professor Gómez accepted that such references to a lack of intent were not relevant to whether the Vessel was essential for the investigation but that they were relevant for the purposes of Article 59 of the LAOC (in particular, Articles 59.1, 59.2 and 59.4). However, he speculated that these references to lack of intent/participation might have been a strategic approach of the Owners to influence the court and he again said that Venezuelan lawyers commonly include statements in this type of application and that, therefore, one should not read too much into them. Once again, I do not agree: as will be seen below, the approach taken in the Third Party Motion is likewise consistent with that taken in all relevant filings with the court in relation to the requested release of the Vessel.

[8] The text of these Articles is set out at paragraph 149 below.

74. The Insurers raised questions as to why the Owners waited so long before filing its Third Party Motion on 24 May 2016, applying for the Vessel to be released from preventive seizure. The Bank's response was as follows:

    i) Firstly, Professor Gómez asserted that the right conferred by Article 293 of the OCCP to seek the return of the asset from the Control Court is triggered by "*unjustified delay*" on the part of the Prosecutor and that "*the [interested third] party's involvement is supposed to happen only when the prosecutor did not fulfil their obligation*". However, I accept Professor Ortiz's view to the contrary that the Owners could have applied at any time to the court under Article 294 of the OCCP for the release of the Vessel, demonstrating their lack of intent by reference to the factors set out in Article 59 of the LAOC (as they ultimately did).

    ii) Secondly, Ms Mujica stated that Clyde & Co (Venezuela) waited until they were "*more certain that we were going to succeed*" before filing the Third Party Motion as this was a "*one shot tool*", and that they were "*very positive*" at that point on the basis of verbal meetings they held with prosecutors and the judge, during which she said that she understood that they had indicated that they were willing to release the Vessel. This account is, however, rather undermined by the terms of the Prosecutors' First Answer dated 8 September 2016 ("**First Answer**") to the Third Party Motion in which they argued for the continued detention of the Vessel and that the Owners could not argue that they were not involved.

    iii) Thirdly, the Bank submitted that the fact that the Owners did not file their Third Party Motion for the release of the Vessel until 24 May 2016 did not relieve the Prosecutors from their duty to release the Vessel, alternatively their duty to request the Control Court to order its release, as soon as they knew that it was not essential to the investigation, pursuant to Article 293 of the OCCP. However (as is agreed by the expert witnesses), only the criminal court (and not the prosecutor) had the power to revoke, modify or lift a detention order, and so it follows that it was essential for the Owners to petition the Court for the Vessel's release as soon as they considered that they had a sufficient case to demand its release. The fact that they did not do so until 24 May 2016 suggests that the Owners did not consider that they could reasonably demand its release before that time.

75. Although Ms Mujica asserts that the Third Party Motion was based primarily on Articles 293 and 294 of the OCCP rather than on Article 59 of the LAOC, the Third Party Motion was advanced on the basis that none of the investigative activities carried out by the Prosecutors involved the Owners, their shareholders, directors or legal representatives, and that there was a lack of evidence connecting the Owners and the crimes charged by the Prosecutors. It also contained three separate references to "*lack of intent*" of the Owners and their directors and alleged non-participation in the events that gave rise to the investigation, and specifically noted the "*lack of intent in the execution of the fact that violated the regulation stipulated in the [LAOC]*". It was put to Ms Mujica that none of this was relevant to whether the Vessel was essential to the investigation. Ms Mujica conceded that that was so but that it "*could be a part of an investigation for them to have proper knowledge of the reputation of the owners*".

76. I do not accept this attempted explanation. Indeed, the Third-Party Claim Ratification ("**the Ratification Brief**") which was subsequently filed by the Owners (around the end of August 2016)[9] clearly demonstrates that the Owners' Venezuelan lawyers had argued the Third Party Motion on the basis that release of the Vessel was governed by Article 59 of the LAOC. It is clear in my judgment and I find as a fact that, by their Third Party Motion, the Owners understood that it was necessary to satisfy the Court both of the criterion in Article 293 of the OCCP as well as any relevant criteria in Article 59 of the LAOC.

(vi) Correspondence between the Owners and the Club

77. On 30 June 2016, the Owners made a claim for an indemnity under the War Risks Policy for the actual total loss ("**ATL**") of the Vessel.

78. On 12 July 2016, the Club (acting by its solicitors, Norton Rose Fulbright LLP ("**NRF**")) responded to the Owners' letter, relying on a number of defences to the Owners' claim, including the fact that:

    i) The Owners had failed to give notice to the Club of the fact that the Vessel had entered an Additional Premium Area, namely Venezuela, with the result that the Owners were not entitled to any recovery from the Club in respect of any claim arising out of events occurring whilst the Vessel was in the Additional Premium Area (Rules 25.1 and 25.4 of the Club Rules); and

    ii) The loss was excluded by Rule 3.5 of the Club Rules, in that the loss arose "*out of action taken by any state or public or local authority: 3.5.1 under the criminal law of any state; or 3.5.2 on the grounds of any alleged contravention of the laws of any state ...*".

79. The Club also reserved its right to avoid the variation of the War Risks Policy of 4 September 2015 (which was to cover calls by the Vessel and one other vessel in the same fleet as the Vessel to the Venezuelan Additional Premium Area) and the Vessel's entry for 12 months at 1 January 2016 by reason of the failure to disclose the Vessel's continued detention since August 2015.

80. On 19 July 2016, the Preliminary Hearing was deferred again, and re-scheduled for 10 August 2016 (although it did not ultimately take place on that date).

81. On 1 August 2016, the Owners (acting by their solicitors, Waterson Hicks) responded to the Club, stating (*inter alia*) that: "*No action has been taken by the State or any public or local authority against Owners or the Vessel itself in respect of the prescribed Proceedings under Rule 3.5*". The Owners contended therefore that Rule 3.5 was of no application.

82. On 4 August 2016, the Club repeated its earlier defences *per* its letter of 12 July 2016 to the Owners.

(vii) Filing of the Ratification Brief by the Owners

[9] See paragraphs 84-85 below.

83. On 16 August 2016, the Criminal Control Court ordered the commencement of the relevant proceedings relating to the Vessel. On the same day, the Criminal Control Court ordered that the Attorney General, the National Office Against Organised Crime ("**ONCDOFT**") and PDVSA be invited to respond to the documents lodged by Owners in support of the Third Party Motion.

84. Shortly after this, the Ratification Brief was submitted by Mr Idemaro Gonzalez and Mr Fernandez-Concheso on behalf of the Owners. The Bank's case is that this was filed with the court between 23 and 28 August 2016 or in any case around the end of August 2016 (which Ms Mujica inferred from emails which she said were sent during the time of drafting, although such emails were not disclosed). The Insurers' case is that the Court's Release Order dated 17 October 2016 suggests that the Ratification Brief was filed on 9 September 2016 (i.e. the same day on which the Prosecutor's First Answer was filed) and that explains the change in the Prosecutor's position between its First Answer (opposing the release of the Vessel) and its Second Answer (not opposing the release of the Vessel), by reason of the fact that the Owners had finally made the proper application satisfying the relevant factors set out in Article 59 of the LAOC. However, it does not appear that that is in fact correct as the reference in the Release Order to a document being filed on 9 September 2016 is rather, it appears, a reference to the Prosecutors' First Answer to the Owners' Third Party Motion.

85. I consider that there is no reliable documentary evidence as to when the Ratification Brief was filed. The most that can be said is that it appears, on balance, to have been filed sometime in late August/early September 2016.

86. In any case, what matters is what the Ratification Brief records. It is a critical document and it records the following:

    i) The "*legal basis*" of the Third Party Motion is Article 294 of the OCCP.

    ii) Article 55 of the LAOC[10] lacks procedural rules setting out the procedural guidelines for the intervention of third parties.

    iii) <u>The considerations (but not the procedure) set out in Article 59 of the LAOC are relevant and applicable for deciding on the return of the seized assets</u>. Following a detailed analysis of each of the Article 59 factors over 7 pages, the following is then expressly stated:

    > "*In this way, Honourable Judge, after reviewing the documentation that has already been submitted in due course by me as counsel and which constitutes evidence of my client's claim, together with the considerations set out in article 59 of the Organic Law against Organised Crime and the Financing of Terrorism, (that the interested party duly prove ownership; that the interested party have no involvement in the acts; that the interested party not have acquired the property to evade a possible seizure; that the interested party have taken all reasonable measures to prevent the illegal use of the property), we are fully convinced that it is possible to re-establish the right of the injured party and that it is ultimately preferable to that of the other party.*"

[10] The text of which is set out at paragraph 146 below.

iv) Citing a 2003 case, *Reinaldo Alberto Diaz and Audelino Miguel Pérez Olmos*, Article 312 of the Criminal Procedure Code (which is equivalent to Article 294 of the current (2012) OCCP) applies to third party requests for the lifting of preventive detention.

87. It follows that the Owners specifically based their detailed application for release of the Vessel under Article 294 of the OCCP upon the criteria contained in Article 59 of the LAOC. Ms Mujica said in her evidence that this reference to the Article 59 "*checklist*" was a useful reference of considerations which lent weight to the return of the Vessel but that it was "*just a reference*", and that it was known that this was not the procedure for obtaining the release of the Vessel. The Bank was likewise compelled to submit before me that whatever is said in the Third Party Motion or the Ratification Brief, these are "*just arguments being put forward by the owners to try to get their vessel out… and they are marshalling such arguments as they can think of to achieve that end*" and are not "*of overwhelming relevance*".

88. I reject this submission and Ms Mujica's evidence on this point. These contemporaneous documents are the best evidence as to how the Owners understood the law to operate in Venezuela. Clyde & Co (Venezuela), and Ms Mujica, are experienced practitioners in this area of the law (i.e. releasing vessels from preventative detention in Venezuela) and the way in which they articulated their case under Venezuelan law in the two most important documents which they put before the court (i.e. the Third Party Motion and the Ratification Brief) shows their understanding, and is a sound guide, as to how the law in Venezuela operates. I shall return to this below.

(viii) The Prosecutors' First Answer

89. On 9 September 2016, the Prosecutors filed the First Answer to the Third Party Motion, in which they requested that the Court dismiss the Third Party Motion and ratify the preventive seizure of the Vessel. The First Answer suggests that investigations were still ongoing in respect of the role of the Owners about whose involvement in the alleged offence the Prosecutors still had suspicions. The Prosecutors made the following points:

i) The Owners' allegations appeared to be an attempt to make the criminal conduct attributed to its crew and the co-defendant PDVSA employees look like an operational error, which was inconsistent with the role of an innocent third party: "*it is evidenced that [the Owners] act more as representatives of the accused than as interested parties, by affirming that the illicit event was simply an error in the product loading processes … there is evidence that [the Owners], rather than acting as a third party, was one of the parties interested in the process, attempting to conceal the offence that part of the crew of B/T ZOUZOU and some ground staff from the petrol port PDVSA Puerto la Cruz were accused of, as though it were an operational error*";

ii) The Owners were also the owners of another vessel under investigation for contraband offences (the 'Marios G') which was seized on 7 September 2015, a few days after ZouZou was seized on 22 August 2015. The Owners did not terminate their contract with the charterers of the Marios G when its dishonest use was discovered by them. The Bank argues that there is nothing to suggest that an inspection of the ZouZou is required for the purpose of investigating the

connection between the alleged acts committed by the two vessels. Whilst Professor Ortiz does not challenge the Bank's case that the Marios G was released without any criminal charges in September 2015 (without any allegations or charges brought against the Owners) and he accepted that the Prosecutors' First Answer did not expressly indicate that the ZouZou was required to be retained for the purposes of any investigation relating to the Marios G, Professor Ortiz nevertheless maintained that it appeared that the Prosecutors were trying to determine whether there was a connection between the Marios G and the ZouZou as the events relating to the two vessels appeared to be contemporary events;

iii) The formal indictment had contained a 'prosecutorial reserve' stating that "*investigations continue to establish whether there is participation in the investigated facts*" and (the First Answer states) "*the representatives of the ship owner who owns the Tanker ZouZou… cannot claim that as they were not accused or involved, that the investigation has concluded, considering that a preliminary hearing has not yet taken place and therefore there is no definitive sentence*", which indicates that the Prosecutors viewed the investigation as continuing and that there was still a possibility that the Owners would be charged; and

iv) The Prosecutors were waiting for further evidence from "*investigations which have not yet yielded results, for example the translations of the conversations in Philippine language which were obtained by extracting the content of the mobile phones of crew members of B/T ZouZou*". Mr MacDonald Eggers QC observed that the need to obtain translations of the mobile phone conversations is not a line of inquiry dependent on the continued detention of the Vessel. However, I agree with Mr Blackwood QC's reading of the First Answer that the reference to the outstanding translations is merely an example of the investigations which remain to be carried out, and that the way in which it is worded suggests that there were others.

90. Despite the foregoing, the Bank denies that the Prosecutors confirmed that the investigation was still ongoing and aver that, rather, the investigation had concluded by 9 October 2015 at the latest. I do not accept that contention. It is clear from the First Answer that the Prosecutors still considered the Vessel to be essential to the investigation, not least because they were still not convinced of the Owners' innocence.

91. Indeed, although Professor Gómez resisted the proposition that detention of the Vessel was "*essential*" to the investigation by this stage, he accepted that the Vessel "*may continue to be important to investigate*" as "*there could be evidence that could stem from the Vessel*". I consider that the distinction that Professor Gómez seeks to draw between the detention being "important" and being "essential" is unsustainable on the facts. I consider it to be perfectly clear that at the time when the Prosecutors filed their First Answer to the Third Party Motion, they were still investigating the Owners' involvement in the alleged crime which they had by no means ruled out, and it could not be said at that stage that the Vessel was no longer essential to the investigation.

92. On 12 September 2016, Clyde & Co (Venezuela) made an application on behalf of the Owners requesting ratification of the notification of the Third Party Motion to

ONCDOFT. The Owners must therefore have considered ONCDOFT's opinion to be important.

93. On 14 September 2016, Hill Dickinson LLP ("**Hill Dickinson**"), the solicitors acting for the Bank at the time, notified the Insurers by way of a letter (c/o the broker, Bankserve) of "*a potential claim under the MII Policy in respect of the [Vessel]*" on behalf of the Bank. The letter stated that it "*seems likely ... that War Risks Underwriters will decline liability*".

94. On 19 September 2016:

i) the Insurers, represented by Kennedys Law LLP ("**Kennedys**"), responded to Hill Dickinson's letter, reserving their clients' rights; and

ii) Clyde & Co (Venezuela) made an application on behalf of the Owners for annulment and correction of the Court's order of 16 August 2016.

(ix) The ONCDOFT opinion filed with the Court

95. On 29 September 2016, ONCDOFT filed its "*non-binding opinion*" ("**the ONCDOFT Opinion**") in relation to the Owners' Third Party Motion. This opinion also confirms that any request seeking the release of the Vessel needed to comply with the criteria contained in Article 59 of the LAOC:

> "*in the event of requesting the return, it must comply with the provisions of article 59 of the [LAOC]… [which] specifies a series of requirements that must be met concurrently for the surrender or return of assets seized preventively*[11] *in matters of organised crime … [The owners of the seized assets] must demonstrate… that they are indeed the owner and that the seized or confiscated asset is not related to or the product of any criminal offence under the [LAOC], and that the presumed owner of the preventively seized asset has taken steps to prevent the illegal use of the asset*"…
>
> "*in the conclusive act, it is not indicated, nor is any responsibility attributed to the applicant [Owners] … therefore important to determine … whether or not the owner, or in this case the owners, intended for these assets (ZOUZOU Tanker) to be used in the commission of the punishable act*"…
>
> "*…the intention of the legislator in incorporating the assumption with which the wording of Article 59 [of the LAOC] ends, is to provide for cases in which the owner of movable or immovable property involved in the commission of one of the offences contemplated in the Organic Law against Organised Crime and Terrorist Financing, does not intend to participate in the illicit acts defined in the special law.*"

96. The ONCDOFT opinion noted that no responsibility was attributed to the Owners in the Accusation Brief: "*the … practice … to require from the Public Prosecutor's Office a pronouncement on whether the ZouZou tanker is essential for the investigation or for*

[11] Under Article 55 of the LAOC.

the culmination of the criminal process[12]*, since in the conclusive act, it is not indicated, nor is any responsibility attributed to the applicant*". This statement also appears to recognise that the issue of the return of the Vessel falls to be considered both at the stage when it is no longer essential to the investigation and also at the end of the trial (but only if the owner of the asset is charged, and that was not the case here) when the issue of its confiscation arises.

97. The ONCDOFT opinion concluded by stating that the preventive seizure did not infringe the Owners' right to property given that it is "*of a preventive nature and therefore does not prejudge the ownership of the right to property, so that it will be at the end of the investigation phase or, failing that, through the final judgment that it will be determined to whom the property belongs, if it was an object linked to the commission of the crime, and if it belongs to the person or persons found criminally responsible*."

98. As regards the express references to Article 59 of the LAOC in the ONCDOFT opinion, Ms Mujica suggested in her evidence that such references are simply to the considerations but not to the appropriate procedure in Article 59 of the LAOC for the return of the Vessel, which she maintains is afforded only under Articles 293 and 294 of the OCCP. I do not accept that evidence. It is clear that ONCDOFT, consistently with the Owners' own Third Party Motion and Ratification Brief, considered that the criteria set out in both Article 293 of the OCCP and Article 59 of the LAOC were the relevant criteria which the Court had to consider in determining whether or not to return the Vessel. I further consider that the appropriate procedure for applying for the release of the Vessel is contained in Article 294 of the OCCP, as discussed below.

99. Ms Mujica further suggested that it is irrelevant that the ONCDOFT opinion relied on Article 59 of the LAOC in its analysis given that ONCDOFT had no standing "*in the procedures or the process of the detention or any of the criminal procedure itself*", it being simply an administrative entity charged with custody of detained assets. The expert witnesses likewise agreed that the opinions or briefs filed by ONCDOFT are not binding on the Court. Indeed, the ONCDOFT non-binding opinion itself also notes that as ONCDOFT is not a party to the present case, it cannot respond, much less provide evidence, since its only function is the custody, safekeeping, maintenance, conservation, administration and use of all assets seized preventively.

100. However, despite being non-binding, firstly the ONCDOFT opinion appears to have been taken into account by the Court in reaching its decision on the Release Order (which contained a discussion of the ONCDOFT opinion – see *infra*); and secondly, (*per* Professor Ortiz's evidence) the opinion of ONCDOFT is significant as it is the highest governmental agency connected to the custody of those assets. Indeed, it is clear that the Owners themselves were keen to ensure that ONCDOFT's opinion was obtained, and the ONCDOFT opinion is directly responsive to the Owners' own Third Party Motion which (together with the Ratification Brief) itself analyses the law in the same way.

(x) The Prosecutors' Second Answer

[12] i.e. Confiscation.

101. On the same day (29 September 2016) and three weeks after it had filed its First Answer opposing the release of the Vessel, the Prosecutors filed a Second Answer ("**the Second Answer**") in which they stated that they were no longer opposed to the release of the Vessel back to the Owners due to the following factors, which is suggestive of an Article 59 LAOC analysis:

> (i) "*during the investigation there was no link between the company DORAN NAVIGATION INC and the offence, and to date there are no elements which could link the company to the offence*"; and
>
> (ii) "*the causes … demonstrate lack of intention and non-participation in the facts that gave rise to this investigation*".

(xi) Owners tender the First NOA

102. On 3 October 2016, the Owners tendered their Notice of Abandonment to the Club ("**First NOA**"), claiming an indemnity for a constructive total loss ("**CTL**") of the Vessel under the War Risks Policy, without prejudice to the validity of their contention that the Vessel was already an ATL. They referred to the fact that the Vessel had been detained "*since on or around 28 August 2015*". As is frequently the case, the First NOA sought to align the date of the First NOA with the date of the commencement of proceedings against the underwriters, by asking that the Club "*confirm that you agree as customary to the Owners being placed in the same position as if a Claim Form had been issued this day*".

103. On 5 October 2016, the Court set a new date, of 20 October 2016, for the holding of the Preliminary Hearing.

104. On 10 October 2016, Clyde & Co (Venezuela) submitted an evidence brief on behalf of the Owners in support of the Third Party Motion.

105. On the same day (10 October 2016), the Club rejected the First NOA but agreed to place the Owners in the same position as if a claim form had been issued on 3 October 2016, subject to certain caveats, including reserving its position as to (i) the application of Rule 3.14.2 of the Club Rules (relating to whether there was a deemed CTL) and the Owners' entitlement to rely on the same; and (ii) whether the NOA was given "*with reasonable diligence after the receipt of reliable information*" in accordance with section 62(3) of the MIA. The Club also denied that, by reason of the above agreement, it had any greater exposure to claims for interests and costs (if any) at or from 3 October 2016, than it would otherwise have had.

(xii) The Release Order

106. On 17 October 2016, the Criminal Control Court granted the Third Party Motion for the release of the Vessel ("**the Release Order**"), and ordered that the preventive seizure be lifted. The expert witnesses agreed that the Release Order did not state that the preventive detention of the Vessel was incorrect or unlawful *ab initio*; nor did the

Release Order declare unlawful the detention or continued detention of the Vessel, but simply released it from detention. The Release Order did not contain any suggestion of any breach of duty by the Prosecutor. Nor did the Release Order contain any analysis of when the Vessel no longer became essential to the investigation, although it did say (as is formally the position) that the investigation phase concluded with the filing of the Accusation Brief by the Prosecutor (and the Owners were not charged in the Accusation Brief). There was also no *express* reference to Article 293 of the OCCP.

107. Whilst drafted in a somewhat convoluted manner, when one looks to the substance of the Release Order, particularly in the context of the submissions made to the court, it is tolerably clear in my judgement that in deciding to release the Vessel the court relied upon the criteria in Article 293 of the OCCP and Articles 55 and 59 of the LAOC. I find that that is so by reason of the following.

108. At the outset, the Release Order refers to the chronology of events and significant documents, notably, the ONCDOFT opinion (which in turn refers to Articles 55 and 59 of the LAOC), the Prosecutor's Second Answer (which in turn refers to Article 294 of the OCCP), and the Accusation Brief (which in turn refers to Article 55 of the LAOC).

109. The Bank accepts in paragraph 204 of its written closing submissions, as it must, that the Court did not need to refer to Article 293 of the OCCP because together with Article 294 of the OCCP, that was the basis on which the Third Party Motion was expressed to be made. The Release Order noted the following in its discussion of the Accusation Brief:

> "*since it is necessary for the Court to rule on the third-party motion filed with this brief, and it being appropriate to observe that while the investigation phase concluded with the filing of the accusatory brief by Public Prosecutor, and from the investigated acts on the basis of which the Public Ministry presented a conclusive accusatory deed, there is no indication that any act of investigation had been ordered, which involved the owners in the acts under investigation, nor is there a causal relationship which involves its shareholders or directors in the acts under investigation*[13]*. This means that the prosecution has no elements of conviction to request the provisional seizure be maintained, let alone request that the Court order the permanent seizure or confiscation of the Vessel which is owned by the commercial company DORAN NAVIGATION INC*"…
>
> "*it is proven that there is no statement whatsoever by the Public Ministry during the investigation phase nor is there in its conclusive acts ... any certainty with regard to the grounds, which should establish the responsibility of the owner(s) of the Vessel*[14] *used in the criminal act, so that her confiscation may be ordered*." (emphasis added)

[13] Article 59.2 of the LAOC refers to the fact that "the interested party has no involvement of any kind in the facts that are the subject of the criminal proceedings."

[14] This could be a reference to Article 55 and/or 59 of the LAOC.

110. This analysis appears to contain elements within it of the criteria contained in both Articles 55 and 59 of the LAOC.

111. The Release Order expressly referred to, and addressed, the criteria of Article 55 of the LAOC, adopting the Article 55 terminology of "*illicit origin*" in noting that:

> "*The judgment handed down by the Court only sets out the description of the seized property and the order for her confiscation but it does not state whether the said seized property was of illicit origin*"…
>
> "*the confiscation of the said assets, by virtue of the impossibility of proving its lawful origin … must state the reasoning, in the investigation phase when the seizure is performed as in the final judgment … It is necessary to establish, stating the relevant reasons, the illegal nature of the property seized*". (emphasis added)

112. Whilst there is no express reference in the Release Order to Article 59 of the LAOC (other than when referring to the ONCDOFT non-binding opinion which in turn refers to this article) and instead there are references to Article 58 of the LAOC[15], it is clear to me when considering the substance of the Court's analysis that Article 58 is an erroneous reference for Article 59.

113. In particular, the Release Order stated that:

> "*The judgment handed down by the Court only sets out the description of the seized property and the order for her confiscation but it does not state… whether her owners could be connected as persons liable for the event under investigation*"…
>
> "*the confiscation of the said assets, by virtue of the impossibility … of proving the responsibility of the owner… must state the reasoning, in the investigation phase when the seizure is performed as in the final judgment, with the purpose of confiscating it when there is responsibility of the owner in the act or returning it if that is not proven…Once the assets relating to the criminal conduct during the investigation have been seized, it will be necessary to elucidate the intent of the owner in committing or participating in the criminal act, in order to relieve him or otherwise of the seizure of the property that was used … It is necessary to establish, stating the relevant reasons, … the responsibility or otherwise of the owner of the property used in the act, to protect the right to property granted by article 115 of the current Constitution and according to the Principle of Effective Judicial Protection and the Presumption of Innocence*"…
>
> "*it is not in accordance with the Law to confiscate assets that have been used in a criminal act, without having established the responsibility of the owner through a final judgment*." (emphasis added)

114. These are Article 59 references.

[15] The text of which is set out in paragraph 147 below.

115. Professor Gómez agreed in cross-examination that the references in the Release Order to Article 58 (rather than Article 59) "*doesn't seem to flow*". I therefore accept the Insurers' contention that the references to Article 58 in the Release Order are erroneous and that the court intended to refer to Article 59 for the following further reasons:

    i) Firstly, the elucidation of the Owners' lack of intent only makes sense in the context of Article 59 and not Article 58, given the nature and substance of those articles.

    ii) Secondly, Article 58 refers to a special procedure where one year has passed since the preventative seizure was carried out (which had not occurred in the present case), and where it has not been possible to establish the identity of the owner of the asset (which is not applicable in this case) or the latter has abandoned it (abandonment not being an issue in this case).

    iii) Thirdly, it would be sensible to assume that the Court, in reaching its decision in the Release Order, would have been considering the documents before it and which it refers to in the Release Order itself, which documents – the Third Party Motion, the ONCDOFT opinion, the prosecutor's Second Answer and the Accusation Brief – all consider the Article 59, not Article 58 criteria.

    iv) Fourthly, it was Ms Mujica's evidence that transcripts of the hearing were typed up rather than recorded, which immediately introduces the possibility of errors of transcription.

116. Whilst the Bank accepts that the Release Order refers to the intent of the Owners, it argues that the Release Order does not say that that was the reason for its decision. The Bank argues that the Release Order does not rely on, or consider, Article 59 of the LAOC and that the Court only gives two reasons for the release of the Vessel – firstly, that there would be no charge brought against the owner, and secondly, the investigation had come to an end with the Accusation Brief – and that it relies upon Article 115 of the Venezuelan Constitution as a constitutional reason for why this property should be returned. I do not accept this submission. I agree with Professor Ortiz that it is implicit in the Release Order that the court is considering the application of Article 59 of the LAOC, and that the court considered many other factors beyond the Vessel no longer being required for an investigation by the Prosecutor, and the lack of an allegation against the Owners.

117. It was put to Professor Ortiz by the Bank that, in the Release Order, the Control Court indirectly or implicitly found that the continued detention of the Vessel was unlawful and an infringement of Article 115 of the Venezuelan Constitution, given the failure by the Prosecutors to identify any reasons for the continued detention of the Vessel in circumstances where the investigation had been completed and where there was a lack of an allegation of criminal wrongdoing against the Owners. In rejecting this suggestion, Professor Ortiz pointed out that there is no concept of a declaration of illegality or unconstitutionality by implication under Venezuelan law and that was not what the Court was doing in its Release Order; rather, it was applying the Article 59 criteria. I accept Professor Ortiz's evidence on this.

118. I also accept the Insurers' case that the release of the seized asset in this case was relatively speedy for Venezuela, as the case had not yet even reached a preliminary

hearing (which was not held until February 2017), and that in this case – which concerned the alleged smuggling of a small amount of fuel (i.e. 12,000 metric tonnes), with the Vessel being released from detention relatively quickly – there is insufficient evidence to suggest that the Vessel was being detained for political reasons as Ms Mujica tentatively suggested in her evidence, and even less to suggest that the detention was upon the orders of the President of Venezuela.

119. On 7 November 2016, the Criminal Control Court notified ONCDOFT of the order for the Vessel's release.

120. On 12 November 2016, port clearance for the Vessel was obtained and a Certificate of Delivery (confirming the delivery of the Vessel to Mr Idemaro Gonzalez on behalf of the Owners) was issued by the Regional Coordinator of ONCDOFT, and the Vessel was returned to her Owners.

(xiii) The Second NOA followed by avoidance of the War Risks Policy

121. On 16 November 2016, the Owners served a further Notice of Abandonment to the Club ("**Second NOA**"), claiming an ATL or alternatively a CTL, without prejudice to the validity of their contention that the Vessel was already an ATL or CTL. The Second NOA also notified the Club that the Vessel had been released and had sailed from Venezuela on 13 November 2016. The cover message to the Second NOA stated (*inter alia*) that:

    i) "*As you know the Vessel has been detained in Venezuela for over 14 months and accordingly the Owners are deemed to have been deprived of the possession of the Vessel without any likelihood of recovery for the purposes of establishing a claim for Actual Total Loss or alternatively Constructive Total Loss per Rule 3.14.2.*"

    ii) "*As for the insured peril, we confirm that Owners rely upon Rule 2A.2.2 namely 'arrest, restraint or detainment and the consequences thereof or any attempt thereat'. In the circumstances of the detention Owners alternatively rely upon Rule 2A.2.5 and the cover for loss, damage or expense caused by any person acting for political motive*".

    iii) "*We do not consider Rule 3.5 is engaged since ... the Vessel has been detained for over 14 months without proceedings being issued against the Owners of the Vessel pending an alleged investigation which has led to the position of Owners being vindicated and the Vessel released. In our view the continuing detention of the Vessel throughout this period was both wholly perverse and unjustified and the result of political interference with the court process. ...*".

122. On 23 November 2016, the Club rejected the Second NOA, agreeing to place the Owners in the same position as if a claim form had been issued on 16 November 2016 (subject to the same caveats as set out in its letter of 10 October 2016). Describing "*a clear pattern of non-compliance with Rule 25.1*", the letter stated that this raised not simply a question as to whether the Directors of the Club should exercise their discretion to pay the claim, but also an issue as to whether the Owners' cover was liable to be avoided for material non-disclosure.

123. On 24 November 2016, Hill Dickinson wrote again to Kennedys informing them that the Vessel had been released on 13 November 2016, but that the Vessel's Owners were still pursuing their claim for the actual and/or constructive total loss of the Vessel. The letter stated "*we remain of the view that cover will likely be declined*".

124. On 16 December 2016, it having become apparent from correspondence between Waterson Hicks and NRF (that the writer had obtained) that "*War Risks Underwriters will deny liability for Owners' claim for an actual/constructive total loss*", Hill Dickinson formally presented the Bank's claim under the MII Policy in respect of the Vessel to the Defendants.

125. By a letter dated 16 March 2017, the Club gave notice that they were avoiding (*inter alia*) the War Risks Policy owing to the Owners' alleged non-disclosure of the Vessel's calls into an Additional Premium Area (and the Owners' lack of a satisfactory explanation relating thereto) which amounted to "*repeated breaches, over a substantial period of time, of Rule 25*", and it accordingly declined the Owners' claim under the War Risks Policy. The letter stated that the "*pattern of non-declarations was a material circumstance which should have been disclosed to [the Club] prior to renewal into 2015 and into 2016, and that, had disclosure been made, cover would not have been permitted to renew into 2015 nor into 2016*".

126. Subsequently, on 30 August 2019, the Trial Court of Barcelona issued a judgment, acquitting the Criminal Defendants of both alleged crimes. The Trial Court found that the evidence offered by the Prosecution fell short of providing sufficient certainty to the Court of the culpability of the accused, stating that "*it was possible to determine the lack of culpability of the accused, which tips the balance in their favour*".

127. The claim form in these proceedings was issued by the Bank on 22 May 2020 and served on 11 June 2020.

(C) DETENTION OF VESSEL FALLS WITHIN THE WAR RISKS EXCLUSION

128. In my judgment, the starting point in the analysis of the issues in dispute is, as the Insurers suggest, to determine whether there would have been cover under the War Risks Policy for the detention of the Vessel.

129. The Insurers' submission is that any loss caused by the detention of the Vessel would have been excluded by Rule 3.5 of the Club Rules. I accept that submission for the reasons which follow.

130. In *The B Atlantic (No. 1)* [2012] Lloyd's Rep IR 363, [22]-[25], Hamblen J (as he then was) considered exclusion 4.1.5 in the Institute War and Strikes Clauses 1.10.83 ("*This insurance excludes loss, damage, liability or expense arising from arrest restraint detainment confiscation or expropriation under quarantine regulations or by reason of infringement of any customs or trading regulations*"). The case concerned the detainment of a vessel by the Venezuelan authorities after the discovery of three large bags of cocaine weighing 132kg which had been strapped to the hull of the vessel below the waterline. It was common ground that the claimant-shipowners knew nothing about the drugs which had been strapped to the vessel as a result of a malicious act by a third party. The underwriters accepted that the vessel was a CTL but relied upon exclusion 4.1.5 (by reason of the infringement of customs regulations). The claimant took issue

with that and also alleged that the detention of the vessel following investigation was contrary to local law and that this broke the chain of causation between the infringement of the customs regulations and the detention of the vessel.

131. Hamblen J first set out a number of general principles derived from the authorities in which similar exclusions in the Institute War and Strikes Clauses had been considered, which general principles I consider also apply in the present case:

> "*22. First, the exclusions contained in clause 4.1.5 must be given a "businesslike interpretation in the context in which they appear" …*
>
> *23. This means, secondly, that questions of construction need to be answered in the light of the fact that the clauses are to be used worldwide. So they must be given a wide meaning to the extent that they are intended to cover laws in force anywhere in the world. They cannot turn on niceties of local law…*
>
> *24. Thirdly, the draughtsmen are to be taken to have had in mind decisions of the courts on earlier editions of the clause which have given the wording a settled meaning: …*
>
> *25. Fourthly, the burden is on underwriters to bring themselves within the exclusion …*"

132. I shall return to the facts of the *B Atlantic* below.

133. In the present case, the relevant exclusion, Rule 3.5 of the Club Rules, provides as follows:

> "*3.5. An Owner of an Entered Ship is not insured for any loss, damage, liability, cost or expense arising out of action taken by any state or public or local authority:*
>
> *3.5.1 under the criminal law of any state; or*
>
> *3.5.2 on the grounds of any alleged contravention of the laws of any state*"

134. The "action" out of which the detention arose was the Detention Order of the Venezuelan Control Court made on 27 August 2015.

135. The detention of the Vessel was made by the Control Court under Articles 4.4 and 55 of the LAOC. The Vessel was accordingly detained by an order of a Venezuelan criminal court applying what it considered to be Venezuelan law. On an ordinary and business-like interpretation of Rule 3.5.1 of the Club Rules, it would therefore appear that that the Detention Order was made "under" the criminal law of Venezuela within the meaning of the Rule.

136. The Bank submits, however, that the Vessel was not detained "*under the criminal law of*" Venezuela under Rule 3.5.1 of the Club Rules. Rather, it contends, its detention was made pursuant to two provisions of the LAOC (Articles 4.4 and 55) which did not legislate as to what constituted an offence and which permitted preventive seizure of assets owned by parties "*without participation in [offences under the Act]*".

Accordingly, the Bank submits, the detention was not under but *incidental to* that criminal law.

137. I do not accept that submission. The preventive seizure of the Vessel under Article 55 of the LAOC occurred because it was alleged that the Vessel had been "*used in the commission of the offence investigated in accordance with this Law*" (i.e. a conspiracy to smuggle fuel), the law being the criminal law, viz the LAOC. The purpose of the LAOC is to "*prevent, investigate, prosecute, classify and sanction crimes related to organised crime and the financing of terrorism*". The seizure was accordingly made by a criminal court under and in accordance with the criminal law of Venezuela, within the meaning of Rule 3.5.1 of the Club Rules.

138. Furthermore, the action was taken on the grounds of an alleged contravention of the laws of Venezuela, namely Article 37 of the LAOC[16], by four members of the crew and three employees of PDVSA, thereby also engaging Rule 3.5.2 of the Club Rules. I do not accept the Bank's submission that Rule 3.5.2 is not engaged because there was no allegation that any *non*-criminal law had been contravened. Adopting the approach to the construction of the exclusions described by Hamblen J, I do not consider that Rule 3.5.2 requires to be read narrowly as limited to non-criminal laws. Whilst, depending on the facts of a particular case, there may be some degree of overlap between Rules 3.5.1 and 3.5.2 if the Insurers' construction of this rule is to be preferred, equally there will be areas where the provisions do not overlap. There is a sensible distinction to be made between action taken under the criminal law (for example, seizure of property used in the commission of a crime under a criminal law) and action taken on the grounds of an alleged contravention of criminal law but not under the criminal law (for example, a civil injunction to restrain a breach of the criminal law).

139. Contrary to the Bank's submission, the heading of the clause "*Exclusion of claims arising out of criminal and other proceedings*" is perfectly consistent with this construction and, in any event, "*other proceedings*" also naturally refer to proceedings where (the separate and different) Rules 3.5.3 and 3.5.4 are engaged.

140. The Bank further submits that Rules 3.5.1 and 3.5.2 presuppose that the owner of the insured vessel must be guilty or alleged to be guilty of an offence under the relevant criminal law in order for those rules to apply. Since the Owners were not (ultimately) accused by the Prosecutors in this case of having committed a criminal offence, the Bank maintains that the exclusions do not apply. Similarly the Bank submits, the only relevant contravention under Rule 3.5.2 is an *alleged* contravention by *the Owners* themselves; but it was not *alleged* at the time of the initial detention of the Vessel, or at any subsequent time, that the Owners had contravened any law.

141. I do not accept these submissions. There is nothing in the language of Rules 3.5.1 and 3.5.2 to suggest that they should be read as only applying when the Owners are themselves accused of a crime or contravention of the law. Indeed, where a vessel is preventatively seized, it may not be possible in any particular case to determine whether the owner, or indeed someone else, is guilty of the offence. Preventive seizure is

[16] "***Article 37. Association***. *Anyone who is part of an organised crime group will be sanctioned for the sole fact of association with a prison term of six to ten years.*"

necessary where it is believed that the property has been used in the commission of an offence being investigated under the LAOC, regardless of the issue of ownership.

142. The Bank's proposed limitation would also be inconsistent with the approach adopted in *The B Atlantic (No. 1)* at [34]-[47] where Hamblen J rejected a similar argument in connection with the meaning of clause 4.1.5 of the Institute War and Strikes Clauses 1.10.83 (applying *The Kleovoulos of Rhodes* [2003] 1 Lloyd's Rep 138), stating (at [36]) that "*Clause 4.1.5 does not say that the "infringement of … customs … regulations" is one to which owners, their servants or agents must be privy, or in which they must be complicit*". The decision was not appealed on this point, but in the Supreme Court, Lord Mance stated that he agreed with Hamblen J: see [2019] AC 136 at [51].

143. The Bank submits that the *B Atlantic* does not provide a helpful analogy because, as Hamblen J noted, "*the starting point must be the words of the exclusion*" (at paragraph 35), and here – unlike in *The B Atlantic* – the word "*owner*" actually appears in the exclusion (which provides that "*An owner … is not insured for any loss*" on the relevant grounds). However, I do not consider this to be a material point of distinction. The reference in Rule 3.5 to "*[a]n Owner*" is merely descriptive of the assured ("*the Owner of an Entered Ship*"). The clause is making clear that the insurance which is afforded to that owner-assured excludes loss, damage, liability, cost and expense arising out of action taken by any state under the criminal law of any state. The clause does not state that the owner is not insured for action taken against it under the criminal law of that state, or for an alleged contravention of the law by it. Indeed, this is confirmed by the fact that every exclusion in the Club Rules (Rules 3.1 to 3.9) begins "*An Owner of an Entered Ship is not insured*…".

144. It is common ground between the parties that the making of the Detention Order itself was lawful[17] and that no further order of the Court was required to maintain the detention of the Vessel, which remained in effect until it was lifted, modified or revoked by the court itself[18]. In the circumstances, I find that the loss would have fallen within Rules 3.5.1 and 3.5.2 of the Club Rules (with the Detention Order being the proximate cause of the detention of the Vessel) unless the Bank was able to show that from a certain point in time the Vessel became *unlawfully* detained by the law of Venezuela. If the Bank is able to show that, then it will be open to it to argue that any period of detention thereafter does not fall within the scope of the exclusion[19] because it did not take place under the criminal law of Venezuela or on the ground of any alleged contravention of the laws of Venezuela. However, even then the Insurers maintain that a *bona fide* error in applying the law would not break the chain of causation absent perversity. I address these arguments below.

(D) PROPER CONSTRUCTION OF VENEZUELAN LAW PROVISIONS

(i) The relevant provisions

[17] Common Ground, paragraph 16: "The Criminal Control Court was entitled to order the initial detention of the Vessel, by way of the order for preventive seizure".

[18] Joint Expert Memorandum, paragraph 14.

[19] I consider that the Bank is correct to submit that it is necessary to treat the detention as a single continuing action which could potentially become unlawful at some point.

145. Before considering this issue by reference to the facts (which are set out above), it is necessary first to consider the proper construction and application of the relevant provisions of Venezuelan law under the LAOC and the OCCP.

146. As has been explained, Article 55 of the (2012) LAOC was the legal basis on which the Control Court detained the Vessel on 27 August 2015. This provision provides:

> "***Article 55***
> ***Assets detained or seized, forfeited and confiscated***
> *The control judge, upon request of the Prosecutor of the Public Ministry, will order the preventive seizure of movable and immovable property that has been used in the commission of the offence investigated in accordance with this Law or on which there are elements of conviction of its illicit origin. Until the specialized service for the administration of seized assets is created, the aforementioned assets will be placed at the disposal of the governing body for their safekeeping, custody, maintenance, conservation, administration and use, which may assign them for the execution of their programs and those carried out by the public entities and bodies committed to the prevention and repression of the offences recognized by this Law.*
>
> *In the case of foodstuffs, drinks, perishable goods or goods that are difficult to administer that are seized preventively, the Prosecutor of the Public Ministry shall request the control judge to dispose of them in advance. The control judge, after taking an inventory of them, and having heard the interested third parties in good faith, shall authorise, if appropriate, their sale or use for social purposes in order to avoid their deterioration, damage or loss. The proceeds from their sale shall be held for safekeeping until the final judgement is issued.*
>
> *When there is a final judgment of conviction for the offences defined in this Law, the seized movable and immovable property shall be confiscated and shall be used for plans, programmes and projects for the prevention and repression of the offences defined in this Law. In the event of a final judgment of acquittal, the assets seized preventively shall be returned to their legitimate owners…*" (emphasis added)

147. Further, Articles 58 and 59 of the LAOC provide as follows:

> "***Article 58***
> ***Special procedure for the confiscation of assets***
> *If one year has passed since the preventive seizure was carried out and it has not been possible to establish the identity of the owner of the asset, the perpetrator or participant in the act, or if the latter has abandoned it, the Prosecutor of the Public Ministry shall apply to the control court for its confiscation. To this end, the control court shall order the governing body to give notice by means of a notice published in a newspaper of national circulation, which shall indicate the reasons for the notification, and shall proceed to record in the respective file the page on which the notice was published.*
>
> *Within thirty days of the publication of the notice, the legitimately interested parties must submit with the aforementioned control court a written brief with their arguments and present the evidence justifying the right invoked. Once this period has elapsed without the legitimate interested parties having made any challenge, the judge shall order the confiscation of the asset.*

If a challenge is filed, the judge shall notify the Prosecutor of the Public Ministry so that within five days of notification, it may respond and submit evidence. If no evidence has been presented or if the point is merely one of law, the judge will decide without further formalities in a reasoned manner within three days following the expiration of the aforementioned term. This incidence shall not interrupt the criminal process.

If evidence has been submitted, the judge shall convene an oral hearing to be held within eight days of the publication of the respective order. At the hearing, the Prosecutor of the Public Ministry and the legitimate interested party shall orally present their arguments and submit their evidence. At the end of the hearing, the judge shall give a reasoned decision. The decision issued by the judge may be appealed by the parties within the following five days.

If the legitimate interested party does not appear at the hearing convened by the court, without duly justified cause, their challenge shall be declared withdrawn and the confiscation of the property shall be ordered. No appeal will be admitted against said decision. When the decision of the control court by which the confiscation is declared is made final, the asset shall pass to the order of the governing body or to the Specialised Service for the Administration and Disposal of Secured or Seized, and Confiscated Property." (emphasis added)

"***Article 59***
Return of assets
For the purposes of deciding on the return of the assets referred to in the previous article, the control court shall take into consideration that:
1. The interested party duly proves ownership of the property that is the object of the confiscation proceedings.
2. The interested party has no involvement of any kind in the facts that are the subject of the criminal proceedings.
3. The interested party did not acquire the property or any rights over it under circumstances that reasonably lead to the conclusion that the rights were transferred to avoid a possible preventive seizure or confiscation.
4. The interested party has made all reasonable efforts to prevent the use of the property in an unlawful manner; and,
5. Any other reasons that, in the opinion of the court and in accordance with the rules of logic, scientific knowledge and experience, are deemed relevant for such purposes." (emphasis added)

148. "Assets" are referred to in Article 4(4) and defined in Article 4(6) of the LAOC as follows:

"*4. Preventive detention or seizure: means the temporary prohibition to transfer, covert, encumber, alienate or mobilize assets, or the temporary custody or control of assets, by order of the competent court."*

"6. Assets: assets of any kind, corporeal or incorporeal, movable or immovable, tangible or intangible, as well as legal or financial documents or instruments that accredit property or other rights over such assets; as well as the assets, means used and the means intended to be used for the commission of the offences established in this Law, committed by a person or structured group, even if they are in the possession or

property of interposed persons or third parties not involved in these offences." (emphasis added)

149. Articles 293 and 294 of the OCCP provide as follows:

"***Article 293***
Return of Objects
The Public Ministry will return as soon as possible the objects collected or seized and that are not essential to the investigation. Nonetheless, in case of an unjustified delay by the Public Ministry, the parties or interested third parties may seek from the control judge the return of the same, without prejudice of any civil, administrative and disciplinary liability that the Prosecutor may incur if the delay is attributable to them.

The Judge and the Public Ministry will deliver the objects directly or will deposit those with the express obligation to present these any time when these are required. The competent authorities must immediately comply with the order issued in this regard by the Judge or the Prosecutor, under penalty of being accused of disobedience to authority, in accordance with the provisions of the Criminal Code." (emphasis added)

"***Article 294***
Incidental Matters
Claims or third-party motions that the parties or third parties bring during the proceedings in order to obtain the restitution of objects collected or seized shall be dealt with before the Control Judge, in accordance with the rules set forth in the Code of Civil Procedure for incidental matters.

The court shall return the objects, unless it deems their preservation to be indispensable.

The above shall not extend to stolen, robbed or defrauded items, which shall be returned to the owner at any stage of the proceedings, once their condition has been verified by any means and after being appraised." (emphasis added)

150. Article 111 of the OCCP further provides as follows:

"***Article 111***
Attributions of the Public Prosecutor's Office
It is the responsibility of the Public Prosecutor's Office in criminal proceedings, to:
…
12. Order the securing of active and passive objects directly related to the commission of the offence."

151. The predecessor to Article 55 of the (2012) LAOC, namely Article 20 of the 2005 LAOC, provided as follows:

"***Article 20***
Seizure of transport vehicles
Ships, aircraft or land transport vehicles or containers used by organized criminals to commit offences will be seized preventively in accordance with the provisions of this Law. The owner will be exonerated from such measure when there are circumstances that demonstrate their lack of intent. In any case, this will be resolved in accordance

with the provisions of article 312 of the Organic Code of Criminal Procedure." (emphasis added)

152. Article 312 of the 2001 Organic Code of Criminal Procedure contained materially identical wording to Article 294 of the current (2012) OCCP (Article 311 was also materially identical to what is now Article 293). It follows that under the predecessor statute to the (2012) LAOC, a vessel which was preventatively seized could be returned to its owners if it was demonstrated that they did not have the necessary intent to commit the offence. That question would be resolved in accordance with what is now Article 294 of the OCCP, that is, the Owners would have to bring a third party motion before the control court for the restitution of the vessel and the court was obliged to return it unless it deemed its preservation to be indispensable.

153. Article 55 of the (2012) LAOC no longer contains the sentence: "[*t*]*he owner will be exonerated from such measure when there are circumstances that demonstrate their lack of intent*". However, the (2012) LAOC does contain the new Article 59 (the terms of which were not contained within the 2005 LAOC), which contains a number of criteria which have a bearing upon the owners' intent, namely:

"*2. The interested party has no involvement of any kind in the facts that are the subject of the criminal proceedings.*
3. The interested party did not acquire the property or any rights over it under circumstances that reasonably lead to the conclusion that the rights were transferred to avoid a possible preventive seizure or confiscation.
4. The interested party has made all reasonable efforts to prevent the use of the property in an unlawful manner…"

(ii) Insurers' submissions

154. These factors lead the Insurers to submit as follows.

155. Whilst it is true that there is no express reference in Article 55 of the LAOC to any decision as to whether to release the seized vessel, where an asset has been detained under such Article 55 of the LAOC, the release of the asset is governed by the matters set out in Article 59 of the LAOC.

156. The factors identified in Article 59 of the LAOC reflect the traditional principle of "lack of intention" which was contained in the predecessor Article 20 of the 2005 LAOC. "Lack of intention" is a term of art. It does not mean simply criminal intent. It is a much broader concept referring to all of the factors set out in Article 59 of the LAOC.

157. Procedurally, an application by a party for the release of the asset is made under Article 294 of the OCCP, but the question of whether the asset is "indispensable" for the purposes of Article 294 of the OCCP will be answered by reference to the factors set out in Article 59 of the LAOC[20]. That is the answer to the Bank's argument that there is no express reference in Article 55 of the LAOC to any decision whether to release the Vessel: there is always a right for an interested party (namely a third party claiming

[20] Professor Ortiz's First Report, paragraphs 263-265.

to be interested in the goods) to apply for the release of an asset under Article 294 of the OCCP.

158. The application of Article 294 of the OCCP to Article 55 of the LAOC is illustrated by Article 20 of the previous 2005 LAOC, which specifically provided that an application to relieve the owner from preventive detention of its asset on the grounds of lack of intent would be resolved in accordance with Article 312 of the (then) 2001 Criminal Procedure Code (equivalent to Article 294 of the OCCP).

159. Whilst release of the asset is governed by the matters set out in Article 59 of the LAOC, nevertheless the principle that an asset may continue to be detained when it is essential for investigative purposes, which is reflected in Article 293 of the OCCP, is relevant when considering any application for the release of an asset. The Court will not order the release of an asset merely because it is no longer essential for investigative purposes; the owner must also establish lack of intent under Article 59 of the LAOC. But if the asset is still essential for the investigation it will not be released, regardless of the owner's lack of intent.

160. This is what Professor Ortiz meant when he said that Article 293 of the OCCP applied "*in conjunction with*" Article 59 of the LAOC[21]:

> "*Q. So you say that 293 is acceptable as a procedure, but it has to be in conjunction with Article 59?*
>
> *A. It is not acceptable as a procedure. It is acceptable as an additional element that is contained that, which is whether the asset is essential or not for determination. But that factor alone is not enough for that return when the detention has been ordered under Article 55 of the Organised Crime Act.*"[22]

(iii) Submissions of the Bank

161. The Bank, on the other hand, submits that the Insurers' construction is wrong as a matter of Venezuelan law. The Bank submits that a Venezuelan court would apply the first sentence of Article 4 of the Civil Code, which provides that:

> "*PRELIMINARY TITLE*
> *OF THE LAWS AND THEIR EFFECTS,*
> *AND OF THE GENERAL RULES FOR*
> *THEIR APPLICATION*
>
> *Article 4.- The Law must be attributed the meaning which is evident from the proper meaning of the words, according to their connection with each other and the intent of the legislator.*
>
> *Where there is no precise provision in the law, the provisions governing similar cases or analogous matters shall be taken into consideration; and if there is still any doubt, the general principles of law shall be applied*."

[21] Day 4/25/6-12, Day 4/26/1-3.

[22] Day 4/28/17-24.

162. The Bank submits that the proper meaning of the statutory provisions is clear and the provisions contain no textual ambiguity. The Insurers' construction of Articles 55, 58 and 59 of the LAOC is impossible to sustain on the basis of a "plain meaning" interpretation of those provisions alone.

163. The plain meaning of the provisions is that Article 59 of the LAOC is only engaged when Article 58 ('*Special procedure for the confiscation of assets*') of the LAOC applies. Specifically:

    i) Article 58 provides a special procedure for the confiscation of property the subject of a preventive seizure at the request of the Prosecutor, when one year has passed since the preventive seizure was ordered and either the seized property has been abandoned or it has not been possible to determine the identity of the owner of the property.

    ii) Article 59 lists the factors to which the Control Court must have regard for the purposes of deciding on the return of the property referred to in Article 58.

164. Further, the first factor in Article 59 refers to the property "*the object of the confiscation proceedings*", further confirming its dependency on Article 58. Furthermore, factors 1, 2, 3 and 4 of Article 59 make repeated reference to "*the interested party*", and in Article 58 there are four references to "*the interested party*". By contrast, Article 55 uses the word "*interested third parties*" only once, but in a very different context, in the second paragraph of that provision in a section dealing with foodstuffs, drinks and perishables, which goes on to address taking an inventory of them. Article 58, on the other hand, refers to confiscation proceedings and interested third parties, and that is precisely what is being referred to in Article 59.

165. Whilst Professor Ortiz maintains that Venezuelan law permits and requires an "*intertwined textual, purposive, systematic and/or progressive interpretations of laws … [which] thus are the correct approach when the legislation of detention of assets, such as in the organized crime and the similar drug trafficking field is being construed*"[23], Professor Gómez considers that only when the language used is not precise, may judges apply analogy. When the language of the law is clear and contains no textual ambiguity – as the Bank contends is so in the present case regarding Articles 55, 58 and Article 59 of the LAOC – then any statutory construction other than the one suggested by the opening sentence of Article 4 of the Civil Code is not permissible and much less required.[24] In any event, Professor Gómez is of the view that none of the legal interpretive methods relied on by Professor Ortiz justify ignoring the plain introductory words of Article 59 and widening the application of the provision to situations disconnected from Article 58.[25]

[23] Professor Ortiz's First Report, paragraphs 78-104.

[24] Professor Gómez's Supplemental Report, paragraphs 19-20.

[25] Professor Gómez's Supplemental Report, paragraph 21.

166. Accordingly, the Bank submits that neither Article 58 nor Article 59 is relevant in this case.

167. The Bank also points out that the 2010 Anti-Drug Law contains in Article 183 thereof its equivalent of the sentence in Article 20 of the 2005 LAOC ("*the owner will be exonerated from such measure where there are circumstances that demonstrate their lack of intent, which will be resolved at the preliminary hearing*") but also contains Article 186 which is in materially identical terms to Article 59 of the (2012) LAOC and therefore contains the checklist. This might suggest, the Bank submits, that the sentence which appeared in Article 20 of the 2005 LAOC but which was omitted from the (2012) LAOC was deliberately omitted (namely, "[*t*]*he owner will be exonerated from such measure when there are circumstances that demonstrate their lack of intent*")*.*

(iv) Discussion

168. Article 4 of the Civil Code in fact provides that the Law must be given the meaning which is evident from the meaning of the words *according to their connection with each other* and *the intent of the legislator*. Professor Gómez agreed that this means that it is necessary to make the meaning "*harmonious between the grammatical meaning and the teleological meaning*"[26]. In this case, this requires consideration of the interaction between Articles 55, 58, and 59 of the LAOC, as well as Articles 293 and 294 of the OCCP.

169. The procedure by which a third party may seek the restitution of preventatively seized objects is contained in Article 294 of the OCCP. That provides that the court shall return the objects unless it deems their preservation to be indispensable. That immediately raises the question as to how the court determines whether the object is indispensable. If it is not essential to the investigation (Article 293 of the OCCP) it *might not* be indispensable. But that might not be the end of the inquiry: the object may need to be detained in case it requires to be confiscated, having been used in the commission of the offence or having had an illicit origin.

170. In order to determine the approach that the Venezuelan courts would adopt upon an application for the return of property which has been preventively seized under Article 55 of the LAOC, it is helpful to look at any Venezuelan case law. Whilst the Venezuelan courts do not operate a doctrine of binding precedent, Professor Gómez accepted that criminal courts may follow what other criminal courts have decided and typically cite earlier decisions. A body of case law may grow in this way, which sets the trend of case law in a particular direction[27].

171. There is only one case before the Court in which the application of these principles to the current LAOC has been directly considered: *Inversiones Delta Sierra* case of 2014-2018. The judgment shows that in that case an aircraft had been detained under Article 55 of the LAOC. The owner of the aircraft was not charged with any crime. Certain individuals were charged with "Criminal Association" under Article 37 of the LAOC,

[26] Day 3/13/16-19.

[27] Professor Gómez, Day 3/18/7 – Day 3/22/5.

and of being "*witting accomplices in the crime of attempted seizure of an aircraft*". No drug crimes were alleged.

172. An application was made for the release of the aircraft (which must have been under Article 294 of the OCCP). The first instance judge granted the application, applying Article 59 of the LAOC in conjunction with Article 293 of the OCCP, the provisions of which the court considered the owners had satisfied, and the court accordingly gave effect to the owners' right to property under Article 115 of the Venezuelan Constitution. The court's judgment involved a careful analysis of the five Article 59 factors, and it concluded that there had been "*strict and concurrent compliance with what is stated in article 59 of the [LAOC]*" and therefore the order should be lifted "*on account of [the owner's] legitimate ownership over it having been established*". The court's reasoning was as follows:

> "*Moreover, it is noted that neither the company which owns said aircraft nor its shareholders have been subject to any criminal investigation or judicial proceeding for the aforementioned events, since the defendants in the case are persons other than the shareholders or members of said company. Likewise, it is observed that the shareholders did not acquire the asset or any right over it in circumstances that reasonably enable one to conclude that the rights had been transferred in order to avoid a possible preventive seizure, since the asset was acquired prior to the date on which the events which form the object of the proceedings took place, a fact which can also be seen from the aeronautical registration of the acquisition of the asset. Likewise, it can be seen that the interested party did everything reasonable to prevent the illegal use of the assets, that is, it did not consent to any illegal use of the asset; on the contrary, it turned out to be the affected party in this case. In this sense, according to article 115 of the Constitution of the Bolivarian Republic of Venezuela, in which the right to property is enshrined with constitutional rank and wherein it is established that every person has the right to use, benefit from and enjoy their property, and, likewise, upon noting that there is strict and concurrent compliance with what is stated in article 59 of the Organic Law Against Organised Crime and the Financing of Terrorism, in conjunction with article 293 of the Organic Code of Criminal Procedure, this Court agrees to leave without effect (lift) the preventive seizure measure issued on 9 April 2014 by this Court on the aircraft …*
>
> *RULING*
>
> *On the basis of the above factual and legal reasons, this First (1st) Criminal Court of First Instance in Trial Functions of the Criminal Judicial Circuit of the State of Miranda - Valles del Tuy Extension, in accordance with the provisions of article 115 of the Constitution of the Bolivarian Republic of Venezuela, in relation to articles 59 of the Organic Law Against Organised Crime and Financing of Terrorism and 293 of the Organic Code of Criminal Procedure, agrees to leave without effect (lift) the preventive seizure measure issued on 9 April 2014 on the aircraft of the brand King Air 300, Bech Aircraft Corporation, registration YV-2899, serial FA-48, and instead agrees to return it to the corporation Inversiones Delta Sierra 2012 C.A., on account of the latter's legitimate ownership over it having been established...*" (emphasis added)

173. It is clear that the decision in *Delta Sierra* provides strong support for the Insurers' case. The owner applied to the court for the release of the aircraft and having satisfied the criteria in both Article 59 of the LAOC and Article 293 of the OCCP, the aircraft was then released.

174. There was no suggestion in *Delta Sierra* that the detention by the court was impermissible *solely* because the owner of the aircraft had not been charged with an offence (rather, the court analysed each of the relevant Article 59 criteria), or that the *only* relevant question was whether the detention was "essential" to the investigation. Nor was there any suggestion that there had been any breach of duty by the public prosecutors in their not seeking the return of the aircraft. Moreover, the court clearly did not consider that the Article 59 criteria only applied for the purposes of deciding on the return of assets under Article 58. This strongly suggests that, contrary to the submissions of the Bank, the language of these provisions, and how they interrelate, is not as clear as the Bank suggests.

175. The prosecutors appealed against the decision to release the aircraft on the basis that the aircraft might have been acquired with the proceeds of drug crime (that is why the judgment contains references to Articles 183 and 186 of the Anti-Drug Law, notwithstanding that the aircraft had been detained under Article 55 of the LAOC and nobody had been charged with any drug related offence). The prosecutors argued that, because there was "*uncertainty regarding the origin of the funds and the ownership of the asset*", "*the requirements for the asset to be returned*" (i.e. the Article 59 requirements) were not met.

176. In dismissing the prosecutors' appeal, the Court of Appeal specifically recorded the following:

> "*From the above transcribed provision and from jurisprudential criteria, it is inferred that the Public Ministry can return seized objects when it does not consider them to be necessary to the investigation*[28]*, the applicants or interested third parties being able to appear before the corresponding Judge in order to lodge their requests*[29]*, it falling upon the Court the duty to return the objects, unless it considers their conservation indispensable*[30]*, which shall be established in a reasoned manner*[31] *or in response to the fact that the items delivery of which is requested are stolen, pilfered or swindled, inter alia, therefore reasonably warranting the refusal to deliver them.*
>
> *Now, this Chamber observes from the records which comprise the file, that they contain elements which were considered by the lower Court at the time of its ruling, to comply with the requirements laid down in Article 59 of the Organic Law against Organized Crime and Financing for Terrorism. Those elements are:…*"

[28] Under Article 293 of the OCCP.

[29] Under Article 294 of the OCCP.

[30] Under Article 294 of the OCCP.

[31] By reference to Article 59 of the LAOC.

177. The Court of Appeal then recorded the fact that the first instance judge had found the Article 59 criteria to be satisfied, including the fact that the interested party was the owner of the aircraft and it did not acquire the asset or any right over it in circumstances that reasonably enable one to conclude that the rights had been transferred in order to avoid a possible preventive seizure, since the asset was acquired prior to the date on which the events which form the object of the proceedings took place (a fact which could also be seen from the aeronautical registration of the acquisition of the asset). Likewise, it could be seen that the interested party did everything reasonable to prevent the illegal use of the assets. It did not consent to any illegal use of the asset; on the contrary, it turned out to be the affected party. This was the "reasoned manner" in which the court found that the preservation of the asset was not indispensable.

178. The Court of Appeal accordingly concluded as follows in dismissing the appeal:

> "*From what is transcribed above, it can be seen that the appellants are not right when they state that the appealed ruling is unfounded, since the lower Judge did indeed give reasons for his ruling in accordance with articles 115 of the Constitution of the Bolivarian Republic of Venezuela, in relation to article 59 of the Organic Law Against Organised Crime and Financing of Terrorism, in harmonious relationship with article 293 of the Organic Code of Criminal Procedure.*
>
> *Having specified the foregoing, it is clear that the appealed decision is duly grounded, since the Judge of First Instance, when giving the reasons for his decision, supported the same in accordance with the constitutional rank referring to the right to property which individuals have with regard to the use, benefit and enjoyment of their assets*[32]*, as well as the requirements set out in article 59 of the Organic Law against Organised Crime and Financing of Terrorism, with which the [owner-applicant] complies, in order to proceed with the return of the aircraft …, thereby enabling the parties to determine with accuracy and clarity what the factual and legal reasons determined by the judge were, this in accordance with the rules of logic, the principles drawn from experience, sound criticism and scientific knowledge, when declaring the right by means of a duly grounded decision, insofar as it is accompanied by a consistent, harmonious and properly articulated enumeration of the various elements that comprise the proceedings and which are linked to one another, which, when assessed jurisdictionally and in a sovereign manner by the Judge, converge to arrive at a serious, defined and certain position or conclusion*." (emphasis added)

179. The Supreme Court upheld the Court of Appeal's decision, holding that it had in turn given adequate reasons for upholding the first instance judge's decision.

180. Whilst Professor Gómez suggested in his supplementary report that the Court of Appeal did not itself engage in an independent analysis of the applicability of Article 59 of the LAOC, he rightly accepted that the Court of Appeal's decision should indeed be read

[32] Article 115 of the Venezuelan Constitution.

as supporting the Judge's analysis that Article 59 was applicable, in conjunction with Article 293 of the OCCP:

> "*MR JUSTICE CALVER: But the Court of Appeal are supporting what the first instance judge has done here, aren't they?*
>
> *A. Yes.*
>
> *MR JUSTICE CALVER: Because they are expressly saying that the decision was duly grounded in proper reasoning and so on under Article 59. And if they thought that 59 had no application, then no doubt they would have said so.*
>
> *A. I agree with that.*"[33]

181. It is the Bank's case that, regardless of *Delta Sierra*, the LAOC does not permit the confiscation of assets where the Owner of the assets is not charged with an offence, by reason of Article 115 of the Venezuelan Constitution; and Article 293 of the OCCP requires the release of an asset which has been the subject of preventive seizure under Article 55 of the LAOC where the asset is no longer essential to the investigation.[34]

182. Accordingly, the Bank submitted that once it had become clear in the present case that no causal connection existed between the Owners and the crimes charged by the Prosecutors and/or that the Vessel was not essential to the criminal investigation, the Prosecutor had *a duty* under Article 293 of the OCCP to request the immediate release of the Vessel to its Owners.[35] The Prosecutor did not have to wait until the Owners or other interested third party had applied under Article 293 and/or 294 of the OCCP to recover the asset.

183. This analysis led the Bank to contend that the Vessel could no longer be regarded as essential to the investigation and should therefore have been released no later than the date of the latest investigative activity referred to in the Joint Accusation Brief, which it says was 1 October 2015, alternatively not later than the conclusion of the preliminary investigation on or about 9 October 2015 (when the Accusation Brief was issued).[36] The continued seizure of the Vessel after this time therefore violated the Owners' rights under the Venezuelan Constitution[37].

184. I do not accept the Bank's submissions. Consistently with Professor Ortiz's evidence, I consider the proper construction of the relevant provisions of Venezuelan law, particularly in light of *Delta Sierra*, to be as follows:

---

[33] Day 3/67/21 – Day 3/68/4.

[34] Professor Gómez's Report, paragraph 50.

[35] Professor Gómez's Report, paragraph 50.

[36] Professor Gómez's Report, paragraph 50; Professor Gómez's Supplemental Report, paragraph 11.

[37] Namely, their right to due process (since the Owners were not allowed to participate in the proceedings), the presumption of their innocence, and their right to property.

i) The court has power under Article 55 of the LAOC to detain a third party's asset, which was used in the commission of an offence being investigated, so as to preserve it in the event of confiscation. The exercise of that power is not unconstitutional[38].

ii) The third party is required to make an application under Article 294 of the OCCP for the return of its asset. The court shall return the asset unless it deems its preservation to be indispensable.

iii) In determining the question of indispensability, the Court takes into account two matters: (i) whether the asset is still essential to the investigation and (ii) the criteria under Article 59 of the LAOC. So far as the Article 59 criteria are concerned, I consider that the Insurers are correct to submit that the burden rests upon the interested party to satisfy the court of the fulfilment of any of the relevant criteria in Article 59[39].

iv) If the owner establishes the Article 59 criteria and the asset is no longer essential to the investigation, then the court must return the asset to the owner.

v) Only the court can order the return of the asset to the owner if it has been seized under Article 55 of the LAOC. The Prosecutor is not able to do so, nor is there any duty upon him to do so. Whilst the Prosecutor's view may carry a lot of weight[40], it is for the court to determine the issue of return.

185. I consider that Article 293 of the OCCP fulfils a dual purpose. So far as assets held by the prosecutor which are *not* subject to any court order are concerned, but which are detained by him under Article 111(12) of the OCCP, then if they are no longer essential to his investigation, they must be returned by him without unjustified delay (which he can do as the assets are not then subject to any court order). But once the assets are subject to a court order for preventive seizure under Article 55 of the LAOC, then it is the court which must determine whether they should be returned upon application of the third party under Article 294 of the OCCP, by applying the test under Article 293 of the OCCP of whether they are essential to the investigation, in conjunction with the application of any relevant criteria under Article 59 of the LAOC. The prosecutor is *unable* in such a case to return the assets until the court has determined whether or not it is appropriate to do so. Until that moment in time, there can accordingly be no duty upon the prosecutor to return the assets (and no duty to request their return), and the prosecutor cannot be guilty of any unjustified delay in returning the assets (leading to potential civil, administrative and disciplinary liability on their part). This analysis is

[38] If it were otherwise, the analysis of Article 59 of the LAOC in *Delta Sierra* would have been unnecessary. I also accept in this regard the evidence of Professor Ortiz (unchallenged in cross-examination) that three Venezuelan cases have upheld and justified the detention and confiscation of assets involved in organised crime, including assets of third parties: Ortiz (1), paragraph 154. Indeed, had the Owners considered the detention of their Vessel to be unconstitutional, they would no doubt have issued a writ of *amparo*, but instead they issued their Third Party Motion relying upon Article 59 of the LAOC.

[39] Consistently with this, see *The B Atlantic (No 2)* [2015] 1 Lloyd's Rep 117 in the context of the anti-drug legislation of Venezuela, *infra*.

[40] Cross-examination of Professor Gómez {Day3/127-128}.

consistent with the fact that: (i) it is only the court which can make an order for the preventive seizure of assets under Article 55 of the LAOC[41]; (ii) accordingly, only the judge can revoke, modify or lift an order of preventive detention or seizure of assets[42]; and (iii) the opinions or requests of the prosecutor are not binding on the judge[43].

186. I further find, as a matter of Venezuelan law, that assets can be detained under Article 55 of the LAOC whether or not the owner is guilty, or alleged to be guilty, of a crime. Article 55 enables the Court to order the detention of assets used in the commission of the offence. "Assets" are defined in Article 4(6) of the LAOC to include assets "*even if they are in the possession or property of interposed persons or third parties not involved in these offences*". Preventive detention under Article 55 is defined in Article 4(4) of the LAOC to mean "*the temporary prohibition to transfer, covert, encumber, alienate or mobilize assets, or the temporary custody or control of assets, by order of the competent court*", and is an interim order which ensures that the relevant assets remain available to the Court for confiscation if the Court ultimately decides after trial to make a confiscation order[44].

187. I accordingly agree with the Insurers that it would therefore be illogical for Article 293 of the OCCP to require the release of an asset which has been preventively detained under Article 55 of the LAOC simply because the asset is no longer essential for the investigation. Preventive detention under the LAOC can be ordered and continued whether the asset is essential to the investigation or not, unless the owner also satisfies the court of the relevant criteria under Article 59 of the LAOC.

188. I also draw comfort in this analysis from the fact that it is consistent with the position adopted by the Venezuelan courts under the anti-drug legislation, where it is open to an interested party to apply to the court for the return of a detained asset by demonstrating "lack of intention". There is a dispute between the experts as to whether cases under the anti-drugs legislation are analogous or not. I consider that Professor Ortiz's evidence was persuasive in this regard, and that whilst the two types of case may require *some* differences in approach depending upon the particular crime charged, contrary to paragraph 187 of the Bank's closing submissions, the anti-drugs cases do provide a reasonable indication at least, as to how a Venezuelan court would likely approach this issue in the context of serious (or "grave") crimes such as smuggling and conspiracy (the crime of association), not least because the approach in the anti-drugs cases is consistent with the approach of the court in *Delta Sierra*.

189. Thus, in *The B Atlantic (No 2)* [2015] 1 Lloyd's Rep 117, where the Venezuelan anti-drug legislation and case law was considered by Flaux J (as he then was), the Judge concluded that the burden was on the owner to make an application to have the vessel released, and that to do so the owner had to demonstrate "lack of intention". The court held at [295] that the matters that the Venezuelan court would have considered in

[41] Joint Expert Memorandum at paragraph 11.

[42] Joint Expert Memorandum at paragraph 11.

[43] Joint Expert Memorandum at paragraph 12. As a matter of fact, the Prosecutor was not in possession of the Vessel in the present case; it was placed at the disposal of the National Office Against Organised Crime.

[44] Ortiz §177-178.

assessing "lack of intention" were reflected in Article 186 of the 2010 Anti-Drug Law, which is in materially identical terms to Article 59 of the LAOC, and which reflected the previous position under the 2005 LAOC as to what needed to be proved by the owners to establish "lack of intention":

> "*I consider that Mr Rainey QC is right that the decision in Geici does support Professor Ortiz's opinion that the approach of the Venezuelan courts is to require more than merely asserting that one has not been accused or convicted of the drug crime. As Mr Rainey QC submitted, behind what might appear to the English eye to be a harsh approach to the owners of vessels used in the commission of drug crime, there is an obvious public policy in Venezuela of taking a tough line on drug smuggling and thus of requiring more of the owners than the assertion of innocence of the crime, for example requiring the owners to show that they have taken all reasonable steps to avoid the use of the Vessel or the land in the commission of the crime. Thus, in my judgment, although Articles 185 and 186 of the 2010 Law*[45] *are new, Professor Ortiz is correct in saying that the matters set out in Article 186 reflect the previous position under the 2005 Law, as to what needed to be proved by the owners to establish "lack of intention". Furthermore, contrary to the owners' submissions, it seems to me that establishing "lack of intention" must necessarily involve more than establishing that the owners were not accused or named in the indictment, given that it is common ground that there is jurisdiction to order preventive detention under Article 63, if the Vessel was used in the commission of the drugs crime, notwithstanding that the owners are not accused.*"

190. Flaux J also concluded at [283] that:

> "*…the burden of proof in any case where the owner of the asset, here the Vessel, seeks its release from preventive detention, is upon that owner not only to establish that it is the true owner but that it can satisfy whatever the requirements are under the relevant law for the release of the Vessel, under article 63, lack of intention. In the circumstances, I have no doubt that the burden of proof was upon the owners under article 63 to establish lack of intention and the prosecution do not have to prove anything, least of all that the owners are accused of the relevant offence.*"

191. I consider that the same reasoning applies in the case of Articles 55 and 59 of the (2012) LAOC. True it is that the sentence concerning lack of intention (which appeared in Article 20 of the 2005 LAOC) has been removed from Article 55 of the LAOC. However, I accept Professor Ortiz's evidence that the old "lack of intention" wording was thought unnecessary because the relevant factors were now spelled out by Article 59 (and that the burden is upon the interested party to establish compliance with those factors). This derives support from ONCDOFT's Non-Binding Opinion in response to the Owners' Third Party Motion in this case, in which it stated:

[45] The equivalents of Articles 58 and 59 of the (2012) LAOC.

> "*…the intention of the legislator in incorporating the assumption with which the wording of Article 59 [Organised Crime Act] ends, is to provide for cases in which the owner of movable or immovable property involved in the commission of one of the offences contemplated in the Organic Law against Organised Crime and Terrorist Financing, does not intend to participate in the illicit acts defined in the special law*."

192. This analysis also derives support generally from the Venezuelan case law in drugs cases. There are numerous examples of the seizure of property belonging to a third party who is not charged with any offence, but whose property is determined to have been used in the commission of the crime being investigated. For example, in *Franey Maritza Sosa* (2009), the Supreme Court of Justice stated as follows:

> "*…it is clear that the Public Prosecutor's office as director of investigations has expressed powers to request the seizure of assets and the control judge par excellence is empowered to decree the seizure of movable assets provided that the aforementioned assets of the elements of investigation that are presented is determined to have been used in the Commission of the crime being investigated without being necessary that the owner of the asset has or does not have a prosecutorial charge that is to say it is sufficient that there is merely an assumption that the asset has been used as instrument in committing a crime to proceed with its preventive seizure which means that it is incorrect the criterion of the appellants that their client is not involved in any punishable act and that therefore the measure of preventive seizure of their property cannot be decreed…*
>
> *The seizure of assets, as expressed in the cited provisions is a preventive and provisional measure, which is issued with the sole purpose of temporarily prohibiting any act of trade of that asset during the process and until final judgement, unless the owner of the asset demonstrates his lack of intent in the using of the property as means in the commission of the crime, therefore it cannot be claimed during this Investigative Phase of the process that such measure is contrary to the right to property and that it causes an irreparable harm, because if the owner, who is the one that has the burden of proof, demonstrates during the process the lack of intent on his part to use the asset for the commission or facilitation of a drug crime, and in addition proves that the asset is a lawful acquisition, he might be exonerated of such seizure during the intermediary phase of the criminal proceeding.*
>
> *Therefore it is considered that the aforementioned measures to secure assets and immobilise bank accounts did not violate the right of ownership nor the prohibition of confiscation… since they are provisional and conservationist measures which are adopted in order to guarantee possible civil liability in addition to that they cannot be indicated as confiscatory measures since there is no final judgement of conviction.*"

193. It should be added that, exceptionally in the drugs cases, confiscation of an innocent owner's property has been allowed but that was on the ground of Article 116 of the Venezuelan Constitution, which expressly refers to confiscation of property derived

from business or activities connected with unlawful trafficking in psychotropic and narcotic substances[46].

194. Significantly, as can be seen from the summary of the factual background set out above, the foregoing analysis of Articles 55 and 59 of the LAOC and Articles 293/294 of the OCCP is also consistent with the way in which the relevant parties argued their cases before the Venezuelan Control Court in the present case, see in particular:

i) The appeal against the Detention Order filed on behalf of the Owners by Mr Idemaro Gonzales;

ii) The Owners' Third Party Motion and their Ratification Brief. I found Ms Mujica's evidence that her and her colleagues did not consider Article 59 relevant despite relying upon its provisions in the Ratification Brief to be implausible;

iii) The Prosecutors' Second Answer to the Owners' Third Party Motion;

iv) ONCDOFT's opinion filed with the Court; and

v) The Court's reasoning in its Release Order, when properly analysed.

195. It follows that whilst it is plainly the case that, as a matter of Venezuelan law, the Venezuelan court takes Article 59 of the LAOC into account in deciding whether to return assets of the type referred to in Article 58 of the LAOC, I find that that is not exclusively so and that it also takes Article 59 of the LAOC into account in determining, under Article 294 of the OCCP, an interested party's application for the return of an asset seized under Article 55 of the LAOC.

(E) DID THE VESSEL BECOME UNLAWFULLY DETAINED AT ANY POINT IN TIME?

196. In light of my findings as to Venezuelan law set out above, I turn next to consider how Venezuelan law applies to the facts of this case in determining whether the ongoing detention of the Vessel became unlawful at any point in time.

197. The starting point is first, as set out above, that it is common ground between the parties that the Detention Order was lawful[47] and that no further order of the Court was required to maintain the detention of the Vessel, which remained in effect until it was lifted, modified or revoked by the Court[48]. Only the court could release the Vessel.

198. Second, the application to release the Vessel from detention had to be made by the Owners (as an interested party) under Article 294 of the OCCP. In order for it to be released, the Owners needed to persuade the court of the satisfaction of the criteria contained in Article 293 of the OCCP and Article 59 of the LAOC.

[46] An illustration of this is afforded by the case of *Agropecuaria Geici* (2009) ("the go-karting case").

[47] Common Ground, paragraph 16.

[48] Joint Expert Memorandum, paragraph 14.

199. There was no duty resting upon the Prosecutors to apply to the court for the release of the Vessel which the court had preventatively detained if they considered that it was no longer essential to the investigation. The Vessel was not unlawfully detained and would only become unlawfully detained should it not be released after the court had ruled that it should be.

200. The Owners' petitioning of the Prosecutors to release the Vessel (which was subject to a court order of detention) on 5 October 2015 was accordingly of no legal effect. No doubt the Owners did this because they wanted to get the Prosecutors "on side" since if that occurred, and the Prosecutors then supported their motion to release the Vessel, the court would be likely to grant its release (as ultimately happened in this case). Indeed, Ms Mujica expressly accepted in cross-examination that what she was trying to persuade the Prosecutors to do by her request of 5 October 2015 was to "*voluntarily*" request the release of the Vessel[49]. The Owners themselves could equally have applied to the court for the release of the Vessel (as they ultimately did). But the Prosecutors had no power themselves to release the Vessel which had been detained by court order under Article 55 of the LAOC.

201. The Detention Order could only be discharged by the court and it was discharged by it on 17 October 2016 because the investigation was at an end, and the Article 59 criteria were established by the Owners (in their Third Party Motion dated 24 May 2016 and in their Ratification Brief filed around the end of August/beginning of September 2016). Any alleged delay in the court hearing the application to lift the detention (until 17 October 2016) did not make the Prosecutors' conduct unlawful: they had to await the court's ruling on whether the detention should be lifted.

202. In any event, it cannot sensibly be said that the Prosecutors' (or indeed the Court's) acts or omissions in respect of the detention of the Vessel were anything other than *bona fide*. A *bona fide* error in applying the law does not break the chain of causation (see *The Anita* [1971] 1 Lloyds Rep 487 at 493-494 and *The Silva* [2011] 2 Lloyds Rep IR 470 at [41]), absent perversity (see the *B Atlantic* [2015] 1 Lloyds Rep 117 at p. 162 (per Flaux J)), which the Bank cannot possibly establish on the evidence in the present case (and for which it did not contend). As I have stated in paragraph 118 above, there is certainly insufficient evidence to suggest that the Vessel was being detained for political reasons as Ms Mujica speculated in her evidence, and even less to suggest that the detention was made and/or continued upon the orders of the President of Venezuela.

203. But even if the Bank were right that there was a duty on the Prosecutors to request the release of the Vessel once the detention of the Vessel was no longer essential for the investigation, I conclude in the light of my factual findings above that the Bank has failed to establish any breach of that duty[50].

204. The Bank's case is that the detention ceased to be essential from 9 October 2015 (alternatively, 1 October 2015). However, my findings of fact above demonstrate that

[49] Day 2/28/11 – Day 2/29/2.

[50] I should add that, in any event, I accept the Insurers' submission that, as a matter of Venezuelan law, even if the Prosecutors owed such a duty of which they were in breach, this would only lead to the possible consequence of their bearing a civil, administrative and/or disciplinary liability, as opposed to rendering the detention of the Vessel unlawful.

as late as September and October 2015, Clyde & Co (Venezuela) (on behalf of the Owners) made their seven requests for the Prosecutors to carry out further investigations, many of which directly concerned the Vessel, including asking for the appointment of a naval inspector to survey the tanks and other equipment and requesting that the Prosecutors carry out a simulated trans-shipment. Ms Mujica accepted that when she was making these requests, the view of Clyde & Co (Venezuela) was that the Vessel was essential to the investigation.

205. In addition to these many evidential requests, the Orinoco survey report was only provided to the Prosecutors on 7 October 2015. It is therefore unsurprising that on 9 October 2015 the Prosecutors stated in the Accusation Brief that the investigations were continuing, and that they included the *reserva fiscal*. I reject Ms Mujica's suggestion that the Prosecutors should have carried out their investigation more quickly.

206. Indeed, it was only when the Owners submitted their Ratification Brief in late August/early September 2016 that they established a legal basis – under the Article 59 criteria – for the release of the Vessel (explaining, amongst other things, their lack of intention and participation in the offence) and the Prosecutors then acted swiftly after that submission by explaining in their Second Answer dated 29 September 2016 that they did not oppose the Vessel's release. I consider that there is an insufficient evidential basis for this court to conclude that the time taken by the Prosecutors to carry out their investigation rendered the detention unlawful.

207. I therefore accept the Insurers' submission that there is no factual basis for concluding that the Vessel was no longer "essential" to the investigation at the time of the Accusation Brief or at any point prior to the Prosecutor's Second Answer. Whilst the court refers in its Release Order to the fact that the investigation phase typically concludes with the filing of the Accusation Brief, the Prosecutors made clear in the Accusation Brief that their investigations were continuing after that date. If the Owners considered that the detention of the Vessel after that date was unlawful, there was nothing stopping them from making an application to the court under Article 294 of the OCCP for the release of the Vessel, but they chose not to do so until 24 May 2016.

208. It follows that the detention of the Vessel was not unlawful and the Detention Order falls within the exclusion clause in Rules 3.5.1 and 3.5.2 of the Club Rules. There would therefore not have been cover under the War Risks Policy in any event.

(F) WAS THERE A CONSTRUCTIVE TOTAL LOSS UNDER THE DETAINMENT CLAUSE?

209. The detainment clause contained in Rule 3.14.2 of the War Risks Policy ("**the Detainment Clause**") provides that:

> "*If an Owner is deprived of the free use and disposal of an Entered Ship by capture, seizure, arrest, restraint, detainment, confiscation or expropriation: …*
>
> *3.14.2 if such deprivation lasts for a continuous period of 12 months, the Owner shall be deemed to have been deprived of the possession of the ship without any likelihood of recovery.*"

210. By reason of the fact that the loss in the present case would have fallen within the exclusion in Rule 3.5 of the Club Rules, I accept the Insurers' submission that there was not in this case a continuous period of 12 months during which the deprivation was not caused by an excluded peril.

211. In *The Aliza Glacial* [2002] Lloyd's Law Reports 421, the claimants were a Norwegian bank which claimed as mortgagees of *Aliza Glacial* under a mortgagees' interest insurance policy issued by the defendant underwriters. The policy contained the following exclusions:

> "*4. This insurance excludes:*
> *4.1 loss, damage, liability or expense arising from*
> *4.1.5 arrest, restraint detainment … or by reason of infringement of any customs or trading regulations;*
> *4.1.6 the operation of ordinary judicial process, failure to provide security … or any financial cause.*"

212. The vessel was detained for some 14 months by the Australian fisheries department ("**AFMA**") by reason of alleged illegal fishing. It was not in issue that, if the vessel was detained for an infringement of trading regulations, then any claim under the War Risks Policy would be excluded and there would therefore be no *prima facie* coverage in relation to the seizure of the Vessel by AFMA (although on the facts the court held that it was detained for illegal fishing rather than for trading illegally).

213. In particular, Potter LJ stated at 433ff:

> "*60… In this context, use of the phrase "Loss ... or expense arising from" the various exceptions does no more than import the usual test of causation as between peril and exception, namely that of proximate cause, primacy being attached to the exception over the peril in any case where competing causes are equal or nearly equal in bringing about the damage.*
>
> *61. Further, we consider that Exception 4.1.6 falls to be construed against the background that the owners' policy is one in which the relevant peril is defined as "loss of or damage to the Vessel" (Clause 1). In that context, the burden rests upon the insured to establish its actual or constructive total loss. The policy plainly contemplates, as indeed is the position in this case, that following seizure and/or detainment, the deeming provision contained in the detainment clause (Clause 3) is likely to be relied on by the insured as the mode of proof of loss. Clause 3 requires that, in the event of seizure, detainment etc "the assured shall thereby have lost the free use and disposal of the Vessel for a continuous period of twelve months". <u>If a claim is made under Clause 3, this seems to us to import a test of causation which must be applied not simply to the cause of the original seizure (not enough in itself to amount to loss of the Vessel) but to the full 12 month period of the detainment relied on as constituting the loss of the Vessel.</u>*
>
> *62. That being so, in this case, where the loss of the Vessel relied on is a constructive total loss accruing as a result of a detainment of at least twelve months, <u>it is the task of the court to consider whether the insured peril is indeed the proximate cause of that loss or whether that loss equally falls within the exclusion.</u> In this connection, however, if it be shown that it was not reasonable for the owners to provide the surety demanded*

in respect of the Vessel because the sum required exceeded the full value of the ship and would otherwise enable her to be treated as a constructive total loss, the exclusion should be treated as inapplicable."

214. Applying this analysis to the facts of the present case, the loss falls within the exclusion and the Bank cannot show that the full 12 months period of the detainment was caused by an insured peril.

215. In any event, the Owners tendered the First NOA to the Club on 3 October 2016, claiming an indemnity for a CTL. The Club rejected the First NOA, but agreed to place the Owners in the same position as if a claim form had been issued on 3 October 2016. Thus, even if the Bank could establish that the detention ceased to be lawful on 9 October 2015[51] because (the Bank alleges) it should have been clear to the Prosecutor by that date that the Vessel was not essential to the investigation, then the Bank still cannot show a continuous period of 12 months during which the detainment was not caused by an excluded peril.

(G) WAS THERE A CONSTRUCTIVE TOTAL LOSS UNDER SECTION 60(2)(i) OF THE MARINE INSURANCE ACT 1906?

216. Section 60 of the 1906 Act provides as follows:

> "*60. Constructive total loss defined.*
> *(1) Subject to any express provision in the policy, there is a constructive total loss where the subject-matter insured is reasonably abandoned on account of its actual total loss appearing to be unavoidable, or because it could not be preserved from actual total loss without an expenditure which would exceed its value when the expenditure had been incurred.*
> *(2) In particular, there is a constructive total loss—*
> *(i)Where the assured is deprived of the possession of his ship or goods by a peril insured against, and (a) it is unlikely that he can recover the ship or goods, as the case may be, or (b) the cost of recovering the ship or goods, as the case may be, would exceed their value when recovered; or…*"

217. If (contrary to the Bank's primary argument) the existence of a CTL must be established under section 60(2)(i) of the 1906 Act, then I consider that the Owners would not have been able to establish a CTL under that section either. As between the Owners and the Club, the relevant date would have been the date of the First NOA, 3 October 2016. The Owners would therefore have had to show that on 3 October 2016 it was unlikely that the Vessel would be recovered within a reasonable time.

218. Section 60(2) of the 1906 Act applies independently of section 60(1) and is not, as might appear at first sight, a mere illustration of a CTL falling within section 60(1). Accordingly, the assured does not have to show that "*there is a constructive total loss where the subject-matter insured is reasonably abandoned …*" to establish a CTL under

[51] The suggestion that it ceased to be lawful on 1 October 2015, being the date of the latest investigative activity referred to in the Accusation Brief but being before the date when the Accusation Brief was even filed, has even less merit, particularly in light of the factual background set out above.

section 60(2).[52] In *Rickards v Forestal Land, Timber and Railways Co Ltd* [1942] AC 50, Lord Wright stated at page 84 that:

> "*I think the view which this House arrived at was that the two sub-sections contain two separate definitions which may be applied to different conditions of fact. Thus an assured can base his claim on the terms of sub-s. 2, which give an objective criterion in each case, ship, goods or freight, not only more precise but substantially different from that in sub-s. 1*."

219. Similarly, HHJ Mackie QC stated in *Clothing Management Technology Ltd v Beazley Solutions Ltd* [2012] EWHC 727 (QB); [2012] 1 Lloyd's Rep 571, at paragraph 36:

> "*I notice that in The Bamburi … Staughton J identifies it as being established by authority and not in dispute that subsection (2) [of section 60] supplements subsection (1) and does not merely illustrate it. The judge identifies that consideration as being important in that case because Bamburi was not a CTL under (1) but proved to be under (2). Further imposing such a criterion [the abandonment of any hope of recovery] is stricter than 'unlikely' and would oblige CMT to show something more than section 60(2) requires.*"

220. It follows that to establish that the Vessel was a CTL as a matter of fact under section 60(2)(i) of the 1906 Act, it suffices for the Bank to show that as at 3 October 2016, when the NOA was tendered, it was unlikely that the Owners could recover the Vessel within a reasonable time.

221. However, I accept the Insurers' submission that, if this is to be considered the relevant date for assessing a CTL as between the Owners and the Club, there is no CTL since, by this date, it was likely that possession of the Vessel would be recovered within a reasonable time. The Owners had already filed their Third Party Motion asking for the Vessel to be released (on 24 May 2016), and the Prosecutor had already filed its Second Answer stating that it consented to the release of the Vessel (on 29 September 2016). It was common ground that once the Prosecutors did that, the court would be likely to release the Vessel (albeit it was not obliged to do so). The Release Order was in fact issued just two weeks later (on 17 October 2016).

222. Whilst the test for assessing unlikelihood of recovery is to be applied *prospectively*, on the true facts existing at the relevant time with regard to the prospects of recovery as they would have appeared to an informed observer,[53] as Sir Raymond Evershed MR also observed in *Atlantic Maritime v Gibbon* [1954] 1 QB 88 at p. 113 (cited in *The Bamburi* [1982] 1 Lloyd's Rep 312 at 316 *per* Staughton J):

> "*What happens afterwards may assist in showing what the probabilities really were, if they had been reasonably forecasted*."

223. Ms Mujica's evidence was that once the Prosecutors had indicated in their Second Answer that they did not oppose the release of the Vessel, she thought it was "*almost*

[52] See *Polurrian Steamship Company v Young* [1915] 1 KB 922, 936-937.

[53] See *Polurrian v Young* (1913) 19 Com Cas 143; *Marstrand Fishing Co Ltd v Beer* (1936) 56 Lloyd's Rep 163; *Kuwait Airways Corp v Kuwait Insurance Co SAK* [1996] 1 Lloyd's Rep 664.

guaranteed" that the Vessel would be released and Clyde & Co (Venezuela) were "*very positive at that point*" (although she said that there are "*no warranties*" and nothing is certain):

> "*Q. So whilst there are no guarantees, as you have just said, if the prosecutor doesn't oppose detainment, it is probable, isn't it, that the judge will release the Vessel, because he will know that a senior prosecutor has been involved, and he won't want to be criticised by detaining the Vessel longer, or in an extreme case, face some sort of liability for wrongful detainment; that is correct, isn't it?*
>
> *A. Yes.*"[54]
>
> "*Q. So when you received the prosecutor's second response to your third party request -- I am sure you remember that, he said he didn't oppose the release of the Vessel -- you must have been optimistic, mustn't you?*
>
> *A. Well, or that, every decision strategy that we made, we were going for the release obviously, so we met many times with prosecutors, and at the moment they said they had the instructions, we thought that we were almost guaranteed, but, like, it is so uncertain that you can see that at what moment at that same month do you oppose three weeks earlier, and then they said they didn't oppose. So there is always an uncertainty.*
>
> *We were very positive at that point, because that is why we filed the third party motion when we did.*"[55]

224. Ms Mujica also confirmed in her evidence that Clyde & Co (Venezuela) had probably communicated to the Owners that they had "*good chances*" of securing the release of the Vessel following the Prosecutor's Second Answer. The Insurers suggest that the inference is that the Owners tendered their First NOA shortly following receipt of the Prosecutor's Second Answer because they appreciated that the release of the Vessel was imminent, and therefore sought to preserve their claim for a CTL before the Vessel was actually released. That may be correct; however, it is not necessary for me to make a finding either way in this regard and I decline to do so in the absence of sufficient evidence on the point (there being a lack of disclosure of the Owners' email traffic around this time).

225. It is sufficient for present purposes for me to find on the evidence, and I do find as a fact, that it was likely by 3 October 2016 that the Vessel would be recovered within a reasonable time.

[54] Day 2/57/2-10. See also Day 2/58/4-10.

[55] Day 2/58/11-24.

(H) CONCLUSION ON WAR RISKS COVERAGE ISSUES

226. It follows that the detention of the Vessel fell within Rules 3.5.1 and 3.5.2 of the Club Rules and it did not give rise to an insured loss. The Owners would not have been able to establish a CTL of the Vessel. Accordingly, subject to the outcome of the arguments under the MII Policy which follow (in particular in respect of Clause 1(ii) of the MII Policy), the Bank has no entitlement to an indemnity as assignee and loss payee under the War Risks Policy.

(I) IS THERE COVER UNDER THE MII POLICY?

227. By the MII Policy, the Insurers agreed to insure the Bank so as to cover all vessels mortgaged to the Bank and declared by the Bank under the MII Policy, which included the Vessel.[56]

228. The "*Interest*" insured under the MII Policy was as "*Mortgagee and/or Lessors and/or Innocent Owners Interest as Assignees and Loss Payees under the owners Policies …*" and the War Risks Policy incorporated and was subject to the terms of notices of assignment dated 20 January 2020 in favour of the Bank. Thus, had a recovery been made under the War Risks Policy, the indemnity would have been paid to the Bank.

229. Clause 1 of the MII wording provides as follows:

> "*1. <u>COVERAGES</u>*
> *This insurance to indemnify the Insured for loss of, or damage to, or liability arising in connection with the vessel.*
> *(i) Which is prima facie covered by the Owners' Policies and/or Club Entries as per Section 3 but in respect of which, there is subsequent non-payment or part non- payment by Underwriters of the Owners' Policies and/or Club Entries resulting from any act or omission of any one or more of the Owners and/or Operators and/or Charterers and/or Managers of the vessel concerned and/or their Servants and/or Agents or anyone else held responsible (hereinafter together called the "Relevant Parties") including any breach of warranty or condition whether expressed or implied or any misrepresentation or non-disclosure or alleged non-disclosure of any fact or circumstances of any kind whatsoever, or the application of any provision for a time limitation on the presentation of claims or*
> *(ii) Which occurs by virtue of any alleged deliberate, negligent or accidental act or omission or any knowledge or privity of any of the Relevant Parties 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) or*
> *(iii) Which, by virtue of any actor omission, any breach or alleged breach of warranty or condition whether expressed or implied, any misrepresentation or non-disclosure, any deliberate, negligent, or accidental act or omission*

[56] The Bank made a declaration in respect of the Vessel for the period of *"12 months from 20 January 2015 …"*. This was subject to specified sums insured, which were amended by endorsement no. 140 dated 23 August 2015, with effect from 4 July 2015. The sum insured for the period *"04/07/2015 to 29/08/2015"* was US$79,413,493.65.

or any knowledge or privity of any of the Relevant Parties, including the deliberate or negligent casting away or damaging of the vessel or the vessel being unseaworthy or inadequately equipped, manned, certified (including but not limited to requirements set out in Conventions and/or by class societies) or having breached the stipulated geographical warranties or has deviated from the designated or usual and customary route which results in a compromise settlement by Underwriters of the Owners' Policies or Club Entries or

(iv) Which arises following the occurrence of a Third Party claim in connection with the vessel resulting in the exercise of a lien having priority over the mortgage of the vessel in favour of the Insured, the amount of which is allegedly not recoverable from Underwriters of the Owners' Policies or the Club Entries by virtue of any act, error, omission or privity of any of the Relevant Parties or

(v) In the event of the total Loss of the Mortgaged vessel which is allegedly not recoverable under either Owners' hull and machinery or war risk policies due to a dispute on the grounds that the loss has not been proved to have been proximately caused by a peril insured under those policies and is not otherwise excluded from payment by any exclusion or other provision therein or

(vi) In the event of any of the Owners Policies or Club Entries being cancelled, Suspended or terminated under the provisions of a Hull Classification Clause or as a result of non-compliance with I.S.M, ISPS requirements or any other international convention, or any other cancellation, suspension or termination provision in the Owners Policies or Club Entries. (Such cancellation, suspension or termination of the Owners Policies or Club Entries will not be held to be a breach under the terms and conditions provided by this policy subject to no explicit consent of the Insured to any act or omission that would result in such cancellation, suspension or termination)."

230. If there is cover under Clause 1, then the indemnity which is payable is contained in Clause 4 as follows:

"*4. <u>INDEMNITY</u>*
(i) The indemnity payable hereunder shall not be determined by reference to the sound market value of the vessel or Insurable value of the vessel but shall be an amount equal to whichever is the least of either:-
(a) the amount not paid under the Owners' Policies/Club Entries by reason of the circumstances specified in Clause 1 (COVERAGES) of the wording.
or
(b) the Total Indebtedness due to the Insured at the time of payment under Clause 4 (iii) hereof
or
(c) the sum insured stated in the relevant policy and/or stated in the declaration attaching hereto.

"Total Indebtedness" includes all sums of money due and owing or to become due and owing by the Owners to the Insured under the Mortgage including:

any principal sum, interest, costs, commission, expenses and any and all other sums whatsoever due or to become due to the Insured from the Owners or for their account, whether alone or jointly with others, including any outstanding liabilities when incurred by the Insured for the Owners and all liabilities to the Insured or incurred by the Insured on the Owners behalf of any Bills, Guarantees or otherwise howsoever.

(ii) For the purpose of this Insurance there shall be deemed to be a non-payment by Underwriters on Owners' Policies and or Club Entries after a reasonable period not exceeding 365 days has elapsed from the date which Owners or the Insured has demanded payment under the Owners Policy and/or Club Entries. The Insured shall formally present its claim hereunder when it has become apparent to the Insured that Underwriters have denied liability or failed to pay."

231. I consider that the following sets out the correct approach to the coverage arguments in this case:

i) Under Clause 1 of the MII Wording ('*Coverages*'), the Bank is entitled to an indemnity for "*loss of, or damage to, or liability arising in connection with the vessel*". The reference to "*loss*" is a reference to the total loss of the Vessel.

ii) The meaning of "*loss*" (and indeed "*damage*" and "*liability*") in the MII Policy bears the meaning adopted by the War Risks Policy. In other words, if the Vessel is a CTL under and within the meaning of the War Risks Policy, the Vessel is a CTL for the purposes of the MII Policy.[57] It follows that the Bank can, in principle, rely upon the Detainment Clause (which contains the 12 months' deeming provision) and I do not accept the Insurers' submissions to the contrary[58].

iii) The concept of a CTL must be one which is judged from the perspective of the Owners – whose interest is insured under the War Risks Policy – and not from the perspective of the Bank. It is the Owners', and not the Bank's, possession that is relevant (as is conceded by the Insurers[59]).

iv) The date when the Owners tender their notice of abandonment is accordingly relevant for the purposes of establishing whether and when the Vessel became a CTL for the purposes of both polices. The Bank was not required to tender its own notice of abandonment[60].

[57] This is consistent with the fact that the MII Policy is intended to operate as a secondary source of indemnity to the Owners' Policies, which both the Bank and the Insurers are agreed upon – see paragraph 29 of the Bank's Skeleton Argument and paragraph 33 of its closing submissions, and paragraph 133 of the Insurers' Skeleton Argument and paragraph 271 of the Insurers' closing submissions.

[58] Paragraphs 285-296 of the Insurers' closing submissions.

[59] Paragraph 184, footnote 11 of the Insurers' Skeleton Argument.

[60] The Insurers accept this on their analysis of the MII Policy: see paragraphs 281 and 303 of their closing submissions.

v) The "*Interest*" insured under the MII Policy is the Bank's interest, not as mortgagee, but its interest "*as Assignees and Loss Payees under the owners Policies and Club Entries (as defined in the Conditions hereto) …*".[61] The Bank suffers a financial loss to its interest as assignee and loss payee where there is an event which would have been treated as a CTL as between the Owners and their insurers. Any insured loss sustained by the Owners is, in principle, also sustained by the Bank.

vi) Whilst a loss which would have been recognised under the Owners' Policies is therefore necessary, it is not sufficient. The MII Policy also requires "*loss of, or damage to, or liability arising in connection with*" the Vessel, caused by one of the perils identified in Clause 1 of the MII Wording.

232. The MII Policy is not intended to, and does not, cover losses which would not have given rise to a loss covered by the Owners' Policies, because, for example, there was no CTL under the Owners' Policies or the loss was excluded thereunder. The latter point is reinforced by the wording at the end of Clause 1(v) of the MII Policy: "*and is not otherwise excluded from payment by any exclusion or other provision therein*" (as it is never envisaged that the MII Policy will pay out if the loss is excluded under the Owners' Policies).

233. Consistently with this analysis, the editors of *Marine Insurance Clauses* (Hudson, Madge and Sturges, 5th Edition), Part V, paragraph 4, state in respect of the Institute Mortgagees' Interest Clauses Hulls 1/3/97[62]:

> "*The words "and not excluded therein" were added to the clause in 1997, presumably to make it doubly clear that the risks specifically excluded by the Owners' Policies and Club Entries cannot found a claim upon the Mortgagees Interest Insurance – but how could they? The addition appears to the authors to be superfluous*." [63]

(i) Clause 1(ii) of the MII Policy

234. The Bank's contention is that it can bring its claim within Clauses 1(i) and 1(ii) of the '*Coverages*' section of the MII Policy, although it is fair to say that the main focus of Mr MacDonald Eggers QC's submissions was based upon Clause 1(ii) and so I address that first. The Bank's argument is that Clause 1(ii) affords cover whenever there is any loss or damage to the Vessel as a consequence of any act or omission by any of the crew

[61] The Insurers accept this: see paragraph 243 of their closing submissions.

[62] Which read "This insurance will indemnify the Assured for loss resulting from loss of or damage to or liability of the Mortgaged Vessel which, in the absence of an Insured Peril set out in Clause 2.1 below, would *prima facie* be covered by the Owners' Policies and Club Entries, and not excluded therein, but in respect of which there is subsequent non-payment (or reduced payment…) by any of the underwriters of Owners' Policies and Club Entries as a result of any Insured Peril…"

[63] Consistently with this, see *The Kleovoulos of Rhodes* [2003] 1 Lloyds Rep 138, where an express exclusion of cover in the owner's policy for loss arising from "arrest … detention by reason of infringement of any customs or trading regulations" was engaged. In such circumstances, a claim on any MII policy on the terms of the 1997 Institute Clauses (or similar) would have failed.

or any other servant or agent of the owners or charterers or by any allegation of such an act or omission.

235. The Bank submits that the cover available under Clause 1(ii), in contrast to Clause 1(i), makes no reference to coverage under "*the Owners' Policies and/or Club Entries*" and is not expressed to be contingent on establishing the existence of *prima facie* cover thereunder. Thus, it contends, the alleged deliberate, negligent and/or accidental acts or omissions of Relevant Parties do not need to be the cause of a lack of cover under the War Risks Policy for Clause 1(ii) to be triggered.

236. The Bank suggests that because the MII Policy is to "*indemnify the Insured for loss of, or damage to, … the vessel … Which occurs by virtue of any alleged deliberate, negligent or accidental act or omission*", Clause 1(ii) looks not at the cause of a lack of cover for a loss which would otherwise be covered under the War Risks Policy, but at the cause of the Vessel's loss.

237. If this argument is correct, then Clause 1(ii) is different to each of the other provisions in Clause 1 (sub-paragraphs (i), (iii), (iv), (v) and (vi)). However, I do not consider that it is correct.

238. The wording of Clause 1(ii) is not so broad. In particular, it is limited by the word "*alleged*". The clause requires loss or damage "*which occurs by virtue of any alleged deliberate, negligent or accidental act or omission … of any of the Relevant Parties*". There must therefore have been an allegation that a Relevant Party caused the loss. On any sensible commercial construction, it is clear that the allegation must be an allegation which is made by the Owners' insurers, and that the purpose of Clause 1(ii) is 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 was caused by the Relevant Parties. It is only where an allegation as to the involvement of a Relevant Party is made by the Owners' insurers that there will (potentially) be damage to the Bank's insured interest, and a loss which can be indemnified by the MII Policy. I reject the Bank's submission that the allegation by the Prosecutors of deliberate conduct is sufficient for this purpose (that is, that the Individual Defendants were alleged to have committed crimes under the Organised Crime Act and the Anti-Smuggling Act, which the Bank contends resulted in the detention of the vessel, and ultimately its loss).

239. This construction is reinforced by the fact that the other parts of Clause 1 use the term "*alleged*" and "*allegedly*" to refer to allegations by the Owners' insurers. Clause 1(iii) refers to "*any breach or alleged breach of warranty*", which must refer to an allegation by the Owners' insurers. Similarly, the losses which are "*allegedly not recoverable*" in Clauses 1(iv) and 1(v) must be losses which the Owners' insurers allege are not recoverable.

240. The Bank also argues, in the alternative, that the cause of the detention was actual (not alleged) conduct on the part of the crew or PDVSA, in the crew accidentally or negligently allowing HSDO into the no. 6 tanks (so that it appeared to the Venezuelan

authorities that crimes had been committed), alternatively in either or both of the crew or PDVSA committing the alleged crimes[64].

241. I reject this argument, as it ignores the word "*alleged*" altogether: it reads the clause as though it applied to any actual or alleged deliberate, negligent or accidental act or omission.

242. If Clause 1(ii) did not require even the making of an allegation, its scope would be extremely broad. It is difficult to think of any act or omission which would not be deliberate or negligent or accidental. Clause 1(ii) would therefore apply whenever there was any loss or damage to the Vessel caused by any act or omission by the Relevant Parties. That cannot be correct.

243. So how does Clause 1(ii) operate? On the proper construction of the MII Policy, I consider that Clause 1, including Clause 1(ii), must be read together with Clauses 4(i) and 4(ii), and that these clauses operate in the following way.

244. Pursuant to Clause 4(i)(a), the indemnity payable under the MII Policy is limited to the amount not paid under the Owners' Policies by reason of the "*circumstances*" specified in Clause 1.

245. For a claim under Clause 1(ii), the relevant "*circumstances*" are that the loss or damage occurred by virtue of an alleged deliberate, negligent or accidental act or omission by a Relevant Party. The indemnity is therefore the sum which would have been payable under the Owners' Policies had it not been for the allegation of the involvement of the Relevant Party.

246. In that way, Clauses 1(ii) and 4(i)(a) are consistent and work in tandem. There is cover where the Owners' insurers have alleged that the loss or damage was caused by a Relevant Party, and by reason of the alleged involvement of the Relevant Party there is an amount not paid by the insurers under the Owners' insurance. This is not to allow "the tail to wag the dog", as the Bank suggested.

247. Under Clause 4(ii), the Insured shall formally present its claim under the MII Policy when it has become apparent to the Insured that the Owners' Underwriters have denied liability or failed to pay. Clause 4(ii) then further provides that, for the purposes of the MII Policy, there shall be deemed to be a non-payment by the Underwriters on the Owners' Policies/Club Entries after a reasonable period not exceeding 365 days has elapsed from the date on which the Owners or the Insured has demanded payment under the Owners' Policies and/or Club Entries.

248. Together, Clauses 1(ii) and 4(i)(a) and 4(ii) ensure that the MII Policy functions as a contract of indemnity. As Clause 1 makes clear, the policy is to "*indemnify the Insured*" (i.e. the Bank) in respect of loss caused to the insured interest (i.e. the Bank's interest in the Owners' Policies) as a result of physical loss of or damage to the Vessel. Where such physical loss or damage is not covered by the Owners' Policies by reason of the

[64] Insurers accepted (in paragraph 30 of their skeleton argument) that the deviation of the HDSO into the number 6 tanks is likely to have been caused by a deliberate, negligent or accidental act or omission on the part of either the crew or the terminal staff.

circumstances described in Clause 1, then if the Bank suffers a loss, the policy indemnifies it for that loss.

249. Clause 4(ii), like Clause 4(i)(a), is expressed to be applicable generally; there is no suggestion that these clauses do not apply in the case of Clause 1(ii). Clause 4(i)(a) and Clause 4(ii) also work in tandem. Thus, in the event of the circumstances under Clause 1(ii) arising, there are three possibilities:

i) The Owners' insurers allege that the loss has occurred by reason of the actions of a Relevant Party and refuse to pay. Clause 4(i)(a) is triggered;

ii) The Owners' insurers allege that the loss has occurred by the actions of a Relevant Party but do not indicate whether they intend to pay or not. Nonetheless, once a reasonable period not exceeding 365 days as described in Clause 4(ii) has elapsed, there is deemed non-payment under (in particular) Clause 4(i)(a) and the Bank can present its claim under the MII Policy; or

iii) The Owners' insurers allege that the loss has occurred by the actions of a Relevant Party but subsequently withdraw the allegation and agree to pay under the Owners' Policies. There is no difficulty then in the Bank recovering as assignee/loss payee under the Owners' policy.

250. I agree with the Insurers' submission that whilst Clause 1(ii) may not expressly refer to non-payment by the Owners' Underwriters, it describes circumstances which are likely to result in a claim under the Owners' Policies not being paid. Indeed, non-payment is an express requirement of Clause 1(i) only. It follows that if the Bank is correct that Clause 4(i)(a) must be "left out of account" when there is cover under Clause 1(ii) because non-payment is not a pre-condition under Clause 1(ii) then it must presumably also be left out of account in cases other than Clause 1(i), which again would be wholly uncommercial.

251. The purpose of MII Insurance is to protect the Bank against the risk of non-payment under the Owners' policy. The coverages in Clause 1 are typical of the types of cover that a mortgagee seeks under mortgagees' interest insurance in protecting itself against the Owners' insurers *denying liability* by reason of the Owners' misconduct in regard to the loss; non-disclosure of material facts; breach of the duty of utmost good faith; breach of warranty; failure to prove that the loss was caused by an insured peril, and so forth[65]. Clause 1(ii) is of the same type in that it expressly includes misconduct such as scuttling and barratry as a result of *Samuel v Dumas* [1924] AC 431, which established that a loss by sea water which has been deliberately let into a ship is not a loss by perils of the sea, on account of the absence of the element of fortuity.

---

65 As is stated in chapter 8 of *Insurance Law – An Introduction* (2007, Merkin): "*The marine wording [of mortgagees' interest insurance] provides indemnity to the mortgagee where the shipowner's own insurers deny liability by reason of the avoidance of the policy, scuttling of the Vessel by the owner, breach of warranty or condition or failure by the owner to prove that the loss was caused by an insured peril.*"

252. The Bank argues that although there is no express limitation on the wording of Clause 4(i)(a) – the amount not paid under the Owners' Policies / Club Entries by reason of the circumstances specified in Clause 1 of the MII wording – where there is no amount "*not paid*" by reason of the circumstances specified in Clause 1 of the MII Wording (it says when there is cover under Clause 1(ii)), Clause 4(i)(a) does not apply. In other words, it must be limited to cases where there is in fact an amount not paid under the Owners' Policies / Club Entries by reason of the circumstances specified in Clause 1 of the MII Wording, *i.e.* where Clause 1(i) applies.

253. But that is to turn the ordinary commercial construction of this clause on its head. Clause 4(i)(a) is one of three expressly stated bases for determining the amount of indemnity payable (depending on "*whichever is the least*" in amount), in circumstances where coverage is established under one of the coverage clauses in 1(i)-(vi). Each of sub-clauses 4(i)(a), (b) and (c) have to be applied to the claim in order to determine which is the least in amount. It is implicit in Clause 4(i) that if non-payment under the Owners' Policies (which leads to the claim under the MII Policy) is *not* made by reason of any of the circumstances specified in Clause 1, then there will not be any claim for an indemnity and there will be no need to carry out the calculation exercise in Clause 4(i).

254. Yet further, if there were no requirement under Clause 1(ii) of the MII Policy of non-payment by War Risks insurers in order for the Bank to recover, then as the Insurers point out, the consequences would be uncommercial and contrary to the purpose of MII cover, namely:

(1) The Bank could recover for losses which would never have been covered under the Owners' Policies because they would have been excluded from cover;

(2) The Bank could recover a sum far in excess of anything it could ever have recovered under the Owners' Policies, even if the loss had been covered[66]; and

(3) The Bank could recover from the MII underwriters even where the loss <u>is</u> covered and there has been payment under the Owners' Policies.

255. Without Clause 4(i)(a), <u>any</u> loss of or damage to the Vessel would trigger an obligation to pay either the total indebtedness or the full sum insured.

256. But if Clause 4(i)(a) applies, the result is as one would expect: the indemnity is limited to the amount not paid under the Owners' Policies. The Bank is therefore indemnified for the damage to the interest insured by the MII Policy, i.e. its interest as assignee and loss payee under the Owners' Policies.

257. I accordingly conclude that, since Owners' War Risks underwriters did <u>not</u> allege that <u>the detention</u> had occurred by virtue of any deliberate, negligent or accidental act or

[66] Thereby infringing the principle of indemnity.

omission or any knowledge or privity of any of the Relevant Parties, Clause 1(ii) of the MII Policy is inapplicable and there is no cover under that clause[67].

258. In any event, the measure of indemnity for any claim under Clause 1(ii) would be nil by virtue of Clause 4(i)(a). There would have been no cover under the War Risks Policy in respect of the detention of the Vessel regardless of whether the detention occurred by virtue of any alleged deliberate, negligent or accidental act or omission by reason of the fact that: (i) the War Risks Policy was avoided by the Club – and the Club refused to pay any sum under the Owners' Policies as a result – on grounds entirely unrelated to the detention[68]; (ii) there was no CTL, and therefore no loss which occurred by virtue of the circumstances in Clause 1(ii) of the MII Policy; and (iii) the alleged loss occurred by virtue of action falling within the terms of the exclusion clause in Rule 3.5 of the Club Rules.

(ii) Clause 1(i) of the MII Policy

259. I can deal with the Bank's secondary case under Clause 1(i) of the MII Policy more shortly because there is a simple answer to it.

260. Clause 1(i) provides cover if there is "*prima facie*" cover under the Owners' Policies/Club Entries, but there is subsequent non-payment by the Underwriters of the Owners' Policies and/or Club Entries, resulting from any act or omission of any one or more of the "*Relevant Parties*", including any breach of warranty or condition or any misrepresentation or non-disclosure or alleged non-disclosure of any fact or circumstances.

261. The Bank submits that, in this case, the cover under Clause 1(i) is engaged because:

i) There has been a loss ("*loss of … the Vessel*"), specifically a CTL.

ii) There was *prima facie* cover for the loss under the War Risks Policy, most clearly under Rule 2A.2.2 ("*capture, seizure, arrest, restraint or detainment, and the consequences thereof or any attempt thereat*").

iii) The Club declined to pay the Owners' claim, relying on the Owners' and/or their servants' or agents' alleged non-disclosure of the Vessel's calls into an Additional Premium Area and/or their alleged failure to give notice of entry into an Additional Premium Area and/or their alleged late notification of an event or matter which may give rise to a claim.[69]

[67] The fact that war risks cover was denied by reason of the Owners' material non-disclosure does not therefore bring the Bank's claim within the scope of Clause 1(ii) of the MII Policy, contrary to paragraph 230 of its written closing.

[68] See paragraph 122 above. War Risks insurers alleged non-disclosure by the Owners of the Vessel's calls into an Additional Premium Area (and referred to the Owners' lack of a satisfactory explanation relating thereto) which amounted to "*repeated breaches, over a substantial period of time, of Rule 25.*"

[69] Agreed Factual Narrative at Appendix 1, paragraphs 55 to 63.

262. These submissions fall at the first hurdle because there has been no CTL of the Vessel, for the reasons given above.

263. But, in any event, there was no *prima facie* cover for the loss under the War Risks Policy for the purposes of Clause 1(i) of the MII Policy, because regardless of the Owners' non-disclosure and the resulting avoidance of the War Risks Policy, the detention of the Vessel would not have been covered: cover would have been excluded by Rule 3.5.1 and/or 3.5.2 of the Club Rules.

264. The Bank suggested that "*prima facie covered*" refers to the loss having been caused by an insured peril, without regard or subject to any policy exclusions, including Rule 3.5; in other words, whether or not there is *prima facie* cover is a matter of the application of the insuring provision (of the War Risks Policy, specifically Rule 2A.2.2). However, the meaning of the words "*prima facie*" must be considered in their context. The clause refers to loss, damage or liability "…*which is prima facie covered by the Owners' Policies and/or Club Entries … but in respect of which, there is subsequent non-payment… resulting from any act or omission of [the Relevant Parties]*". The words "*prima facie*" in that context identify loss, damage or liability which *would have been* covered by the Owners' Policies – taking into account both the insured perils and the policy exclusions[70] – *but* in respect of which there is no cover, or cover has been lost, because of the conduct of a Relevant Party (by reason of non-disclosure, misrepresentation, breach of warranty etc). If it were otherwise, then the MII Policy would be providing primary insurance in respect of loss of or damage to the Vessel as it would be providing cover where there would have been no cover under the War Risks Policy due to the exclusion, and yet both the Bank and the Insurers are agreed that the MII Policy provides secondary insurance[71].

265. I therefore do not consider that the "absurd result" referred to by Purchas LJ on the differently worded MII Policy in *The Alexion Hope* [1988] 1 Lloyd's Rep 311 at 322 affects my conclusion as to the proper construction of the particular wording of Clause 1(i) of the MII Policy in this case (Clause 1(i) is the only coverage clause in the MII Policy which uses the particular expression "*prima facie covered*")[72]. I do not consider that *The Alexion Hope* lays down a general principle which applies to all MII cover

[70] The scope of cover under an insurance policy is as a matter of general principle determined by reading the insured perils and the exclusions together: *Impact Funding Solutions v Barrington Support Services* [2017] AC 73 at [7] *per* Lord Hodge JSC. See also the mortgagee's concession recorded by Potter LJ in the *Aliza Glacial* (*supra*) at [425 RHC]; and *The Wondrous* [1991] 1 Lloyd's Rep. 400 at 416 *per* Hobhouse J: "*The Institute Clauses include a coherent scheme of the formulation of the risks covered and to take only one part is not only contrary to that scheme, it is also contrary to the express wording of the clauses themselves and to the terms of the incorporation. The risks are the perils with the exclusions; together they delimit the risks covered*."

[71] See footnote 59 to paragraph 231(ii) of this judgment.

[72] Likewise, the Bank's argument in paragraph 117 of its closing submissions that "Were the words *"prima facie covered"* in Clause 1(i) to require exclusions to be taken into account, it would to a significant extent defeat the commercial purpose of mortgagees' interest insurance, because it would enable the Insurers to avail themselves of defences available to the Owners' policy insurers (*i.e.* the Club) against the Owners" is overly broad, and fails to recognise the fact that it is only Clause 1(i) of the coverage wording which uses these words in contrast to the other coverage clauses, such as Clause 1(ii).

regardless of its wording, to the effect that it would defeat the purpose of MII cover if the rights of recovery under a MII policy were subject to the exclusions in an underlying hull policy[73].

266. Additionally, in its Reply, the Bank also suggested that "*prima facie covered*" meant "*arguably covered (by reference both to the insuring provision and exclusions)*" (Reply, paragraph 15.2(a)). Mr MacDonald Eggers QC rightly did not press this point orally, although the point is briefly mentioned in paragraph 121 of the Bank's written closing submissions. The words "*prima facie*" in the context of Clause 1(i) clearly do not mean "arguably". They mean that cover was *prima facie* available (with the claim not being excluded) but the insurers subsequently refused to pay by reason of the assured's conduct. In other words, cover *would* have been available but for subsequent events.

267. Furthermore, Clause 1(i) requires "*non-payment…resulting from*…" the act or omission of the Relevant Party. That is, the act or omission must be the cause of the non-payment. If (as the Bank suggests) Clause 1(i) covered loss, damage or liability which was excluded by the Owners' Policies, the matters specified in the second part of the clause (breach of warranty or condition, misrepresentation, non-disclosure, missed time-bar) would never have causative effect. There would have been no cover in any event (regardless of the misrepresentation etc.) because the loss would not have been payable by reason of the exclusion.

(J) QUANTUM

268. In view of my findings, the Bank's claim fails. I do not consider it is necessary therefore to go on to make findings on the subsidiary issues of quantum (namely, the residual value of the Vessel and interest).

[73] Bank's closing submissions, paragraph 117.