

Do Mention the War!

Issues arising from the detention of ships in Ukrainian ports



IUA – AAA Seminar
London
2 November 2022

Burkhard Fischer - Partner, Albatross Adjusters Ltd.

Jonathan Bruce - Partner, HFW LLP



TOPICS

- Declared and undeclared wars
- The concept of War Risks Insurance
- Development of War Risks Insurance
- Detainment
- The concept of the two premiums
- Extent of cover post cancellation
- The residual value of vessels
- Reinsurance aggregation

DECLARED AND UNDECLARED WARS

Declared Wars

- World War I 1914-1918
- World War II 1939-1945

Undeclared Wars

- Sino-Japanese War 1937-1945
- Korean War 1950-1953

WAR OR NOT?

- **The Falklands War 1982** – No definite answer as to whether it was a war / All peaceful outside a narrow area of heavy fighting
- **The First Gulf War 1990-1991** – Only a short period of 1,5 months that can be considered as a war
- **The Kosovo Conflict 1998-1999** – Arbitrators found that events in Kosovo did not constitute a war (and even if, Germany was not involved)
- **The 9/11 attacks** – Different views as to whether this was an “act of war” (“War on Terror”) or a terrorist attack (perspective of a business person)

THE INSURED PERIL OF “WAR”

- Definition: Conflict between two or more nations whose (*de jure* or *de facto*) governments have committed them to warfare (either by aggression or by defence)
- Whether a state of war exists is a question of fact
- A declaration of war is not required
- A peace treaty is not required to end a state of war
- Included by agreement in a commercial document → Important is what businessmen intended when they included it

Common sense!!

THE CONCEPT OF WAR RISKS INSURANCE

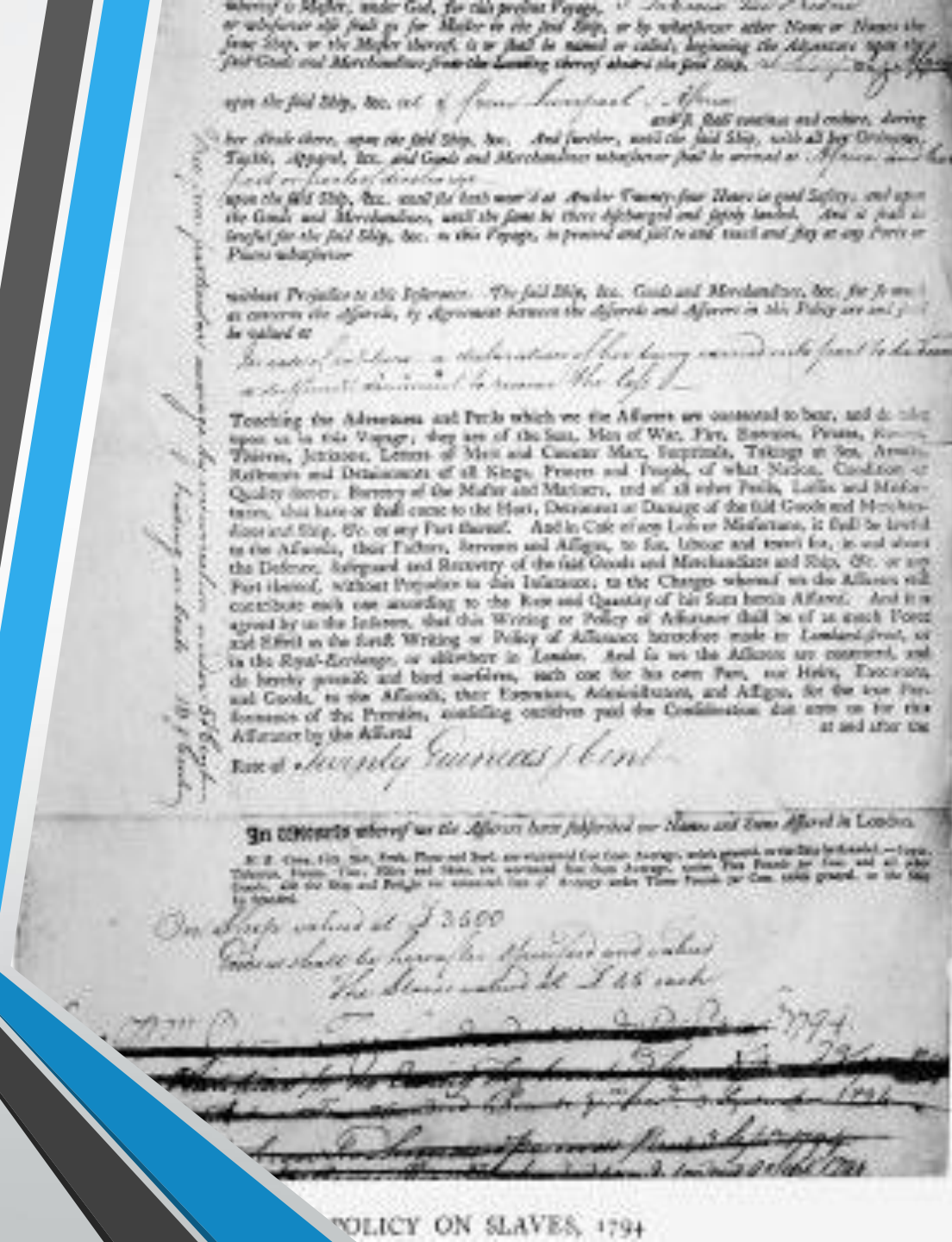
- Perils posed by Nature (including negligence or worse, of those in charge of the ship) to the ship and all that is on board, i.e. the crew and the cargo. → **Marine clauses**
- Liabilities which the ship incurs, or “what the ship does to other people or property”. → **P&I insurance**
- Damage or destruction to the ship and all that is on board by people from outside the ship, or “what other people do to the ship”. → **War and Strikes clauses, for ship, freight, cargo and containers**

DEVELOPMENT OF WAR RISKS INSURANCE

- S.G. Form

Lloyd's Policy S.G.

TOUCHING the adventures and Perils which we the Assurers are consented to bear and to take upon us in this Voyage, they are of the Seas, **Men-of-War**, Fire, **Enemies**, Pirates, Rovers, Thieves, Jettisons, Letters of Mart and Countermart, **Surprisals**, **Takings at Sea**, **Arrests**, **Restraints** and **Detainments of all Kings, Princes and People, of what Nation, Condition, or Quality soever**, Barratry of the Master and Mariners, and all other Perils, Losses and Misfortunes that have or shall come to the Hurt, Detriment, or Damage of the said Goods and Merchandises and Ship, &c, or any Part thereof



DEVELOPMENT OF WAR RISKS INSURANCE

- S.G. Form
- F.C. & S. Clauses

DEVELOPMENT OF WAR RISKS INSURANCE

Wars in the 18th and 19th centuries

- Seven Years' War (1756–1763)
- American War of Independence (1775-1783)
- 1812 War (June 18, 1812–February 17, 1815)
- Napoleonic Wars (1803–1815)
 - *A real distinction was to be made between marine and war risks, and a variety of exclusions were added to the policies by endorsements.*

DEVELOPMENT OF WAR RISKS INSURANCE

F.C. & S. Clauses

- “Free of capture and seizure in the ship’s port of discharge” (Napoleonic Wars / beginning of 19th century)
- “Warranted free from capture, seizure and detention, and of all the consequences thereof, or any attempt thereat, and free from all consequences of hostilities, riots, or commotions.” (1863)
- “Warranted free from capture, seizure and detention, the consequences thereof, or any attempt thereat, unless arising from piracy or barratry, and from all consequences of hostilities or warlike operations, whether before or after declaration of war.” (1889)

Note: “Warranted free of” means “excluding”

DEVELOPMENT OF WAR RISKS INSURANCE

- S.G. Form (from 17th century)
- F.C. & S. Clauses (from beginning of 19th century)
- “Hatteras Lights” case (1863)
- “Warlike operations” added to the list of excepted perils (1889)
- Marine risks and war risks insured by separate policies (from 1898)
- The “Coxwold” (1942) → New F.C. & S. Clause drafted (1943)
- London market reform (1982/1983) → MAR Form, War Exclusion Clause

DETAINMENT

- Definition: A vessel unable to leave a port without infringing regulations, and would be stopped by force if trying to do so.
- Suez Canal crisis (1967)
- Institute Detainment Clause (January 1970)
- The “Bamburi” (1982) – Decided that Owners had lost the free use and disposal of their vessel, and that it was reasonable to consider vessel a CTL after 12 months from Notice of Abandonment
- IWSC Cl. 3 Detainment (1983)
- London Blocking and Trapping Addendum (March 1984)

THE CONCEPT OF TWO PREMIUMS

- Conflict between super-powers (World war) → Automatic Termination per Clause 5.2.2, no insurance cover provided
- Peace between super-powers, ship trading in an area that can be described as peaceful → Insurance cover provided without additional premium
- Peace between super-powers, ship trading in an area with regional conflicts → Cancellation with 7 days notice per Cl. 5.1, Insurance cover provided against additional premium

THE CONCEPT OF TWO PREMIUMS

IWSC Hulls - Time 1.10.83 CI 5.1 Termination

This insurance may be cancelled by either the Underwriters or the Assured giving 7 days notice (such cancellation becoming effective on the expiry of 7 days from midnight of the day on which notice of cancellation is issued by or to the Underwriters). The Underwriters agree however to reinstate this insurance subject to agreement between the Underwriters and the Assured prior to the expiry of such notice of cancellation as to new rate of premium and/or conditions and/or warranties.

THE CONCEPT OF TWO PREMIUMS

Question:-

Is it justified to impose an additional premium on a vessel after same has been struck by “*capture, seizure arrest restraint detainment confiscation or expropriation*”, and the Assured has “*lost the free use and disposal of the Vessel*”?

THE CONCEPT OF TWO PREMIUMS

MIA s.58 Missing ship.

Where the ship concerned in the adventure is **missing**, and after the lapse of a reasonable time no news of her has been received, **an actual total loss may be presumed.**

ITC Hulls 1.11.95 Cl 2 Continuation

Should the Vessel at the expiration of this insurance be at sea and in distress or **missing**, she shall, provided notice be given to the Underwriters prior to the expiration of this insurance, **be held covered** until arrival at the next port in good safety, or if in port and in distress until the Vessel is made safe, **at a pro rata monthly premium.**

THE CONCEPT OF TWO PREMIUMS

Question:-

What happens where a War Risks Policy has been cancelled or has expired?

Suggestion:-

When a Policy contains a Detainment Clause, it could also include a provision that a detained vessel be held covered until the time that she is either free to leave or declared a total loss, at a pro rata monthly premium.

CURRENT SITUATION IN UKRAINE

- 24 February – invasion
- 25 February – order closing ports
- Approx 100 vessels were stuck in UKR
- Aug onwards: Odessa/Chornomorsk/Yuzhne
 - some vessels escaped (Sue & Labour? GA?)
 - approx. 80 vessels still there (value US\$800m?)

CURRENT SITUATION (CONT'D)

- War risks cover lapsed and/or cancelled; Loss of Hire?
- Skeleton crews
- Missile attacks (“Banglar Samriddhi”)
- Mines
- No pilots/tugs
- Risk of capture/seizure/detainment “or any attempt thereat”

IWSC 1983

- Detainment clause: restraint etc/loss of free use and disposal “for a continuous period of 12 months” (6 months?)
- Blocking and trapping addendum: inability to sail for 12 months as a result of closure of channel by “warlike act, or act of national defence” = restraint (LPO 444)
- Prior to 12 months: CTL under s. 60(2)(i)(a)?
- NB. Exclusions for loss arising from
 - Detonation of a nuclear weapon
 - Outbreak of war between the five powers

POSITION RE CANCELLED/TERMINATED POLICIES

- Detainment/blocking and trapping
 - 6 month deeming provision already triggered in some cases?
 - Majority: 12 months – multiple simultaneous deemed total losses in February 2023
 - Novel situation compared to Suez (1967-1975) and Shatt-Al-Arab (1980s)
 - Detainment clause controversial (piracy; drug seizures)

EXTENT OF COVER POST-CANCELLATION

- What if vessel destroyed by missile/mine prior to becoming deemed total loss?
- Uncertainty where policy lapsed and no ongoing premium paid.

SCOTT V COPENHAGEN RE COURT OF APPEAL 2003

2 Aug 1990: Iraq invaded Kuwait and took control of airport.

- 15 KAC aircraft plundered; one BA aircraft stranded.

16 Jan 1991: War between Iraq and coalition forces.

27 Feb 1991: BA aircraft destroyed by allied bombing.

Insurance: 12 months from 1 April 1990. *“Loss” under this contract means loss... arising from any one [loss or series of losses arising from one event].*

Held at first instance: Total loss of BA aircraft could not be established until after a reasonable “wait and see” period. No unity of time, so separate event to loss of KAC aircraft.

Held (CA): Separate events. Loss of BA aircraft did not arise from the invasion, but from the event of the war. *“The period clause appears to be emphatic that the loss must occur precisely within the contract period for it to be covered. It may be... that marine policies are treated in some other way. In theory, of course, the triggering event for a loss covered by a policy can be defined by reference to the incidence of either a peril, or a loss, or a claim, or any combination of the three.”*

SCOTT V COPENHAGEN RE COURT OF APPEAL 2003

“Grip of the peril” doctrine

Rix LJ quotes Bailhache J in *Fooks v Smith* [1924]

“...if in the ordinary course of an unbroken sequence of events following upon the peril insured against the constructive total loss becomes an actual total loss — as, for instance, there is a capture followed by confiscation — the underwriter is liable in respect of the total loss. If, however the ultimate total loss is not the result of a sequence of events following in the ordinary course upon the peril insured against, but is the result of some supervening cause, the underwriter is not liable.”

Also quotes Arnould:

“Although the doctrine expounded by Bailhache J is unquestionably right in principle, it should be observed that where the assured has been deprived of possession of his ship or goods by capture and some accident befalls the property when it is in the hands of those who have taken it, the proximate cause of loss has generally been regarded as the capture, not the subsequent casualty.”

SCOTT V COPENHAGEN RE COURT OF APPEAL 2003

Also quotes Eveleigh LJ in *Integrated Container Service Inc v. British Traders Insurance Co Ltd* [1984] :

“It did not matter if further loss might occur after the expiration of the policy, for the containers had already been the victims of an insured peril within the policy period. They had received a potential death blow.”

- Usually some physical damage required during policy period. Is this an exception ?

EXTENT OF COVER POST-CANCELLATION

Present cases create uncertainty:

- War; blocking and trapping occurs.
- Policy then cancelled (7 days notice), not reinstated.
- If restraint / B&T started during the contract period and then continued for [12] months, it appears there is cover even if extensions not purchased.
- If vessel subsequently destroyed by missile before [12] months, not clear if loss is covered.
- Scott v Cop Re suggests “death blow” / “grip of the peril” argument under English law: covered if peril (war) occurred during the contract period, unless wording clearly requires loss to occur during the contract period.
- Double insurance if risk placed with other insurer after cancellation?

PROBLEMS RE RESIDUAL VALUE

- Problem re vessels worth more than insured value.
- Novel situation compared to before
- Insurers unlikely to fall into “WD Fairway” trap

“WD FAIRWAY” (2009)

- Rare dredger insured for EUR 73.5m
- Became CTL after collision
- Owners tendered NOA; insurers rejected it.
- Insurers paid out for CTL without expressly accepting a proprietary interest in the vessel.
- Dispute over residual value: EUR 25m v EUR 75m
- Most of the insurers attempted to take over the vessel (s. 79 MIA)
 - Owners disputed that because not unanimous.
 - Owners sold vessel to related Nigerian company for EUR1K
- Insurers claimed equitable lien on the vessel.

WD FAIRWAY JUDGMENT

- English Court found in favour of the Owners. It was held:
 - Although the insurers paid CTL, they had not acquired an equitable lien
 - Unconscionable to impose a security interest in favour of insurers, as they could easily have secured their position through ss. 63 & 79 MIA;
 - Insurers took additional time to determine whether they wanted to own the vessel
 - Therefore lien not equitable
 - Those insurers who elected to take over rights only entitled to share of tiny sale proceeds
- Catch 22 for insurers: risk of losing right to residual value if do not take over vessel.

PROBLEMS RE RESIDUAL VALUE

- Solution: insurers must not lose right to ownership when paying out for CTL
- BUT: insurers are not shipowners; usually subscription market.
 - Liability for pollution, wreck removal, maintenance
 - Sell back to owner for discount?
 - Sell to third party?
 - Complications re cargo/charterers

PROBLEMS RE RESIDUAL VALUE

- Practical issues re NOA
 - S. 62: Owner must tender NOA “with reasonable diligence after the receipt of reliable information of the loss”; “entitled to a reasonable time...”
 - How long can owners safely delay? (6 months in “Renos”)
 - Standard practice for insurers to reject the NOA on basis claim form deemed issued.
 - Safer for insurers to accept NOA?

ISSUES OF AGGREGATION

- Problem for insurers and their reinsurers
 - Marine treaty market includes aviation
- Losses = one occurrence/event, or multiple?
 - Number of excesses
- Also: date of loss important re which reinsurance policy/period responds

MEANING OF “EVENT” OR “OCCURRENCE”

- Event – something that happens at a particular time, at a particular place, and in a particular way (AXA v Field)
- In aggregation context, “occurrence” and “event” are generally interchangeable, depending on policy wording (Mann v Lexington)
- Dawson’s Field arbitration (1972)
 - Four aircraft hijacked over three days; one taken to Cairo and three taken to Dawson’s Field in Jordan; all destroyed.
 - Blowing up of three aircraft was series of losses arising from one event. (4 unities: place, time, cause, intention/motive of human agents).
- Kuwait Airways v KIC: In August 1990, 15 KAC aircraft seized and separately flown out/destroyed = one occurrence
- Scott v Copenhagen Re: 16th aircraft owned by BA destroyed by coalition bombs in January 1991 = separate event

UKRAINE – EVENT CANDIDATES

- Russian plan to invade Ukraine
 - Unlikely that unities present – see *Midland Mainline v Eagle Star*: “A *decision or a plan cannot constitute an event or occurrence. It is the application of the programme that might.*” BUT: Butcher J in *Stonegate v Amlin* – a decision can be an occurrence.
- Invasion by Russia on 24 February
- Order closing all ports on 25 February
- Sanctions
- Acts by Russian government (eg March legislation nationalising aircraft)
- Individual missile attacks; laying of mines
- Expiry of period for deemed CTL?

CONCLUSIONS

- Novel situation: a lot of uncertainty
- Situation may change before February 2023
- Practical problems e.g. re residual value, especially if market value more than insured value; creative solutions required?
- Potentially a lot of simultaneous CTLs in February 2023 – quick decisions to be made.
- Uncertainties for insurers regarding reinsurance.

Do Mention the War!



**Thank
You!**



HFW