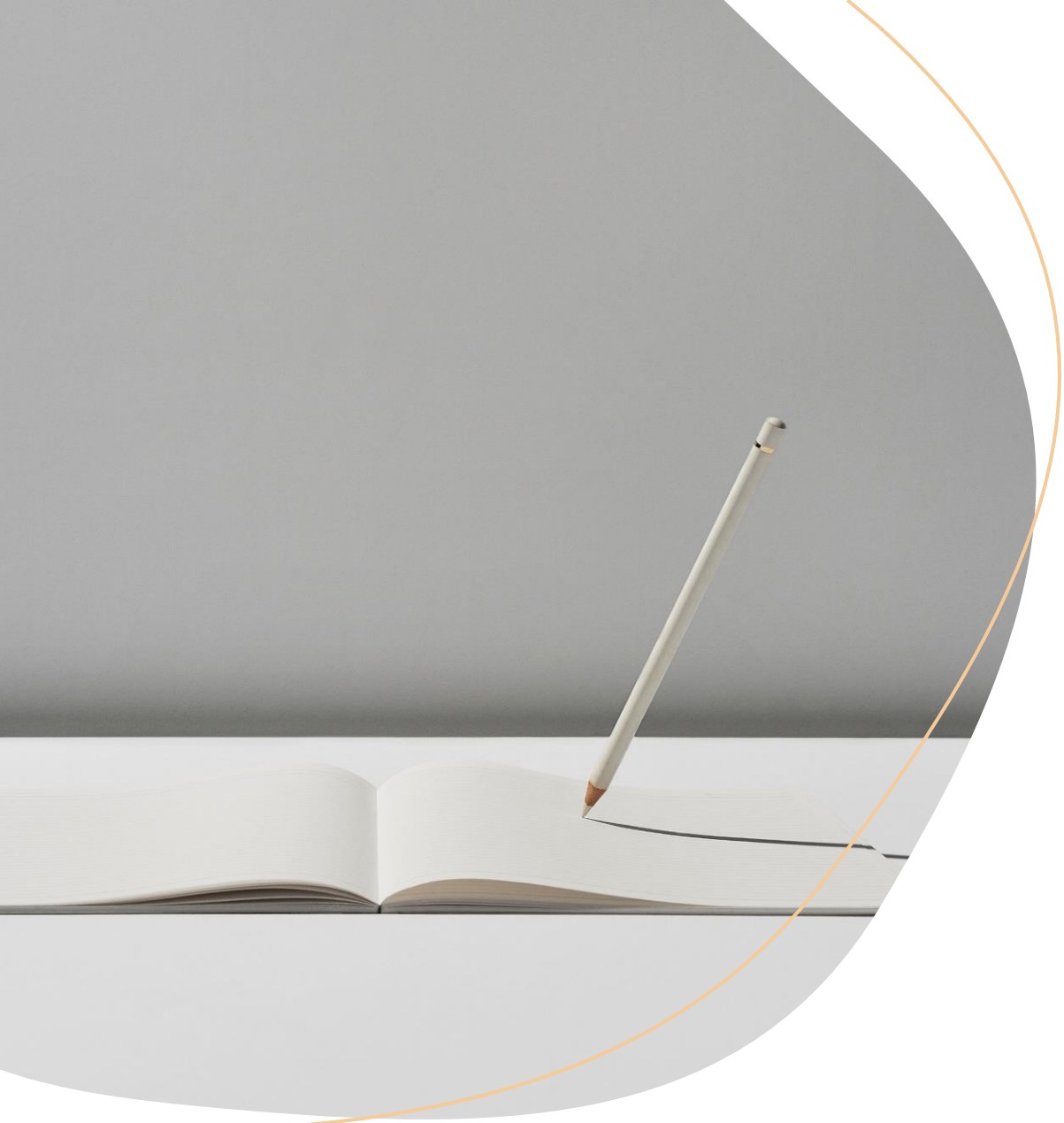
The International Insurance Law Association

WELCOME



Please Note

- Upon entry, please note that all delegates will be put on mute.
- Please send all questions by chat message as these will be answered at the end.
- A recording will be made available to all AIDA members so by participating, delegates are agreeing to be recorded. By participating you are giving your consent to being recorded.
- A survey will be sent by email to all delegates. Your response would be very much appreciated.

Sanctions- Legal bases in International Law, and Implications on Insurance

16 May 2022 |12:00-13:15 London time | CET(Europe)13:00

Chair
prof. Birgit Kuschke

First speaker
Prof. Erika de Wet

Second Speaker
Prof. Özlem Gürses

Forthcoming Events

Return of in-person meetings - save the dates

- 22-26 August 2022: CILA Congress in Costa Rica

- 6-7 October 2022: 9th AIDA Europe Conference in Zurich
- “Getting Fit for the Future” – Tackling the legal, regulatory and business challenges in times of climate, structural and political changes

- Details of these events and how to register are to be circulated and posted very shortly via various channels including the AIDA website: www.aidainsurance.org

UKRAINE CRISIS: INSURANCE CONSIDERATIONS

Professor Özlem Gürses

Insurance claims

- Claims related to
- ships trapped in the Black Sea,
- disrupted exports of cereals and agricultural products from Ukraine and Russia
- cyber attacks
- stranded planes,
- bombed-out buildings and
- unrecoverable debts
- Specialty lines: energy, marine, aviation
- (Generally) under the political risk umbrella: credit insurance -sanctions ?

Responses

- The Joint War Committee labelled more waters around Russia and Ukraine higher risk.
- But a handful of vessels already damaged.
- The "single largest aviation loss in history" if stranded planes were not recovered
- Estimated loss: near-600 planes in Russia could be worth $13bn.
- Cancellation notices by insurers ".. . . while it is in the grip of an insured peril" ?
- Non-payment of insurance claims: sanctions.

Royal Boskalis Westminster NV v Mountain
[1999] Q.B. 674

- Claimants: Five Dutch companies owned and operated a dredging fleet
- Two of the companies contracted with the Iraqi Ministry of Transport to undertake extensive dredging works on the Iraqi-Kuwait border.
- The contract was governed by Iraqi law, provided for arbitration in Paris
- The dredging fleet was insured against war risks (inc sue and labour clause).
- The insurance contract was governed by English law.

Royal Boskalis Westminster - claim

- The United Nations sanctions against Iraq : 6 August 1990
- Article 7 of Law No. 57 (Iraq): all the assets of the companies of those countries which had enacted sanctions legislation against Iraq "shall be seized."
- Finalisation Agreement: (1) the abandonment of all claims that the joint venture might have under the dredging contract and (2) the payment into accounts of the Central Bank of Jordan held in Swiss and Austrian banks
- The dredging fleet and the joint venture's personnel were able to leave Iraq safely

Claim

- (1) "unusual and extraordinary" steps or exertion; (2) the objective: to preserve the insured property from loss by an insured peril; (3) the insured peril was operative, imminent; (4) the loss, if it had occurred, would have been recoverable under the policy; (5) it was reasonable to take the steps.
- Expense involves the payment or disbursement of money or money's worth and waiver of a claim (expenses and sacrifices)
- BUT Paris arbitration !.
- The fact that it was valid by Iraqi law was essential, but not sufficient if by the curial law the arbitrators would not enforce it.
- The finalisation contract was obtained by duress of the most extreme kind: unenforceable

Finalisation agreement: null and void, unlawful

- Breach of the sanctions legislation : effecting the transfer of D.fl.24,250,000
- Governing law was not English law but
- By seeking to rely upon the waiver, the Iraqi forces would be invoking the aid of the court.
- Arbitration would have been an attempt to enforce the original rights
- Insurance is designed to provide an indemnity against real loss, not notional loss
- Quantification of that loss: comparison btw the assured's position before and after the agreement

Finalisation agreement: governing law?

- English court: would not help them to enforce it - as a matter of public policy would override the proper law of the contract
- Whatever may be the law of the country in which the contract was made - (The threat to use a large number of personnel as human shields).
- No loss (when before and after the agreement is compared): the Paris arbitrators would have decided the matter
- A presumption that a French tribunal would adopt a similar approach to the duress in this case as the English court

Reasonable actions of the assured

- *Becker, Gray and Co v London Assurance Corporation* [1918] A.C. 101
- June, 1914: a firm of British merchants shipped 218 bales of jute on board the German steamship *Kattenturm* for carriage from Calcutta to Hamburg
- The perils insured against included "men of war …. enemies …. takings at sea, arrests, restraints and detainments of all kings, princes and people of what nation, condition or quality soever."
- "warranted free from capture, seizure, &c." was struck out in consideration of an extra premium.
- At 11 P.M. on August 4, war was declared between Great Britain and the German Empire.
- On August 6 the master put in to Messina, then a neutral port, to avoid the risk of capture
- Notice of abandonment: September 1, 1914 : "a constructive total loss through consequence of hostilities,"

Operation of a peril v. avoiding it

- The loss arose from steps taken by the captain to avoid a peril which had not begun to operate
- The peril of actual capture, not the mere apprehension of capture.
- The ship left Malta on August 3, 1914. The captain took her into Messina on the 6th.
  - How did the master learn about the war, why he chose Messina: unknown, to sail direct from Malta to Messina need not have taken three days.
- Admiralty's letter:
  - "any German steamer proceeding on or after the 5th August through the Mediterranean on a voyage to Hamburg would have been in peril of capture …. when outside neutral territorial waters."
- HL: We know nothing of the actual numbers of the possible captors or of their particular positions: we do not know if the presence of the *Kattenturm* was known to any of them.
- "in peril of capture" conveys by implication that she would have had a chance of escape, but here again the assured give us no information.

self-restraint, not restraint of princes

- Assured: he had no real choice at all
- "I do not say that he ought to have done otherwise, but… he could do as he liked. He might have picked his own time; he might have weighed his chances at leisure; reasonable delay would not amount to abandonment of the voyage. Even an early peace was not wholly beyond the bounds of possibility."
- Capture, enemies, war …. Remote cause
- Voluntary action upon mere apprehension that a restraint of princes will come into operation

The precedent

- Lord Sumner: *Butler v Wildman* (1820) 3 B. & Ald. 398 is illogical
- *The law was settled : Kacianoff v China Traders Insurance Co, Ltd* [1914] 3 K.B. 1121; Hadkinson v Robinson (1803) 3 Bos. & P. 388
- *Distinguish: British and Foreign Marine Insurance Co. v. Sanday & Co* [1916] 1 A.C. 650: both ship and goods were British, and HL's judgment was based on the fact that the ship abandoned the voyage as the proximate result of the outbreak of war.

Win or lose?

- "if it were otherwise, some remarkable consequences would follow. At 11 P.M. on August 4, 1914, all the world over, every parcel of goods owned by His Majesty's subjects and laden on board of German vessels or of neutral vessels bound for German ports, for freight not prepaid, suddenly became, on this view, a total loss. Both ships and goods might be safe and sound and likely to remain so; cargo owners and shipowners, captains and crews, might all be ignorant of the outbreak of war. The assured, for want of advice that their goods were afloat, might have made no declarations to underwriters under floating policies, and the underwriters might be quite unaware that they were at risk. None the less on that day and at that hour the ocean became suddenly full of constructive total losses securely laden in uninjured ships."

- *Sanday*: the illegality was of the centre of the decision.

Frustration of adventure

- The fact that the assured was British had nothing to do with the actual termination of this adventure.
- The declaration of war, at the time when it was made, only prohibited acts which the assured was in any case already powerless to perform.
- If it frustrated the adventure, it did so eventually, but at the same time, though for different reasons and in a different way, the captain of the *Kattenturm* frustrated it forthwith.
- If he had continued the adventure, the cargo owners might have sustained a recoverable loss by other perils insured against without any illegality on their part.

Becker

- "a destruction of the contemplated adventure" -no
- the subject-matter of the insurance was abandoned "on account of its actual total loss appearing to be unavoidable" -no
- a direct loss by "enemies" - no
- "To be sure he said that he did so by order of his Government, but I do not see why we should believe him. Bailhache J. did not, and it does not appear what motive he had for speaking the truth. Committed in neutral waters his act was a mere civil wrong, and not one falling within the cause of loss called "enemies" in the policy."

Nobel's Explosives Co v Jenkins &Co [1896] 2 QB 326

- Bill of lading containing the exception of "restraint of princes,"
- a special clause "if the entering of or discharging in the port (of discharge) shall be considered by the master unsafe by reason of war … the master may land the goods at the nearest safe and convenient port."
- Held:
- (1.) that the risk of the goods being seized, if attempted to be carried further, amounted to a "restraint of princes" within the exception;
- (2.) that such risk of seizure, rendered the "entering of or discharging in the port" of Yokohama unsafe
- (3.) that the master's duty to take care of the cargo justified him

War risks v. cyber risks : Merck & Co v ACE American Insurance Co (Jan 2022)

- M's computer systems were infected by a malware – affected computers in countries around the world (40.000 computers around the world, $1.4billion.

- 'all risks' property insurance provide coverage for loss or damage resulting from destruction or corruption of computer data and software

- Insurers: it was an instrument of the Russian Federation as part of its ongoing hostilities against Ukraine

Warlike Action Exclusion Language

1) loss or damage caused by hostile or warlike action in time of peace or war, including action in hindering, combating or defending against an actual, impending or expected attack:

a) by any government or sovereign power (de jure or de facto) or by any authority maintaining or using military, naval or air forces;

b) or by military, naval or air forces

c) or by an agent of such government, power, authority or forces

This policy does not insure against loss or damage caused by or resulting from Exclusions A,B,or C regardless of any other cause or event contributing concurrently or in any other sequence to the loss

Interpretation of the clause

- Insurance policies: contracts of adhesion
- the ‘great’ imbalance between insurer and assured in their respective understanding of the terms and conditions of the policy
- ‘sophistication’ and ‘knowledge’ of the assured
- Merck was a sophisticated assured, but no evidence that the war risk exclusion was individually negotiated
- Plain meaning of the term.
- If ambiguous: the reasonable expectations of the assured

Interpretation of insurance clauses

- All risks policy : all losses of a fortiutious nature, but for the exclusions or deliberate action of the assured

- Insurance policy exclusions: narrow interpretation, strictly construed against the insurer, more than one possible interpretation of the language, courts apply the meaning that supports coverage rather than the one limits it

- The insurer must show that the assured's interpretation of the exclusionary clause is entirely unreasonable.

Warlike action exclusion

- Ordinary meaning of hostile or warlike operation
- Warlike : like war
- Hostile: should be understood as the use of armed forces
- Both the insurer and the assured were aware that cyber attacks of various forms, sometimes from private sources and sometimes from nation states have become more common
- Despite this the insurer did not attempt to change the wording of the war exclusion
- The assured had every right to anticipate that the exclusion applied only to traditional forms of warfare

Hostilities – warlike operations

- The word ‘hostilities’ connotes the idea of belligerents, properly so called, enemy nations at war with one another, and is used to describe the operations, offensive, defensive, or, possibly, protective of the one against the other, in the conduct of their war
- Britain Steamship Company, Ltd v The King [1921] 1 A.C. 99

- ‘Warlike operations’ not only include ‘hostilities’
- where a state of war does not exist, operations of such a general kind or character as belligerents have recourse to in war.
- *Yorkshire Dale Steamship Co, Ltd v Minister of War Transport* [1942] A.C. 691

Questions
& Answers