

Cover for intervention by state power in the Nordic Plan from 2019 – a fair and timely compromise?

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1 Introduction and overview¹

The Nordic Marine Insurance Plan 2013 (NP) Version 2016 is revised and published in a new Version 2019 to apply from January 2019. An important part of the amendment was the cover for intervention by state power. The purpose of this article is mainly to give a presentation of the new regulation and the background for the changes made. However, the aim is also to illustrate the advantages of the Nordic Plan model for construction and maintenance of the marine insurance contract. To emphasize this point, some comparison will be made with the UK regulation without aiming to go into depth on this issue.

Interventions by state power refer to measures taken by a state against the vessel. The most serious measure is when the state takes possession of the vessel through confiscation, expropriation or requisition. Less serious measures have a more temporary character; i.e. capture at sea, arrest, restraint or detainment. As a vessel is always registered in a certain state, a distinction must be made between interventions from “own” and “foreign” state power. In general, interventions by own state power has traditionally not been insurable in the marine insurance market, whereas certain interventions by a foreign state power have been insured as a war risk.

The traditional distinction between interventions by own state power as a non-insurable risk and more war related interventions by a foreign state power has however been challenged in later years. We have seen several cases where vessels are captured at sea and/or detained in port formally justified with breach of trade- or customs regulations but where the vessel has not been released even if there apparently has been no breach or the investigations take an abnormally long time. From a Nordic perspective the intervention in such cases has the character of corruption, abuse of power or even extortion. The question has thus arisen

¹ This article is a reedited and shortened version of Trine-Lise Wilhelmsen, Marine insurance for intervention by state power – the Nordic perspective, which is published in Scandinavian Institute of Maritime Law Yearbook (SIMPLY) 2018.

whether such cases are covered under the existent regime, and if not; if they should be covered. This issue was an important part of the revision of the NP Version 2016, and a new regulation is agreed upon for Version 2019 of the Plan.

In the following, a short presentation of the NP is given in 2 and an overview of the distinction between marine risk and war risk insurance is provided in 3. The background for the changes and the main compromise is presented in 4 before 5 addresses the new regulation.

2 The Nordic Marine Insurance Plan and Commentary

The Nordic Marine Insurance Plan (NP) was introduced in 2013, based on the Norwegian Marine Insurance Plan 1996 Version 2010. The NP has the same characteristic features as the previous Norwegian Plan.² It is published by the Nordic Association of Marine Underwriters (Cefor)³ and shall according to an agreement between Cefor and the Norwegian, Danish, Swedish and Finnish Ship-owner Associations 3 November 2010 be revised every third year.

Contrary to the UK marine insurance conditions, the NP is an agreed document constructed by a committee consisting of participants from all interested parties, i.e. the ship-owners, the insurers, and the average adjusters, and with the Scandinavian Institute of Maritime Law as secretariat.⁴ This broad participation in the construction of the Plan has secured its neutrality and balance, and this is also reflected in the 2019 revision on the cover for interventions by state power. The method of construction makes the Plan more similar to legislation than to ordinary standard contracts.⁵ The Plan is supplemented by extensive commentaries (the Commentary) which is published on Cefor's web site.⁶

As the Plan is an agreed document, one cannot rely on the ordinary Nordic rule that a standard agreement shall be interpreted against the party drafting the clause. The similarity to legislation implies that it is more correct to interpret the Plan according to legislative principles rather than using those for contracts.⁷ This means that the Commentary is a highly relevant and important legal source both in regard to explaining the background for the provisions and the interpretation of them. The significance and weight of the Commentary is emphasized by the Commentary itself⁸ and has been accepted by the Supreme Court⁹ and

² Trine-Lise Wilhelmsen and Hans Jacob Bull, Handbook on Hull Insurance, 2017 (Wilhelmsen/Bull), p. 26.

³ <http://www.nordicplan.org/The-Plan/>

⁴ Wilhelmsen/Bull p. 26.

⁵ Wilhelmsen/Bull p. 26.

⁶ <http://www.nordicplan.org/Commentary/> The reference to the 2016 Commentary and 2019 Commentary in this article is to the Pdf download for these versions of the Plan.

⁷ Wilhelmsen/Bull p. 27.

⁸ Commentary 2019 p. 25 and Commentary 2016 p. 25.

⁹ ND 1998.216 NSC *Ocean Blessing*, cf. Wilhelmsen/Bull p. 27-28.

several arbitration cases.¹⁰ The extensive references to the Commentary in this article must be seen in this context.

3. The distinction between marine risk and war risk insurance

The scope of cover in the NP is divided between insurance against marine perils, which is regulated in Cl. 2-8 and insurance against war risk, which is regulated in Cl. 2-9. Insurance against marine risks in Cl. 2-8 is based on the all risks principle which means that the insurance covers all perils to which the vessel may be exposed to the extent they are not specially excluded. Cl. 2-8 (a) excludes perils covered by the war risk insurance as defined in Cl. 2-9. The war risk insurance is based on the named perils principle, which means that the listed perils in Cl. 2-9 are excluded from marine risk cover. The relevant provisions in NP 2013 Version 2016 reads as follows:

Clause 2-8. Perils covered by an insurance against marine perils

An insurance against marine perils covers all perils to which the interest may be exposed, with the exception of:

- (a) the perils covered by an insurance against war perils in accordance with Cl. 2-9,
- (b) intervention by a State power. A State power is understood to mean individuals or organisations exercising public or supranational authority. Measures taken by a State power for the purpose of averting or limiting damage shall not be regarded as an intervention, provided that the risk of such damage is caused by a peril covered by the insurance against marine perils,

.....

Clause 2-9. Perils covered by an insurance against war perils

An insurance against war perils covers:

...

- (b) capture at sea, confiscation and other similar interventions by a foreign State power. Foreign State power is understood to mean any State power other than the State power in the ship's State of registration or in the State where the major ownership interests are located, as well as organisations and individuals who unlawfully purport to exercise public or supranational authority. Requisition for ownership or use by a State power shall not be regarded as an intervention,

...

It follows from these clauses that some interventions are covered as war risk perils and thus excluded from the insurance against marine perils through Cl. 2-8 (a), some interventions are excluded from coverage altogether according to Cl. 2-8 (b), and that interventions (if any) that are not directly regulated in either Cl. 2-8 or Cl. 2-9 are covered under the all risks principle in Cl. 2-8. The distinction between cover and no cover is obviously very important. But also the distinction between marine risk and war risk cover is important because the war risk cover is extended in several directions. An insurance against marine perils covers damage according to

¹⁰ ND 1956.920 *Bandeirante*, ND 1956.937 *Pan*, ND 1969.126 *Grethe Solheim* and ND 2000.442 NA *Sitakathrine*, cf. *Wilhelmsen/Bull* p. 28.

the NP ch. 12, total loss according to NP ch. 11 and loss of hire according to NP ch. 16. The characteristic features of these provisions are that total loss requires that the vessel is in fact lost for the assured¹¹ and that cover for loss of hire requires damage to the vessel.¹²

In addition to this “normal” cover for marine perils, the war risk insurance provides cover for total loss if “the assured has been deprived of the ship by an intervention by a foreign State power, for which the insurer is liable under Cl. 2-9,” and the ship is not “released within twelve months from the day the intervention took place.”¹³ In such cases it is “irrelevant for the assured’s claim that the ship is released at a later time”.¹⁴ Further, if “the ship is prevented from leaving a port or a similar limited area due to blocking, the assured may claim for a total loss, if the relevant obstruction has not ceased within twelve months after the day it occurred”.¹⁵ This means that if an intervention by a foreign state that is covered by Cl. 2-9 sub-clause 1 (b) results in the assured being deprived of the ship or in the ship being prevented from leaving a port for a period of 12 month, he may require compensation for total loss.

There is also extra cover for loss of hire under the war risk insurance. First, the insurer “is liable for loss due to the ship being wholly or partly deprived of income because it is prevented from leaving a port or a similar limited area” regardless of any damage to the ship.¹⁶ Second, the insurer is also liable for loss of time if the ship is brought to a port by a foreign state power for the purpose of visitation and search of cargo, etc. and capture and temporary detention.¹⁷

4 The new regulation; background and compromise

The regulation in NP 2013 Version 2016 on state intervention raised several difficult interpretation issues. The first concerned the general exclusion for “interventions by State power” in Cl. 2-8 (b). There was no reference to the cause of the intervention, and from the wording this should be irrelevant. Even so, the Commentary stated that “Interventions made as part of the enforcement of customs and police legislation will thus, as a main rule, be covered by the insurance against marine perils to the extent the losses are recoverable in the first place”.¹⁸ This was contradictory to the wording and it was also uncertain if the comment referred to both own and foreign state interventions. Based on the historical development of

¹¹ NP Version 2016 Cl. 11-1 (The assured may claim compensation for a total loss if the ship is lost without there being any prospect of it being recovered or if the ship is so badly damaged that it cannot be repaired).

¹² NP Version 2016 Cl. 16-1 sub-clause 1. Sub-clause 2 provides cover for a limited number of other circumstances but they are less relevant here.

¹³ NP Version 2016 Cl. 15-11 sub-clause 1.

¹⁴ NP Version 2016 Cl. 15-11 sub-clause 4.

¹⁵ NP Version 2016 Cl. 15-12 sub-clause 1.

¹⁶ NP Version 2016 Cl. 15-16 sub-clause 2.

¹⁷ NP Cl. 15-17 sub-clause 1.

¹⁸ Commentary 2016 p. 40 and p. 49.

the clause it could be argued that the Commentary only referred to interventions by foreign State power, but this interpretation was uncertain.¹⁹

The second problem concerned the war risk cover for “capture at sea, confiscation and other similar interventions” in Cl. 2-9 sub-clause 1 (b). The wording did not require any war like situation or political motive. However, according to the Commentary, cover for “other similar interventions” was dependent on the intervention having a political motive.²⁰ There were no similarly expressed requirement for capture at sea and confiscation, and it was therefore uncertain whether such requirement applied also for these interventions.²¹

The last problem concerned the cover for requisition and expropriation. According to Cl. 2-9 sub-clause 2 (b), requisition was not an intervention. The meaning was that requisition should not be covered as an intervention by the provision, but the wording was confusing when applied to the exclusion for State intervention in Cl. 2-8 (b). If requisition was not an intervention it could be argued that it was not excluded from the marine insurance cover and thus covered by the all risks principle. This was obviously not the meaning with the regulation, but unclear nonetheless.²² The intervention “expropriation” was not mentioned in the regulation and should therefore as a starting point be excluded by Cl. 2-8 (b) and covered by Cl. 2-9 sub-clause 1 (b), but several remarks in the Commentary could indicate that requisition was the same as exclusion.²³

It is also clear that the interpretation of the provisions has gained importance in the later years as there have been several situations where vessels have been detained in foreign ports and kept there for a long period without a clear legal basis. Examples are the detainments of the vessels *B Atlantic* in Venezuela, *Sira* in Nigeria, and *Poavosa Ace* in Algeria. Such cases often include some fraudulent or criminal behaviour by a third party, for instance by the charterer or the receiver of the goods. From a Nordic perspective, detainment for a long period without a clear legal basis has the character of corruption or misuse of power, against which there is a clear need for insurance cover. On the other hand, such cover should be established within the framework of Cl. 3-16 on illegal undertakings.

Based on this, it was under the 2019 revision agreed that it was necessary to provide extended cover for state intervention, in particular in regard to interventions that had the character of misuse of power and corruption and where the assured was in good faith. On the other hand, it was decided that this extension should be placed under the insurance against marine perils, and that the war risk insurance should be limited to more war like situations reflecting the core of the war risk insurance. Further, the extension of cover should be limited to the perils

¹⁹ Wilhelmsen SIMPLY ch. 5.1.2.

²⁰ Commentary 2016 p. 49.

²¹ Wilhelmsen SIMPLY ch. 5.1.1.2.

²² Wilhelmsen/Bull p. 107-108, Commentary 2016 p. 40, Wilhelmsen SIMPLY ch.5.1.2.

²³ Commentary 2016 pp. 48-49.

covered. The distinction between the losses covered under the marine risk insurance and the war risk insurance should be upheld. The main results of the discussions were as follows:

- The marine insurance cover for state interventions should be extended
- The war risk insurance for interventions by foreign state power should be limited to interventions motivated by an overriding political goal
- Such politically motivated interventions by own State power should be excluded
- No amendments should be made in the losses covered, i.e. war risk cover is still better than marine risk cover
- But: the time limit to establish total loss according to Cl. 15-11 is reduced from 12 to 6 months.

The structure of the new regulation is the same as before in that Cl. 2-8 covers all risks that are not excluded, and that war risks and certain interventions are expressly excluded. However, the exclusion in Cl. 2-8 (b) is narrowed significantly compared to the 2016 wording, the cover in Cl. 2-9 sub-clause 1 (b) is narrowed somewhat, requisition is in both provisions singled out in separate exclusions to avoid uncertainty, cf. Cl. 2-8 (c) and Cl. 2-9 sub-clause 2 (c), and a new provision that excludes the operation of ordinary legal process to enforce payment of any fine, penalty, debt or right to security unrelated to a claim or liability covered by the insurance is inserted in Cl. 2-8 letter (d) and Cl. 2-9 sub-clause 2 letter (a).

5 The new provisions

5.1 Introduction

The new provisions in the 2019 Version where new text is marked read as follows:

Clause 2-8

An insurance against marine perils covers all perils to which the interest may be exposed, with the exception of:

(a) perils covered by an insurance against war perils in accordance with Cl. 2-9,

(b) capture at sea, confiscation, expropriation and other similar interventions by own State power provided any such intervention is made for the furtherance of an overriding national political objective. Own State power is understood to mean the State power in the vessel's State of registration or in the State where the major ownership interests are located. Own State power does not include individuals or organisations exercising supranational authority,

(c) requisition by State power,

(d) insolvency or lack of liquidity of the assured or the operation of ordinary legal process to enforce payment of any fine, penalty, debt or right to security unrelated to a claim or liability covered by the insurance,

Clause 2-9. Perils covered by an insurance against war perils

An insurance against war perils covers:

...

(b) capture at sea, confiscation, expropriation and other similar interventions by a foreign State power, provided any such intervention is made for the furtherance of an overriding national or supranational political objective. Foreign State power is understood to mean any State power other than own State power as defined in Cl. 2-8 (b), second sentence, as well as organisations and individuals exercising supranational authority or who unlawfully purport to exercise public or supranational authority,

...

The insurance does not cover:

(a) insolvency or lack of liquidity of the assured or the operation of ordinary legal process to enforce payment of any fine, penalty, debt or right to security unrelated to a claim or liability covered by the insurance,

....

(c) requisition by State power.

Based on this regulation one may divide the cover for State power interventions into 5 different groups:

1. Political risk/war risk – Cl. 2-8 (b)/2-9 sub-clause 1 (b)
2. Requisition – Cl. 2-8 (c)/2-9 sub-clause 2 (c)
3. State intervention in relation to illegal undertakings excluded by Cl. 3-16
4. State intervention in the operation of ordinary legal process to enforce fine etc., Cl. 2-8 (d)/2-9 sub-clause 2 (a)
5. All other state interventions: covered by Cl. 2-8

5.2 Political risk/war risk – 2-8 (b)/2-9 sub-clause 1 (b)

5.2.1 The starting points

As mentioned above, the war risk perspective of state interventions was previously defined in the Commentary through the requirement of political motive for “other similar interventions”. In the new regulation, this requirement is made general and further developed to define the distinction between state interventions that constitute a political or war related risk which naturally is covered by war risk insurance and excluded from the insurance against marine risk. The political oriented interventions are defined as “capture at sea, confiscation, expropriation and other similar interventions by ... State power, provided any such

intervention is made for the furtherance of an overriding ... political objective”. Interventions in this group from a foreign state power is covered by Cl. 2-9 sub-clause 1 (b), and thus excluded from the marine insurance cover by Cl. 2-8 (a). That leaves the mentioned interventions from own state cover, which would be covered by the all risks principle without the specific exclusion found in Cl. 2-8 (b). The clauses are identical apart from the fact that they relate to own and foreign state power.

The type of interventions are addressed in 5.2.2 below, whereas the requirement of an overriding political motive is discussed in 5.2.3 and the distinction between own and foreign state power is discussed in 5.2.3.

5.2.2 The interventions

The term “capture at sea” means that the vessel is intercepted, seized or arrested by a foreign State power at sea. This covers the situation where the insured vessel is stopped at sea by a war ship or military ship using power or threatening to do so.²⁴ Under the previous versions it has been argued that the concept “capture at sea” comprised a situation where the vessel was arrested and detained in port without a foregoing capture,²⁵ but it follows clearly from the Commentary that this is outside the concept of “capture at sea” today.²⁶ On the other hand, when the vessel is captured at sea, it will normally be escorted by power into port for further control. As long as the detainment in port is due to the same cause as the capture, the stay in port must be regarded as part of the capture.²⁷

The expression “capture at sea” presumes that the arrest or seizure is enforced by the authorities by the use of physical power or the threat of use of such power. It has been argued that even a “voluntary” call at a port may be deemed as a capture if the alternative was an enforced measure by the authorities, but this was never tested in court.²⁸ This issue is now solved by the Commentary stating that ²⁹

“If the vessel sails into port without any threats from the foreign State, this is outside the concept of “capture at sea”. This is true even if the State could have forced the vessel to enter the port”.

The term “confiscation” is from the latin *confiscare* “to consign to the *fiscus*, i.e. transfer to the treasury” and is a legal form of seizure by a government or other public authority. The word is also used, popularly of any seizure of property as punishment or in enforcement of the

²⁴ Commentary 2019 p. 56.

²⁵ Brækhus/Rein p. 69.

²⁶ Commentary 2019 p. 56-57.

²⁷ Commentary 2019 p. 57.

²⁸ Brækhus/Rein p. 69, Wilhelmsen/Bull p. 96.

²⁹ Commentary 2019 p. 57.

law.³⁰ According to the Commentary it means an appropriation of the vessel by a State power without compensation.³¹ It includes “condemnation in prize”, where a warring power will invoke international or domestic condemnation in prize rules.³²

The new regulation also includes “expropriation” in the list of interventions. The concept of “expropriation” means according to the Commentary that “the State takes over the vessel for a purpose deemed to be in the public interest.”³³ As mentioned, it was uncertain how this risk should be treated in the previous Plan, but the Plan Committee found that expropriation is more similar to confiscation than to requisition. Both expropriation and confiscation mean a permanent loss of ownership, whereas requisition typically is for a limited period in time and can also be limited to the use of the vessel. It was therefore agreed that expropriation by a foreign state should be covered on a similar basis as confiscation. However, whereas confiscation does not generate compensation, when the vessel is expropriated, the assured may be compensated for his loss. It follows from general insurance principles and is also stated in the Commentary that any “such compensation must be deducted from the liability of the insurer”.³⁴

The term “other similar interventions” indicates that the enumeration in Cl. 2-8 (b) and Cl. 2-9 sub-clause 1 (b) is not exhaustive, and that other types of interventions by a foreign State power may also be included. However, the condition is that the intervention be “similar” to capture at sea, confiscation and expropriation. Typical for capture at sea, confiscation and expropriation is that the owner is deprived of the ownership or the right to use his vessel.³⁵ This is further emphasized in the Commentary:³⁶

“the intervention must have similar consequences for the assured as “capture at sea” and “confiscation”. Typical for these interventions is that the ship-owner is being divested of the right of disposal of the ship. This is therefore a necessary condition for an intervention to be covered under this group. An intervention that satisfies this criteria can of course take place while the vessel is in port.”

The type of interventions that are covered under NP appears to be fairly similar to the State interventions that are covered according to the Institute War and Strike Clauses (Hulls-Time) 1/10/83 as amended 1/11/95 (IWSCH) (Cl. 281),³⁷ but some of the concepts used are different. IWSCH Cl.1.2 covers “capture seizure arrest restraint or detainment”, whereas Cl. 1.6 covers “confiscation or expropriation”. The terms are not mutually exclusive, and overlap

³⁰ <https://en.wikipedia.org/wiki/Confiscation>

³¹ Commentary 2019 p. 57, see also Commentary 2016 p. 48 and Brækhus/Rein p. 71.

³² Commentary 2019 p. 57, see also Commentary 2016 p. 48.

³³ Commentary 2019 p. 57.

³⁴ Commentary 2019 p. 57.

³⁵ Wilhelmsen/Bull p. 96.

³⁶ Commentary 2019 p. 57.

³⁷ https://www.garex.fr/documents/IWSC_HULL_CL281_1995.pdf

to a certain extent.³⁸ “Capture” is a taking by the enemy as prize, in time of war, or by way of reprisals, with intent to deprive the owner of all dominion or right of property over the thing taken.³⁹ “Capture” seems to presume a belligerent act⁴⁰ and is prima facie a case of total loss, which gives the assured an immediate right to notice of abandonment.⁴¹ The IWSCH term capture is therefore closely linked to condemnation by a prize court which is included in the intervention “confiscation” according to NP Cl. 2-9 sub-clause 1 letter b.

The Nordic concept “capture at sea” therefore seems more parallel to “seizure”, which is a broader concept than capture and includes other forms of taking, such as one by revenue or sanitary officers of a foreign state⁴² or due to smuggling by the master.⁴³ It embraces every act of taking forcible possession either by lawful authority or by overpowering force.⁴⁴ The seizure need not be belligerent.⁴⁵ This means that “seizure” may be a state intervention, but the concept is broader and includes taking the vessel by forcible means from other groups.

The IWSCH terms “confiscation” and “expropriation” refer to acts done on the parts of governmental authorities or by persons professing to represent those in power.⁴⁶ There is no judicial determination on these concepts in relation to this particular clause.⁴⁷ Such acts will normally also be included in the term “restraint”. Both expressions are probably confined to circumstances where the appropriation of the vessel to public use is intended to be permanent or to be reversible only on payment of some fine or penalty or other exaction.⁴⁸ It is argued that these expressions are confined to circumstances where no compensation is paid,⁴⁹ and that the clause is designed to “deal with the regrettable propensity of certain states to seize ships and other insured objects, often under the flimsiest of pretexts and sometimes by the most dubious means”.⁵⁰

IWSCH do not cover “other similar interventions”, but the expressions “arrests, restraints, and detainments” seem to cover the most practical situations.

³⁸ Arnould, *Law of Marine Insurance and Average*, 18 ed. 2013 (Arnould), p. 1225 and 1229, Hudson, Madge, Sturges, *Marine Insurance Clauses*, 5 ed. 2012, p. 342 and p. 360.

³⁹ Arnould p. 1223, note 165.

⁴⁰ Arnould p. 1223, note 166, Hudson et al p. 342.

⁴¹ Arnould p. 1225.

⁴² Arnould p. 1223.

⁴³ Keith Michel, *War, Terror and Carriage by Sea*, 2004 (Michel), pp. 203-204.

⁴⁴ Arnould p. 1224, Hudson et al p. 342, Michel p. 205.

⁴⁵ Michel pp. 205-207.

⁴⁶ Arnould p. 1229.

⁴⁷ Michael D. Miller, *Marine War Risks*, 3 ed. 2005, p. 224.

⁴⁸ Arnould p. 1229.

⁴⁹ Arnould p. 1229.

⁵⁰ Miller p. 225.

5.2.3 Overriding political motive

The most significant amendment is the condition that “any such intervention is made for the furtherance of an overriding national political objective”. A similar requirement followed from the 2016 Commentary in regard to “other similar interventions”, but it has not been clear whether such requirement applied also for capture at sea and confiscation. It follows from the 2019 Commentary that the purpose is to delimit the cover in relation to both ordinary administrative procedures and misuse of power or corruption from the administration:⁵¹

“It is therefore clear that interventions in accordance with applicable law for the purpose of enforcing customs-, police-, safety- or navigation-regulations or any private law rights against the insured vessel are outside the scope of the war insurance cover. If the ship is arrested/captured at sea by the Coast Guard or representations of the police or customs authorities to hinder or investigate illegal fishery, import or export or breach of trade regulations, this will not be covered. The same is true if the ship is arrested or detained in port because of doubt as to whether the ship is compliant with the rules regarding technical and operational safety, or because the crew is suspected of smuggling. Obviously, losses arising from the ship being detained or seized as part of debt-recovery proceedings against the owners are not covered, either; this follows in any event from the exclusion in sub-clause 2 (a).

It does not matter whether such police or customs intervention is caused by illegal acts performed by a third party, for instance the charterer or the master or crew. Further, it is not decisive whether the State intervention is based on the legislation of the country or may be seen as abuse of power or corruption, if the intervention does not have an overriding national or supranational political objective. However, if an overriding national or supranational political objective is detected, it does not matter if the State power formally justifies the interventions with for instance police or customs regulations, or if the intervention has the character of abuse of power or corruption.”

The expression “overriding national political objective” is based on four arbitration cases in regard to the war risk cover for interventions by foreign state power under the 1964 Plan and the 2013 Plan Version 2016, The *Germa Lionel* award 11 June 1985 (unpublished), ND 1988.275 NA *Chemical Ruby*, a case that was settled (the *Wildrake* case), and the *Sira* award 27 October 2016 (unpublished). The *Wildrake* case concerns capture at sea followed by detainment in port:⁵²

The diving ship *Wildrake* was working on taking up metals from a wreck of war 17.8 nautical miles outside Tunis, on the Tunisian Continental Shelf but outside the territorial waters, when it was approached by a Tunisian cannon boat and ordered to sail to the naval port in Bizerte. Here, the ship was given a customs fine and the metals were confiscated. The ship stayed in Bizerte for about 14 days. The *average adjuster* that decided the case stated that there was a «capture at sea», but raised the question whether the capture was an intervention to enforce police and customs legislation, in which case it would fall outside the war risk cover. However, based on a concrete and individual assessment of the political situation in Tunis at the time, he concluded that the capture could not be seen as an intervention to enforce police and customs regulation, and thus constituted a war peril.

⁵¹ Commentary 2019 pp. 57-58.

⁵² See Brækhus/Rein p. 75 and Wilhelmsen/Bull pp. 94.

The *Germa Lionel* award and ND 1988.275 NA *Chemical Ruby* concern detainment in port without a previous capture:⁵³

Germa Lionel was on a voyage from London to discharge her cargo first in Tripoli, thereafter in Benghazi in Libya. During the approach to the port of Tripoli the vessel had problems with the electric wiring which caused a lamp to blink. The Libyan authorities suspected that the vessel was communicating with groups in Libya which were opposed to the President, Colonel Ghaddafi. When the vessel had berthed, Libyan troops boarded the vessel. The crew was interrogated. One of the crew members died of mistreatment. The authorities checked the cargo and the vessel, but it appeared that the suspicions were without any foundation. The vessel's agents in the port incurred some costs, and the question was if these costs were covered by the war risk insurance. The main issue for the arbitrator was whether the Libyan authorities' action could be seen as a reasonable action as part of enforcing Libyan laws. The interrogation of the crew and the harshness shown were found to be of a nature which constituted a war peril under the Plan.

In the *Chemical Ruby* case the vessel was detained for about 6 months by Nigerian authorities based on an unfounded suspicion that the vessel tried to ship contaminated soya oil into the country. The starting point was that it was an enforcement of Nigerian legislation, and thus not a war risk. Even if it took about 6 months for the vessel to be released, this was not so extraordinary as to constitute a war risk. The detainment was not made to achieve some political gain or motivated by purposes which would be typical for war and war-like conditions as opposed to a State's right to enforce compliance with national laws.

The decisions in these three cases are further analyzed in the *Sira* arbitration award from 2016.⁵⁴

Sira arrived at Lagos, Nigeria, 1 February 2015 for discharge of palm oil, and was the same day boarded by a security team engaged by the ship-owner, consisting of an unarmed British security advisor and four armed men from the Nigerian Navy. Permission had been obtained in advance from the immigration authorities for the advisor to visit *Sira* for inspections. Between 2 and 14 February, *Sira* and its documents were inspected several times by the Nigerian Maritime Administration and Safety Agency (NIMASA), whose task it is to secure safety at sea. On 5 February there were two attempts to board *Sira*, presumably by Nigerian pirates, which were stopped by the security guards on board. On 14 February the cargo was discharged and *Sira* was ready to sail. However, the captain was told by NIMASA that *Sira* could not sail before this had been clarified with the Commanding Officer. On 13 March NIMASA formally arrested the ship because it had a foreign security advisor on board, which was claimed to be "illegal and unacceptable as it is not supported under our constitution". *Sira* was released 31 March after having signed a letter of indemnity holding NIMASA free from the losses caused by the detainment. The owner argued that the detainment of *Sira* constituted a war peril according to NP Cl. 2-9 letter (b), whereas the insurer argued that the detainment was outside the scope of this provision.

The arbitrator made the following summary of the legal sources as defined above:

⁵³ See Brækhus/Rein pp. 74-75 and Wilhelmssen/Bull p. 97.

⁵⁴ Wilhelmssen/Bull pp. 98-99.

“For the intervention to be covered under the war risk insurance, the intervention must be made for the furtherance of overriding political goals. Such interventions are interventions typical for war and times of crises, and can often be explained by foreign policy considerations. The reason for the intervention may be a warranted or not warranted suspicion that the ship has breached rules to protect the security of the State involved. It is not decisive that the general political situation in the State involved has been contributory to the intervention.

A State intervention which is tied to regulation or control of normal commerce and shipping is not covered by war risk insurance. Relevant interventions will first and foremost be tied to breach of or suspicion of breach of customs, currency, or police legislation. It is normally not decisive if such intervention due to its duration represents misuse of power. However, this can be different if the misuse of power takes the form of a regular police act or similar act, but in reality is part of an action motivated primarily by overriding political objectives.”

The arbitrator found that based on these guidelines the detention of *Sira* did not constitute “other similar interventions” in regard to NP Version 2013 Cl. 2-9 sub-clause 1 letter (b). Even if a detention of 1 ½ months constituted an “intervention”, it was not documented whether the action was motivated primarily by political objectives. This latter expression represented a somewhat imprecise translation of the Norwegian text “til fremme av et overordnet politisk mål”, and meant that the intervention should be connected with the actual State’s policy in general and in relation to that particular area. Typically it is the task of the central authorities to outline such overriding political goals, such as the president, the parliament, the government at large, or a particular ministry. Authorities at a lower level will not have the power or authority to make this type of political assessment, as their mandate will be limited to exercising given authority in a specific and limited area. NIMASA was seen as an organ at a lower level in the State hierarchy, and this organ did not make decisions on a superior level but exercised their agency within a legal framework and in conformity with political guidelines provided by others.

The arbitrator also held that since one of NIMASAS’ tasks was to fight piracy, regulation of how piracy should be avoided and the role foreign security guards should have in this respect must be seen as ordinary police legislation. Even if it constituted misuse of power to detain *Sira* without issuing an immediate written decision, it was not documented whether an overriding political goal had played a significant role in the detainment.

Based on the *Sira* case, “overriding political goals” must normally be typical for war and times of crises and represent a sanction against breach of security rules and/or explained by foreign policy considerations. It is not sufficient that the intervention can be explained by the general political situation in the state. A state intervention which is tied to regulation or control of the normal commerce and shipping is not covered by the war risk insurance. This is true even if the intervention constitutes misuse of power unless the misuse of power in reality is motivated by overriding political objectives. The new regulation has however added “national” to emphasize that a public State is involved.⁵⁵

⁵⁵ Commentary 2019 p. 58.

It follows from this that abuse of power is neither a necessary nor a sufficient condition for war risk cover. If an overriding national political goal is detected, there is no need to establish misuse of power. On the other hand, misuse of power need not be explained by such overriding political motives. Misuse of power may be a reflection of a dysfunctional State and indicate another motive, but misuse of power is not in itself a necessary condition for cover.⁵⁶

In Cl. 2-9 sub-clause 1 (b) the term “supranational” is added to emphasize that the concept of “foreign State power” includes both public and supranational power, cf. further below.

The UK conditions contain no requirement of political motive. Capture appears to be a political act per se, but the other perils are not necessarily so. However, it appears that by tradition and rule 10 of the “Rules of Construction of Policy” in Sch. 1 to the Marine Insurance Act 1906 that “arrests, restraints, and detentions” refer to “political or executive acts”, and do not include a loss caused by ordinary judicial process.⁵⁷ The words “ordinary judicial process” relate to the administration of justice in civil proceedings.⁵⁸ It does not include a detention of the ship by judicial process for the purpose of enforcing the public or criminal law of the country. Thus the fact that a judicial process is in operation does not deprive the restraint of its character of being a political or executive act. The cover includes a situation where the vessel is seized for a smuggling offence and in subsequent legal proceedings an order for her confiscation was issued under which the ship continued to be detained.⁵⁹ Further, only “ordinary” judicial process is outside the scope of the cover. If an order for restraint is issued by a court not acting “bona fide” as an independent judicial body and the situation is effectively an attempt at extortion, there is no “ordinary judicial” process.⁶⁰ Added to this restriction in the interpretation of the covered interventions, Cl. 5.1.5 also contains a general exclusion for “the operation of ordinary judicial process”, and clause 5.1.4 excludes “arrest restraint detention confiscation or expropriation under quarantine regulations or by reason of infringement of any customs or trading regulations”.

Based on this it appears that the UK war risk cover is better than the Nordic in the sense that it covers interventions that is outside “ordinary judicial process”. This means that it covers corruption and misuse of power and also detention etc. of the ship by judicial process for the purpose of enforcing the public or criminal law of the country, but not if the intervention is “by reason of infringement of any customs or trading regulations”.

⁵⁶ Commentary 2019 p. 58.

⁵⁷ Arnould p. 1226, Hudson et al p.342.

⁵⁸ Arnould p. 1228.

⁵⁹ Arnould p. 1228.

⁶⁰ Arnould p. 1228.

5.2.6 Own and foreign State power

The cover in Cl. 2-9 sub-clause 1 (b) refers to “foreign State power”, whereas the exclusion in Cl. 2-8 refers to “own State power”. A state power is a state that is recognized under international law and their local entities (provinces, communes, etc.).⁶¹

The concept of “own State power” is defined in Cl. 2-8 as “the State power in the vessel’s State of registration or in the State where the major ownership interests are located. Own State power does not include individuals or organisations exercising supranational authority”.

The term “State of registration” points in the direction of one State and may cause a problem in the event of so-called double registration in connection with bareboat chartering. This is solved in the Commentary by stating that “in the event of double registration in both the owner State and the bareboat-charterer State, both States must be regarded as “the State of registration” for the purpose of this provision.”⁶² The term “controlling ownership interests” seems according to the wording to mean the country where the largest proportion of the ownership interests are located. According to the Commentary, however this is not necessarily decisive as “the term opens the door to a discretionary assessment, where other elements such as limitations on voting rights, the composition of the ownership interests, co-operation arrangements etc. may lead to the conclusion that the controlling ownership interests are located in another country.”⁶³

The concept of “own State power “does not include individuals or organisations exercising supranational authority”. This conforms to the previous definition of own State power.

Foreign State power is defined in Cl. 2-9 sub-clause 1 (b) as “any State power other than own State power as defined in Cl. 2-8 (b), second sentence, as well as organisations and individuals exercising supranational authority or who unlawfully purport to exercise public or supranational authority”. The expression “foreign State power” therefore consists of three groups:

The first group is all persons or organizations exercising public state power except for own state power.

The second group is all such persons or organizations exercising supranational authority. A supranational power is a supranational organization like the UN, EU and NATO, to the extent such organizations exercise power of the same type as a state could do.⁶⁴ Hence, if an intervention is implemented by representatives of a league of States (alliance, group, block), it

⁶¹ Wilhelmsen/Bull p. 93.

⁶² Commentary 2019 p. 44.

⁶³ Commentary 2019 p. 45.

⁶⁴ Commentary 1964 p. 20, Commentary 2016 p. 50, Wilhelmsen/Bull p. 93.

must be regarded as an intervention by a foreign State power. Confiscation or expropriation by NATO or a similar organization will accordingly be covered by Cl. 2-9 sub-clause 1 (b).⁶⁵

The third group is all persons and organisations which unlawfully pass themselves off as being authorised to exercise public or supranational authority. Such organizations or persons may according to the circumstances be characterised as piracy, which is covered by Cl. 2-9, sub-clause 1 (d).⁶⁶

The IWSCH do not make a similar distinction between “State power”, “foreign State power” and “own State power”. The starting point for the cover is the interventions regardless of who makes them, but interventions from “the country in which the Vessel is owned or registered” are excluded in Cl. 5.1.3. The main result appears however to be the same, i.e. that war insurance does not cover interventions by own state power.

5.3 Requisition

The intervention “requisition” by state power is excluded in Cl. 2-8 (c) and Cl. 2-9 sub-clause 2 (c). It is therefore clear that requisition is not covered by the expression “other similar interventions” in 2-9 sub-clause 1 (b), and also that this peril is not covered by the all-risk cover in Cl. 2-8. Even if this is stated in a new letter in both clauses, the solution was meant to be the same in the previous Plan.⁶⁷ The exclusion is for “requisition” in general and includes both requisition for “ownership” and for use.⁶⁸ Requisition is typically performed by own State power, but the exclusions apply both to own and foreign State power.

The previous Plan did not define the concept of requisition and the relationship between requisition and expropriation was not clear. It was however implied that requisition was the same as politically motivated expropriation.⁶⁹ In the new Plan, a distinction is made between expropriation, that is covered, and requisition, that is excluded. The reason is that whereas compensation is normally paid for requisition, this is not always the case for expropriation, in particular expropriation by foreign state power.⁷⁰ However, the Commentary emphasize that the “concepts may overlap if the period of requisition is uncertain and/or compensation is paid for the expropriation.”⁷¹

⁶⁵ Commentary 2019 p. 59.

⁶⁶ Commentary 1964 p. 20, Commentary 2016 p. 51, Wilhelmsen/Bull p. 93.

⁶⁷ Commentary 2019 p. 45.

⁶⁸ Commentary 2019 p. 45.

⁶⁹ Commentary 2016 p. 49, Commentary 2019 p. 46.

⁷⁰ Commentary 2019 p. 46.

⁷¹ Commentary 2019 p. 46.

There is no court decision that provides a definition of the concept of requisition, and the concept is not clear either in Nordic or in English marine insurance. The Commentary has the following explanation of the concept:⁷²

“Requisition” in the Plan means that the State “requisite” the vessel for ownership or use according to legislation and in national interest. The relevant legislation will normally provide a formal procedure to be followed. Requisition is typically limited in time and the purpose is that the vessel shall be redelivered to the owner after a certain period. Normally, but not necessarily, the authority to requisite vessels will be limited to vessels under the State’s own flag. The rule is also that the State compensate for the use of the vessel and pay for any damages during the period of use, but this is not a requirement for the exclusion to apply”.

Requisition is thus not covered by any insurance. If the requisition is made by a Nordic State it must be expected that the state will pay compensation to the owner and it is not natural to cover this by insurance.⁷³ There is no guarantee that a foreign state power will adhere to these principles, but there is limited availability of reinsurance for this kind of purely political risk.⁷⁴

The exclusion for requisition conforms to IWSCH 1995, where requisition is not mentioned as a peril in Cl. 1.2 or 1.6, but excluded in Cl. 5.1.2.

5.4 State intervention in relation to illegal undertakings excluded by 3-16

Illegal undertakings are regulated in NP Cl. 3-16:

The insurer is not liable for loss which results from the vessel being used for illegal purposes, unless the assured neither knew nor ought to have known of the facts at such a time that it would have been possible for him to intervene.

...

The insurance terminates if the vessel, with the consent of the assured, is used primarily for the furtherance of illegal purposes.

There is no amendment in this provision, but the aim of the extended cover in Cl. 2-8 for own and foreign state intervention is to align the cover for state intervention with Cl. 3-16.⁷⁵ The previous absolute exclusion for State intervention in Cl. 2-8 (b) meant that interventions that were caused by illegal undertakings were excluded whether or not the assured was in good faith. This was contrary to the provision in Cl. 3-16, which provides protection for the assured in cases where loss is caused by the vessel being used for illegal purposes if the assured “neither knew nor ought to have known” this. Even if the vessel is used primarily for the

⁷² Commentary 2019 p. 46.

⁷³ Commentary 2019 p. 46 and p. 59-60.

⁷⁴ Commentary 2019 p. 60.

⁷⁵ Commentary 2019 p. 43.

furtherance of illegal purposes, the assured is protected provided he has not consented to such use. With the new regulation in Cl. 2-8, the assured is covered if capture at sea, detainment or similar interventions are caused by a criminal act from the master or crew, the charterer or the sender or receiver of the goods, provided the assured is in good faith. Examples are smuggling of drugs, or import of illegal goods.

IWSCH Cl 5.1.4 excludes “arrest restraint detainment confiscation or expropriation ... by reason of infringement of any customs or trading regulations”. This exclusion applies to both own and foreign state. The term “customs regulation” is interpreted to have a wide meaning referring to laws in force in the country concerned, whatever their form, which deal with smuggling or other offences in the realm of customs.⁷⁶ It includes smuggling of narcotics.⁷⁷ It does not matter whether or not the owner is in good faith.⁷⁸ The concept of “trading” is interpreted to refer to regulation forbidding, controlling or otherwise regulating the sale or importation of goods into a country and the carriage of goods for that purpose.⁷⁹

5.5 The exclusions in Cl. 2-8 (d) and Cl. 2-9 sub-clause 2 (a)

Since Cl. 2-8 (b) and Cl. 2-9 sub-clause 1 (b) is now limited to interventions for the furtherance of overriding national political goals, any other intervention would be covered by the all risks principle. As this is a very wide scope of cover, it was necessary to restrict it somewhat. Such restriction is made through an exclusion for “the operation of ordinary legal process to enforce payment of any fine, penalty, debt or right to security unrelated to any claim or liability covered by the insurance” in Cl. 2-8 (d). A similar exclusion is found in Cl. 2-9 sub-clause 2 (a). As war risk insurance is based on the named perils, this exclusion is of less importance, but will be relevant in cases of combination of the perils excluded and a peril that is covered.

The exclusion applies only to legal proceedings to enforce a debt or obtain security for a debt. It does not apply to e.g. proceedings related to public law matters such as the enforcement of customs or trading regulations. Such cases are governed by the rules in Cl. 3-16,⁸⁰ cf. above. The provision has a rather limited application as it is unlikely that the operation of ordinary legal processes will be the direct cause of physical damage or total loss of the vessel. The reason for the provision is that the possibility cannot be entirely discounted, and the aim is also to avoid insurance cover if damage triggers delay or legal costs to enforce the payment of debts or other legal rights against the assured or the vessel.⁸¹

⁷⁶ Arnould p. 1249.

⁷⁷ Hudson et al. p. 365-366, Arnould p. 1249.

⁷⁸ Hudson et al. p. 366, Arnould p. 1250.

⁷⁹ Arnould p. 1250.

⁸⁰ Commentary 2019 p. 49.

⁸¹ Commentary 2019 p. 48.

The exclusion can be compared to IWSCH Cl. 5.1.5, which excludes the “operation of ordinary judicial process, failure to provide security or to pay any fine or penalty or any financial cause”, but appears to be more narrowly. The words “ordinary judicial process” relates to the administration of justice in civil proceedings and does not include judicial process for the purpose of enforcing the public or criminal law of a country.⁸² Thus, this part of the exclusion does not apply to interventions based on public or criminal law, but it is still wider than that of the NP. The expression “failure to provide security or to pay any fine or penalty” on the other hand extends to the areas of public and criminal law and also applies whether or not the owner is liable for the failure.⁸³

5.6 Other interventions

All interventions that are not regulated by the provisions presented above in 5.2 -5.5 will be covered by the all risks principle in Cl. 2-8. This means that all interventions from own state, foreign state, or supranational power that is not made with an overriding national or supranational political goal will be covered by the insurance against marine perils unless the intervention is excluded by Cl. 2-8 (c) or (d) or Cl. 3-16. There is no restriction in the cover related to the kind of intervention (apart from requisition, which is excluded) or in regard to the legal basis for the intervention, unless Cl. 3-16 applies. The result is that interventions such as capture at sea, arrest or detainment in port or the like - due for instance to suspicion or investigation of breach of regulations concerning fishery, customs, pollution, safety, navigation, or the technical operation of the vessel will be covered.⁸⁴ It does not matter whether the intervention has the character of ordinary administrative procedures (apart from the exclusion in Cl. 2-8 (d) for “operation of ordinary legal process to enforce payment of any fine, penalty, debt or right to security unrelated to a claim or liability”), or appears to be misuse of power, corruption or extortion by the authorities. In some countries cases which commence as a regular administrative, police or judicial process can easily degenerate in excessive delays or attempts at extortion. If the intervention in such case turns out to be for the purpose of an overriding national political objective, the intervention will be covered by the war risk insurer according to Cl. 2-9 sub-clause 1 (b). However, there may be cases where no such national political motive can be detected, but the interventions are clearly outside the scope of normal due process. Exemplified are the *Chemical Ruby* and *Sira* arbitration cases referred above, where there were excessive delays but no clear overriding political objective. Such cases will then be covered by Cl. 2-8 according to the all-risks principle.⁸⁵

The new provision in Cl. 2-8 (b) only regulates the peril that is insured. There are no changes in the regulation of losses that are covered by the marine insurer. The traditional difference

⁸² Arnould p. 1252.

⁸³ Arnould p. 1252.

⁸⁴ Commentary 2019 p. 43.

⁸⁵ Commentary 2019 pp. 43-44.

between losses covered under a marine policy and that covered under a war policy and which is outlined in ch. 3 above is therefore upheld. The standard cover provided by the Plan is not intended to provide the kind of “political risk” cover that would more fully protect owners of vessels trading to countries that have a more or less dysfunctional political system. Insurance against political risk is available in the market and it is not natural to spread this risk over all assureds that do not trade in these areas.⁸⁶

6 Summary and some conclusions

The new regulation of intervention of state power in the NP 2013 Version 2019 is aimed to clarify the cover for such interventions and to extend the cover for non-politically motivated measures taken by any state. Based on the new regulation, state interventions may be classified into 5 different groups:

1. The catastrophic and political oriented risk inherent in measures taken by a state for the furtherance of an overriding national or supranational goal. Such risk is most naturally placed under the war risk insurance if the measure is taken by a foreign State or supranational power, cf. Cl. 2-9 sub-clause 1 (b), but outside the scope of ordinary marine insurance if taken by own state, cf. Cl. 2-8 (b).
2. Requisition, which would typically be made by own State against compensation, and therefore also outside the ordinary insurable risk, Cl. 2-8 (c) and 2-9 sub-clause 2 (c).
3. State interventions due to illegal entities where the insurer is not liable according to Cl. 3-16, are not covered.
4. State intervention as part of the operation of ordinary legal process to enforce payment of any fine, penalty, debt or right to security unrelated to any claim or liability covered by the insurance, is excluded in Cl. 2-8 (d) and Cl. 2-9 sub-clause 2 (a).
5. All other State interventions by own or foreign States, which are covered by the all risks principle in Cl. 2-8. This group consists of non-political interventions based on any legislation not excluded above and interventions that from a Nordic perspective has the character of misuse of power, corruption and extortion. This cover is the main amendment in the new version.

Compared to the UK war risk conditions the war risk cover under 1 is narrowed somewhat because there is no explicit reference to motive, but similar limitations are obtained through rule 10 requiring a “political or executive act” which does not cover loss caused “by ordinary judicial process”, and the exclusions in IWSCH Cl. 5.14 and 5.1.5. The exclusions in nos. 2-4 correspond to similar exclusions in IWSCH Cl. 5.1.2, 5.1.4 and 5.1.5. The main difference therefore is group 5, where the NP cover now offered for marine risks goes much further than the UK conditions.

⁸⁶ Commentary 2019 p. 44.

The process has demonstrated the advantages of operating with a Standard Revision Committee and continuous renewal procedures to amend the Plan to adjust to the political development and the changing financial needs of the assureds.