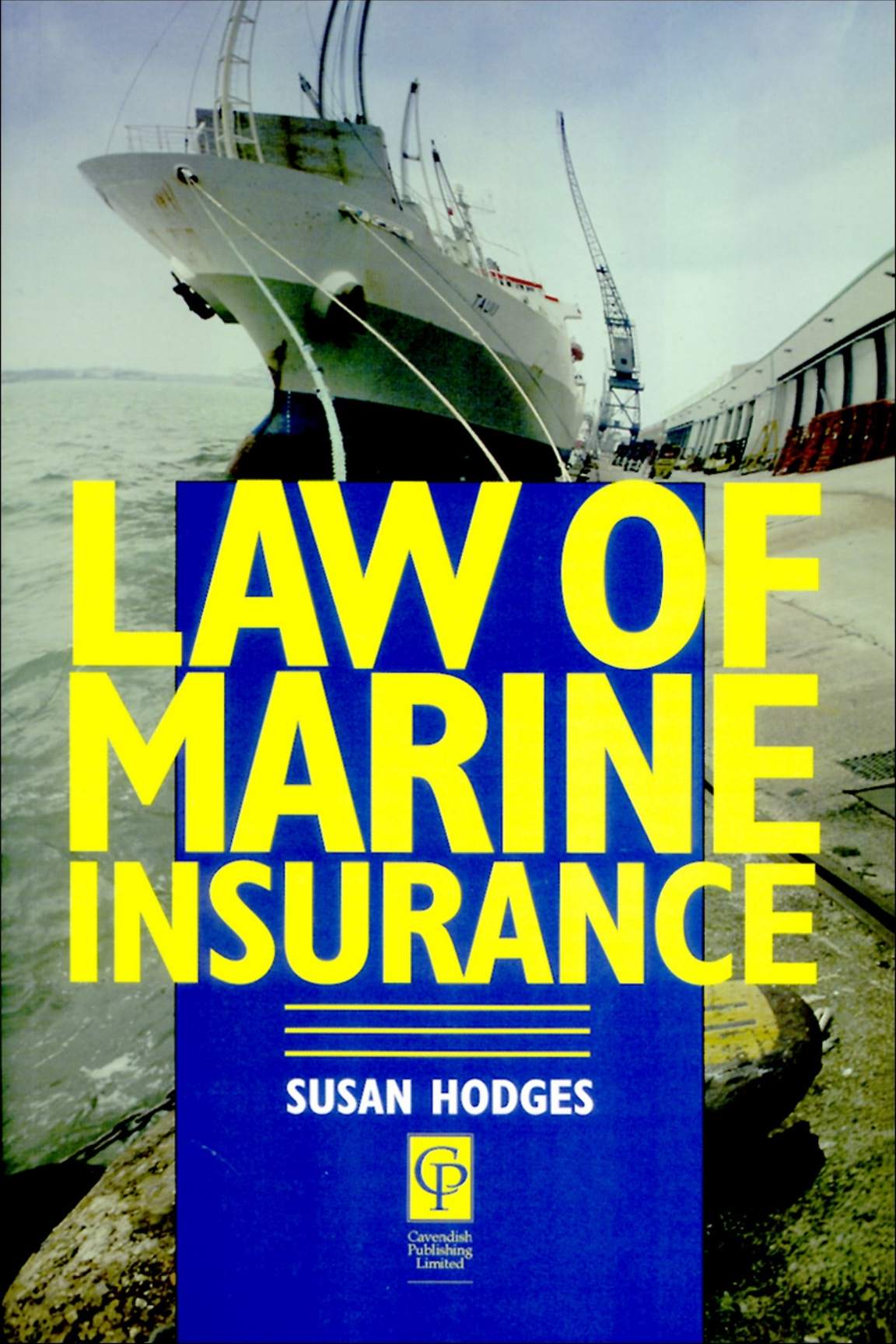

LAW OF MARINE INSURANCE

SUSAN HODGES

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CHAPTER 14

WAR AND STRIKES RISKS

INTRODUCTION

The law of insurance on war and strikes risks has had a colourful and interesting, but somewhat tumultuous history. Dragged through the war years, it has endured many changes most of which were made as a result of lessons learnt from hindsight. It was only through trial and error that insurance on war risks has now settled itself in the form of the Institute War and Strikes Clauses for Hulls (IWSC(H)).[1] There is a set of Institute War and Strikes Clauses Hulls for time[2] and one for voyage. As for cargo, insurance for war and for strikes is contained in separate clauses, namely, the Institute War Clauses (Cargo) (IWC(C))[3] and the Institute Strikes Clauses (Cargo) (ISC(C))[4] respectively.

The current versions of the IWSC(H) and the IWC(C) have, fortunately, rendered much of the complex case law on the subject of war risks of academic interest. Thus, it is unnecessary to spend time on historical perspective,[5] except, perhaps, on those aspects which are relevant for a proper understanding of the modern clauses. Naturally, cases interpreting the meaning of familiar terms which are still being used in the current clauses will have to be examined.

For a great many decades, marine and war risks were insured under one policy: the old SG policy covered a host of perils, the majority of which, interestingly enough, were concerned with hostile acts of men rather than of the seas. Insurance of war risks is, in fact, sanctioned by s 3 of the Act, which defines 'maritime perils' as including '… war perils … captures, seizures, restraints and detainments of princes and peoples …'.

Warranted free of capture and seizure

In the old days, when both marine and war risks (and insurance for ship and goods), were covered by a single policy, an assured who did not wish to insure his ship against war risks had to attach a clause, known as the 'warranted free of capture and seizure' clause, to the policy. Used in this context, the word 'warranted' has no relation whatsoever to a promissory warranty as defined by s 33; it is understood to mean an exclusion or exception of liability for the risks enumerated.[6] This method of excluding insurance against war risks was later found inconvenient by the market.

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1 As the main clauses of the IWSC(H) for time and voyage are identical, it is unnecessary to refer to both; the abbreviation 'IWSC(H)' is used in this chapter as referring to both the Institute War and Strikes Clauses Hull–Time, and the Institute War and Strikes Clauses Hulls–Voyage.

2 See Appendix 20.

3 See Appendix 21.

4 See Appendix 22.

5 For a full historical account of insurance on war risks, see Arnould, para 880; M D Miller, 2nd edn, Chapter 1; and D O'May, *War Risks* [1976] LMCLQ 180.

6 See Chapter 7.

Instead of having to affix the 'fc & s' clause to policy as and when the need arose, it was thought more convenient to have it printed in the policy; with the fc & s clause constituting a standard term of the policy, cover for war risks was automatically excluded. For a period of time, it was understood by all concerned that if an assured wanted to include war risks as part of the cover, he would have to take steps to have the clause deleted.

In its various forms, the use of the fc & s clause was found to be a contrived and an unsatisfactory way of excepting or excluding liability for war risks. Even its final version, drafted in 1943 after the decision of *Yorkshire Dale SS Co Ltd v Minister of War Transport, The Coxwold*,[7] was described as 'convoluted' and 'tortuous and complex in the extreme'.[8] Attempts to employ the fc & s clause both as an exception to, and positive cover for, war risks in one policy proved to be unworkable. Not surprisingly, it was eventually abandoned and replaced, thankfully, by the current clauses, which have adopted a tidier and more effective means of excluding war risks from the standard hull and cargo clauses, and of providing positive cover therefor. A 'back to back' method of coverage now applies and the whole subject is now made easier to understand. The war perils which are excluded by the ITCH(95), the IVCH(95), and all the ICC are now specifically insured by the IWSC(H) and the IWC(C). Additional risks have also been added to the positive cover. The cover for war and strikes risks will be discussed in the order as they appear in the IWSC(H); but before so doing, it is necessary to say something about the paramount clause to the war, strikes, malicious acts, and radioactive contamination exclusions of the ITCH(95) and the IVCH(95).

WAR, STRIKES, MALICIOUS ACTS AND RADIOACTIVE CONTAMINATION EXCLUSIONS OF THE ITCH(95) AND OF THE IVCH(95)

The paramount clause

The above-named exclusion clauses are 'paramount and shall override anything' contained in the 'insurance'[10] which is inconsistent with the said exclusion clauses. The question which arises is under what circumstances the paramount clause applies. It is to be noted that there is no paramount clause in any of the ICC.

7 (1942) 73 Ll L Rep 1, HL.

8 *Per* Mocatta J, in *Panamanian Oriental SS Corpn v Wright, The Anita* [1970] 2 Lloyd's Rep 355.

9 Replacing the nuclear exclusion clause of the ITCH(83).

10 It is to be noted that it is not just anything inconsistent with the Institute Clauses which is overridden; anything which is inconsistent with the 'insurance', eg, an express warranty, is also overridden.

The rule of proximate cause

Any of the perils insured by the ITCH(95) and the IVCH(95) can occur in time of peace as well as of war. A loss arising as a result of, for example, a peril of the seas, stranding, collision, or fire, can take place in a circumstance enumerated in the war exclusion or, for that matter, any of the other exclusion clauses. In the context of war (or warlike operations), the Lord Chancellor, Viscount Simon, in *The Coxwold*[11] was very much concerned with the problem of the possibility of dual causes of loss. His remarks, though they were made in reference to the subject of 'warlike operations' of the fc & s clause which no longer exists, are, nonetheless, pertinent to the present discussion. He said:

> 'It is not correct to say that, because a vessel is engaged in a warlike operation, therefore everything that happens to her during her voyage is proximately caused by a warlike operation or is a proximate consequence of a warlike operation. Neither is it correct to say that because the accident of a kind which arises from a marine risk (eg, stranding or collision), therefore the particular accident can in no circumstances be regarded as the consequence of a warlike operation. The truth lies between these two extremes.'

In such a situation, the question for determination is whether the marine or the war insurer is liable for the loss. In each case, the matter is to be resolved by applying the principle set out in s 55, the rule of proximate cause.[12] Using collision[13] as an example, the issue is: is the loss proximately caused by a peril of the seas, a marine risk, or a war risk? If the former is regarded as the proximate cause of loss, it would be covered by the marine policy, and therefore it would be unnecessary to inquire further. On the other hand, if one of the circumstances enumerated in the exclusion clause is held to be the proximate cause, the loss would be excluded. In the words of the Lord Chancellor,[14] 'one has to ask oneself what was the effective and predominant cause of the accident that happened, whatever the nature of that accident may be'.

If the matter may be so easily resolved by a straightforward application of the rule of proximate cause, one could then ask: what function does the paramount clause perform? When only a single cause is discerned as the proximate cause of the loss, there would be no need to refer to the paramount clause. But, as was seen,[15] a loss may well result from a combination of causes. It is possible for there to be two (or more) proximate causes of loss of equal (or nearly equal) efficiency. If collision and war are both regarded as the proximate causes of a loss, the former which is a peril insured against is an included loss, whereas the latter is not, by reason of the fact that it is expressly excluded by the war exclusion clause. In the absence of the paramount clause, a predicament would arise for the loss is recoverable under one clause, but not in another. The paramount clause was inserted to put this problem at rest. As each of the exclusion clauses is supreme, the loss is not recoverable; the fact that it may be

11 (1942) 73 Ll L Rep 1, HL.

12 See Chapter 8.

13 Collision is a peril of the sea: *The Xantho* (1887) 11 PD 170.

14 (1942) 73 Ll L Rep 1 at p 6, HL.

15 See Chapter 8.

recoverable as a marine risk is inconsequential. The need to refer to the paramount clause will only arise when there is a conflict as to which of the clauses is to prevail.

It has been suggested that the paramount clause was inserted for the purpose of avoiding the problem which arose in *Attorney-General v Adelaide SS Co Ltd, The Warilda*,[16] and also to deal specifically with the collision liability clause and the sue and labour clause.[17] In *The Warilda*, the hospital ship which was requisitioned by the Admiralty collided with vessel P which was proceeding with only dimmed sidelights. The House of Lords held that *The Warilda* was solely to blame for the collision and further, that she was engaged on a warlike operation of which the collision was a direct consequence. As the Admiralty had, under the terms of the charter, agreed to be responsible for war risks, they were held liable for the damage suffered by *The Warilda*.

As regards the damage sustained by the P, it was held by the House, in a different action, that the collision was due to the negligence of *The Warilda* in not giving way or slackening speed. The loss sustained by the P was as a direct consequence of negligent navigation of the master of *The Warilda*. As damage by negligent navigation was not excluded by the policy on marine risks,[18] the marine underwriters were liable for the loss under what was then the running down clause.[19]

O'May has pointed out that the marine insurers were held liable for the loss only because there was no paramount clause in the policy in question.[20] With due respect, it is difficult to see how a paramount clause would have made any difference to the case. A clause to the effect that the fc & s warranty is paramount would be of no relevance to the damage sustained by vessel P which was proximately caused by negligent navigation.

But, of course, if both war and collision were regarded as the proximate causes of the loss, then the presence of a paramount clause would have made a difference. The objective of a paramount clause is precisely to resolve such a conflict. By expressly declaring that the exclusion clauses prevail, it removes all doubts that if war is *the* proximate cause or one of the proximate causes of loss the marine risks insurer is not liable, even if the damage sustained by the P may also have been caused by an insured peril. But as the negligent navigation of *The Warilda* alone was held to have proximately caused the damage sustained by the P, the absence or presence of a paramount clause would have been of no consequence.

The view of the common law is that, if one of the proximate causes is expressly excepted, the exception must prevail. The courts are of the view that,

16 [1923] AC 292, HL.

17 See O'May, p 259 and JK Goodacre, *Institute Time Clauses Hulls* (1983, 1st edn), p 26.

18 See cl 6.2.2 of the ITCH(95) and cl 4.2.2 of the IVCH(95).

19 Now the 3/4ths collision liability clause.

20 He said, at p 259, that, 'It followed from this finding that such damages were not excluded by the fc & s clause and had to be paid by the marine underwriters under the running down clause, which was not, at that time, made subject to the fc & s clause'.

as the parties had taken pains to stipulate for freedom from liability, their express wishes must be enforced.[21]

In support of his contention, O'May relied on the word 'liability' in relation to collision liability, and 'expense' to suing and labouring. It is, however, submitted that these words have to be read with 'caused by' which means 'proximately' caused by the said risks. In short, only a loss 'proximately' caused by an event stipulated in the exclusion clauses would prevail and override another proximate cause which is covered by the policy.

WAR AND STRIKES COVER

The risks covered by cll 1.1. 1.2 and 1.3 of the IWSC(H) are worded in identical terms to the risks excluded by the war exclusion clause of the ITCH(95) (cl 24) and the IVCH(95) (cl 21). There are essentially three main categories of risks which are excluded by the war exclusion clause of the ITCH(95), the IVCH(95) and all the ICC, but are covered by cll 1.1, 1.2 and 1.3 of the IWSC(H) and the IWC(C). Each of these classes will be examined separately. As insurance for war risks for cargo (IWC(C)) is couched in almost identical terms as the IWSC(H), the following discussion is, it is needless to say, also relevant to cargo. Attention to the differences between them will be drawn as and when convenient.

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

Clause 1.1 of the IWSC(H) and the IWC(C) states that it covers loss of or damage to the vessel caused by 'war, civil war, revolution, rebellion, insurrection, or civil strife arising therefrom, or any hostile act by or against a belligerent power'.

These risks are apparently graded in terms of gravity in descending order beginning with 'war' as the most serious of the risks insured. As none of the terms is defined, it can be assumed that they are to be given their popular or ordinary meaning. This scale of conflict may be divided into four groups:

(1) War;

(2) Civil war, revolution, rebellion, insurrection;

(3) Civil strife arising therefrom, meaning from (1) and (2) above; and

(4) Any hostile act by or against a belligerent power.

'War'

A 'war' can only be waged against another nation(s);[22] it involves hostilities between belligerent nations conducted by military, naval and/or air attacks or series of attacks. A formal declaration of war, *per se*, is not conclusive evidence

21 See Chapter 8.

22 It is interesting to note that 'war' itself was not expressly mentioned in the fc & s clause as an excluded risk.

that a state of war exists; neither is a statement to the opposite effect conclusive evidence that no state of war exists. The question as to whether there is or there is not a state of war in existence at a particular time is in each case one of fact.

'Civil war revolution rebellion insurrection'

All the above named events relate to internal conflict within one nation or country; it involves an uprising of rival factions or groups. The most serious of the list is civil war, followed by revolution, rebellion, and insurrection, all of which clearly fall short of a civil war; they are just gradations of unrest, tumult and turbulence. Revolution and rebellion involve the use of armed force in an attempt to overthrow the ruling power or established government of one's country in order to take control of the country or a part of it. An insurrection, however, which manifests itself as an uprising of the people against the established authority, is generally less organised than a revolution or rebellion. Though the line between one and the other may be fine, fortunately, it is unnecessary to distinguish between them because they are all insured risks.

'Riots' and 'civil commotions' could well fit within this class of perils, but have been included in the strikes clause. They will be discussed when that clause is examined.

'Civil strife arising therefrom'

A 'civil strife' is the weakest form of the internal disturbance listed. However, it is significant to note that the only type of civil strife which is covered is that which arises as a consequence of the preceding perils, namely, 'war, civil war, revolution, rebellion, insurrection'.

'Any hostile act by or against a belligerent power'

It is necessary at this juncture to discuss the historical events which have led to the formulation of this last limb of cl 1.1. The appearance of the fc & s clause in a standard marine policy meant that a clear line had to be drawn between marine and war risks. In each case, it had to be determined whether a loss was caused by a peril insured against or by a peril excluded by the fc & s clause. In this regard, particularly troublesome were the words 'warranted free … from the consequences of hostilities or warlike operations'.[23] It is interesting to note that none of the versions of the fc & s clause had mentioned anything about a loss caused by a direct act of war or an act of hostility. It excluded only losses which were the result or consequence of hostilities or warlike operations. The expression 'warlike' suggests that a vessel does not have to collide with an enemy vessel to attract the operation of the fc & s clause; coming into collision with a warship would be sufficient to bring home liability to the insurer of war risks. Interestingly, it was not the consequence of war operations, but of 'warlike' operations which were relevant.

23 Described by MacKinnon LJ as 'ten infamously obscure words' in *The Coxwold* (1942) 1 KB 35 at p 43.

'Consequences of ... warlike operations'

A long and persistent line of cases dating from 1921 to 1946, nearly all emanating from the House of Lords, took the stand that, even though the insured vessel or the vessel with which she had collided with may not, at the time of loss, be directly engaged in an act of war, nevertheless, if she or the other vessel was engaged in 'warlike' operations, that alone was sufficient to take the loss resulting therefrom out of the cover of marine risks .

The main authorities on the subject of the fc & s clause were primarily concerned with the interpretation of the expression 'consequence of … warlike operations'. Nearly all the cases were in connection with ships which were requisitioned by the government, using the familiar charterparty form 'T 99', during the First World War. One of the terms of the charter was that the government undertook the risk of damage resulting from 'all consequences of hostile or warlike operations', and her owners, marine risks. The government was, for all intents and purposes, acting as war risks underwriters of the chartered vessel. Insurance for marine risks was left to marine risks underwriters.

In the main, the judges in the House did not appear to have any difficulty in each of the cases in deciding whether a particular ship was or was not engaged in 'warlike operations'. In seven out of the nine leading authorities on the subject, either the injured ship herself and/or the other ship was engaged in warlike operations at the time of the loss. The following are examples of ships held to have been engaged in warlike operations:

- collision with a destroyer which was patrolling in an area for submarines;[24]
- collision with a warship proceeding on a voyage to pick up another convoy;[25]
- the carriage of war stores from one war base to another;[26]
- the employment of a ship as ambulance for the transportation of wounded solders;[27]
- using a ship as a mine planter;[28]
- proceeding in convoy on a zigzag course under the orders of the naval officers;[29]
- the discharge of oil into a naval vessel;[30] and
- travelling at high speed and taking a zigzag course in order avoid the possibility of submarine attack.[31]

24 *Attorney General v Ard Coasters Ltd* [1921] 2 AC 141, HL.

25 *Ibid*.

26 *Commonwealth Shipping Representative v P & O Service, The Geelong* [1923] AC 191, HL.

27 *Attorney General v Adelaide SS Co Ltd, The Warilda* [1923] AC 292, HL.

28 *Board of Trade v Hain SS Co Ltd* [1929] AC 534, HL.

29 *Yorkshire Dale SS Co Ltd v Minister of War Transport, The Coxwold* (1942) 73 Ll L Rep 1, HL.

30 *Athel Line Ltd v Liverpool & London War Risks Insurance Association Ltd*, *The Atheltemplar*, [1946] 1 KB 117, CA.

31 *Liverpool & London War Risks Assocn Ltd v Ocean SS Co Ltd, The Priam* [1948] AC 243, HL.

Marine risks insurers became perturbed by this trend and felt that marine risks were slowly but surely being converted into war risks. Much disquiet was experienced by the insurance market, which thought that the distinction between marine and war risks was becoming more and more faint and was gradually being eroded, so much so that Viscount Simon LC in *The Coxwold* had to issue the reminder cited earlier.[32]

The real problem, it is submitted, lies not so much in the question of causation, but in the use of the term 'warlike' operations. The expression is wide, and one could easily lose sight of the real issue, which is the determination of the proximate cause of loss.

It was said that the decisions of these cases had 'upset the balance between marine and war risks underwriters, to the extent that the fc & s clause should be further revised'.[33] After the decision of *The Coxwold*, it was revised and the relevant parts of the 1943 revision read as follows:

> '… but this warranty shall not exclude collision, contact with any fixed or floating object (other than 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 collision, any other vessel involved therein, is performing) by a hostile act by or against a belligerent power …'

This part of the clause was introduced evidently to redress the balance. Unless the events enumerated are 'directly' (meaning proximately) caused by a hostile 'act' by or against a belligerent power, they are not to be excluded by the fc & s warranty: they are marine risks and continue to be covered by the policy. The words in the second pair of brackets were inserted with the above-mentioned line of cases in mind. The objective of these words is to dismiss the relevance of warlike operations and conduct which are only incidental to acts of hostility.

'Caused by'

Before the efficacy of this clause could be tested, it was redrafted and streamlined in the current version of the IWSC(H). Clause 1.1 states that the IWSC(H) covers 'loss of or damage to the vessel caused by … any hostile act by or against a belligerent power'.[34] The term 'consequences of'[35] has been replaced by the expression 'caused by' which has to be read to mean 'proximately caused by'. In positive terms, it means that any loss proximately caused by a hostile 'act' by or against a belligerent power is excluded by the war exclusion clause but is covered by cl 1.1 of the IWSC(H).

The nature of the operation which the ship is engaged in at the time of loss is now irrelevant. It is observed that it is not so much the phrase 'consequences of', but the word 'warlike' in the old clause which had clouded the issue. Put in

32 (1942) 73 Ll L Rep 1 at p 6, HL.

33 See NG *Hudson, The Institute Clauses* (1995, 2nd edn), p 222.

34 See also cl 1.1 of the IWC(C).

35 The words 'all consequences of' were interpreted to mean the 'totality of causes, not to their sequence, or their proximity or remoteness': *per* Willes, J in *Ionides v The Universal Marine Insurance Co* (1863) 14 CB (NS) 259 at p 290.

the right perspective, the governing principle is the rule of proximate cause. Even with regard to the old fc & s clause, this point was in fact stressed by the Lord Chancellor in *The Coxwold* who said:[36] 'It is well settled that a marine risk does not become a war risk merely because the conditions of war may make it more probable that the marine risk will operate and a loss will be caused.' This comment is also relevant to cl 1.1.

With the demise of the expression 'consequence of … warlike operations', it matters not, to borrow the imagery used by one author, whether a ship is carrying a cargo of war ammunition or a cargo of bibles for missionaries at the time of loss; no longer is it necessary to separate the 'marine sheep' from the 'warlike goats'.[37] It is worthwhile remembering that the term 'warlike' has been replaced with 'hostile', and 'operation' with 'act'. The test which has now to be applied is: is the loss proximately caused by a 'hostile act'?

'Hostile act'

Only a hostile act 'by or against a belligerent power' is excluded by the war exclusion clause and is covered by the IWSC(H). A hostile act committed by an individual does not count. The nearest explanation of the term can be gleaned from the definition given to the word 'hostilities' by Viscount Cave in *The Matiana and The Petersham* who said that:[38] 'The word 'hostilities' connotes operations of war, which may be either offensive or defensive …'. Lord Wrenbury in the same case observed that:[39] '… the word "hostilities" does not mean "the existence of a state of war" but means "acts of hostility" or … "operations of hostility"'. Both judges acknowledged the fact that 'warlike operations' has a wider reach than 'hostilities'. It would appear from the above comments that there does not have to be a war in progress for one belligerent power to levy a hostile act against another.

'Capture seizure arrest restraint or detainment, and the consequences thereof or any attempt thereat'

The above risks are covered by the IWSC(H), but in relation to the IWC(C) they are qualified with the words 'arising from risks covered under 1.1 above' which means that any 'capture seizure arrest restraint or detainment' must arise from one of the war risks enumerated in cl 1.1 discussed earlier.

'Capture' and 'seizure'

'Capture' and 'seizure', which also appeared in the fc & s clause, are derived from s 3 of the Act. These terms are defined in *Cory v Burr*,[40] a well-known barratry case. The words 'capture' and 'seizure' mean different things. In lay terms, 'capture' is often prefaced with the word 'enemy' and is generally

36 (1942) 73 Ll L Rep 1 at p 6, HL.

37 Arnould, para 895.

38 [1921] 1 AC 99, at p 108, HL.

39 *Ibid*, at p 133.

40 (1883) 8 App Cas 393.

understood to mean capture by an enemy or belligerent. 'Seizure', on the other hand, is a wider concept; it relates to any forcible act of dispossessing another of his/her property either by 'lawful authority or by over-powering force'. In the said case, the seizure of the vessel by the Spanish authorities in consequence of an act of smuggling was held to constitute 'seizure'.[41] Another example of a seizure is when diseased cattle are seized by health authorities.[42]

The word 'seizure' connotes a taking by a third party from another who is in possession of the ship or cargo. One cannot seize something from oneself; it implies forcible dispossession of property by another person. Thus, crew members on board a ship who are already in possession of the ship cannot seize the possession of her.

Barratrous and piratical seizures

A seizure of ship or goods as a consequence of a barratrous act (eg smuggling) committed by the master and/or crew was considered earlier.[43] It is observed that 'barratry and piracy' are specifically excepted from the war exclusion clause of the ITCH(95) and the IVCH(95). The purpose of the barratry (and piracy) exception within the war exclusion is to clarify that a loss caused by, for example, a barratrous seizure is not an excluded loss. This does not, however, mean that it has thereby become an included or insured loss under the Institute Hulls Clauses. Unless specifically insured, a loss solely and proximately caused by seizure, albeit barratrous, is not recoverable.[44]

In each case, the proximate cause of the loss has to be ascertained. There are three possibilities:

- if barratry is held as the sole proximate cause, there is no problem – it is covered by cl 6.2.4 of the ITCH(95) and cl 4.2.4 of the IVCH(95);
- if seizure is regarded as the sole proximate cause of loss, the loss is not, for reasons given earlier, recoverable under the Institute Hulls Clauses. Whether it is recoverable under the IWSC(H) is also unclear. Though the word 'seizure' in cl 1.2 of the IWSC(H) is unqualified, it could be argued that it relates only to hostile seizures occuring under war conditions. Further, if the seizure is by reason of infringement of customs regulations, the exception contained in cl 5.1.4 of the IWSC(H) would apply, thus preventing recovery. This could be described as a case of a loss falling between two stools.
- if both barratry and seizure are held to be the proximate causes of loss, it would appear that the loss is recoverable under the ITCH(95) for two reasons: first, barratry is an insured risk under cl 6.2.4, and, secondly, a barratrous seizure, having been excepted from the war exclusion clause, is no longer an *expressly* excluded loss.

41 Within the then fc & s clause under the policy. Under cl 5.1.4 of the IWSC(H) (but not the IWC(C)), 'arrest restraint detainment confiscation or expropriation ... by reason of infringement of any customs ... regulations' are excluded.

42 *Miller v Law Accident Insurance Soc* [1903] 1 KB 712.

43 See Chapter 12.

44 The same applies to piratical seizures.

The same line of argument applies to piratical seizures. If 'piracy' is regarded as the proximate cause, the loss is covered by cl 6.1.5 of the ITCH(95) and cl 4.1.5 of the IVCH(95). To ensure that there is no overlapping,[45] and to clarify that the loss is not also covered by the IWSC(H), 'piracy' is expressly excluded by cl 5.1.6 of the IWSC(H).

In so far as cargo is concerned, neither a loss proximately caused by barratry or by piracy is an insured peril under the ICC (B) and (C). For this reason, it is unnecessary expressly to except 'barratry' and 'piracy' from the war exclusion clause of the ICC (B) and (C). 'Piracy' has, however, to be expressly excepted from the war exclusion clause of the ICC (A) by reason of it being an all risks policy. Why barratry is not excepted from the war exclusion clause of the ICC (A) is unclear.[46]

'Arrest restraint or detainment '

All the above-named perils are derived from the old SG policy and the fc & s clause. Only 'restraints and detainment', but not 'arrest', appear in s 3 of the Act. Under the SG policy, 'arrests, restraints, and detainments' were qualified with 'of all kings, princes, and people, of what nation, condition, or quality soever …'.[47] The meaning of the whole of this expression is defined in r 10 of the Rules for Construction as:

> '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.'

Following from this, the question which has to be considered is whether the same meaning is to be attributed to the current clause, which is unqualified.

The clause, in failing to incorporate the words 'of all kings, princes and people' or the like, has left the matter in doubt. But as there is nothing in the policy suggesting that a different interpretation be awarded to the expression, the definition in r 10 should apply.[48]

Meaning of 'arrest restraint or detainment'

Rule 10 has made it clear that the term 'arrests etc …' refers to political or executive acts of governments or authorities. That force is not an essential ingredient for this peril was established in *Miller v Law Accident Insurance Co*,[49] where a ship carrying a cargo of cattle was prevented from entering port by the order of the administration – the executive authority at Buenos Aires. That the object of the assured in shipping cattle to the said port was altogether defeated

45 See also cl 5.3 of the IWSC(H).

46 For a fuller discussion on barratry, see Chapter 12; and for piracy, see Chapter 9.

47 See *The Sanday Case* [1915] 2 KB 781, HL, where as a consequence of 'restraint of princes,' the insured cargo suffered a loss of the adventure.

48 See s 30(2): '... unless the context of the policy otherwise requires, the terms and expressions mentioned in the First Schedule to this Act shall be construed as having the scope and meaning in that schedule assigned by them.'

49 [1903] 1 KB 712.

was not disputed.[50] The insurers, however, refused to pay for the loss on the ground that it was not due to 'arrest, restraint, or detainment', arguing that it implied the use of direct force and none had in fact been employed. The Court of Appeal unanimously held that the issue of the decree by the Argentine government, under which the landing of the cattle was forbidden, was an act of State falling within the words of the policy 'restraint of people'. Actual force was not used in this case because there was no opposition by the master; but force would have been used if he had not submitted.

The most recent authority on the subject of detainment, the use of force, and the exclusion of cl 5.1.4 is *The Wondrus*,[51] in which the policy in question incorporated the IWSC(H). The vessel was prevented (for some 18 months) from sailing from Bandar Abbas because of the impecuniosity of the charterers, who were unable to pay port due and freight tax, or provide certain necessary documents. In order to recover under the policy for the loss of hire, the assured had to show that the vessel was 'detained' within the meaning of cl 1.2 of the IWSC(H). The insurers rested their defence on cl 5.1.4, which excludes from cover detainment '… by reason of infringement of any custom or trading regulations'. Thus, the issue in the case was whether there was any detainment within the meaning of cl 1.2, and if so whether it was by reason of infringement of any customs regulation.

Applying r 10 and on the strength of *Miller v The Law Accident Insurance Co*,[52] the trial judge, Mr Justice Hobhouse, held that there was in *a sense*[53] a detention: though the vessel was not in fact physically detained, she would have been detained if she had tried to leave the port without paying her port dues and local tax. Provided that the detainment was not the result of 'ordinary judicial process' he felt that the words 'restraint' and 'detainment' have to be given 'a wide commercial interpretation'. On the question of the insurer's defence, he said that, 'In a commercial sense she was detained by reason of infringement of customs regulations'.

In the Court of Appeal, Lord Justice Lloyd, while upholding (albeit somewhat reluctantly) this part of the decision of Mr Justice Hobhouse, expressed his sentiments on the issue of detainment as follows:[54]

> '… I would hold in agreement with the judge that if there was a detainment within the meaning of cl 1.2 then there was an infringement within the meaning of cl 4.1.5. But putting it in my own words, I would prefer to say that, reading the two clauses together, there was no detainment within the meaning of cl 1.2 at all.'

Nevertheless, he and Lord Justice Nourse upheld the decision of the trial judge who decided that the plaintiff's claim failed because the loss fell within

50 Applying *The Sanday Case* [1916] 1 AC 650, HL.

51 *Ikerigi Compania Naviera SA & Others v Palmer & Others, Globas Transeeas Corpn & Another v Palmer* [1992] 2 Lloyd's Rep 566, CA. For a discussion of *The Wondrus*, see P Foss, *Institute War and Strikes Clauses, Detainments and Exclusions* [1993] LMCLQ 22.

52 [1903] 1 KB 712, CA.

53 In another sense, she was not detained at all, because she was not physically restrained.

54 [1992] 2 Lloyd's Rep 566 at p 572, CA.

the exclusion of detainment by reason of infringement of any customs regulations.

Lord Justice McCowan, on the other hand, had no doubt whatsoever that the vessel was detained,[55] '… in the same sense that a man under house arrest could be properly described as detained, since, although free within his house, he would immediately be apprehended if he tried to leave it'. He agreed with Mr Justice Hobhouse on this point, but disagreed with him and the rest of the Appeal Court on the applicability of the exclusion. He confessed that he was puzzled as to how the judge had arrived at his conclusion that there was detainment by reason of infringement of custom regulations when the vessel did not at any time make any attempt to leave the port. Obviously, he held the view that nothing short of an actual infringement would trigger the exclusion.

The Wondrus, though not actually detained, could be described as having been 'constructively' detained; and her owners having 'constructively' infringed the custom regulations, if such a notion could be applied to an important matter such as breach of the law. Though not said in so many words, this appears to be the view of the trial judge.The former may be easier to accept, but not the latter. As there are clearly two points of view on the subject, this matter is in need of further judicial clarification.

Whilst on the subject of the exclusion of custom infringement, it is perhaps appropriate here briefly to mention *Panamanian Oriental SS Corpn v Wright, The Anita*,[56] where unmanifested goods were found when she was boarded by a Vietnamese custom official. A special military court acquitted the master of smuggling offences, but convicted some of the crew. The vessel was ordered to be confiscated, upon which her owners claimed for a constructive total loss, whereupon the insurers repudiated liability on the ground that the exclusion (worded in almost identical terms as cl 5.1.4 of the IWSC(H)) applied. That the vessel was in fact detained and that there was infringement of the Vietnam custom regulations were never in dispute. The main issue centred on the question of the integrity of the special court and the burden of proof in respect thereof. The Court of Appeal held that the burden of proof lies with the shipowners, and as they were unable to prove that the order of the special court was made under political direction and without jurisdiction, the loss fell within the exclusion. It was for the shipowners, not the insurers, to convince the Court of Appeal that the special Vietnamese court was not acting *bona fide* as an independent judicial body, but as a puppet court following the directions of the government or knowingly exceeding its power.

'Riot' and 'ordinary judicial process'

According to r 10 of the Rules of Construction, a loss caused by riot or by ordinary judicial process is not recoverable under this clause. As noted earlier, riot is excluded by the strikes exclusion of the ITCH(95) and the IVCH(95), but is now an insured loss under cl 1.4 of the IWSC(H). Whether the term 'riots' under these provisions may be given a meaning which has no connection

55 *Ibid*, at p 577.

56 [1971] 2 All ER 1028, CA; [1971] 1 Lloyd's Rep 487, CA.

whatsoever with its preceding words, namely, 'strikers, locked-out workmen or persons taking part in labour disturbances' is a question which has to be addressed. In other words: is a loss caused by an arrest, restraint, or detainment resulting from a riot covered by the IWSC(H)?

What are 'ordinary' and not 'ordinary' (extraordinary) judicial processes is unclear. In *Panamanian Oriental SS Corpn v Wright, The Anita*,[57] Mr Justice Mocatta in the court of first instance thought that the former related to civil, whilst the latter to criminal, proceedings. As his decision was overruled on other grounds, the validity of his civil and criminal distinction remains to be confirmed.

Clause 5.1.5 expressly excludes 'loss, damage liability or expense arising from the operation of ordinary judicial process, failure to provide security or to pay any fine or penalty or any financial cause'. The same problem as regards the meaning of 'ordinary judicial process' arises here.

'And the consequences thereof or any attempt thereat'

The phrase 'consequences of',[58] as was seen,[59] has been held not to be specific enough to abrogate or diminish the rule of proximate cause declared in s 55 of the Act. To recapitulate, they refer to 'the totality of causes, not to their sequence, or their proximity or remoteness …'.[60] As such, they do not affect the general principles of causation and the same must apply here to the term 'consequences thereof'.

The provision of 'attempts thereat' has been inserted to clarify that a loss arising from attempts at 'capture seizure arrest restraint or detainment' are also covered.

The detainment clause

The detainment clause, cl 3 of the IWSC(H), applies only to 'capture seizure arrest restraint detainment confiscation or expropriation' of the vessel. It states that if 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.'

The purpose of this clause is to aid an assured in his claim for a constructive total loss when he is deprived of the possession of the vessel without any likelihood of recovery.[61] It has thus to be read with s 60(2)(i) of the Act. The case which immediately springs to mind is *The Bamburi*,[62] which, though it cannot be said to be responsible for the introduction of the clause, nevertheless illustrates

57 [1970] 2 Lloyd's Rep 365.

58 And also 'consequent on' used in relation to insurance to freight.

59 For a fuller discussion on the law of causation.

60 *Per* Willes J in *Ionides v Universal Marine Insurance Co* (1863) 14 CB (NS) 259 at p 290.

61 For a thorough historical survey of the detainment clause, see O'May, p 276.

62 [1982] 1 Lloyd's Rep 312.

the usefulness of such a clause.[63] It is fair to say that a period of 12 months (from the date of the tendering of the notice of abandonment) was considered by the case as a 'reasonable time' for establishing that a constructive total loss, on the basis of unlikelihood of recovery, has occurred.

Exclusions

The terms of some of the exclusion clauses (cl 5) of the IWSC(H) are of particular relevance to this cover on capture, seizure, arrest, restraint or detainment.

Any loss, damage, liability, or expense arising from 'requisition ... or pre-emption' are excluded by cl 5.1.2. The need for this exclusion is particularly well illustrated by the case of *Robinson Gold Mining Co v Alliance Marine & General Insurance Co Ltd*.[64] In the absence of this exclusion, a vessel which, for example, has been requisitioned by the state may be recoverable under the heading of 'seizure, arrest, restraint or detainment'. There is no legal definition for the word 'requisition', but it is generally understood to mean the taking over of possession and ownership of merchant ships by the government during an emergency – for example, wartime.

The word 'pre-emption' is apparently a concept used in the American Institute Clauses. O'May has pointed out that it is 'probably covered by requisition', but 'to avoid narrow and irrelevant distinctions being made' both terms are used in the Institute and American Institute Clauses.[65]

Clause 5.1.3 excludes 'loss damage liability or expense arising from capture seizure arrest restraint detainment … by or under the order of the government or any public or local authority of the country in which the vessel is owned or registered'.[66]

The exclusion under cl 5.1.4 relating to infringement of customs or trading regulations has already been discussed.

'Derelict mines torpedoes bombs or other derelict weapons of war'

Loss resulting from any of the above perils are excluded by the war exclusion clause of the ITCH(95), the IVCH(95) and all the ICC, but are now covered by cl 1.3 of the IWSC(H) and of the IWC(C). It is to be noted that an 'explosion' which is not connected with any of the above forms of ammunition is covered by cl 6.1.2 of the ITCH(95); cl 4.1.2 of the IVCH(95); cl 1.1.1 of the ICC (B) and ICC (B) under the peril of 'fire or explosion'; and under the ICC (A) by virtue of this being an all risks policy.

63 For further discussion of the clause, see Chapter 15.

64 [1901] 2 KB 919; 6 Com Cas 244. See also *France Fenwick & Co v The King* [1927] 1 KB 458; and *The Steaua Romana* (1944) P 43.

65 See O'May, p 274.

66 As regards war risks insurance for cargo, there is no equivalent to this exclusion in the IWC(C).

The case which is relevant to this risk is *The Nassau Bay*,[67] which was decided in 1978, when the fc & s clause was still in use. The court held that the damage sustained by the dredger, which had sucked up a number of derelict shells that exploded, was recoverable from the marine risks insurer because it was not excluded by the fc & s clause. Mr Justice Walton found it impossible to classify the dumping of ammunition, at the end of the war, a warlike operation.[68] Such a loss is clearly now not a marine risk, but a war risk falling within cl 1.3 of the IWSC(H) and the IWC(C).

'Strikers, locked-out workmen, or persons taking part in labour disturbances, riots or civil commotions'

The above clause appears in both the IWSC(H) and the ISC(C). As can be seen, it is a mirror image of the strikes exclusion clause of the ITCH(95), the IVCH(95) and all the ICC, though in the case of the ICC there is an additional exclusion for loss, damage, or expense '*resulting from* strikes, lock-outs, labour disturbances, riots or civil commotions' which has not been reproduced in the ISC(C).

It is noted that whilst the positive cover of the IWSC(C) and the ISC(C) insure against 'loss of or damage to' the vessel, the exclusion clause excludes 'loss damage or *expense* …' from the ITCH(95), the IVCH(95) and the ICC. The positive cover is thus narrower than the exclusion.

The ISC(C) has, however, included under its wing a clause relating to loss of or damage to the vessel caused by 'any terrorist or any person acting from a political motive'. This appears as a separate clause (cl 1.5) in the IWSC(H).

Strikes

Neither the Act nor the Clauses have defined any of the above terms. In so far as strikes are concerned, the case closest to the subject is *The New Horizon*,[69] which involved a charterparty, where Lord Denning MR was prepared to accept the dictionary meaning of the word adopted by Mr Justice Sankey in *William Brothers (Hull) Ltd v Naamloose Vernootschap WH Berghuys Kolanhandel*[70] to the effect that a 'strike' is 'a general concerted refusal by workmen to work in consequence of an alleged grievance'. He then proceeded to amplify the term as follows:

> '… a strike is a concerted stoppage of work by men done with a view to improving their wages or conditions, or giving vent to a grievance or making a protest about something or other, or supporting or sympathising with other workmen in such endeavour. It is distinct from a stoppage which is brought about by an external event such as a bomb scare or by apprehension of danger.'

67 [1979] 1 Lloyd's Rep 395.

68 *Ibid*, at p 404, Walton J said: ' In the circumstances ... it itself is the very reverse of a warlike operation ... It involves the very opposite: the destruction of war stores, which surely is an act of pacification'.

69 [1975] 2 Lloyd's Rep 314 at p 317, CA.

70 21 Com Cas 253 at p 257.

Lord Justice Stephenson stressed that,[71] 'There cannot be a strike without a cessation of work by a number of workmen agreeing to stop work … It must be a stoppage intended to achieve something, to call attention to something …'.[72]

A 'labour disturbance', on the other hand, is something less specific than either a strike or a lock-out. It covers any industrial or employment dispute giving rise to a 'disturbance' which is less serious in nature than a rebellion or insurrection.

'Riots'

The term 'riot' has a fixed meaning in criminal law. In *The Andreas Lemos*,[73] Mr Justice Staughton adopted the criminal law definition of a 'riot' spelled out in *Field v the Receiver of Metropolitan Police*,[74] which was later approved by the House of Lords in *London & Lancashire Fire Insurance Co v Bolands Ltd*.[75] To constitute a riot, the following elements have to be complied with:

- a number of persons not less than three (now 12);[76]
- pursuing a common purpose;
- execution or inception of the common purpose;
- an intent on the part of the number of persons to help one another, by force if necessary, against any person who may oppose them in the execution of the common purpose;
- force or violence, not merely used in and about the common purpose, but displayed in such manner as to alarm at least one person of reasonable firmness and courage.

Even though a riot in fact took place in *The Andreas Lemos*, nonetheless, the loss was held not recoverable because the riot took place only after the loss, and therefore it could not have caused the loss. In the colourful words of Mr Justice Staughton, it should be given its 'current and popular meaning', and not what a 'sloane ranger' would consider a 'riot'; 'The word today means the sort of civil disturbance which has recently occurred in Brixton, Bristol or Wormwood Scrubs'.[77]

Incorporated as part of the cover on strikes and, particularly, in relation to cargo, under the heading of the Institute Strike Clauses (Cargo), it is liable to cause confusion – for one could validly ask the question: is the word 'riots' (and 'civil commotions') to be read *ejusdem generis* with the preceding words 'labour

71 [1975] 2 Lloyd's Rep 483 at p 317.

72 *Cf* cl 3.7 of the ISC(C): Absence, shortage, or withholding of labour *per se* does not amount to a strike.

73 [1982] 2 Lloyd's Rep 483, QBD.

74 [1907] 2 KB 853 at p 860.

75 (1924) 19 Ll L Rep 1; [1924] AC 836, HL.

76 The Public Order Act 1986 which came into force on 1 April 1987 has increased the number from three to 12 or more persons: s 10(2) of this 1986 Act expressly provides that rr 8 and 10 of the Rules for Construction of Policy in Sch 1 Marine Insurance Act 1906 shall be construed in accordance with the definition of riot given by the 1986 Act.

77 [1982] 2 Lloyd's Rep 483 at p 491.

disturbances'? If this is to be the case, the 'common purpose', which is an essential ingredient for the offence of 'riot', must be in connection with a matter relating to labour and employment and not to a 'general purpose' or political issue. As will be seen, the same question may be asked of 'civil commotion'.

It is submitted that as a riot is a 'civil disturbance', it would be more appropriate if it were placed (together with civil commotion) in a separate provision of its own. Lumped with 'strikers, locked-out workmen and labour disturbances', it can only cause misunderstanding and could be interpreted (or misinterpreted as the case may be) as being associated only with 'industrial' riots.

The American and Canadian courts,[78] however, prefer the popular and ordinary meaning of 'riot' to the more technical, criminal law definition described above. Mr Staughton in *The Andreas Lemos* could see the attraction of the American approach, but felt that he could not, for an English policy of marine insurance, depart from the British understanding of the term.

'Civil commotions'

In *Levy v Assicurazioni Generali*,[79] the words 'civil commotion' appearing in what was a war risks clause of a policy in respect of a stock of merchandise stored in a warehouse, were examined. The Privy Council, which had to give a meaning to these words, cited the following passage from *Welford and Otter-Barry's Fire Insurance*[80] with approval:[81]

> 'This phrase is used to indicate a stage between a riot and civil war. It has been defined to mean an insurrection of the people *for general purposes*, though not amounting to rebellion; but it is probably not capable of any precise definition. The element of turbulence or tumult is essential; an organised conspiracy to commit criminal acts, where there is no tumult or disturbance until after the acts, does not amount to civil commotion. It is not, however, necessary to show the existence of any outside organisation at whose instigation the acts were done.'[82]

It is important to bear in mind that the term 'civil commotion' in the clause under consideration was set in a scheme which is wholly different from the current cover of the IWSC(H) and the ISC(C). The sequence of the enumerated risks was as follows: 'War, invasion, act of foreign enemy, hostilities … riots, civil commotions, insurrection, rebellion, revolution …'. The remark that 'civil commotion' means 'an insurrection of the people for general purposes' is, in the context of the said clause pertaining to war (and civil war) risks, correct. But whether the same definition may be attributed to cl 1.4 of the IWSC(H) and cl 1.1 of the ISC(C) is, it is submitted, questionable because 'civil commotion' is not part of the war cover, but of the cover on strikes.

78 See the remarks of District Judge Frankel in *Pan American World Airways Inc v The Aetna Casualty & Surety Co & Others* [1974] 1 Lloyd's Rep 207 at p 234, on appeal [1075] 1 Lloyds Rep 77; and the Canadian case of *Ford Motor Co v Prudential Assurance* (1958) 14 DLR 2d 7, Ontario Court of Appeal.

79 [1940] 3 All ER 427, PC.

80 3rd edn, p 64.

81 (1940) 3 All ER 427 at p 431, PC.

82 Emphasis added.

First, support may be drawn from the fact that, like labour disturbances, riots and civil commotions are excluded by the strikes and not the war exclusion clause. Secondly, particularly in relation to cargo, riots and civil commotions appear as insured risks under the ISC(C), and not the IWC(C). If riots and civil commotion are meant to have a 'general purpose' connotation, they should have been incorporated either in a separate clause divorced from the strikes cover of the IWSC(H) and, in the case of cargo, the ISC(C). The fact that they have been lifted out of the Strikes Exclusion Clause of the ITCH(95), IVCH(95), and all the ICC, and placed in the same provision as for a loss caused by 'strikers, locked-out workmen … labour disturbances' could be taken to mean that they are to be read *ejusdem generis* with matters relating to labour disputes.

The Privy Council has placed 'civil commotion' as at a stage between riot and civil war, but below rebellion; this suggests that they are in the same league as civil war and the like. Furthermore, 'civil commotion' has been described as an 'insurrection of the people' and 'insurrection', it is observed, is an insured peril under the war risks clause.

In *Spinney's v Royal Insurance Co Ltd*, albeit a non-marine insurance case, Mr Justice Mustill said that he could find:[83]

> '… nothing in the authorities compelling the court to hold that a civil commotion must involve a revolt against the government, although the disturbances must have a sufficient cohesion to prevent them from being the work of a mindless mob.'

This points to the fact that 'civil commotion' is a wider concept covering anti-governmental, as well as other forms of discontent. O'May, however, drew the distinction between a 'civil commotion' and an 'insurrection' as thus: 'The former is more a "domestic" disturbance whilst the latter involves action against the government with a view to supplanting it.' This statement goes some way to supporting, perhaps unwittingly, the point that 'civil commotion' should be awarded a limited meaning when it is placed alongside 'strikers, locked-out workmen, etc'. It is not unreasonable to deduce from the above discussion that 'riots' and 'civil commotions' arising from a labour or labour-related grievance, and not a political, politically-related, or general issue, are envisaged by this clause.

It is submitted that if riots and civil commotions are meant to have a wider implication, they should either be placed in a clause of their own or be left in the war risks clause.[84] Unless they are to be read *ejusdem generis* with 'labour disturbances,' there does not appear to be any good reason for keeping them in the strikes cover.

One could, of course, argue that, as the terms 'riots' and 'civil commotions' are already well-known in the insurance market to have a wide and general meaning, it does not matter where they are placed. But surely this cannot excuse or justify the present arrangement of the perils which, it is submitted, is

83 [1980] 1 Lloyd's Rep 406 at p 438.

84 A riot or civil commotion could, of course, develop into an insurrection, rebellion, revolution or civil war when it becomes more organised and takes the form of an attempt to overthrow the government.

unsatisfactory. To promote clarity and consistency, more thought should be given to the moving of 'riots' and 'civil commotions' to a more appropriate place.

'Any terrorist or any person acting maliciously or from a political motive'

The inclusion of loss damage liability or expense caused by 'any terrorists or any person acting from a political motive' as part of the strikes exclusion clause of the ITCH(95), the IVCH(95), and all the ICC does not pose any problem. They are now insured under a separate provision, cl 1.5 of the IWSC(H) and cl 1.2 of the ISC(C). However, in relation to hull, it is to be stressed that cl 1.5 also covers the acts of any person acting maliciously. Under the ICC (B) and (C), a loss caused by malicious acts is expressly excluded by cl 4.7 of the general exclusion clause which is worded thus:

> '… deliberate damage to or deliberate destruction of the subject-matter insured or any part thereof by the wrongful act of any person or persons.'

To insure for such a loss, an assured would have to take out the Institute Malicious Damage Clause by which, in consideration for an additional premium, the exclusion for 'deliberate damage to or deliberate destruction of the subject-matter insured or any part … is deemed to be deleted'. As there is no such exclusion in the ICC (A) (being an all risks policy) the risk of malicious damage caused by a third party is covered; consequently, there is no need to take out this special cover.

'Confiscation or expropriation'

The above are insured risks in the policy for hull, the IWSC(H), but not for cargo. Clause 1.6 of the IWSC(H) providing positive cover has to be read with cl 5.1.3 where '… confiscation or expropriation by or under the order of the government or any public or local authority of the country in which the Vessel is owned or registered' is excluded.

As no definition is given either by the Act or the Clauses to these expressions, it can perhaps be assumed that they must bear their ordinary and dictionary meanings. 'Confiscate' means to 'take or seize by authority, or appropriate to the public treasury (by way of a penalty)'. In the context of the positive cover, it has to be read to mean confiscation by the order of the government, public or local authority of a country other than the country in which the vessel is owned or registered.[85]

'Expropriation' is commonly understood to mean the taking away or the dispossession of property from its owner. It is a wide concept and, therefore, even includes 'confiscation'. It is generally accepted to embrace nationalisation and where some form of compensation is paid for the taking of the property.

85 See *Levin v Allnutt* (1812), 15 East 267 at p 269, a very old case, where Lord Ellenbourough CJ had given a narrow meaning to the word 'confiscation', that, it has to be 'some way beneficial to the government; though the proceeds may not strictly speaking be brought into the treasury'. Whether such a restricted meaning has to be given the term is questionable.

The detainment clause

Just as the detainment clause (discussed earlier) is applicable to capture, seizure, arrest, restraint and detainment, it is also applicable to confiscation and expropriation. After a continuous period of 12 months of loss of the free use and disposal of the vessel, the assured may claim for a constructive total loss by reason of having been deprived of the possession of the vessel without any likelihood of recovery.

The frustration clause

Clause 3.7 of the IWC(C) and cl 3.8 of the ISC(C), named as the frustration clause, state that the insurance does not cover 'any claim based upon loss of or frustration of the voyage or adventure'. As was seen, the notion of loss of or frustration of the adventure owes its existence to *The Sanday Case* where, as a consequence of restraint of princes, the voyage which was to be undertaken by a cargo of linseed was abandoned. Even though the cargo did not suffer any physical damage, the assured was allowed to recover for the loss on the basis that there was a loss of the voyage or adventure. To overcome the effects of the decision of the House, the frustration clause was introduced. It needs to be pointed out that there is no frustration clause in the IWSC(H) because the concept does not apply to a policy on hull.

'Based on'

In *The Sanday Case*, the 'loss of or frustration of the voyage or adventure' arose as a result of a restraint of princes. Restraint, however, is not the only way by which such a loss can arise: a loss of voyage could well occur by reason of any of the perils insured by the IWC(C) and the ISC(C).[86]

The construction of the frustration clause was considered in the celebrated case of *Rickards v Forestal Land, Timber and Railways Co Ltd* and two other cases,[87] sometimes referred to collectively as the 'Three Test Cases of 1941'. According to the oft-quoted explanation given by the Lord Chancellor, Viscount Simons:

> '… the proper construction of the frustration clause is not "free of any claim which on the facts might be based on loss of the insured voyage", and that its proper meaning must be "free of any claim which is in fact based, because it can only be based, upon loss of the insured voyage".'

In simpler terms, this means, to cite the words of Lord Wright, that: '… it cannot be applied to a case where the assured is claiming for loss of, or damage to, the actual physical things or chattels'. He then proceeded to spell out the circumstance when the clause would apply. He said:

86 This explains why the current version of the frustration exclusion is couched without any qualification. The original clause, which was narrower, read as follows: 'Warranted free of any claim based upon loss of, or frustration of, the insured voyage or adventure, caused by arrests, restraints, or detainments of kings, princes or people'.

87 The other two cases are: *Robertson v Middows Ltd*; and *Kann v WW Howard Brothers & Co Ltd* [1941] 3 All ER 62, HL.

> 'The exception is expressly by its language limited to the loss of, or frustration of the insured voyage. Its language cannot … be twisted to make it exclude a claim for actual loss of, or damage to, the goods themselves.'

It has to be said that if the goods themselves were to suffer physical damage, there would be no need for the assured to rely on loss of the voyage as the basis of his claim. The House took pains to explain the scope of the clause even when the issue was actually of little importance to the three cases, because there was in fact an actual total loss of the goods. Lord Wright was clear in his mind that the clause was:[88]

> '… undoubtedly invented from a desire to abrogate the effect of *Sanday's case*, where only the adventure was affected by the peril, the goods being unaffected. I attach no importance to … the words "based upon". The clause might just as well have run "for loss of".'

Unlike 'caused by', the phrase 'based upon' used in the clause is not an expression which is known to possess any causal implication. But interestingly enough, causation was the approach which Lord Justice Jenkins adopted in *Atlantic Maritime Co Inc v Gibbon*,[89] where he cited with approval the following remarks made by Lord Sumner in *Samuel v Dumas*:[90]

> 'Where a loss is caused by two perils operating simultaneously at the time of the loss and one is wholly excluded because the policy is warranted free of it, the question is whether it can be denied that the loss was so caused, for if not the warranty operates.'

Admittedly, it is difficult to imagine how a loss or frustration of the voyage or adventure can ever occur on its own: it can only arise as a result of an earlier event or occurrence. From this, some may argue that loss of the voyage or adventure is not a cause of loss, but the product of a cause of loss; others may consider it as a remote cause of loss. In either case, if *the* proximate cause is, for example, restraint of princes, an insured peril, the loss is recoverable. This would go against the grain of the frustration clause.

As a way out of this dilemma, Lord Justice Jenkins was prepared to regard loss of voyage as one of two proximate causes of loss; and as loss of voyage is expressly excluded, the loss is not recoverable.

As can be seen, the problem cannot always be solved by applying the rule of causation. It is submitted that, it is precisely for this very reason that the term 'based on' (and not the standard 'caused by') has been chosen for this clause. The position is best resolved by observing the words of Sir R Evershed MR, who said that:[91]

> 'It is applicable, on the face of it, only to cases where the claim is based on loss or frustration of a voyage or adventure, which I take to be in distinction from those cases where the vessel or the cargo is itself lost.'

88 [1941] 3 All ER 62 at p 85, HL.

89 (1953) 2 All ER 1086 at p 1110, CA.

90 [1924] AC 467.

91 (1953) 2 All ER 1086 at p 1099, CA.