

A conference presented by the IBA Maritime and Transport Law Committee

IBA Maritime and Transport Law Committee Conference

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Marine insurance: new developments



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A low-angle, upward-looking photograph of a complex industrial facility. The scene is dominated by numerous large, vertical, cylindrical pipes and tanks, likely made of stainless steel, which are interconnected by a network of smaller pipes and valves. The lighting is dramatic, with strong highlights and deep shadows, creating a sense of scale and complexity. A blue horizontal bar is overlaid across the middle of the image, containing the title and author information.

MARINE INSURANCE - WAR RISKS

Hugh Kennedy
IBA - June 2024

Kennedys

Marine War Risk Insurance - a brief overview

- History
- Hull
- Cargo
- P&I
- Joint War Committee - Listed areas
- Cancellation Notices
- 5 Powers Clause



Marine insurance overview

Standard covers

- **Cargo insurance**
 - Most common form of marine insurance
 - Loss or damage to goods while in transit by sea, can include air, road, or rail
- **Hull insurance ('H&M')**
 - Covers physical damage to the ship or vessel itself
 - Includes machinery and equipment.
 - Collision, fire, piracy, and 'marine' related damages.
- **Liability insurance (Protection & Indemnity "P&I")**
 - Shipowner's legal liabilities
 - Damage to cargo
 - Injury, or death of crew members or passengers, and environmental pollution

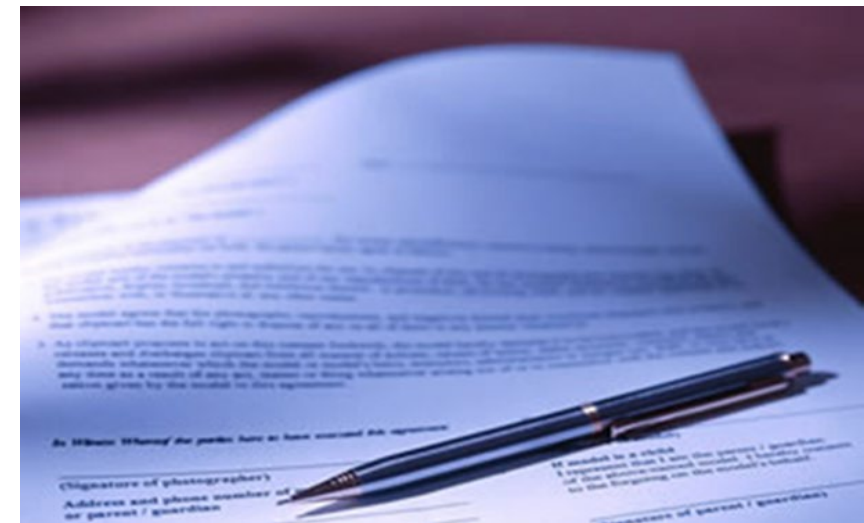


Marine insurance overview

War risks

- **Cargo insurance**
- **Hull insurance ('H&M')**
- **Liability insurance** (Protection & Indemnity "P&I")

- **War risk insurance**
 - Coverage against damage or loss caused by war-related perils
 - Including strikes, riots, civil commotions, and terrorist acts
 - Perils typically excluded from standard policies.



History

Lloyd's S.G. Policy

- Covered both marine and war risks
- Used for several centuries to provide comprehensive cover
- Most kinds of damage to a ship or cargo on the seas
- Violence by persons more prominent than marine 'perils of the sea'



Perils...of the seas, men of war, fire, enemies, pirates, rovers, thieves, jettisons, letters of mart and countermart, surprisals, takings at sea, arrests, restraints, and detainments of all kings, princes, and people, of what nation, condition, or quality soever, barratry of the master and mariners, and of all other perils, losses, and misfortunes....

History

Insurance Market excluded war risks

- Geographical volatility - 18th and 19th Centuries - England, France & United States
- Increasing frequency of underwriters not offering 'war' risks
- Clauses excluding war risks - *Free of capture and seizure* - FC&S Clause

“Warranted free of capture, seizure, arrest, restraint or detainment, and the consequences thereof and of any attempt thereat; **also from the consequences of hostilities and 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 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.



Separate policies for war risks

- 1898 Lloyd's resolution for dividing marine and war risks
 - Standard inclusion of the FC&S clause in all marine policies

“Warranted nevertheless free of capture, seizure and detention, and of the consequences thereof, or any attempt thereat, piracy excepted, and also from all consequence of hostilities or warlike operations, whether before or after the declaration of war”



Marine Insurance Act 1906

War covered as an insured peril

“Maritime perils” means the perils consequent on, or incidental to, the navigation of the sea, that is to say, perils of the seas, fire, war perils, pirates, rovers, thieves, captures, seizures, restraints, and detentions of princes and peoples, jettisons, barratry, and any other perils, either of the like kind or which may be designated by the policy.



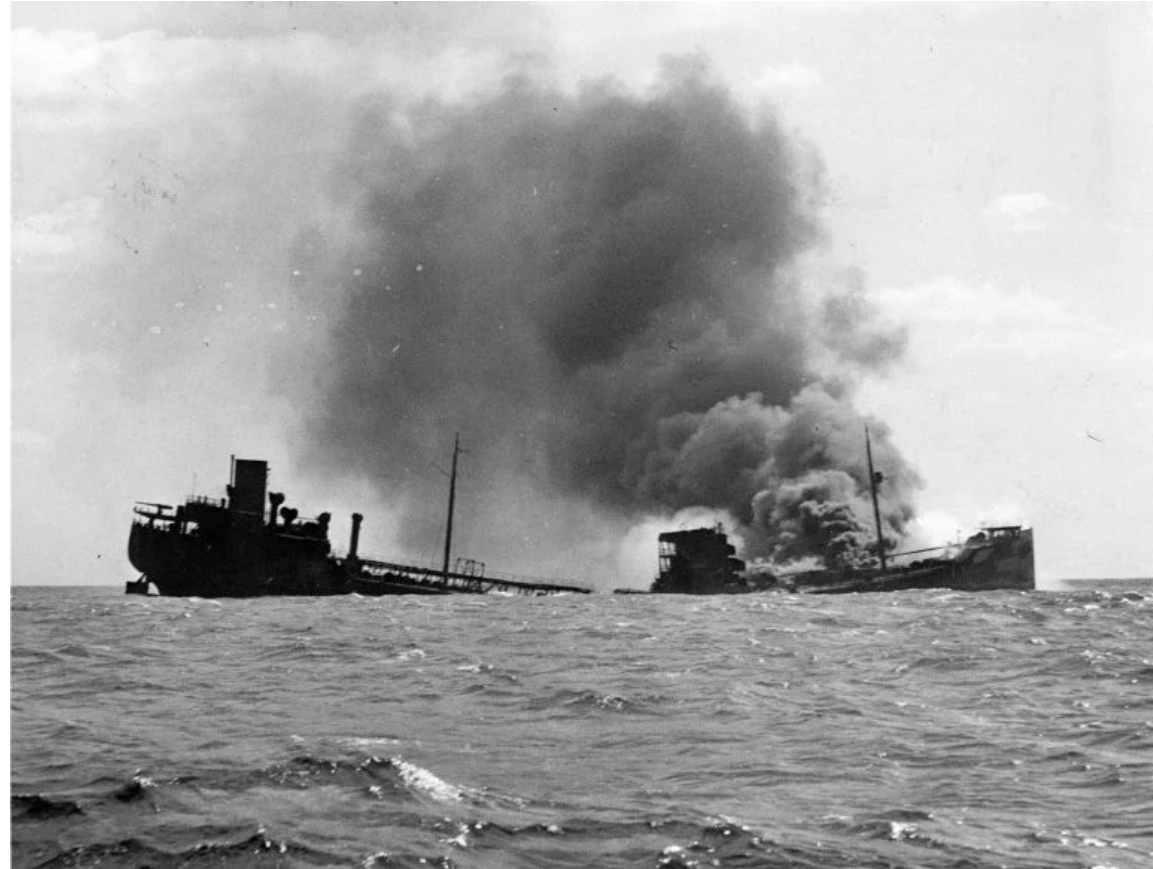
Marine Insurance Act 1906

1906 CHAPTER 41 6 Edw 7

War risks

Government Insurance in time of war

- **First World War**
 - UK Government 80% reinsurance
 - War Risk Associations
 - T99 Charterparty
 - 'marine risks' by Owners
 - 'war risks' by Government
- **Second World War**
 - War Risks Insurance Act 1939
 - Standard policy wording
 - Government reinsured 80% then up to 96%



War risks

Government participation in war risks insurance

- UK - permanent basis
 - Marine and Aviation Insurance (War Risks) Act 1952
- The Falkland Islands Conflict
 - Requisitioned Ships
 - Claims met from the Marine and Aviation Insurance (War Risks) Fund
 - Established under Marine and Aviation Insurance (War Risks) Act 1952



History

Complicated Interpretation

- Insurance should cover only
 - *“the risks excluded from the standard form of English marine policy by the FC&S clause”*
- Recovery under War Risks policy required an assessment:
 - Does the loss fall within the words of positive cover contained in the marine policy?
 - If so, is the loss taken out of that cover by the FC&S exception?
- The ‘exception’ wording was different from the ‘cover’ wording
 - Claims potentially involved applying two different sets of words to the same group of facts
 - Newer war clauses often overlapped with the original policy.

International Underwriting Association of London (IUA)

- Up to 1824
 - Only three entities allowed to conduct marine insurance
 - Lloyd's - The London Assurance - The Royal Exchange Insurance
- 1884
 - Institute of London Underwriters was formed (“ILU”)
- 1888
 - ILU issued first full set of Institute Time Clauses
 - New versions were introduced 1952; 1959; 1969; 1970, 1983; 1995.
- 1998
 - International Underwriting Association (‘IUA’)
 - London International Insurance and Reinsurance Market Association (LIRMA)
 - Institute of London Underwriters (ILU)

The Institute Time Clauses - Hulls - Exclusions

23— War Exclusion

In no case shall this insurance cover loss damage liability or expense caused by

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

23.2 capture seizure arrest restraint or detainment (barratry and piracy excepted), and the consequences thereof or any attempt thereat

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

24— Strikes Exclusion

In no case shall this insurance cover loss damage liability or expense caused by

24.1 strikers, locked-out workmen, or persons taking part in labour disturbances, riots or civil commotions

24.2 any terrorist or any person acting from a political motive.

25— Malicious Acts Exclusion

In no case shall this insurance cover loss damage liability or expense arising from

25.1 the detonation of an explosive

25.2 any weapon of war

and caused by any person acting maliciously or from a political motive.”

The Institute War and Strikes Clauses (Hulls)

1— Perils

1 Subject always to the exclusions hereinafter referred to, this insurance covers loss of or damage to the Vessel 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, and the consequences thereof or any attempt thereat

1.3 derelict mines torpedoes bombs or other derelict weapons of war

1.4 strikers, locked-out workmen, or persons taking part in labour disturbances, riots or civil commotions

1.5 any terrorist or any person acting maliciously or from a political motive

1.6 confiscation or expropriation

Institute Cargo Clauses (ICC) A, B & C

- Institute Cargo Clauses (ICC) same in all three wordings A, B & C
- Excludes loss damage or expense arising from war, civil war, revolution, rebellion, insurrection or civil strife arising therefrom, or any hostile act by or against a belligerent power.
- Starting point is that all war perils are excluded.
- Usual for both types of cover to be taken out, and, combined in the same policy
- The language used in the Cargo War Clauses mirrors the exclusions

Institute War Clauses (Cargo)

Risks Covered

1 This insurance covers...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

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

P&I

War risks

- P&I liabilities caused by war not covered by customary Club P&I cover
 - Owner's P&I liabilities can be covered by Hull war risk insurers
 - Exclusion for P&I liabilities arising from capture, seizure, arrest, restraint or detainment
 - P&I Liabilities remain covered when arising out of incidents of piracy
- Hull war risk policy
 - Provides P&I Cover only up to value of the insured vessel
- Club war cover for P&I war liabilities will extend above value of the vessel
 - Limit of excess cover fixed (Typically US\$500 million)

War risks

Joint War Committee - Lloyd's Market Association

- **The Joint War Committee “JWC”**
 - Represents marine hull war underwriters in London market
 - Underwriters from
 - Lloyd's
 - International Underwriting Association (‘IUA’) company markets
- **JWC Retains independent security advisers, Herminius**
 - Input informs and underpins the ‘Listed Areas’.
- **Listed Areas**
 - Owners are required to notify underwriters of voyages
 - Insurance individually negotiated between underwriters and brokers.



War risks

Breach APs

- War risks
 - Normally low flat rate for worldwide cover excluding listed areas (as determined by JWC)
- Ships entering geographic listed areas ‘breach’
 - Typically have an option to ‘buy back cover’ for a listed area
 - Pay additional premium - “Breach AP”
- Wide range of pricing for Breach APs
 - ‘Standard’ 0.25% of hull value
 - Up to 5% of hull value

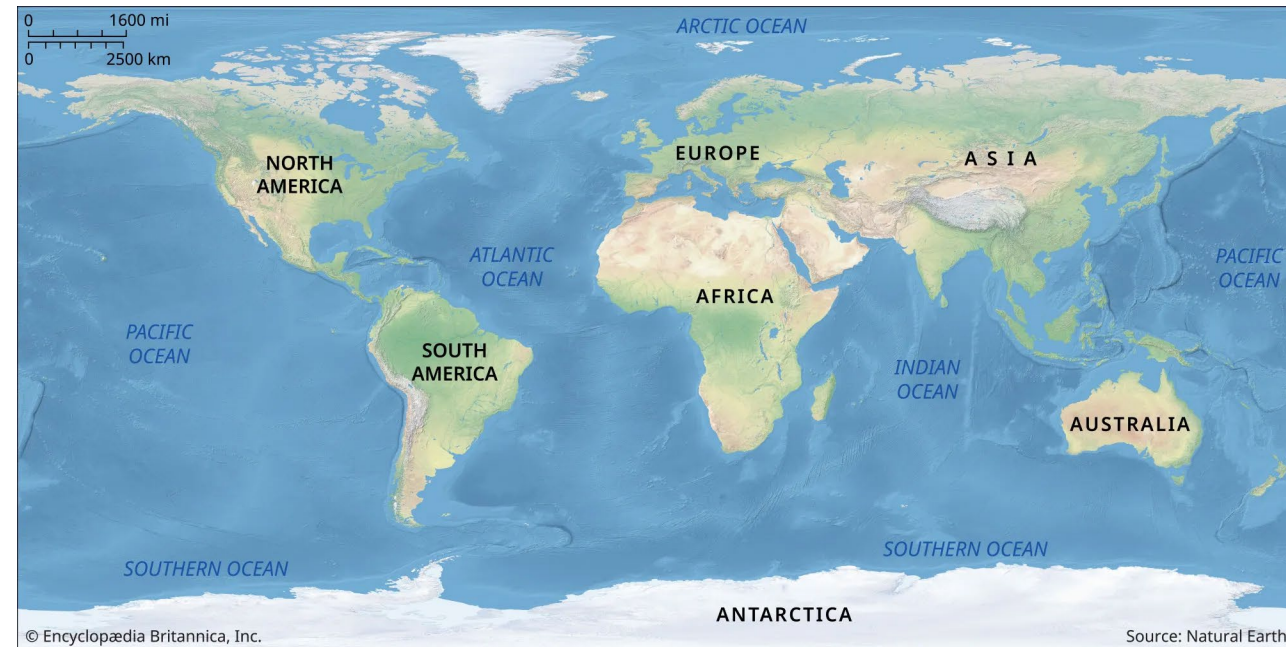


War risks - JWC 'listed areas'

Often subject to defined waters by specific co-ordinates

Worldwide

- **Europe**
 - Sea of Azov and Black Sea waters
- **Indian Ocean, Gulf of Aden and Southern Red Sea**
 - Defined waters
- **Africa**
 - Defined areas
- **Asia**
 - Pakistan
- **Middle East**
 - Defined areas - Gulf
- **Russia**
- **South America**
 - Venezuela



War Risks - Notice of Cancellation

Hull Cargo & P&I

- Underwriters can give Notice of Cancellation in respect of war risk liabilities
- Avoid being overwhelmed by specific event
- Specific geographic area - usually 7 days' notice
- Often preceded by Notices of cancellation from reinsurers
- May offer an option to 'buy back' exclusion - Additional Premium
- Brokers have prearranged products - specifically to cover War Risks

*Upon expiry of the notice at Noon GMT, 20 February 2024, **War Risk cover will be terminated automatically** where any such liabilities, losses, damages, costs and expenses occur or arise in the waters specifically mentioned below:*

***Indian Ocean, Gulf of Aden and Southern Red Sea.** The waters enclosed by the following boundaries:*

a) on the northwest, by the Red Sea, south of Latitude 18°N

b) on the northeast, from the Yemen border at 16°38.5'N, 53°6.5'E to high seas point 14°55'N, 53°50'E

c) on the east, by a line from high seas point 14°55'N, 53°50'E to high seas point 10°48'N, 60°15'E, thence to high seas point 6°45'S, 48°45'E

d) and on the southwest, by the Somalia border at 1°40'S, 41°34'E, to high seas point 6°45'S, 48°45'E

Five Powers War Exclusion clause

Beyond the resources of insurance industry

“Where any war risks coverage is provided by underwriters, this(re)insurance excludes loss damage liability or expense arising from the outbreak of war (whether there be a declaration of war or not) between any of the following: United Kingdom, United States of America, France, the Russian Federation, the People's Republic of China”

- After World War II
- Automatic termination clause - different iterations
- Marine and Aviation Insurance (War Risk) Act 1952
 - *“reasonable and adequate”* war risk insurance not available
- Similar arrangements in USA



War Risk Insurance

- Developed over 200 years
- Marine war risks are usually excluded in marine policies
- Specific policies to cover war risks
- Sophisticated market
 - Lloyds
 - Mutual Risk Associations
 - Insurance Companies



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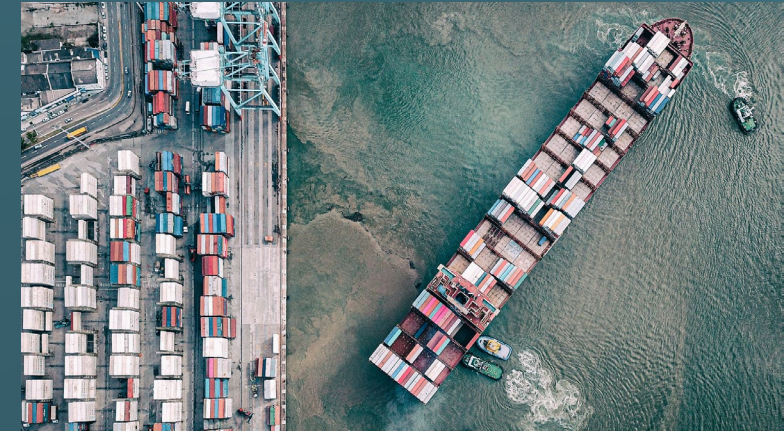
Marine Insurance – War Risks

Dr. Markus Eichhorst

War Risks – Hull Insurance

Practical Problems / Potentials for conflict based on recent cases:

- Scope of cover: Loss resulting from insured (war) risks vs. other cause
- Burden of proof: Is there a “claimant friendly” (lower) standard of proof?
- The Time Element: When is cover “triggered”?
- The Time Element: What is a Total Loss?
- “Sorry, Your Cover is Terminated”: (7) day notice for excluding specific geographical areas



Scope of Cover: Loss resulting from insured (war) risks vs any other cause

Case: District Court of Hamburg, judgment of 12 May 2023 (418 HKO 5/21):

Three vessels chartered under (bareboat) “Hire/Purchase Agreements” to a Venezuelan State Entity; failed to pay the hire; owners terminated the contracts in 2017, requested redelivery and in July 2019 obtained an LMAA arbitration award ordering the “redelivery to owners”; ignored by Charterers. No enforcement attempt of award by owners.

Vessels were used as storage facilities for oil in Venezuelan waters.

Scope of Cover: Loss resulting from insured (war) risks vs any other cause (continued)

German War Risk Conditions 2009 (incl. Piracy) GD-0156: Reference to Institute War and Strike Clauses Hull – Time 1.10.83 (IWSC) with modifications; German law to apply.

Cl. 1.1. IWSC: “Loss of or damage to the Vessel due to capture, seizure, arrest, restraint, detention, confiscation or expropriation”

Interpretation of District Court of Hamburg: closely connected terms; they all imply that a governmental or actual authority by way of using their “public power” (“hoheitliches Handeln”) deprive the insured of its control or possession.

Court dismissed claim. Was – after hearing of evidence – not convinced that Ministry ordered the “confiscation” of the vessels (not convinced that the use of public powers (hoheitliches Handeln) caused the loss).

Burden of Proof: Is there a “claimant friendly” (lower) standard of proof?

Considered by the Hamburg District Court due to “typically limited evidence”: The court must not impose unfulfillable expectations as to evidence to be provided by claimants as that would stand against the purpose of the war risk insurance

Did not help the insured in this case: Benefit of lower standard of proof only for “honest” claimant who does not submit incorrect documentation.

The Time Element – When is cover triggered?

Cl. 3 IWSC: “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.”

Section 60 Marine Insurance Act 1906:

“In particular, there is a constructive total loss—

(i) Where the assured is **deprived of the possession of his ship** or goods by a peril insured against, and (a) it is **unlikely** that he can recover the ship or goods, as the case may be ...”

The Time Element – What is a Total Loss?

Lloyds' Standard Wording LSW555D – Section One: Loss of or Damage to the Aircraft

This Policy covers loss or damage to the Aircraft (...) against claims excluded from the Assured's Hull 'All Risks' Policy as caused by

(a) War, invasion, acts of foreign enemies, hostilities (...)

(b)...

(c)...

(d) Confiscation, nationalization, seizure, restraint, detention, appropriation, requisition for title or use by or under the order of any government (whether civil, military or de facto) or public or local authority.

...

German law to apply

No time element defined in (some?) aviation policies/conditions: **Consequences??**

The Time Element – What is a Total Loss? (continued)

Case (pending before District Court of Hamburg): Aircraft “stuck” on a Russian airport as of 24 February 2022 due to Russia’s invasion of Ukraine

Consequence of missing time element in policy (and MIA not applicable): Questions:

Physical damage/loss required?

Under German law certainly not: Confiscation etc. typically does not result in physical loss. Time element as implied term?

Is there a “loss” if owners still have some control (possession?) over the Vessel/Aircraft?

Depends on the details of the Policy and eventually the definition of “Detention”: Is a direct action against the asset required or is the creation of circumstances sufficient under which the asset is “detained”?

“Sorry, Your Cover Is Terminated”: (7) day notice for excluding specific geographical areas

Case (imminent proceedings before District Court of Hamburg):

Policy Clause:

“Trading: World-wide, subject to exclusions as per JWC Hull War, Strikes, Terrorism and Related Perils Listed Areas (JWLA027 – 29 April 2021), subject to 7 days notice of cancellation (...) or held covered at terms to be agreed by Leading Underwriter.”

Unlimited freedom of insurers to exercise this right? Even in a situation ...

... in which the vessel is contractually obliged to perform the voyage / cannot reasonably abort?

... is already physically trapped?

Thank you!

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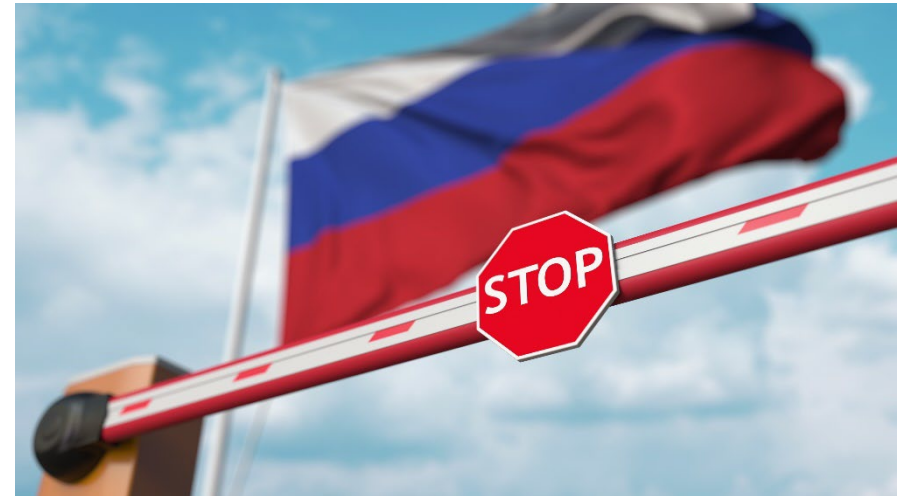


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Sanctions and the Dark Fleet

Overview

- Following Russia's invasion of Ukraine on 24 February 2022, extensive sanctions have been imposed on Russia
- Purpose behind sanctions
- Sanctions have led to significant geopolitical shifts
- The rise of a dark fleet of tankers

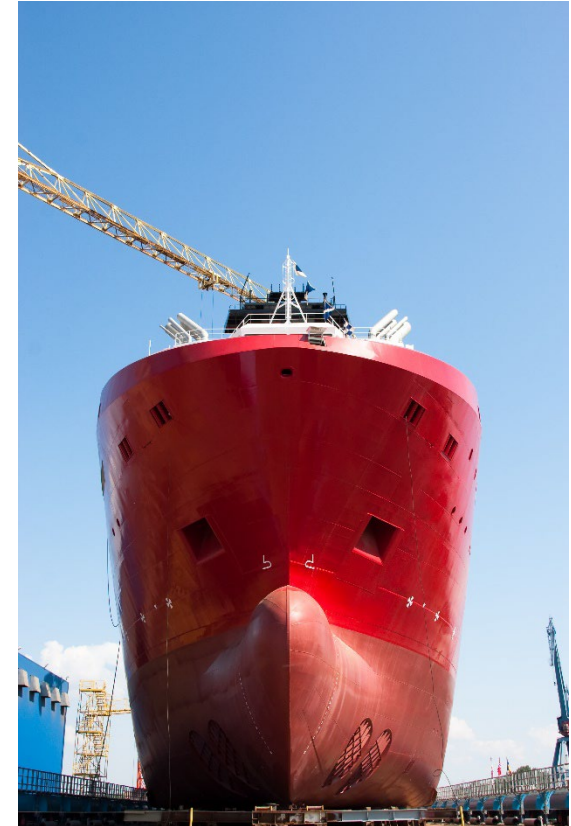


Some Key Sanctions Imposed

- Prohibition on EU port access
 - For Russian-flagged vessels
 - For vessels suspected of AIS spoofing and STS transfers, which are used to obscure the origin and trajectory of Russian oil
- Import and export ban on goods from Russia
 - Seaborne crude oil
 - Refined petroleum products
 - Coal
 - LNG?
- Oil price cap for Russian oil exports

Some Key Sanctions Imposed

- Notification requirement for tanker sales
- Derecognition of the Russian Maritime Register of Shipping
- Prohibition of maritime services by all EU operators to the oil trade between Russia and third countries
 - Unless it falls under the oil price cap
 - Impact on marine insurance covers



Oil Price Cap

- The G7 Oil Price Cap Coalition established an oil price cap mechanism on Russian seaborne crude oil and petroleum products
 - P&I cover from the International Group is seen as a proxy for G7 price cap compliance
- The cap prevents EU operators, for example from providing transport or insurance services for the transport of Russian oil above the cap
- Purpose => Further reducing Russia's revenues, while at the same time keeping global energy markets stable
- Three price caps currently in place, on export of
 - Russian seaborne crude oil = USD 60 per barrel
 - "Premium-to-crude" petroleum products = USD 100 per barrel
 - "Discount-to-crude" petroleum products = USD 45 per barrel

The Rise of the Dark Fleet

- Shortly after sanctions were imposed, Russia responded by building up a dark fleet of vessels
 - Aged 15 years or older
 - Anonymously owned and/or has a corporate structure designed to obfuscate beneficial ownership discovery
 - Solely deployed in sanctioned oil trades
 - Engaged in one or more of the deceptive shipping practices outlined by the US State Department in its guidance issued in May 2020
- Sanction compliance?
 - International industry and what counts as a sanctions breach in one jurisdiction, may not in another
 - Not possible to make any judgement about whether the vessels in the Dark Fleet are breaching sanctions
- Environmental and safety hazards

Contractual Considerations

- Check your counterparts and contracts
- Use of service providers who can perform a thorough check of the entire ownership structure
- Solid and valid sanctions clauses
- The situation is changing rapidly, and more sanctions announcements are on the way





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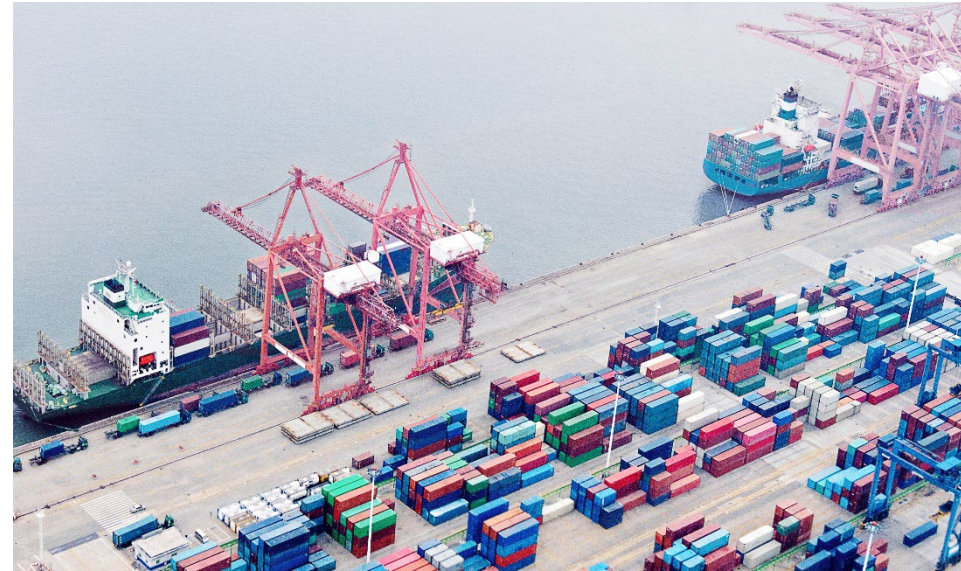
IUMI at a Glance

- International Union of Marine Insurance (IUMI) traces its roots back to 1874
- 42 national (marine) insurance associations as members
- Represents marine hull insurance, marine cargo insurance, offshore energy insurance, but not P&I
- Accredited NGO at the International Maritime Organisation (IMO) in London



Sanctions against Insurers

- Since Iran established instrument to influence the economy of target countries – persons, goods, entities
- Insurers do their utmost to understand and comply - „self sanctioning“
- Sanctions have to be clear, transparent and feasible
- Challenges:
 - Circumvention prevention: Example oil price cap, example “ship to ship transfer”
 - Trade and shipping are truly international, sanctions are regional – “sanctions islands”
 - Extraterritorial and contradictory sanctions
 - Effectiveness?



Dark Fleet / Shadow Fleet

- LLI definition: *“Aged 15 years or over, anonymously owned and/or has a corporate structure designed to obfuscate beneficial ownership discovery, solely deployed in sanctioned oil trades, and engaged in one or more of the deceptive shipping practices outlined in US State Department guidance issued in May 2020”*
- A quality issue:
 - Classification,
 - Flag,
 - (Mandatory/non mandatory) insurance,
 - Age of vessel,
 - Quality of vessel,
 - AIS
- It can breach sanctions, but not necessarily



Thank you



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Marine insurance: new developments

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Dr. Giovanna Montanaro

Other hot topics

- » War risks
- » Sanctions and dark fleet
- » Other hot topics

New developments in Switzerland

- » Partial revision of the Swiss Insurance Contract Law ("*Versicherungsvertragsgesetz*")
- » in force since 1 January 2022
- » two aspects interesting for marine insurance

Direct claim against liability insurer

- » **Direct claim against liability insurer**
 - » for contractual and extra-contractual claims
 - » in case of compulsory and voluntary liability insurance
 - **any kind of liability insurance**

- » **Issues**
 - » defences available to liability insurer
 - » obtaining information on liability insurer and policy content

Recourse action of subrogated marine insurer

» **Before 1 January 2022**

» recourse action of subrogated marine insurer was limited

» **Since 1 January 2022**

» general and full right of recourse

Panel discussion

- » Strategic considerations with respect to direct claims?
- » Experiences with direct claims?

- » Obstacles to take recourse?
- » Experiences with recourse actions?

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Thank you for your attention!

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