The War Risk Exclusion

History and Expansion

Presented By:
Stephen V. Rible, Esq.
Kennedys
570 Lexington Avenue
New York, New York 10022
Mobile: 908-902-5180
Stephen.Rible@Kennedyslaw.com

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Marine Insurance for War Risks

This presentation moves from the past to the present insurance wording regarding the FC&S Paramount Warranty with a focus on the war risk exclusion

- The war risk exclusion is derived from the law of marine insurance.
- Marine policies in their original form covered against war perils,
- but by the insertion of the “war clause” or “free of capture and seizure clause” as it is commonly known, these perils are excluded from the protection of the marine policy.
- WINTER, MARINE INSURANCE: ITS PRINCIPLES AND PRACTICE 292 (2d Ed. 1929).

- In its ordinary form [in 1929] this clause reads:

  - Warranted free of capture, seizure, arrest, restraint, or detainment, and the consequences thereof or any attempt thereat (piracy excepted), and also from all consequences of hostilities or warlike operations whether before or after declaration of war.
  - *Id.*

1966 AIMU All Risk Cargo Form

- The **1949** American Institute All Risk Cargo Form added the phrase "whether in time of peace or war" to the "free of capture and seizure" section of the FC&S Warranty.

- The addition of that phrase was repeated in the **1966** American Institute All Risk Cargo Form as follows:

- F.C. & S. Warranty
- . . . .
- Notwithstanding anything herein contained to the contrary, this insurance is warranted free from capture, seizure, arrest, restraint, detainment, ... and the consequences thereof or any attempt thereat**, whether in time of peace or war** and whether lawful or otherwise; also warranted free, **whether in time of peace or war**, from all loss, damage or expense caused by any weapon of war employing atomic or nuclear fission and/or fusion or other reaction or radioactive force or matter or by any mine or torpedo, **also, warranted: free from all consequences . . . .by a hostile act by or against a belligerent power:** and for the purposes of this Warranty "power" includes any authority maintaining naval, military or air forces in association with a power.

Court Recognition of "In Time of Peace"

- By 1980, the Court of Appeals recognized that the wording of the standard FC&S exclusion had been broadened to include seizures and detentions in times of peace.

- In *Blaine Richards & Co., Inc. v. Marine Indem. Ins. Co. of America, 635 F.2d 1051 (2d Cir. 1980),* the Court of Appeals considered an ocean marine cargo policy that contained an SR&CC Warranty.

- Blaine shipped 10,000 bags of pea-beans from Antwerp to Baltimore. Prior to the ocean voyage, the beans were fumigated with the fumigant Phostoxin, a pesticide not approved by the FDA.

- The beans arrived at Baltimore and were inspected upon arrival by an FDA official. He discovered an empty can of Phostoxin in one of the shipping containers as well as some powder on some of the bags of beans.

- The FDA detained the beans and required Blaine to recondition and release the bags of beans. Aside from the money spent upon reconditioning, plaintiff lost money when the original sales contracts for the beans were cancelled, and the beans had to be sold at lower prices.

- In the lower court, Judge Nickerson held that recovery was barred by the F.C.&S. Clause of the “all risks” policy and the “customs regulation” exemption of the War Risks policy.
- He held that the F.C.&S. Clause was not limited to exclusion of perils of a “warlike nature” but applied as well to risks of detention by civil authorities.
- The Court of Appeals stated that the F.C.&S. Clause was intended to exclude the risk of detention by civil authorities in peaceful circumstances.

- The Court stated that although the F.C.&S. Clause may have originally been inserted in marine policies to protect against risks of war,
- its interpretation in recent years to include seizure or detention by civil authorities seems consistent with the general purposes of the Clause,
- which is to exclude from coverage losses arising from unforeseeable actions of sovereign states against the insured vessel or cargo.

Courts have Consistently Broadened the Application of the FC&S Warranty

- In fact, cases have consistently applied the F.C.&S. Clause to detention by civil authorities. *Int'l Multifoods Corp. v. Commercial Union Ins. Co., 309 F.3d 76, 87 n. 4 (2d Cir.2002)*. (FC&S clause excluded coverage after shipment of frozen food was seized by Russian police and never returned, incident to investigation of black-market bribery and customs evasion);
- *Intermondale Trading Co. v. North River Insurance Co., 100 F.Supp. 128 (S.D.N.Y.1951); Nakasheff v. Continental Insurance Co., 89 F.Supp. 87, 1954 A.M.C. 986 (S.D.N.Y.1953);*
- *Resin Coatings Corp. v. Fidelity & Casualty Co. of New York, 489 F.Supp. 73 (S.D.Fla.1980)*(F.C.&S. Clause was held to bar recovery for losses due to a seizure by Saudi Arabian customs officials).

- In *Northern Feather Intern., Inc. v. Certain London Underwriters, 714 F.Supp. 1352 (D.N.J. 1989),* the Insured commenced a lawsuit against the Insurers claiming that the Insurers failed to make payments under an "Open Cargo" insurance policy on two shipments of cotton cloth
- The cloth was destroyed in a warehouse fire **while being detained by U.S. Customs.**

- The Court held that the “Free of capture and seizure” clause of the Insured’s open cargo policy excluded loss occurring during United States Customs’ detention of goods.
- The Clause stated that insurance was warranted free from detainment and consequences of it, whether in time of peace or war and whether lawful or not.

A Suggestion for Change

2004 AIMU All Risk Cargo Form

In 2004, the Exclusion was worded as follows:

- F.C. & S. Warranty
- A. Notwithstanding anything herein contained to the contrary, this insurance is warranted free from:
- (1) all consequences of capture, seizure, arrest, restraint, detainment, confiscation, . . . and the consequences thereof or any attempt thereat, **whether in time of peace or war** and whether lawful or otherwise;
- (2) all loss or damage or expense**, whether in time of peace or war,** caused by:
- (a) any weapon of war employing atomic or nuclear fission and/or fusion and/or reaction or radioactive force or matter or
- (b) any mine or torpedo;
- **(3) all consequences of hostilities or warlike operations (whether there be a declaration of war or not),** . . . . by a hostile act by or against a belligerent power, and for the purposes of this Warranty "power" includes any authority maintaining naval, military, or air forces in association with a power; . . . .

- http://www.aimu.org/forms/Cargo%20Clauses%20All%20Risk%20(in%20tables).pdf

Hostile or warlike acts in time of peace

- The phrase “whether in time of peace or war” was not added to the exclusion for “all consequences of hostilities or warlike operations”, in a similar manner as the phrase was added to the FC&S Clause.
- The addition of this phrase to the section excluding “hostilities or warlike operations” should unambiguously broaden the application of the Exclusion.
- The War Risk exclusion should then be applied to all consequences of hostilities or warlike operations by a hostile act by or against a belligerent power whether in time of peace or war

Modern Day Application of the Standard War Risk Exclusion – The War in Ukraine

Closure of the Port at Odessa

- The LIVERPOOL EXPRESS departed Montreal on 2/7/2022 and was scheduled to arrive at Odessa, Ukraine on 3/19/2022, if there was no port closure.
- Due to the developments in Ukraine, the Port of Odessa was closed on 2/24/2022
- The vessel diverted to Piraeus, Greece and containers were discharged on March 3rd
- The ocean carrier, CMA CGM, re-routed the shipment
- Certain cargo interests submitted insurance claims for extra expenses on open cargo and war risk policies.

Claim under the "all risks" cargo policy

- The open cargo policy provided coverage for "all risks" of physical loss or damage from a fortuitous external cause, subject to insurance terms, conditions, warranties and exclusions from coverage.
- The transhipment of cargo on carriage to destination raises several coverage issues
- These similar issues were considered during the Hanjin bankruptcy incident in 2016 when numerous ships failed to deliver cargo to original destination ports

- Various coverage issues include:
- Does an “all risk” cargo policy insure the “adventure” in addition to coverage for physical loss or damage to cargo, *i.e.*, does the insurer pay for completion of the voyage
- Does the forwarding clause cover extra expenses for transshipment of cargo where there is no physical loss or damage to cargo
- Does the Delay Warranty exclude coverage for any loss, damage or expense resulting from delay.

- With respect to the LIVERPOOL EXPRESS incident, however, the FC&S Paramount Warranty trumps all other provisions in the policy.
- See *Commodities Reserve v. St. Paul Fire & Marine Ins. Co., 879 F.2d 640, 642 (9th Cir. 1989)*
- The "War Risk" section of the FC&S Warranty excludes coverage for any extra expenses.
- The Port of Odessa was closed as a result of the War between Russia and the Ukraine.
- As a result of the Port Closure, the vessel diverted to a different port of destination.

- Thus, any cargo loss, damage or extra expense incurred as a result of the Port Closure is excluded from coverage under the “War Risk” Exclusion.

- The “War Risk” Exclusion states that the insurance is warranted free from all consequences of hostilities or warlike operations by a hostile act by or against a belligerent power

War Risk Insurance

The Sinking of the Moskva

War Risk Insurance

- War risks are excluded from coverage in the Cargo Policy, but insurance is provided under a standard cargo war risk policy, according to its express terms, conditions, warranties and exclusions from coverage.
- A standard cargo war risk policy provides separate insurance with respect to War Risks on a "named perils" basis.
- In order to recover under a "named perils" policy, the insured must demonstrate that one of the enumerated perils operated to cause the losses.

Limited Named Perils Coverage

- The coverage for War risks is limited.
- The insurance is only against the risk of capture, seizure, destruction or damage by men-of-war, piracy, takings at sea, arrests, restraints, detainments and other warlike operations and acts of kings, princes and peoples in prosecution of hostilities or in the application of sanctions under international agreements, whether before or after a declaration of war and whether belligerent or otherwise, including factions engaged in civil war, revolution, rebellion or insurrection, or civil strife arising therefrom; the imposition of martial law, military or usurped power.

- Express wording in the War Risk Policy clearly provides as follows:

- • Depending upon the particular risk insured, the duration of **coverage is limited to port to port;** or while the property is on board a waterborne conveyance. There is a maximum limit of 15 days for cargo to be discharged from an overseas vessel; and the policy terminates after discharge.
- • There is coverage for when goods are loaded on a lighter, craft or vessel at shipment or when landed from said vessels at the discharge port, but only from the perils of mines and torpedoes.
- • **Goods being moved by land are not covered** under the War Risk Policy, with an exception for mail.
- • **Coverage is excluded for any claim based upon loss of, or frustration of, the insured voyage or adventure caused by arrests, restraints, or detainments.**
- • **The insurance does not cover delay, deterioration and/or loss of market.**

- It appears that any extra expenses incurred by cargo interests may not covered under the war risk policy or are excluded from coverage, as a claim based upon loss of, or frustration of, the insured voyage or adventure caused by arrests, restraints, or detainments.
- The term "arrests, restraints or detainments" includes embargoes and situations where the vessel and/or its cargo are unable to continue the intended transit.
- See *Battat v. Home Ins. Co. of New York, 56 F.Supp. 967 (N.D. Cal. 1944)*

Russia's war on Ukraine could triple ocean shipping rates to $30,000 per container, expert says