

CLYDE&CO

# Uncharted waters: navigating the hazards of war and SRCC risks insurance



Dr Jennifer Lavelle, Marine Claims & Policy Specialist

May 2024

# Current situation in Red Sea

## Notable dates

- 7 Oct 23: Hamas Attack
- 19 Nov 23: Highjack of “**GALAXY LEADER**”
- 12 Jan 24: US/UK strikes in Yemen started
- 18 Feb 24: “**RUBYMAR**” – total loss
- 6 Mar 24: “**TRUE CONFIDENCE**” – loss of life
- 13 Apr 24: “**MSC ARIES**” – seized by Iranian Revolutionary Guards
- 26 Apr 24: “**ANDROMEDA STAR**” – latest attack



## Effect on commercial shipping

- c.70 vessels would transit Suez/Red Sea daily
- Transits down 50%+, c.30-40 voyages each way per day
- Suez Canal revenues down 40%+
- Major container lines avoiding Red Sea where possible
- Almost all LNG carriers diverting
- All Israeli linked vessels diverting
- Strikes on c.40 commercial vessels to date; Houthis claim 90+ ships, inc. naval ships etc.
- Resurgence of piracy
- Chinese/Russian vessels appear to have safe passage (no Israeli connection)

# Behind the scenes

## Owners & P&I insurers

- Owners & charterers carry out risk assessment
- Additional 10-14 days to go around Cape
- Vessel required to proceed with utmost despatch
- Transit via Suez Canal shorter
- Charterers entitled to instruct Owners as to route
- Owners must oblige unless able to decline for e.g. genuine safety concerns  
*The Hill Harmony*
- Deviation may impact on P&I cover – cases assessed on individual merits
- B/L and/or C/P clauses allowing vessel to reroute? **VOYWAR (2013) cl.(a)(ii) & (d)**
- Master's overriding obligation to keep vessel, crew & property safe (**SOLAS** etc.)
- Has there been a material change to risk profile at time of transit vs. when C/P agreed? *The Polar*



“YASAN JUPITER” – missile strike, Feb 2022

# Before the voyage

## Cargo underwriters



- Underwriters assume risk assessment carried out by Owners
- Specifics of voyage: will vessel stop anywhere; called at Israel last 12 months
- Parties in the chain: shipper, seller, buyer, receiver etc.
- Screen vessel and associated risks; sanctions
- Notice given for geographical area in late 2023 (for time policies)
- Decision based on very little data
- Additional premium charged
- Moral obligation to provide cover that client needs?
- Wider obligations to allow international trade to continue; not let the 'bad guys' win?
  - Ex. Grain corridor following Russian invasion of Ukraine

# Claims

## Does the cargo insurance respond?

Most cargo policies on **ICC(A) + IWC (Cargo) + ISC (Cargo)**

Cf. vessels: H&M, war cover and P&I cover with separate insurers

**ICC(A), cl.1** covers **all risks** of loss of or damage to insured cargo except as excluded

**ICC(A), cl.6** – exclusion of **war risks**

**ICC(A), cl.7** – exclusion of **SRCC risks**, inc. **terrorism**

If only marine perils insured against, no cover for missile attacks

Do not dismiss unnecessarily, e.g. engine failure unconnected with Houthi attacks, ICC(A) may still respond

Buy-back cover in IWC and ISC narrower than exclusion

Ex. Cover for **loss of adventure** expressly excluded in IWC & ISC



# Risks covered under the **IWC (Cargo) 2009**

“1. This insurance covers, except as excluded by the provisions of 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 detainment**, 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*”



# Overview of war & like perils

cl.1.1, “*war civil war revolution rebellion insurrection, or civil strife arising therefrom, or any hostile act by or against a belligerent power*”

- “**war**” – to be given its ordinary and popular meaning as a commercial man would use it; meaning intended by the parties; not a technical legal meaning
- “**civil war**” – internal rather than external war
- “**revolution**” – successful rebellion; radical change in government
- “**rebellion**” & “**insurrection**” – similar; organised & violent internal uprising in a country with main purpose of trying to overthrow government
- “**insurrection**” – denotes a lesser degree of organisation/size; if Underwriters cannot establish “*insurrection*”, they will fail to establish “*rebellion*”

# “Any hostile act by a belligerent power”

*cl.1.1, “war civil war revolution rebellion insurrection, or civil strife arising therefrom, or any hostile act by or against a belligerent power”*

- originated from FC&S Clause
- persons acting on behalf of sovereign powers, e.g., rebels or revolutionaries rather than rioters
- does not include individuals acting on their own initiative
- Can only arise in the context of a war or civil war, but does not mean the existence of a state of war
- old reported English cases involving prior terms such as “hostilities”





# Risks of capture & seizure

cl.1.2, “capture seizure arrest restraint or detainment, **arising from risks covered under 1.1 above, and the consequences thereof or any attempt thereat**”

- “**capture**” – every act of seizing or taking by an enemy belligerent; narrower than “*seizure*”
- “**seizure**” – every act of taking forcible possession either by a lawful authority or by overpowering force
  - includes “*capture*”; includes seizure by pirates (unless excepted)
- “**arrest, restraint or detainment**” – political or executive acts depriving assured of possession; does not include rejection risks
  - **Rule 10** for construction of SG Form in **MIA 1906**:  
*The term “arrests, &c., 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*
- General Average and salvage charges covered, **cl.2, IWC**

# War risks on land not covered

- Limited to carriage **on board vessels** with cover continuing while cargo remains onboard for up to 15 days at the disport
- Very different to 'shelf-to-shelf' cover in **ICC(A) 2009, cl.8**
- Limited cover to avoid accumulation/aggregation of risks on land or in ports should a war situation occur and a port or place be attacked
  - 1944 explosion at Mumbai Docks
  - 1912 explosion at Halifax harbour
- Difficult for cargo insurers to assess where/when cargoes may accumulate worldwide
- Insurers agreed to not insure war risks on land at all by the terms of the **Waterborne Agreement 1982** (similar previous agreements)
- Duration clause in **IWC (Cargo)** originated from Waterborne Agreement



# Risks covered under the **ISC (Cargo) 2009**

- “1. This insurance covers, except as excluded by the provisions of Clauses 3 and 4 below, loss of or damage to the subject matter insured caused by
- 1.1 strikers, locked-out workmen, or persons taking part in labour disturbances, riots or civil commotions
  - 1.2 **any act of terrorism being an act of any person acting on behalf of, or in connection with, any organisation which carries out activities directed towards the overthrowing or influencing, by force or violence, of any government whether or not legally constituted**
  - 1.3 **any person acting from a political, ideological or religious motive**
2. [...] General average and salvage charges [...]”



# Terrorism

cl.1.2, “any act of terrorism being an act of any person acting on behalf of, or in connection with, any organisation which carries out activities directed towards the overthrowing or influencing, by force or violence, of any government whether or not legally constituted”

- **Reinsurance (Acts of Terrorism) Act 1993, s.2(2)**
- requires the use of force or violence resulting in physical loss/damage
- activities must be directed at “*influencing a government*”
- doubtful whether an individual acting alone can be a “terrorist”; must act “on behalf of or in connection with” a terrorist organisation (cf. **cl.1.3**)
- **Hijacking** = classic example of terrorism



# Political, ideological or religious motives

cl.1.3, “any person acting from a political, ideological or religious motive”

- Acts of a lone extremist unlikely to fall within cl.1.2 but may fall within cl.1.3
- “**political motive**” – deliberately wide term; embraces demonstrator who, intentionally or otherwise, causes physical loss/damage to insured cargo to call attention to his political objectives
- “**ideological or religious motive**” – recently added to **2009 ISC (Cargo)**
  - *Newmarket Investment Corp v Fireman’s Fund Ins Co.*



# Attachment & termination of cover

## Transit clause (cl.5) & Termination of Transit Clause (Terrorism)

Transit clause (cl.5)  
in ISC (Cargo) very  
similar to ICC(A)

Different duration  
provisions for  
terrorism

Concerns re  
aggregation of risk,  
similar to war risks

JCC introduced  
JC56 in 2001  
(paramount)

# Main limitations on war & strikes cover

## Identifying the gaps in cover

- Buy-back cover for war & SRCC risks is not seamless with exclusions in ICC
- War clauses only provide cover for capture, seizure, arrest, restraint, or detainment where these risks are **consequent** on war or like perils including hostilities
- Losses by seizure/restraint by government authorities under customs regulations or by breach of embargoes etc. (i.e. rejection risks), outside standard insurance provided by ICC and not within buy-back cover
- Duration of cover in war risks insurance is (generally) limited to time that cargo is at sea or on board a Vessel
- Neither war cover nor SRCC cover extends to loss of the adventure
- SRCC cover does not extend to expense caused by closure of a port resulting from strikes etc.



# Attacks on vessels in Red Sea

## Legal & practical considerations

- Are Houthi attacks covered under IWC or ISC? Does it matter?
  - Duration of IWC vs ISC
  - Damage caused by retaliation against the Houthis
- Claim notified – physical loss/damage of cargo clear?
- Laden vessel trapped or immobilised – cargo condition unknown
  - Perishable / seasonal / non-perishable cargo?
  - “Wait and see” situation; tests for ATL vs CTL
  - Salvage possible? Ex. “**RUBYMAR**” – same considerations for pollution
- If salvage attempted but unsuccessful, cargo insurers may pay a total PA loss plus the costs of salvage
- Total Loss clauses in Open Cover – can insured elect to treat undamaged cargo as a total loss where it has not arrived within e.g. 30 / 60 / 90 days of estimated arrival at insured destination





# Attacks on vessels in Red Sea

## Legal & practical considerations

- Owners abandoned voyage; no cover for loss of adventure = no action taken by insured – covered?
  - Proximate cause?
- Bespoke clauses, e.g. trade disruption insurance triggered by war perils
  - What is the “event” – a state of war is a general state of affairs, not an event
- No subrogated recovery action (?)
  - Liberties in the contract of carriage, esp. if transit via Suez requested
  - Defences available to carriers in **Hague-Visby Rules** – carrier not liable for
    - **Art 4(2)(e)** – Act of war
    - **Art 4(2)(f)** – Act of public enemies
    - **Art 4(2)(g)** – Arrest or restraint of princes, rulers or people, or seizure under legal process
    - **Art 4(2)(q)** – Any other cause arising without the actual fault or privity of the carrier etc.

# Thank you. Any questions?

Clyde & Co LLP accepts no responsibility for loss occasioned to any person acting or refraining from acting as a result of material contained in this summary. No part of this summary may be used, reproduced, stored in a retrieval system or transmitted in any form or by any means, electronic, mechanical, photocopying, reading or otherwise without the prior permission of Clyde & Co LLP.  
© Clyde & Co LLP 2023

Dr Jennifer Lavelle

T: +44 20 7876 5736

E: [Jennifer.Lavelle@clydeco.com](mailto:Jennifer.Lavelle@clydeco.com)

Clyde & Co LLP

[www.clydeco.com](http://www.clydeco.com)