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Carmen Vicente

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## War Risk Insurance

**By Carmen Vicente.**

LLM, Cardiff Law School

### INTRODUCTION

#### HISTORY OF WAR RISK INSURANCE

As in any discipline, it is necessary to look back into the history of war risk insurance in order to understand its present functionality. This work is concerned with the analysis of the new Institute War Clauses for cargo, so that its great advantages can be established. Such a purpose could not be achieved without a previous understanding of the evolution, through history, of such cover. Marine insurance, the oldest kind of insurance, was born in Italy. In fact, "the word policy itself is derived from the Italian polizza, which means a promise or an undertaking, and the oldest one in the Admiralty archives (dated 20 September 1547) was indeed written in Italian". According to D.E.W. Gibb, the practice of marine insurance was transferred to London in a very unusual way: through coffee. The custom of coffee houses, as places where people could gather not only for the pleasure of this exotic beverage but also for their convenience as places to talk and exchange information about different subject-matters, developed in London from the seventeenth century. People with different interests would gather together and soon coffee houses were divided according to the interest of the persons who would frequent them. One coffee house is of special interest for this study, the one founded by a man who, according to Flower & Jones, probably never thought his name would have so much importance even three centuries later. This man was Edward Lloyd. His coffee house used to be the meeting point for all the people in the shipping business. In its walls, information could be found about ships and cargo movements. Little by little, Edward Lloyd's Coffee House started to develop into a place that, as Flower & Jones suggest, shows little difference with the actual Lloyd's. A big room filled with desks that a broker approaches, one by one, with the slip on his hands until he has all the signatures needed for his client's coverage. Depending on the quantity of signatures, each "name" will bear a small percentage of the loss. These "names" that are sat on the desks at Lloyd's are mere representatives of a syndicate of people who are the ones who will actually bear the loss up to a very small amount. Along with Lloyd's, which can be regarded as the central market for marine insurance, there are marine insurance companies in which the same risks can be placed. Moreover, as Hodgson writes, "Lloyd's has come to provide many other services besides insurance to the world's maritime industry, such as accurate information about ships and cargo". For years the practice of marine insurance was carried out, by brokers acting for assureds and underwriters accepting risks on behalf of syndicates of names, using the system explained above, but it was not until 1779 that this practice was embodied into a policy, the Shipping Goods policy (SG form). This form of policy, which is basically a reflection of the practice that had been used in the Lloyd's market, proved to be quite effective in its time. It remained almost unaltered for the next 200 years, save for the constant interpretations that the courts had to do due to her rather complicated wording. Miller points out that the S.G. form was never a planned document, on the contrary, "risks and exceptions were added on an ad hoc basis as the demands of the insured shipowners, the practices of the market and the decisions of the Courts indicated were necessary". The policy comprises war risks coverage with what are usually regarded as marine risks. According to Gibb, fifteen different perils are enumerated in the traditional form of marine policy, and of these fifteen, eleven relate to war, piracy and violence on the high seas. The same author writes that eighteenth century merchants and underwriters gave great importance to the possibility of capture at sea, both in times of peace and war. But it is important to bear in mind that, by that time, the supremacy of the British Navy was never challenged. Gibb suggests that events like the launching of the first submarine in 1893, and the destructive powers of the propelled torpedo, which up until that time, had seldom been used in practice, lead to a certain degree of uncertainty

towards what the future could be like amongst those in the insurance business. London Assurance's suggestions to the Committee of Lloyd's about the separation of war risks from the marine policies, lead to a resolution in 1898 excluding the risk of war from the Lloyd's policies unless a special agreement had been reached that it should be covered. This was achieved by the introduction of the Free of Capture and Seizure Clause (F. C. & S. clause).

This clause forwarded war risks into another policy. Its original wording, back in 1898 used to be as follows: "Warranted nevertheless free of capture, seizure and detention, and of the consequences thereof, or any attempt thereat, piracy excepted, and also from all consequences of hostilities or warlike operations, whether before or after the declaration of war". Such wording underwent several modifications, according to the circumstances and the perils intended to be covered from time to time. The last wording of such clause that has come to our knowledge is the one drafted in 1943, after the decision of *The Coxwold* (1942), which Miller suggests brought some more darkness to the distinction between marine and war risks. The 1943 version read as follows:

Warranted free of capture, seizure, arrest, restraint or detention, and the consequences thereof or of any attempt thereat; also from the consequences of hostilities or warlike operations, whether there be a declaration of war or not; but this warranty shall not exclude collision, contact with any fixed or floating object (other than a mine or torpedo), stranding, heavy weather or fire unless caused directly (and independently of the nature of the voyage or service which the vessel concerned or, in the case of a collision, any other vessel involved therein, is performing) by a hostile act by or against a belligerent power; and for the purpose of this warranty "power" includes any authority maintaining naval, military or air forces in association with a power. Further warranted free from the consequences of civil war, revolution, rebellion, insurrection, or civil strife arising therefrom, or piracy.

As can be noted, the new wording of the Free of Capture and Seizure clause, sought to prevent decisions like *The Coxwold*, a case where a ship which stranded due to an exceptional and unexpected tidal set which took her out of her course and to the ground, was surprisingly held to be lost by the consequences of a warlike operation, perhaps the decision being influenced by the fact that the vessel was carrying petrol for the British forces and was following a convoy, though having lost touch with it. Despite all the alterations that the clause and the SG form had undergone, the system was becoming more and more the object of criticism specially by those who had to interpret the law. In *Panamanian Oriental Steamship Corporation v Wright (The Anita)*, Mr. Justice Mocatta would refer to:

The present method, certainly as regards war risk insurance, [as] tortuous and complex in the extreme. It cannot be beyond the wit of underwriters and those who advise them in this age of law reform to devise more straightforward and easily comprehended terms of cover. However, the form taken by the war risk cover here, since clause 1 of the Institute Clauses only covers the risks excluded from the SG form by the F. C. & S. clause, for it is only in respect of such exclusions that the plaintiffs can recover under the present policy.

Moreover, the United Nations Conference on Trade and Development (UNCTAD), on its 1978's report, made some comments with reference to the Shipping Goods policy suggesting that it should be updated to make it easier to understand and interpret. UNCTAD also criticised the wording of the policy with respect to the imprecise meaning of "warlike operations". Despite such range of criticism from different sources, the London insurance market was still reluctant towards change and the primary reason for this attitude was its unwillingness to sacrifice "the body of market practice, case-law, statutory interpretation and specially tailored clauses which had developed over the 200 or more years since the basic SG form of policy had come into use." However, this change was becoming more and more essential to preserve the important position of the London marine insurance market among its competitors. Anthony George writes that:

As the world trade recession of the 1970s deepened and the competition of other insurance markets increased, London found it no longer had a seller's market: there was increasing capacity seeking diminishing demand. If the market was not to decline, then it had to be prepared to sacrifice its conservatism and abandon the SG Form and its corpus of interpretation and instead attend more to the needs of the consumer. For these reasons, after several meetings, the Technical Clauses Committee of the Institute of London Underwriters succeeded in formulating a new policy and set of clauses to be used instead of the S.G. form of policy. The MAR form of policy "is the first policy for marine risks ever issued by the London market as a comprehensively planned document." It is the purpose of this work to analyse the advantages of the new Institute War Clauses for cargo, comparing them with the old insurance system used, as well as their recent development in practice.

## CHAPTER I

### THE INSTITUTE WAR CLAUSES FOR CARGO PERILS INSURED AGAINST

#### RISKS COVERED

The first clause of the Institute War Clauses (Cargo) reads as follows:

##### I RISKS COVERED

1 This insurance covers, except as provided in Clauses 3 and 4 below, loss of or damage to the subject-matter insured caused by

1.1 war civil war revolution rebellion insurrection, or civil strife arising therefrom, or any hostile act by or against a belligerent power

1.2 capture seizure arrest restraint or detention, arising from risks covered under 1.1 above, and the consequences thereof or any attempt thereat

1.3 derelict mines torpedoes bombs or other derelict weapons of war.

2 This insurance covers general average and salvage charges, adjusted or determined according to the contract of affreightment and/or the governing law and practice, incurred to avoid or in connection with the avoidance of loss from a risk covered under this clauses. The following perils insured against can be extracted from the wording of the preceding clause:

I. WAR The introduction of war as a peril insured against is an innovative approach undertaken by the new Institute War Clauses (Cargo), since "war as a named peril had not been previously expressly mentioned in either the FC&S clause or in the SG policy". However, although it was not mentioned expressly, it was insured under the concept of "civil war", "as the insurance meaning of civil war in English courts has been regarded to include the peril war". The point was discussed in *Pesquerias y Secaderos de Bacalao de Espana v. Beer*, a case concerning looting and vandalism of six ocean-going fishing trawlers during the Spanish civil war. The trawlers were insured under a policy which expressly excepted war risks from the coverage. The Court eventually found out that the exclusion applied, but before it had to decide upon whether a civil war was included in the concept of a war or not, within the meaning of the policy. After the assertion of Lord Porter about the existence of a civil war, in the following words: "The crux of the matter is, was there a civil war or not? In my view there plainly was..." , Lord Morton considered the point, in the following words:

I desire to say quite plainly that in my view the word 'war' in a policy of insurance includes civil war unless the context makes it clear that a different meaning should be given to the word. There is no such context in the policy now under consideration. I can see no good reason for giving to the word 'war' a meaning which excludes one type of war.

He reached that conclusion after affirming what was decided in the case of *Curtis & Sons v. Mathews*, that is to say, that the meaning of "war risk", for the purposes of the policy, includes war between nationals of the same country.

War is perhaps the peril with which the Courts are more cautious when it comes to definition. From an international lawyer's point of view, Hugo Grotius describes it as "an armed contest between states". The authors of *The Institute Clauses Handbook* suggest that "war involves the employment of force between States or entities having, at least de facto, the characteristic of a State". Several definitions might be attempted, as well, by municipal law, but the courts prefer to give it its "common sense" meaning. What will be, then, its "common sense" meaning? As Miller points out, "Over a series of cases, the courts have made it clear that when they are considering a commercial document such as a war risks policy, they are not going to be bound by narrow definitions... 'war' will be given its normal and popular meaning". The same author suggests that the influence that definitions of the term "war" should have upon decisions, must be merely persuasive rather than binding. It seems like the courts have to decide that on the light of the facts of each particular case. The former assertion has been challenged by the appellants in the case of *Kawasaki Kisen Kabushiki Kaisha v. Bantam Steamship Company Ltd.*. The case relates to a charterparty which gave any of the parties the possibility to cancel it in the event of war breaking out (involving Japan). In fact, the Sino-Japanese War broke out and the charterparty was canceled. The case went to the High Court when Kawasaki claimed that the cancellation was erroneous, since, in their point of view, no state of war existed. Several points concerning the meaning of war were considered by the Court, such as the fact that there was not any declaration of war, diplomatic relations between the two countries were still normal, and some other points of fact in relation with what was going. Both the umpire and the High Court found that there was a war and that the term should be construed in the sense in which an ordinary

commercial man would use it. One of the points in which Kawasaki based their appeal was that the term 'war' should be given its technical meaning, rather than its popular one, but the Court of Appeal confirmed once again the reasoning of the previous judge: "...in the particular context in which the word 'war' is found in this charterparty, that word must be construed, having regard to the general tenor and purpose of the document, in what may be called commonsense way". Another case concerning the definition of war is *Pan American World Airways Inc. v. The Aetna Casualty and Surety Co.* The case refers to the high jacking of a plane by some members of the Popular Front for the Liberation of Palestine, (P. F. L. P). Pan Am was insured with Aetna with a policy excluding, inter alia, the risks of war. Another policy was taken out in order to cover the excluded risks, a war risk policy. The eventual contentions of both insurance companies as regards their respective covers, led the Court to make a review about the perils insured by war risk policies. A definition of war was finally achieved by the Circuit Court's judgment, which, after affirming what was said by the District Court before, that is to say, "The term 'war' has been defined almost always as the employment of force between governments or entities essentially like governments at least de facto", found out that the term 'war' implies some kind of hostility engaged in by entities that have at least the minimum requirements of to be sovereign. In this case, the Court decided that the loss of the plane was not due to a 'warlike' operation. In the words of the judge:

There is no basis whatever for any claim that the insured, Pan American, was involved in a warlike operation. It carried no cargo destined for a theatre of war. Its owner was not he national of any middle eastern belligerent. Pan Am serves no routes to any middle eastern belligerent. When the loss occurred, the aircraft was not near or over the territory of any belligerent or any theatre of war.

As can be inferred from the above commented cases, the task of defining whether there is a war in a given situation is not an easy one. As was said before, it will depend upon the facts of the particular case. In this regard, and after a deep analysis of specific situations of war of different points in time, Miller comes to the suggestion of some points that should be taken into account when analysing the definition of war, for marine insurance purposes. They can be summarized as follows: The term war has to be interpreted in the light of its natural and commonsense meaning rather than any technical or international one. The insured peril of 'war' refers to a conflict between two or more nations whose governments have committed them to warfare, and such governments can be de jure or de facto. The insured peril of war can either arise where two or more nations consider themselves to be at war, even though no military operations against each other are actually carried out, or when two or more nations are at peace, but are conducting military operations against each other within a limited area. Finally, neither a declaration of war by any of the belligerent countries, nor the flying of the flag of one of the belligerents are requisites to the insured peril of 'war'. A recent analysis of the meaning of the word "war" in a given situation can be found in the Panamanian case of *Mendriefal, S.A., Benji Incorporated, Almacen El Chocho, S.A. y otras v. The Continental Insurance Company*. The case relates to the looting of property on land, insured under a fire policy which contained the usual war exclusion, provided for insurance on land. The clause excluded the following risks:

...pérdida que sea consecuencia directa o indirecta de guerra internacional declarada o no, acto de enemigo extranjero, guerra civil, revolución, insurrección y otras situaciones semejantes a las anteriores descritas y las acciones dirigidas a evitarlos o contenerlos". (Translation by the author: ...[the policy excludes]... loss as a direct or indirect consequence of international war, declared or not, act from a foreign enemy, civil war, revolution, insurrection, and similar situations, as well as the actions directed to avoid or contain them). The looting occurred during the American invasion of the Republic of Panamá in 1989. The juridical nature of such an invasion had to be analysed by the courts, in order to see if it could be regarded as a war for the purposes of the above mentioned exclusion. The First Circuit Court eventually found that what happened in the Republic of Panamá during the days starting on the 20th of December 1989, was a war, but to reach that conclusion, several points, such as those mentioned by Miller, had to be taken into consideration. Facts like the declaration of "a state of war" made by the Panamanian government just five days before de invasion, certifications by international organizations like Human Rights, Red Cross and the O.E.A. (Organization of American States), as regards the number of victims of the war, the fact that General Noriega was captured as a prisoner of war, were taken into consideration by the Court. But the point that definitely decided the controversy was the violent occupation of the Panamanian territory by the United States army. In the words of Justice Bolívar:

La guerra es un conflicto violento entre Estados. Lo esencial en la guerra es la violencia, ya que es mediante ese acto de fuerza que se pretende obligar al Estado enemigo o adversario a que haga los deseos del Estado agresor. Para lograr el sometimiento del Estado agredido es necesario desarmar cualesquier fuerza de defensa que este tenga, tales como son su ejército, marina y policía. El día 20 de Diciembre de 1989, los Estados Unidos de Norte América invadió el territorio de la República de Panamá con su ejército, y destruyó nuestro ejército, marina y policía; y esta clase de hecho se denomina guerra internacional. (Translation by the author: War is a violent conflict amongst States. The essential element in war is the violence, since through that act of force the State seeks to oblige the State enemy or opponent to do the will of the Aggressing State. To achieve the domination of the State it is necessary to disarm any defensive forces that it might have, that is to say, the army, the marine forces and the police. The 20th of December 1989, The United States of North America invaded the territory of

the Republic of Panama with its army, and destroyed our army, marine forces and police; and this situation is called international war.) One of the main purposes of the United States invasion was to destroy the military structure existing in Panama at that time. After achieving such goal, the city was left unprotected, since the United States army did not provide replacement for the police forces they had destroyed. This being the state of the city, the panicked population went out to the street in such state of desperation that could only lead to looting and vandalism. The Court found, further, that the looting occurred as an consequence of the war, and that was a loss excepted by the policy.

This war exclusion of the fire, non-marine, policies has also been analysed in a previous case concerning the invasion of the Dominican Republic by the United States in 1965, *Santo Domingo Motors Co. v. The Hanover Insurance Company*. The case relates also to the looting of some properties as an indirect consequence of the invasion. The point for consideration was again, whether the events that were going on in the Dominican Republic during that time could be regarded as a war for the purposes of the exclusion. The Court of Appeal, as well as the Supreme Court, eventually found that the events going on were actually a war. In reaching such a decision, one of the points which the Supreme Court had to take into consideration was the way in which such events were characterized by the government. Laws and decrees which came out right after the invasion were analysed by the Supreme Court, in order to see the way in which the events were regarded by the governmental authorities. After finding out that the events were qualified as "civil war", the Supreme Court went on to explain the reasoning behind such a conclusion. In the wording of the judge:

...cuando un hecho social cualquiera es de caracter tan amplio y generalizado que llega a paralizar o a sacar de su cauce normal los servicios públicos y en esta anormalidad se incluyen las actuaciones de los tribunales y el curso de los procesos judiciales, se configura así un hecho público y notorio que los jueces pueden tomar en cuenta en las motivaciones de sus actos... . (Translation by the author: ...when any social event is so wide and generalized as to paralyse or take out the public services from their normal way, and in this abnormality are included the actions of the Courts and the course of the judicial proceedings, a public and notorious fact is created which the Courts can take into consideration as a motive for their actions...). The question about the juridical nature of an invasion has also been considered recently by Thambu Kanagasabai, consultant to the Kuwait Insurance Company, in relation to the Iraqi invasion of Kuwait in August 1990. Mr. Kanagasabai analyses the existing situation in Kuwait during the invasion, in order to see if it met the necessary requirements to be excluded by the standard "non-marine" policy. As can be remembered from the case explained above, such a clause reads as follows: "...the policy does not cover loss or damage directly or indirectly occasioned by, happening through or in consequence of war, invasion, acts of foreign enemies, hostilities (whether war be declared or not)...". In Mr. Kanagasabai's opinion, interpreters of insurance law have to be really careful with respect to the meaning of the word "invasion". In his view, an "invasion" should not be confused with "occupation", since when the latter occurs, there is no war, nor invasion due to the lack of resistance. During the Kuwaiti occupation by Iraqi forces, which lasted from August 1990 until February 1991, there was no organised resistance save for Kuwait forces in a few security locations and some hostilities from Kuwait resistance groups. There was a military presence, totally outnumbering the Kuwait population, coupled with widespread looting, theft, vandalism and the destruction of private properties and business premises by both armed forces and/or civilians. Mr. Kanagasabai stated that, even though the claims lodged by the insureds were rejected by the insurers on the grounds of the excluded war risks and the rejections went unchallenged by the insureds, a controversy could have arisen in this point, since the standard exclusion clause in the policy does not mention expressly the word "occupation", which, as explained by him above, does not have the same meaning as invasion. Mr. Kanagasabai's suggests that the word "occupation" should be added to the war exclusion clause to avoid any uncertainty.

Although the latter view might not be shared by all of those engaged in the insurance market, one can not deny the merit of Mr. Kanagasabai's opinion as regards this matter. When analysing the Panamanian case *Mendriefal y otras v. The Continental Insurance Co.* in the light of Mr. Kanagasabai's views, one has to note that the fact that there was resistance in the country against the invasion, as can be seen from the several certifications from hospitals, governmental and international organizations, making reference to the number of dead and wounded victims during the invasion, is a point that was carefully taken into consideration by the Court when determining whether the existing situation in the Republic of Panama at that time fell into the exclusion clause in the policy.

## II. CIVIL WAR

This is another term rather difficult to define, at least for marine insurance purposes. In fact, several meanings might be given to this term in different areas, but when it comes to insurance law, one can not regard the different interpretations that the media often apply to this term as a useful source. Fortunately, however, British insurers have more to rely upon than the media, since the meaning of "civil war", as well as some other perils covered by the policy, have been recently analysed in the *Spinney's v. Royal Insurance* case (1980) .

The background of the case was the unrest in Beirut during December 1975 and January 1976 when properties covered by a fire insurance policy were badly damaged as a result of looting and vandalism. The insurers denied liability on the basis of a Riot and Strike Endorsement which excluded losses caused, inter alia, by "civil war" and "commotion". The case went on to the Queen's Bench Commercial Court, and the Court had to decide whether the events in Lebanon had progressed to the stage of "civil war". In its search for the ordinary meaning of the term "civil war", Mustill, J asserted that the meaning of war was wide enough to include "civil war", as well:

In my judgment, the ordinary and the literal meaning of the words are the same: a civil war is a war which has the special characteristic of being civil - i.e. internal rather than external. This special characteristic means that certain features of international war are absent. Nevertheless, a civil war is still a war. The words do not simply denote a violent internal conflict on a large scale. The Court went on, then, to analyse the definition of "civil war". Four main points might be extracted. The first important point is whether the views of the government of the country, as regards the events in Lebanon amounting to "civil war" were relevant. It was decided by the Court that they were not. The second important point laid down by the Court is that "a civil war will only be held to exist where there has been an internal conflict between two or more identifiable 'sides' which have as their objective the seizure or retention, as may be applicable, of political power in the country concerned". This point can be divided in two: first, a civil war can only exist between "sides", that is to say "struggle by one side to wrest the power from the other". In that sense, Justice Mustill regards the meaning of "civil war" as concerned "...either with a conflict between the state and body of inhabitants who have a sufficient cohesion and apparatus of government to merit recognition as a kind of quasi-state, or with a conflict between two such quasi-states, each claiming to be the state itself". The judge came to the conclusion that there were no opposing "sides" in this conflict. The second part of this point refers to the objectives of the "sides". The Court found that, to meet the requirements of a civil war, the aim of changing the political structure is not actually necessary. In the words of Justice Mustill: "I believe that there would be a civil war if the objective was not to seize complete political power, but (say) to force changes in the way in which power is exercised, without fundamentally changing the existing political structure". As regards this point, the Court found that this was not the objective of either of the factions. The last point to consider is the scale and the character of the conflict, as well as the number of the combatants and casualties. In Cornish's interpretation of the case "...[another] pre-requisite for a civil war is that the conflict is on a large scale involving considerable sections of the populace with a resulting disruptive effect on public order and the way of life". After pointing out the variability of the character of civil wars from one to another, and the fact that "the abundant presence of some elements may compensate from the comparative absence of others" , the Court went on to give a brief account of the matters that should be considered when deciding whether internal strife has reached the level of civil war:

...the number of the combatants; the number of the casualties, military and civilian; the amount and nature of the armaments employed; the relative sizes of the territory occupied by the opposing sides; the extent to which it is possible to delineate the territories so occupied; the degree to which the populace as a whole is involved in the conflict; the duration and degree of continuity of the conflict; the extent to which public order and the administration of justice have been impaired; the degree of continuity of the conflict; the degree of interruption to public services and private life; the question whether there have been movements of population as a result of the conflict; the extent to which each faction purports to exercise exclusive legislative, administrative and judicial powers over the territories which it controls.

All these are factors that should be taken into account when deciding whether there is a state of civil war or not, but again, as Justice Mustill stated, the decision would be made upon the facts of the specific case.

### III. REVOLUTION, REBELLION, INSURRECTION

Although being separate perils with special characteristics of their own, they actually represent different degrees of the same civil disorder. From a very simplistic point of view, an insurrection will be the most precarious form of civil disorder, acquiring, at some stage, the state of rebellion whereas the revolution is a rebellion which has already gained its purpose. As the late Donald O'May pointed out "Revolution and Rebellion are really only distinguishable by the success factor; a revolution is a rebellion which succeeds. Insurrection is somewhat lower down the scale but requires an intent to overthrow a lawfully constituted regime." This is supported by the view expressed by the United States Court of Appeal in *The Pan American World Airways Inc. v. The Aetna Casualty and Surety Co.*, where it was held that if a loss was not caused by an insurrection, the more it could not have been caused by a revolution or rebellion. In the words of Circuit Judge Hays: "'Insurrection' presents the key issue because 'rebellion', 'revolution' and 'civil war' are progressive stages in the development of civil unrest, the most rudimentary for of which is insurrection". The essential feature, and main purpose, of either of the three, "is the attempt to overthrow the established Government or at least to change the political structure of the Government". The Pan Am case defined insurrection as a violent uprising by a group or movement acting for the specific purpose of overthrowing the constituted government and seizing its powers. As regards Revolution and Rebellion, even the authors of the Institute Clauses Handbook felt the need of a dictionary in order to draw some differences between them. Rebellion is defined, thus, by the Universal English Dictionary as "a state of organised armed and open resistance against the authority and Government or Sovereign of the country to which one is in allegiance; distinguished from Civil War, usually by the smaller number of the rebels". In the same way, Revolution is defined as "Complete subversion of established political authority and establishment of a new form of government ; overthrow of existing political conditions". As can be guessed, the dividing line between these three kinds of perils is quite fine and is not often simple to establish the differences between one another. In a recent case, *National Oil Company of Zimbabwe (Private) Ltd. and others v. Nicholas Collwyn Sturge*, the meaning of the word insurrection was considered another time. The case concerns losses sustained when a pipeline and an oil farm were blown up by terrorists. The policy incorporated the provisions of the new Institute Strike Clauses, the material clauses being :

Clause 1 - Risks Clause..1.1.2. any terrorist or person acting from a political motive... Clause 3 - General Exclusions Clause: In no case shall this insurance cover...3.10 loss damage or expense caused by war civil war revolution rebellion insurrection, or civil strife arising therefrom, or any hostile act by or against a belligerent power. It was the contention of the defendants that the plaintiff's claim could not be covered by Clause 1.1.2. since the acts in question fell within the exclusion clause. The question for the Court to decide, then, was whether the terrorist attack was made as a consequence of civil war, rebellion or insurrection . After a long analysis of the existing political situation in Zimbabwe, the Court went on to decide about the primary motivation of the Renamo movement, which was the political group responsible for the terrorist attack. His lordship's conclusion were that the aims of the Renamo movement were mainly oriented towards the downfall of the Government. The deciding factors were, ultimately, the large amount of tacit support for Renamo; the widespread internal discontent with the Government; the ready means of support for Renamo provided by Rhodesia and South Africa and the willingness of large numbers of Mozambicans to join Renamo and to perpetrate extreme and violent acts in order to overthrow the Government. In the opinion of Saville J, these factors pointed unequivocally to a state of insurrection in Mozambique at the time in question and thus his lordship held the losses were caused by insurrection.

Commenting upon this case, Janice Wills, research student of the University of Liverpool suggested that "Whilst it may be easy to state when and if a civil war is taking place, the dividing line between terrorism and insurrection is finely drawn and, as has been seen with the situation in Mozambique, it may be a series of events and circumstances that lead to the conclusion that insurrection is occurring rather than one deciding event" Furthermore, Saville J commented upon the fact that both sides have differing explanations for the activities and it is not automatic that the word of the government of the day will be accepted.



#### IV. CIVIL STRIFE ARISING THEREFROM

The words denote some kind of unrest or civil disorder which arises out of any of the preceding perils. As commented by the late Donald O'May, "Civil Strife is a much wider term in itself (in comparison with 'insurrection'), but it is to be noted that, in the war clauses, it is only civil strife arising from the preceding named perils, civil war, revolution, rebellion and insurrection, that is covered" . Some confusion may arise as regards "civil commotion", another peril which is covered by the Institute Strikes clauses, due to its similitude with 'civil strife arising therefrom'. The meaning of the term "civil commotion", was considered by Mustill J. in *Spinney's v. Royal Insurance Co. Ltd.* The judge had to analyze whether the events going on in the Lebanon in 1975 could be said to amount to "civil commotion", for the purposes of the exception in the policy. Several points as regards the meaning of this particular term were considered, and although not giving a precise definition of it, Mustill J. came to the conclusion that even though there was nothing that could be found in the authorities to hold that a civil commotion must involve a revolt against the government, yet "...the disturbances must have sufficient cohesion to prevent them from being the work of a mindless mob." In this connection, the Court came to the conclusion that the events in the Lebanon did amount to civil commotion, giving these words the meaning expressed above, since they were certainly something more serious than the action of a "mere leaderless mob". As can be noted, the distinction between the two perils ('civil strife arising therefrom' and 'civil commotion') is far from clear. Miller points out that "Revolution, rebellion and insurrection or the civil strife arising therefrom were insured perils of the old cargo War Clauses, whereas civil commotions was an insured peril of the old cargo Strikes Clauses." The author describes the distinctions between the two perils as "wafer thin", and comments about the inconveniences that may arise if there is confusion about which clause to apply in a particular incident. A clear distinction between the two perils is important, thus, in order to know from which of the clauses an assured can recover in case of a loss due to a particular civil disorder. The point which makes this distinction easier is the "intent" of the people involved in the particular incident. It is submitted by the authors of the Institute Clauses Handbook that "...the factor which would bring the loss within the War Clauses is the existence of an intent on the part of the rebels or insurrectionists to overthrow the established government" . Thus, there will be a loss falling within the Institute War Clauses when, for example, property is looted due to panic in the population caused by an attack from another country. On the other hand, if the same property is looted due to a civil unrest caused, say, by a strike or other kind of civil disorder without the intent to overthrow the established government, the loss will fall under the Institute Strikes Clauses.

#### V. ANY HOSTILE ACT BY OR AGAINST A BELLIGERENT POWER

These words were introduced to substitute the old wording of "hostilities or warlike operations" which appeared in the F. C. & S. Warranty. However, it is suggested that the same interpretation which was applied to the term "hostilities" must apply now to this words.

The definition and delimitation of the phrase "hostilities and warlike operations" was considered in *Spinney's v. Royal Assurance*. In the words of Mr. Mustill J.:

The term 'hostilities' refers to acts or operations of war committed by belligerents; it presupposes an existing state of war...'Warlike operations' has a wider meaning, and includes such operations as belligerents have recourse to in war, even though no state of war exists (Arnould on Marine Insurance, 15th edn., par 904). Nevertheless, the acts must be done in the context of a war. . In *Clan Line Steamers, Limited v. Liverpool and London War Risks Insurance Association, Ltd.*, Mr. Justice Atkinson defined 'warlike operation' as:

...one which forms part of an actual or intended belligerent act or series of acts by belligerent force. It may be performed preparatory to the actual act or acts of belligerency, or it may be performed after such act or acts, but there must be a connection sufficiently close between the act in question and the belligerent act or acts to enable a tribunal to say, with at least some modicum of Lord Dunedin's common sense, that it formed part of acts of belligerency. The authors of the Institute Clauses Handbook suggest that, to bring a claim within "hostilities", the following characteristics have to be showed: "(a) that the loss or damage had been proximately caused by an act (that is to say, some action on the part of somebody), (b) which was 'hostile' (which may or may not involve a question of intent), (c) directed either by or against a 'power' which is belligerent" . The author goes on to explain the meaning of "power" as a "...state and probably also an entity exercising quasi- governmental authority" . In the same way, he refers to "belligerent", in vernacular usage, as a term which "...probably applies to anyone engaged in armed conflict" . Finally, he points out that the use of the words "by or against" "...does ensure that the property of neutrals which are subject to armed attack either by the forces of a State of war, or of one in opposition to it, is protected by the clause".

The preceding brief explanations refer only to the meaning of "hostilities and warlike operations", and even though it is a term which deserves a deeper analysis, since there is a vast collection of jurisprudence, as well as opinions of authors dealing with the subject, it is important to bear in mind that the term used by the new Institute War Clauses is slightly different to the one used in the F. C. & S Warranty, and its been said to be even narrower. For that reason, the meaning of such words used in the previous wording would not be analysed in any more detail, since it is the purpose of this work is to be concerned exclusively with the wording of the new cargo clauses.

## VI. CAPTURE AND SEIZURE

These perils are not new in the Institute War Clauses (Cargo), since they have been brought back into the new clauses from the SG policy. For that reason, they are expected to be interpreted in the new War Clauses, in the same way they were interpreted in the SG policy. The editors of Arnould's give to the peril "capture" the meaning extracted from *Anderson v. Martin*, in the following words: "Capture, properly so called, is a taking by the enemy as prize, in time of war, or by way of reprisals, with intent to deprive the owner of all dominion or right of property over the thing taken". With respect to "seizure", it has long been established by the courts that it does not have the same meaning than 'capture'. In the words of Lord Fitzgerald, "'Capture' would seem properly to include every act of seizing or taking by an enemy or belligerent. 'Seizure' seems to be a larger term than 'capture', and goes beyond it, and may reasonably be interpreted to embrace every act of taking forcible possession, either by a lawful authority, or by overpowering force". In the same way, the editors of Arnould's refer to 'seizure' as including "...other forms of taking, such as one by revenue or sanitary officers of a foreign state...Nor is 'seizure' confined to acts of state. It includes a seizure by passengers, or by natives whose object is to plunder the vessel." However, the same meaning is not given to the term 'seizure' by American Courts. Under New York law, for example, 'seizure' is restricted to taking possession by a government or governmental authority. In the *Pan Am* case, 'seizure' was one of the terms excluded from the "all risks" policy, however, since the Popular Front for the Liberation of Palestine was not a government or a governmental authority, the loss could not fall under such exclusion. Although the preceding authorities are still binding as far as the definition of the perils is concerned, one has to be careful when using such authorities and bear in mind an important change that has been introduced in the new War Clauses for cargo. We refer to the first phrase which appears after the perils are mentioned in clause 1.2. The same reads "1.2 capture seizure arrest restraint or detainment, arising from risks covered under 1.1..." . The latter phrase has the effect to qualify such perils, as included by the policy only when arising out of an event covered by clause 1.1., that is to say, war, civil war, revolution, rebellion, insurrection, civil strife arising therefrom or any hostile act by or against a belligerent power. As Miller explains in his book "From the position of the first comma, it is clear that capture, seizure, arrest, restraint or detainment are only insured in the case of war, civil war, revolution, rebellion, insurrection, or civil strife arising therefrom, or any hostile act by or against a belligerent power". The author goes on to explain that the latter innovation does not have any effect on the meaning of 'capture', since, as has been explained above, the same can only arise when the cargo is taken by a belligerent government, and this is an indication of the existence of one of the perils mentioned in clause 1.1 (war, civil war, revolution, etc.). The problem is rather with the following perils, that is to say, seizure, arrest, restraint or detainment, since it was held by previous authorities that they do not require the "taking at sea" to be by a government or governmental authority. For that reasons, a review has to be done of what has been said in the previously mentioned cases, with regards to the new wording. Thus, for example, in *Cory v Burr* , a case which concerns the seizing of a ship by the Spanish Revenue Authorities, because the master was engaged in smuggling, the House of Lords found that the loss of the ship was excluded by the F. C. & S. warranty since it fell under 'seizure' . If such a case was concerning a policy of cargo, under the new War Clauses, the loss could not have fallen under the peril 'seizure' since the seizing did not arise out of any of the events described in clause 1.1. It is important to note that this restriction only applies to the new War Clauses for cargo and not to the Hulls (Time and Voyage). Thus, in the case of ships, there is unrestricted insurance for capture, seizure, arrest, restraint or detainment.

## VII. ARREST, RESTRAINT OR DETAINMENT

These risks are imported into the new Institute War Clauses for cargo from the old Lloyd's form of policy, in which they were described as "arrests, restraints and detainments of all Kings, Princes and people, of what nation, condition or quality so ever...". As can be noted, the old wording of the policy incorporated the qualifying words "...of all Kings, Princes and people, of what nation, condition or quality so ever...", which do not appear in the new clauses. The latter words used to be interpreted by the aid of Rule 10 of the Marine Insurance Act 1906, which states that "the term 'arrests, etc. of Kings, Princes and people' refers to political or executive acts, and does not include a loss caused by riot or by ordinary judicial process". However, this interpretation is not relevant any more, since the introduction of the phrase "...arising from risks covered under 1.1. above..." , right after the list of perils insured in clause 1.2, leaves no doubt about the way in which coverage for such perils is provided by the policy, that is to say, only when such are arising as a consequence of the ones mentioned in clause 1.1. Thus, cargo insured with the new Institute War Clauses (Cargo) does not require the exclusion of "ordinary judicial process", as it is required for ships. In this respect, Miller comments that "In the case of ships, which have unrestricted insurance for capture, seizure, arrest, restraint or detainment, such an exclusion is required to exclude from the insurance the normal workings of the civil courts when hearing and determining civil disputes."

With respect to the meaning of the three perils and the relation amongst each other, the editors of Arnould suggest that there is no authority for any distinction in meaning between the three words. The same author explains that, as can be inferred from the case of *The Anita* , "...a loss by 'arrests' may be constituted where the authorities intend permanently to confiscate the insured property, which they may be empowered to do under legislation dealing with customs offenses." There are several decisions explaining the meaning of these perils which should not be of much relevance nowadays due to the changing of wording in the policy and the current restriction in the War Clauses for cargo. However, despite the changes in the wording, some of them are still relevant to this work.

The leading case dealing with the peril of 'detainment' as regards cargo insurance is *Rodacanachi v. Elliot* , in which it was decided that "...an arrest, restraint or detainment can arise from war, even though not an act of war against the state of which the assured is a subject." The case concerned a shipment of silk which was insured for a voyage from Shanghai to London, including the risk of overland transit from Marseilles, via Paris, to Boulogne. The cargo reached Paris, but whilst there, the city became seized by German armies and the forwarding of the cargo became, therefore, impossible. In its judgment, Baron Bramwell, commented upon the fact that, even though there was no actual seizure or arrest of the goods or any order prohibiting their forwarding, the existing status of the city made it impossible for the goods to be forwarded, and the effect was as if they had been actually seized by the German army. Such became, then, the position as regards cargo insurance, when dealing with detainment, that is to say, that even though the owner of the goods never lost their possession, the deprivation of their "free use and disposal" amounted to a constructive total loss. The reasoning behind this decision lies on the fact that, in voyage policies, the owner of the cargo insures his goods to be forwarded from one place to another, with the intention to commercialize with them in the place which he has designated as the destination. If for some reason the goods do not arrive to such a destination, then, it does not matter whether he is still on their possession, the goods "have been taken out of commerce", and thus, he has suffer, in some sense, a total loss. The position is not so clear, though, as regards insurance for ships. In *The Bamburi* , a case concerning the trapping of some vessels in the Shat-al-Arab waterway, the point arose whether a ship which is neither arrested nor war-damaged could recover from a war risk policy under the peril of detainment. Following the same line of thought used by the Court in *Rodacanachi v. Elliot* , one could say that, since the subject-matter of the insurance is not precisely the policy at risk but the "commercial adventure" undertaken by the assured, as was seen in the early days of marine insurance, the deprivation of the "free use and disposal" of the vessel amounted to a total loss. Despite how strong this contention might be, the specific point was not clarified by the decision of the arbitrator. According to Grime, *Staughton J.*, decided that "a trapped vessel was suffering 'restraint'. However, it was crucial to his decision that instructions had been given by the Iraqi authorities that the vessels be not moved. Had they merely stayed where they were out of prudence, it seems likely that the detention would not have been within the War Clauses, for the judge had no doubt that it would not have been a 'loss by hostilities". The judge decided, though, that there was a constructive total loss, applying the "loss of free use and disposal" test used in *Rodacanachi v. Elliot*.

The *Bamburi* arbitration encouraged important developments with respect to the peril of detainment as regards insurance for ships. As R. P. Grime writes, Lloyd's underwriters,...apparently took the view that the standard War Clauses gave no cover for 'blocking and trapping'...If such cover was required, it could be purchased by means of the 'R.J.M. Exclusion J. Wording', which gave cover both in respect of direct detainment of the insured vessel and in respect of the consequences of the closure of any part of the 'J' area. However, this new cover available was only against total loss. It did not include partial loss, so the expenses of protecting and maintaining

the trapped ship where not covered. As regards constructive total loss, a new clause was introduced in the Institute War and Strikes Clauses for Hulls (Time). The same reads as follows:

**DETAINMENT** In the event that the Vessel shall have been the subject of capture seizure arrest restraint detainment confiscation or expropriation, and the Assured shall thereby have lost the free use and disposal of the Vessel for a continuous period of 12 months then for the purpose of ascertaining whether the Vessel is a constructive total loss the Assured shall be deemed to have been deprived of the possession of the Vessel without any likelihood of recovery.

Such a clause need not be introduced in the Institute War Clauses for cargo since, as has been explained above, the position with respect to insurance of cargo has long ago been clarified by the leading case on the matter, *Rodacanachi v. Elliot*, that is to say, that as long as the goods have been "taken out of commerce" there has been a constructive total loss of such.

After the introduction of the MAR form of policy, the only case that has come to our knowledge, considering the meaning of 'detainment' is *The Wondrous*. In the case, a vessel was delayed in a port for eighteen months (thirty-five days initially allowed to the charterer as laytime), due to the impecuniosity of the charterer, an Iranian company with no substantial assets. The question arose whether the owners were entitled to recover under two policies on marine insurance, covering loss of hire and loss of freight, respectively. The central point of the controversy was whether the vessel was detained within the meaning of the War and Strikes Clauses and, if so, whether any of the relevant exclusions on that policy could be applied. The exclusion which the case is specifically referring to is the 4.1.5. of the Institute War and Strikes Clauses which reads as follows: "This insurance excludes...arrest restraint detainment confiscation or expropriation under quarantine regulations or by reason of infringement of any customs or trading regulations". In this regard, *Hobhouse J.*, on the first instance, held that, if following the decision in *The Bamburi*, a wide interpretation had to be given to the peril of detainment, then a similarly wide interpretation were to be given to the policy exclusions. In this sense, the exclusion should apply even though it could only be said that the vessel was detained since, if she had tried to sail without complying with the Customs regulations, she would have been prevented from so doing by the Iranian Government. Despite how sound this new interpretation of the peril of detainment by *Hobhouse J.* might seem, it was upheld by *Lloyd, L.J.* in the Court of Appeal, when deciding that there was no detainment at all. The importance of the case, as *Patrick Foss* suggests is that it

...serves as a remainder to war risks underwriters that the peril of detainment is wider than they may imagine. The approach of the courts, and indeed the draftsmen of the Institute Clauses, appears to be to leave these hallowed words alone and not to attempt to redefine the peril. This is in accordance with previous practice where over the years additional exclusions have been added prohibiting recovery for detainment in specified circumstances. Underwriters are therefore protected so long as they ensure that the Institute Clauses are always incorporated in full.

As regards, "restraints of princes", the leading case of *Sanday & Co. v. British and Foreign Marine Insurance Co. Ltd.*, clearly established that such words did not mean the actual use of force. As can be remembered, in that case, the prosecution of a voyage to Hamburg suddenly became illegal when war was declared between Great Britain and Germany and, consequently, all kind of trading was prohibited between the two countries. Accordingly, this was held to be a restraint of princes.

In *Miller v. Law Accident Insurance Co.*, when a vessel was not permitted to stay in a port due to her cargo of cattle being infested with a disease, it was definitely affirmed that there is no need for the use of force to give rise to a restraint of princes. However, this case will not be good authority now due to the fact that the new wording makes it clear that such perils as "arrest, restraint and detainment" can not arise but as the consequence of one of the perils listed in clause 1.1.

### **VIII. AND THE CONSEQUENCES THEREOF OR ANY ATTEMPT THEREAT**

These words have been imported into the new Institute War Clauses from the F. C. & S. Warranty, in which they appeared just after the mention of the perils. Apart from the introduction of the new phrase "...arising from risks covered under 1.1. above", between the perils and the words, their meaning should have the same interpretation which was given to it in the times of the SG form.

### **IX. DERELICT MINES TORPEDOES BOMBS OR OTHER DERELICT WEAPONS OF WAR**

Save for a few changes that will be explained further down, this clause existed already in the previous war clauses. Its wording was slightly different, covering "mines, torpedoes, bombs or other engines of war".

The word "derelict" was introduced into the new Institute War Clauses (Cargo) to prevent the negative results arising from the case of *Costain-Blankevoort (U.K.) Dredging Co. Ltd. v. Davenport (The Nassau Bay)*. The case relates to a dredger (*The Nassau Bay*) which, whilst being involved in an operation to deepen access to a new fishing harbour in the English Channel, accidentally sucked up ammunition dumped after the end of the Second World War. Consequently, the vessel exploded and was sunk. The controversy arose whether this was a loss by war, since it happened many years after the Second World War. Although the assured recovered the insurance money from the loss of the dredger, he became involved in a dispute with the United Kingdom Revenue Authorities which claimed a balancing charge pursuant to the Capital Allowances Act 1968. The owner of the vessel claimed he was exempted to pay such a charge, since the loss of the *Nassau Bay* was due to a war risk. The legal question was, then, whether a loss caused by a "mine" or "torpedo" in peacetime should be regarded as a loss by war. One of the points for discussion was the way in which the ammunition came to be in the sea. In this regard, the decision of Walton J., in the Chancery Division, was that, even though there are some times when dumping of ammunition at sea might be a warlike operation, in this case, the action involved was actually one of pacification, since it concerned the destruction of war stores at the end of the war.

As was mentioned before, the introduction of the adjective "derelict" was added right after this decision came out, in order to clarify any misunderstanding that might arise, as regard this kind of coverage. However, when considering whether a loss falls under this heading, the courts would still take into account the way in which mines have come to be in the sea, since, as the authors of *The Institute Clauses Handbook* explain:

...it appears to be necessary to enquire by whom or on whose orders the mine was sown, the torpedo fired or the bomb thrown. If that arose in the course of a war or as a result of one of the 'war-like' perils listed in Clause 1.1., the claim will be covered by the War Clauses; conversely, if the weapon had been discharged in the course of a civil commotion (not amounting to an insurrection) or, say, by a terrorist, then,...., there will be claim under the Institute Strikes Clauses.

## CHAPTER II

### EXCLUSIONS FROM THE COVER

The clause reads as follows :

#### EXCLUSIONS

3 In no case shall this insurance cover

3.1 loss damage or expense attributable to willful misconduct of the Assured

3.2 ordinary leakage, ordinary loss in weight or volume, or ordinary wear and tear of the subject-matter insured

3.3 loss damage or expense caused by insufficiency or unsuitability of packing or preparation of the subject-matter insured (for the purpose of this Clause 3.3 "packing" shall be deemed to include stowage in a container or liftvan but only when such stowage is carried out prior to attachment of this insurance or by the Assured or their servants)

3.4 loss damage or expense caused by inherent vice or nature of the subject-matter insured

3.5 loss damage or expense proximately caused by delay, even though the delay be caused by a risk insured against (except expenses payable under Clause 2 above)

3.6 loss damage or expense arising from insolvency or financial default of the owners managers charterers or operators of the vessel

3.7 any claim based upon loss of or frustration of the voyage or adventure

3.8 loss damage or expense arising from any hostile use of any weapon of war employing atomic or nuclear fission and/or fusion or other like reaction or radioactive force or matter.

4. 4.1 In no case shall this insurance cover loss damage or expense arising from unseaworthiness of vessel or craft, unfitness of vessel craft conveyance container or liftvan for the safe carriage of the subject-matter insured, where the Assured or their servants are privy to such unseaworthiness or unfitness, at the time the subject-matter insured is loaded therein.

4.2 The Underwriters waive any breach of the implied warranties of seaworthiness of the ship and fitness of the ship to carry the subject-matter insured to destination, unless the Assured or their servants are privy to such unseaworthiness or unfitness.

The present work shall only deal with the exceptions that are exclusive from the Institute War Clauses for cargo, leaving aside, thus, those which are common with the Institute Cargo Clauses.

I. "Any claim based upon loss of or frustration of the voyage or adventure"

This clause was introduced to prevent the unwanted effects of the decision in *British & Foreign Marine Insurance Co. v. Sanday*, a case in which goods that were insured on a voyage from Buenos Aires to Hamburg, under a war risk policy were diverted from their actual destination (Hamburg) during the voyage due to war being declared between Germany and Great Britain. The reason for the diversion was that, from the moment war was declared between the two countries, trade between each other was prohibited, thus rendering the adventure illegal, and so, frustrated. Although the goods themselves did not suffer any damage, they were held to be a constructive total loss by "restraint" on the grounds that, a loss or frustration of the adventure gives rise to a claim for constructive total loss, despite the goods being in a perfect condition.

The clause can lead to confusion if it is interpreted in a way as to consider that any loss in which also there has been frustration of the adventure can rely on the exception. On the contrary, the correct interpretation is the one given by Viscount Simon L.C. in *Midows Ltd. v. Robertson* (and other test cases). The case relates to the loss of some goods which were diverted from their voyages due to the German captains obeying the orders of their country. It was held that the loss was caused by a physical restraint on the goods as well as a frustration of the adventure. In the Viscount's opinion, the proper meaning of the clause should be "...free of any claim which is in fact based, and can only be based, upon loss of the insured voyage". It is to be inferred, then, that the clause does not affect any loss based on, say, the condition of the goods when there has been frustration of the adventure as well. The point came again for consideration in another case, *Rickards v. Forestal Land*, one of a series of cases in which German vessels whose cargoes were insured under war policies, were instructed by the German Government that, in the event of war becoming imminent, vessels had to go for ports of refuge, or return to Germany or, as a last option, they were to be scuttled. Several of these vessels made their way to Germany. The owners of the cargoes claimed, then, for a constructive total loss of their goods and a controversy arose as to whether the "frustration clause" prevented the insured from recovering under the policy, since the loss was due to frustration of the adventure. The question was solved this time by the House of Lords, affirming the decision of the Court of Appeal. As commented by the editors of *Arnould*, the judge held that the policies covered both loss of the goods, and loss of the adventure, that the "frustration clause" was intended only to except the loss of the adventure from the ambit of the insurance, and that, as the claims were in respects of the goods, whose loss was independent of the loss of the adventure, they were not defeated by the clause.

Some other controversy arose before, as regards the meaning of the clause due to her original wording. The clause use to read: "Warranted free of any claim based upon loss of, or frustration of, the insured voyage or adventure, caused by arrests, restraints or detentions of kings, princes, or peoples". In *Atlantic Maritime Company Inc. v. Gibbon*, a vessel under a charterparty in China, left the vessel without its cargo due to an order of the Nationalist Government. The loss would have been one to give rise to a proper contention by the insurers that the exclusion of "frustration" applied, since there was no actual loss of the goods, however, since the loss was held to be due to three different perils, namely, civil war, restraint of princes and warlike operations, the assured could avoid the application of the exclusion basing his claim in one or two of the perils which were not covered by the exclusion clause. As can be seen, the exclusion clause does not make reference to civil war or warlike operations, thus the assured based his claim on the grounds that the loss was caused by civil war.

II. "loss damage or expense arising from any hostile use of any weapon of war employing atomic or nuclear fission and/or fusion or other like reaction or radioactive force or matter"

The wording of this clause is slightly different from the one used in the other type of policies. As regards normal cargo insurance, for example, the clause reads as follows: "4. In no case shall this insurance cover...4.7 loss damage or expense arising from the use of any weapon of war employing atomic or nuclear fission and/or fusion or other like reaction or radioactive force or matter". A similar wording can be found in the Institute Time Clauses - Hulls as well as in the Institute War and Strikes Clauses (Hulls - Time). In this respect, it can be concluded that the Institute Clauses for ships do not give any coverage as regards explosion of nuclear weapons, however they may be caused.

This comparison and analysis is relevant in order to understand the way coverage is provided in the Institute War Clauses for cargo. In this regard, it is important to refer to Miller with respect to his explanation of the different ways in which nuclear weapons can explode: "...nuclear weapons can explode or be exploded in three separate ways; they can be used in war by a belligerent as hostile explosions, they can be exploded in practice, and they can explode accidentally". The relevance of this classification lies on the fact that, as can be noted from the exclusion clause in the Institute Cargo Clauses quoted above, the clause refers to "the use of" any weapon of war, whereas the wording of the Institute War Clauses for cargo is slightly different in the sense that it introduces the adjective "hostile" before "use", so that it actually reads: "any hostile use". Which of the three kinds of nuclear weapons explosions will be covered, then, with the two different set of clauses? According to Miller, "the use of" refers to "a purposeful and deliberate use". Consequently, a hostile detonation as well as a practice one will be excluded from the Institute Cargo Clauses. On the other hand, an accidental detonation does not meet the requirements of the meaning given by the policy to the word "use". In conclusion, the coverage awarded by the Institute Cargo Clauses (A) in relation to accidental detonations is unrestricted. The same effect will follow in the Institute Cargo Clauses (B) and (C), as long as the loss falls within one of the insured perils of the policy.

The wording of the Institute War Clauses for cargo produces another effect in relation to the three types of nuclear explosions. Since the clause refers only to "any hostile use" of nuclear weapons, it appears that accidental detonations will be fully covered by the policy, since the only express exclusion is as regards a hostile detonation. With respect to practice detonations, Miller points out the difficulty of any such arising in the situations contemplated by Clauses 1.1 and 1.2 of the Institute War Clauses (Cargo). It must be remembered, in this regard, that there is a restriction in Clause 1.2 in the sense that capture seizure restraint or detainment must arise from any of the perils covered under Clause 1.1, that is to say, war civil war revolution rebellion insurrection, civil strife arising therefrom or any hostile act by or against a belligerent power. As regards the interpretation of Clause 1.3, that is to say, "derelict mines torpedoes bombs or other derelict weapons of war", their possible actions can not actually be characterized as "hostile" since a this expression indicates "...purposeful use against a target rather than the explosion of a weapon whose hostile use has long since ceased and which is 'derelict'". Consequently, it appears as if loss or damage caused by nuclear explosion from a derelict mine torpedo bomb or other derelict weapon of war will be covered by the Institute War Clauses.

As a final comment in relation to this exclusion, it is important to note that the doubts as regards coverage which are left in the Institute War Clauses for cargo are, according to Miller, inconsistent with the intention of the insurance market which is to exclude entirely from coverage any claim caused by the detonation of nuclear weapons. Miller suggest, thus, that this purpose has not been achieved with regard to insurance of cargo as it is with insurance of ships.

## CHAPTER III

### DURATION OF THE COVER

#### I. THE DURATION CLAUSE - Analysis of its wording.

The clause reads as follows:

##### 5.1 This insurance

5.1.1 attaches only as the subject-matter insured and as to any part as that part is loaded on an oversea vessel and  
5.1.2 terminates, subject to 5.2 and 5.3 below, either as the subject-matter insured and as to any part as that part is discharged from an oversea vessel at the final port or place of discharge, or on expiry of 15 days counting from midnight of the day of arrival of the vessel at the final port or place of discharge, whichever shall first occur; nevertheless, subject to prompt notice to the Underwriters and to an additional premium, such insurance

5.1.3 reattaches when, without having discharged the subject- matter insured and as to any part as that part is thereafter discharged from the vessel at the final port or place of discharge, the vessel sails from, and

5.1.4 terminates, subject to 5.2 and 5.3 below, either as the subject-matter insured and as to any part as that part is thereafter discharged from the vessel at the final (or substituted) port or place of discharge, or on expiry of 15 days counting from midnight of the day of re- arrival of the vessel at a substituted port or place of discharge, whichever shall first occur.

5.2 If during the insured voyage the oversea vessel arrives at an intermediate port or place to discharge the subject- matter insured for on-carriage by oversea vessel or by aircraft, or the goods are discharged from the vessel at a port or place of refuge, then, subject to 5.3 below and to an additional premium if required, this insurance continues until the expiry of 15 days counting from midnight of the day of arrival of the vessel at such port or place, but thereafter reattaches as the subject-matter insured and as to any part as that part is loaded on an on-carrying oversea vessel or aircraft. During the period of 15 days the insurance remains in force after discharge only whilst the subject-matter insured and as to any part as that part is at such port or place. If the goods are on-carried within the said period of 15 days or if the insurance reattaches as provided in this Clause 5.2

5.2.1 where the on-carriage is by oversea vessel this insurance continues subject to the terms of these clauses, or  
5.2.2 where the on-carriage is by aircraft, the current Institute War Clauses (Air Cargo) (excluding sendings by Post) shall be deemed to form part of this insurance and shall apply to the on-carriage by air.

5.3 If the voyage in the contract of carriage is terminated at a port or place other than the destination agreed therein, such port or place shall be deemed the final port of discharge and such insurance terminates in accordance with 5.1.2. If the subject-matter insured is subsequently reshipped to the original or any other destination, then provided notice is given to the Underwriters before the commencement of such further transit and subject to an additional premium, such insurance reattaches

5.3.1 in the case of the subject-matter insured having been discharged, as the subject-matter insured and as to any part as that part is loaded on the on-carrying vessel for the voyage;

5.3.2 in the case of the subject-matter not having been discharged, when the vessel sails from such deemed final port of discharge; thereafter such insurance terminates in accordance with 5.1.4

5.4 The insurance against the risks of mines and derelict torpedoes, floating or submerged, is extended whilst the subject-matter insured or any part thereof is on craft whilst in transit to or from the oversea vessel, but in no case beyond the expiry of 60 days after discharge from the oversea vessel unless otherwise specially agreed by the Underwriters.

5.5. Subject to prompt notice to Underwriters, and to an additional premium if required, this insurance shall remain in force within the provisions of these Clauses during any deviation, or any variation of the adventure arising from the exercise of a liberty granted to shipowners or charterers under the contract of affreightment.

As can be seen, the clause provides for coverage exclusively from the time that the goods are loaded onto an oversea vessel and continues until they are unloaded from such, at the port of discharge, or until the expiry of 15 days, counting from midnight of the day of arrival, whichever shall first occur. Miller defines an "oversea vessel" as "a vessel carrying the oversea goods between ports on a sea-passage". In the same way, he defines "arrival" as "anchored moored or otherwise secured at a berth or place within the harbour area; if however that is not available, arrival is complete, and the 15 days begin to run, when the vessel reaches the waiting area". The preceding part of the clause is so far consonous with the Waterborne Agreement, an agreement which would be explained with some more detail further down. The following provisions of the clause, however, depart somehow from the strictness of such agreement and are considered as exceptions to it.



Clause 5.1.3. and 5.1.4. provide that the insurance reattaches when the vessel sails from the port of discharge without having unload the goods and continues until the same are discharged at the final or substituted port of discharge, or 15 days after the vessel's arrival (provided prompt notice be given to the underwriters and additional premium is paid if required).

Clause 5.2 and 5.3 refer to the case when the oversea vessel discharges the insured goods for transshipment at an intermediate port or port of refuge. The insurance, then,

...continues only for 15 days after arrival..., but will reattach when the insured goods are loaded onto an on-carrying oversea vessel or an aircraft. If they are carried onwards by sea, the insurance continues on the conditions of the new cargo War Clauses. If however they are carried onwards by aircraft, then the current Institute War Clauses (Air Cargo) will apply. As can be noted, the exception to the rule of the Waterborne Agreement consists in that the goods remain insured during the 15 days that they are at the discharge port. It is not the case when the voyage is terminated at another port which is not the contracted one, because then the coverage terminates on discharge. However, the risk can reattach, provided notice be given to the underwriters and an additional premium is paid when required, if the goods are loaded onto an on-carrying vessel or if the original vessel continues her voyage.

Unlike the previous clauses, Clause 5.4, which refers to the insurance against risks of "mines and derelict torpedoes", provides coverage for every period "whilst the insured goods are on board craft in transit to or from the oversea vessel, but this is limited to a period not exceeding 60 days following discharge from the oversea vessel".

Clause 5.5 provides that the goods remain insured during a deviation by the oversea vessel from the contract of carriage, provided prompt notice be given to the underwriters and an additional premium is paid, if required.

Finally, clause 6 provides for coverage when the assured changes the destination of the goods, stating that they will be "held covered at a premium and on conditions to be arranged subject to prompt notice being given to the underwriters".

This characteristic clause of the cargo policies has been described as complex and difficult to define. However, a deep analysis of its wording will definitely lead us to the conclusion that its meaning is actually perfectly clear and has a reason of being. Its principal function is to provide for non-coverage of war risks on land, thus giving effect to a long-standing agreement among those engaged in the cargo insurance business, known as the "Waterborne Agreement". A brief study of the intrinsic differences between marine risks and war risks will help us understand the origin and intention of such agreement.

It is helpful to have a through knowledge of the catastrophic results which may follow after a war in order to understand the reason why marine and war risks can not be regarded as equal in the insurance business. However, one can not be viewed as ignorant or naive for not visualizing the dimensions of such an event, since uncertainty seems to be the main characteristic of the results of a war. As commented in the famous American case *Queen Ins. Co. of America v. Globe & Rutgers Fire Ins. Co.*, war coverage provisions originated in government's attempt to secure ships for use in war, which was a use not generally covered by marine insurers. In a more recent American case, a similar opinion was expressed:

The purpose of a war risk exclusion is to eliminate an insurer's liability in circumstances in which it is impossible to evaluate the risks. The clause effectuates this purpose by excluding coverage for claims occasioned by the special hazards of war...An insurance company clearly has the right to limit his liability for risks associated with war hazards. In this regard, R. P. Grime suggests that "The difficulty with war risk cover from the point of view of the insurer is the extreme variability of the risk. Wars, belligerent acts, insurrections, and similar events occur around the globe with unfortunate regularity, but the exact prediction of their outbreak is a very difficult task". Again, G. Cornish also shares the same opinion, as he states that:

The starting point for any insurer must be that is willing to consider granting cover in respect of relatively normal risks which can be assessed with some degree of accuracy. As soon as an abnormal element is introduced into the picture, like the increased risk of losses due to war or war-like activity, the insurer must consider whether it is still willing to write the business subject to the payment of an appropriate premium or apply an exclusion clause. However, despite how logic this assertions might be today, one has to bear in mind that it was not until recently that the world was able to see the devastating results of a war. In fact, underwriters did not start to question whether they had sufficient financial resources to meet huge potential claims until the Spanish civil war of the thirties demonstrated that this was a matter for governments themselves to deal with. Ever since, it became an accepted practice for all insurers not to give coverage on land, the reason why the standard "non-marine" war exclusion clause says "the policy does not cover loss or damage directly or indirectly occasioned by, happening through or in consequence of war, invasion, acts of foreign enemies, hostilities (whether war be declared or not)...". With respect to the United Kingdom, this practice took the form of an agreement, the "Waterborne Agreement", whose theory is that "...individual ships and their cargoes at sea present sufficient separation to be much more manageable risks and similar thinking applies to insurance of aircraft". This "Waterborne Agreement" is present in cargo insurance as regards risks on land. As can be seen from the wording of the Institute War Clauses (Cargo), the risk does not attach until the goods are loaded on to the overseas vessel

and does not extend beyond fifteen days after arrival of the vessel at the final port or place of discharge. If there is a discharge of the goods at an intermediate port or place, the assured can obtain continuation of the cover only on payment of an additional premium, if required.

When compared with the 'transit clause' of the Institute Cargo Clauses, the clause might cause some confusion since such 'transit clause' provides for coverage from warehouse to warehouse, that is, while the goods are on land. Depending on the wording of the policy, this coverage can even extend for 60 days. Errors of interpretation might lead to the wrong conclusion that, since the policy has to be interpreted as a whole, the 'transit clause' should apply, as a general condition, to the war risk clause. This erratic conclusion can arise specially from American policies, since, at least the American Institute ones, have not adopted the new form of policy designed by London. The new Institute Clauses have been described, in general, as very simple and easy to understand, when compared with the wording of the old Shipping Goods policy. However, despite the American Institute's clauses similitude with the Shipping Goods one, such policy is very clear and straightforward with respect to duration of the cover. In fact, some people engaged in the insurance business have expressed their predilection towards the American policies. In a recent case, *Nabil Internacional, S.A v. Aseguradora Mundial de Panama, S.A.* decided by the Panamanian Maritime Court in May 1994, the point of law to decide was in relation to the correct interpretation of the policy with respect to this matter. The case relates to the loss of a container, by looting and vandalism, while awaiting shipment at the port of Zamba Bonita (Panama). Both parties agreed upon the casual link between the American invasion to Panama on the 20th of December and subsequent days and the looting and vandalism that succeeded such war. Having cleared this point of fact, the only point of law to be discussed was as regards the true interpretation of the policy, that is to say, if the policy should cover or not such loss. The form of policy used by Panamanian underwriters in general, and by the specific underwriters in this case, is derived from the standard form of policy of the American Institute. In this case, it was a floating policy for cargo which incorporated, amongst other annexes, the war risk only clause, in a separate form (Form 2-1, American Institute, March 1951). The floating policy contained the classical cover from warehouse to warehouse, as well as the Free of Capture and Seizure Warranty (F. C. & S), that are usual in such form of cargo insurance. On the other hand, the War Risk Only Clause contained the same wording, as regard duration, than the Institute War Clauses. It was the contention of the plaintiffs that the policy should be interpreted in its whole context, so that the coverage from warehouse to warehouse would apply, not only to the provisions of the mother policy itself but also to her annexes such as the War Risk Only one. Thus, in the words of attorney Norman Douglas Castro (for the plaintiff):

...dicha cláusula [de bodega a bodega] es clara al No incluir ninguna excluyente a la cobertura que ella en si encierra, y que es el cubrir el riesgo asegurado de bodega a bodega, salvo con una sólo excepción, cuando se trata de trasbordo, que solo lo cubre por un período determinado de tiempo. (Translation by the author: ...that clause [from warehouse to warehouse] is clear in not including any exclusion to the cover that she provides, that is to cover the insured risk from warehouse to warehouse, save for one only exception, regarding transshipment, which is only covered for a specific period of time). Mr. Justice Cabal, summarized as well the plaintiff's contentions, in the following way:

...la cobertura "DE BODEGA A BODEGA", no excluye en la misma, el riesgo de guerra pues la cláusula no lo dice, y que la intención del asegurado al contratar el seguro, era mantener asegurada su mercancía de bodega a bodega. Lo que da lugar a una oscuridad dentro de la Póliza.... (Translation by the author: ...the cover "FROM WAREHOUSE TO WAREHOUSE", does not exclude in it the war risk because the clause does not say it, and the intention of the assured when contracting the insurance, was to maintain insured his goods from warehouse to warehouse. That leads to obscurity within the policy....

As can be inferred from the above contentions, the plaintiff's point lies on the suggestion that the mother policy, that is to say, the floating policy's general conditions should apply to all her annexes, including the war risk one. But such an interpretation lies far beyond accuracy since, although is true that a policy of marine insurance is a document that should be interpreted as a whole, such interpretation should also take into account the Free of Capture and Seizure Warranty (F. C. & S.), which is part of the mother policy, that is to say, the floating policy. As has been explained elsewhere in this work, it is the function of the Free of Capture and Seizure Warranty (F. C. & S.) to forward the war risks into another policy, the War Risk Only one, in this case, which would have her own conditions, as limitation of coverage on land, whose reason has also been explained.

As regards this point, Mr. Justice Cabal has settled the position with respect to the interpretation of the duration clause, thus clearing out any misunderstanding that might have arising. After commenting upon the long-standing usage of these kind of policies in the Panamanian insurance market (for 30 years) and their consonance with the world insurance use and practice, he also makes reference to the wording of the policy and his annexes, which, in his opinion, are perfectly clear and free from any ambiguity. In this connection, he quotes a clause from the War Risk Only annex which reads as follows:

Queda entendido que esta póliza es un contrato por separado y completamente independiente y no esta sujeto a ninguno de los términos y condiciones de la antes dicha póliza contra los riesgos marítimos,..., excepto a lo que respecta a los términos y condiciones que hayan sido citados e incluídos en la presente. (Translation by the

author: It is to be understood that this policy is a separate contract and totally independent and not subject to any of the terms and conditions of the marine risks policy ..., except for the terms and conditions which had been quoted and expressly included in it [in the war risk only annex]. In this regard, the judge goes on to explain that, since the War Risk Only annex does not make any reference to the "Warehouse to Warehouse" clause, the "Waterborne Agreement", contained in the War Risk Only annex policy should be given its full and usual interpretation, that is to say, that the goods are not covered against war risks whilst they are on land (save for a limited period of time in the case of transshipment). Following this line of thought and after clearing out that the goods were not on board the ship, neither awaiting transshipment, since it was proven from the facts of the case that the goods were in the port of Zamba Bonita and that the exportation of such was originated from the warehouses of Nabil Internacional, the judge arrived, then, to the conclusion that the exclusion applied and the underwriters were, thus, relieved to pay.

## CONCLUSION

The previous analysis of the Institute War Clauses for cargo gives the reader an overview on the great improvement achieved in this area of marine insurance. Although it appears that the epithet of "new", often attached to the Institute War Clauses, is inappropriate since the clauses have been existing for at least thirteen years, their novelty actually refers to the radical changes which they introduced with respect to clarity of the wording and delimitation of the perils.

As discussed, the coverage offered by the Institute War Clauses neither differs to a large extent from the one offered more than one decade ago by the Shipping Goods form of Policy, nor does it differ considerably from the coverage offered by other systems of insurance in other countries. However, the outcome of the new Institute War Clauses lies in the great deal of clarity and precision achieved.

As regards to the perils insured against, the delimitation, and individualization of the perils in different subheadings have contributed to clarify the extension of the risks covered. For instance, the peril of war, although always insured under the coverage for civil war, has been expressly added to the policy once more in the interest of clarity. The qualifying words in clause 1.2 with respect to the perils of capture, seizure, arrest, restraint or detainment, limiting their coverage only when the same have arisen from one of the perils mentioned in clause 1.1., have certainly helped with the understanding of the delimitation of coverage for such perils. On the other hand, the great quantity of case law existing at the time of the re-drafting of the clauses, has been adequately embodied on the new clauses to ensure the same coverage that has been studied and discussed, not only by those engaged in the insurance business but also by those sitting on the benches, is being provided by the new clauses. Proof of this is the small quantity of cases that have been deliberated by the courts since the re-drafting of the clauses with respect to the meaning of the perils.

The exclusions from the cover have also been clarified and redefined. Basically being only two exclusions exclusively from the Institute War Clauses for cargo, the same have been studied by the drafters of the clauses to ensure their true meaning and intention have been incorporated into the policy. Again, the interpretations that the courts have given to such words have been accurately introduced in the new clauses.

Finally, with respect to the duration of the cover, a clause where the greatest degree of clarity was needed, due to the complexity of such a clause as regards to war risk insurance, the reader can observe how effectively this goal has been reached. The wording used by the new Institute War Clauses with respect to duration of the cover, has been used as a model by a vast number of countries for the drafting of their respective policies. Although having the same underlying principle as regards to coverage for war risk insurance on land, which in English law is embodied in the Waterborne Agreement, an agreement deeply commented and explained in the course of this work, one can not deny that the clear and precise wording of the new War Risk Clauses for cargo has been of great advantage towards the understanding of this rather complicated coverage. In fact, recent decisions in other countries even make reference to the English law in this matter and to the wording of the new War Risk Clauses with respect to duration of the cover, as their basis for assuring the correctness of such a clause.

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