

OFFICERS OF THE ASSOCIATION*SECRETARIES*

YEAR	NAME	YEAR	NAME
1879-1880	JOHN H. GOURLIE, JR.	1931-1952	HERMAN A. HOLSTEN.
1880-1888	WILLIS M. TYLER.	1953-1967	ANTHONY B. CATALDO.
1888-1900	CHARLES C. TYLER.	1967-1970	SYDNEY W. WILDE.
1900-1911	EDWARD SANFORD.	1970-	FRANK E. HOURIGAN.
1911-1931	HENRY PEGRAM.		

1988

REPORT

OF

THE 110th ANNUAL MEETING

OF THE

**ASSOCIATION OF AVERAGE ADJUSTERS
OF THE UNITED STATES**

Held October 6, 1988 at 10:00 A.M.
in the meeting room of
The Association of the Bar
of the City of New York
42 West 44th Street
New York, New York

CHAIRMAN: JOHN A. HICKEY

The Chairman: Good morning, ladies and gentlemen. Welcome to the 110th meeting of your Association. I have some logistics to take care of, first. The first thing is that New York City is very, very tough these days on smoking, and if you'll look around, you'll see that there's "no smoking" signs all over the place, which really bothers me because I love cigars, as many of you know.

The second little bit of logistics. If you desire to speak, there are microphones there, there and on the sides. Please use them so everybody has the benefit of your wisdom.

And the third little bit of business is that I lied to one of the gentlemen who was at the dinner last night. I told him my speech was 48 pages. I just checked it, Bill. It's 52.

You think I'm kidding? (*Laughter*)

The reason I expanded it to 52 pages, I understand there are some people who may desert the dinner tonight, for a cruise with some underwriting organization. 52 pages, you may not make the boat. (*Laughter*)

Ladies and gentlemen, the Secretary has informed me that we have a quorum present.

The first item on the agenda is the reading of the minutes of the previous Annual Meeting, held on October 1, 1987. The Chair will entertain a motion to dispense with the reading of those minutes, and that they be approved as circulated.

A Voice: So move.

A Voice: Second.

The Chairman: Those in favor? ("*Ayes*" heard.) Opposed? (*No response*) The motion is carried.

Before we get into the formal agenda of this meeting, it's my pleasure to be able to introduce some of our distinguished visitors from abroad, and I would ask them to stand up and be welcomed by those assembled here.

From London, we have Mr. Alan Birch, the Chairman of the Association of Average Adjusters of the UK. Mr. Birch. (*Applause*) It's nice to have you here, Alan.

Mr. Birch: Thank you.

The Chairman: From Montreal, we have Mr. Graham Deere, the Chairman of the Association of Average Adjusters of Canada. Mr. Deere. (*Applause*)

From Rotterdam, we have Mr. J. Gerritzen, President of the European Association of Average Adjusters. Mr. Gerritzen. (*Applause*)

And a gentleman who traveled quite a distance and shows up at an awful lot of these meetings, I'm glad to

welcome him back again - - the President of the Brazilian Association, Mr. Rucemah Pereira. (*Applause*) It's nice to see you.

We do have a couple of other people that I should acknowledge, and I will acknowledge. Mr. Jeffrey Hudson and Mr. Jeffery Allen, partners in the British Adjusting firm of E. Robert Linley. (*Applause*)

Someone I dare not forget, because if my memory serves me correctly, I think this is his 26th in a row, coming to New York, John Cantello, Canada. (*Applause*)

Is that correct John? Is this 26 in a row?

Mr. Cantello: 27, John, but who counts?

The Chairman: Who counts? I thought you were only 26 years old.

And one other little announcement I would like to make. Also in attendance today is a first full member, who is certifiably not a gentleman. Marion Feugate. Where are you Marion? (*Applause*)

During the course of the year, it was my privilege and pleasure to represent our Association at the Annual Meeting of the British Association. I did not make it to Canada. I was sidetracked and wound up in Athens, instead.

The time spent in London was most enjoyable. John Wilson was a superb host at the Chairman's Dinner, and for those of you who have never been to the Association's dinner at the Savoy, I just won't even attempt to describe it. It was absolutely phenomenal. I recommend to anybody who has a chance, to go. You just won't believe it.

The title of my address has apparently piqued some interest by some people. There is some speculation that the title is somewhat macabre. Most people are interested - - what is he going to talk about? What does he mean by "Is This War?"

In September of 1987, I had the privilege of Chairing an International Union of Marine Insurance Workshop in Nice. The topic of discussion was, Accidents in an Area of Hostilities, Marine and/or War Perils.

This little adventure made my choice of the topic for this address quite simple. In the next few minutes, I hope you will learn, as I did, that the topic is far from being simple. I would also caution you that being an underwriter, and not an average adjuster, may have colored my views just a tiny bit.

It's taken years of litigation to arrive at the present wording of the FC&S Warranty. And many students experience difficulty in understanding the rather cumbersome way in which war risks are covered.

Mr. Justice Mocatta, in 1970, in the case of the Panamanian Orient Corporation was prompted to say, and I quote him: "It is probably too late to make an effective plea that the traditional methods of insuring against ordinary marine risk and what are usually called war risk, should be radically overhauled. The present method, certainly as regards war risk insurance is torturous and complex in the extreme. It cannot be beyond the wit of underwriters, and those who advise them in this age of law reform, to devise more straightforward and easily comprehended terms of cover." End of a very interesting quote.

When marine and war risk are insured with different sets of underwriters, it can create real difficulty for the assured, unless great care is taken by the broker to assure that the policies are complementary.

The fundamental problem usually arises from the need to establish which policy should pay the claim. In other words, whether the proximate cause of loss is a marine peril or a war peril. The unexplained disappearance of a vessel makes this determination more difficult. Sometimes the last message is significant, but often it is not. That's probably the case with my speech, my last message is not very significant.

Under the pre-World War I authorities, if only a loss at sea was shown, it was presumed to have resulted from a marine peril of the sea. But this presumption has been invalidated by unrestricted submarine warfare, far-ranging aircraft, "Exocet" missiles, indiscriminate mining of sea lanes, and similar expansions of warfare.

Sometimes a war risk can be proved circumstantially by showing satisfactory weather at a time, and near the course of the vessel, an attack on other vessels in about the same area.

The time that must elapse before a vessel is presumed a total loss, depends on the circumstances of the particular case. When an appropriate time has passed, under British practice, she is posted at Lloyd's as missing. Therefore, a claim may be made on the underwriters.

When the case is doubtful, to avoid delay in settling claims, sometimes marine and war risk underwriters, each contribute fifty percent of the loss, awaiting a later determination of the issue between them.

Sometimes one of the underwriters, frequently the war risk underwriter, pays the loss up to the amount of insurance available, and becomes subrogated to the insured's right through arbitration or otherwise, the claim against the marine underwriters.

Sometimes this is done under a missing vessel's clause, which I'm happy to say is not used too much, anymore. The underwriters have kind of wised up to that one.

The wording of the missing vessel clause I will not get into with you today. I'm sure most of you have heard of it. Simply put, it boils down to that, if a vessel is missing, it is treated as a war loss and that the policy will pay within 30 days of presentation of proper documents, after the vessel is posted as missing at Lloyd's.

Unfortunately, the understanding of war risk coverage has been aggravated by the necessity to interpret the phraseology employed in the war clauses. And to complicate the matter further, the English market, the Norwegian market and the American market, have not always agreed on interpreting the FC&S clauses.

To assist you to form your own judgment of the suitability or otherwise of the current clauses, it's probably best to study the subject of war risk through a little bit of historical development, of where the FC&S clause came from.

The earliest reference that I've been able to discover for the exclusion of war risk, occurred in 1744. It was a ship called the *Charming Peggy*. It was insured in 1739 from North Carolina to London, with a warranty against captures and seizures.

In the case decided in 1792, *Green and others v. Elmsley*, the ship, *Fly*, was insured from Exeter to London against capture only, which suggest that any marine policies covering the vessel excluded that particular risk.

Until the Napoleonic Wars, it was extremely rare to exclude war risk from the marine policy. War risk were the very one that ship owners and merchants wanted most to cover at that particular time.

Although in 1780, a disaster to a British convoy, resulting in the capture of 55 of 63 vessels, led to the failure of a number of Lloyds underwriters, nevertheless the covering of war risk proved during the years of British Naval supremacy, distinctly profitable.

Many Lloyd's underwriters grew wealthy covering war risk during the Napoleonic Wars, and since that time, I might add, put a few shekels in their pockets as well.

However, it was during these wars that the practice of excluding war risk became common. Most Baltic and Western European ports were in a state of intermittent hostility to Britain, however sympathetic disposed toward Britain the inhabitants might be. Trade with Europe continued, but it was hazardous, not on the high seas where the British Navy was supreme, but in the continental ports where the writ of Napoleon and his allies ran.

Because of this, the first form of FC&S Warranty read, free of capture and seizure in ports of discharge. In 1863 the warranty wording was changed. It was changed to read as follows: Warranted free from capture, seizure and detention, and all the consequences thereof, or any attempt thereat, and free from all consequences of hostilities, riots or commotions.

Some say that the wording was an attempt by marine underwriters to avoid payment of claims from enhanced

marine perils, due to wartime conditions. Enhanced marine perils. This is a key word, and it became very key words recently in the Iran/Iraq situation. We'll talk about that just a little bit later. Keep that in mind - - enhanced marine perils.

Most Courts, over the years, have been consistent in the view that marine risks are not converted to war risk, simply because vessels in the time of war are sailing without lights, zigzagging to confuse submarines, sailing in convoy, or experience other difficulties in navigation due to lack of suitably lighted landmarks.

Perils stated in the FC&S Warranty do not coincide with those mentioned in the body of the old SG policy, which was in use at that time. The reason for this is lost in obscurity. It can only be assumed that capture and seizure was intended to replace men of war, enemy surprises taking at seas.

In some respects, however, it can be appreciated that the deletion of certain perils from the body of the policy does not entirely relieve underwriters from liability for war risk. In the absence of any special provision, the basic peril of fire, for instance, involves underwriters and claims for both war and marine. Mention must also be made that the opening words "warranted free of" simply means "excluding."

Accordingly, there is no condition with which the assured is required to comply. He simply accepts, there is no cover for war risk.

In 1883, a meeting was held at Lloyd's, and it was decided that the following words should be added to the FC&S Clause, and this started a whole series of complications and confusion, which led me to decide my title should be "Is This War." I'm not sure we know.

The wording was changed to make it free from all consequences of hostilities in warlike operations. In Britain, *Steamship Company v. the King*, in 1919, Lord Acton explained that the use of the words "warlike operations," probably arose out of the bombardment of Alexandria in 1881 by the British Fleet, which operation was conducted by that fleet against persons who were in rebellion against the friendly

power, and where no state of war had been declared. This goes all the way back to 1881, where you have a war without it being a war.

In 1889, the first set of institute time clauses was amended to include the FC&S Warranty. I won't read it to you. I am sure most of you are familiar with it. It was amended again in 1893, in recognition of the fact that risks of loss or damage in riots or civil commotions are cognant with war risk, and that accordingly, logic calls for their exclusion.

The clause then added to it the exclusion for riots and civil commotions.

The inclusion of those words, riots and civil commotions, provoked much opposition, and in 1898, they were omitted. They didn't last very long, from 1893 to 1898. It being considered that any advantage gained by their retention was out of all proportion to the opposition they encountered.

The strong feeling was growing, at about this time, that war risk should not be covered by the ordinary policy. The great naval strength of the European powers was making the hazards of war incalculable. Both the submarine and the propelled torpedo had been invented, and although neither had, up to that time, much opportunity to show what it could do in war, many well-informed people believed, with good reason, that together they would revolutionize naval warfare as much as or more than the invention of the steam engine.

In 1901, the clause was amended following a further attempt to exclude riots and civil commotion. The form that was used in 1893 was reintroduced. More confusion on "is this war or is it not."

Another case that's of interest is a case of *Sande v. British and Foreign Marine Insurance Company* in 1915. This brought about another change. Two British vessels, then at sea, had Cargoes destined for Hamburg. In obedience to orders received from naval authorities, they put into a British port and their cargoes were sold. It was held that inasmuch as the cargo policy covered the Adventure as well as the

goods, underwriters were liable for the loss of the Adventure by restraint of princes. This case drew attention to the fact that restraint of princes was not mentioned in the FC&S Clause, and in 1916, the clause was again amended so that you do have, and I'll read it this time - - warranted free of capture, seizure, arrest, restraint or detainment, and the consequences thereof, or any attempt thereat, piracy excepted, and also from all consequences of hostilities or warlike operations, whether before or after the declaration of war.

As we all know, the First World War did not, unfortunately, usher in an era of enduring peace. There were many skirmishes which occurred during the 20's and 30's. The Bolshevik Revolution dragged on. War broke out between Greece and Turkey in 1922. Japan invaded Manchuria in 1931. And without any formal declaration of war, Japan continued her aggressions against China. Italy invaded Abyssinia in 1935.

I can enumerate other instances, but I don't think it's necessary.

The time-honored distinction between war and peace, between warlike acts and piratical acts, became more difficult to determine. Recognizing these facts, underwriters realized that the FC&S clause was no longer adequate.

On April 26, 1937, four days after my birthday - - I didn't realize that until this minute - - this clause was amended to read as follows: Warranted free of capture, seizure, arrest, restraint or detainment, and the consequences thereof, or any attempt thereat, also from the consequences of hostilities or warlike operations, whether or not there be a declaration of war, also civil war, revolution, rebellion, insurrection or civil strife arising therefrom, or piracy.

Thus was piracy, so long a marine peril, switched over to the war policy. It's interesting to note that at the present time, piracy is covered in the English marine clauses, but in the American form, it is still considered to be a war risk. I think the English underwriters are somewhat smarter than we are, because if you put it in a marine policy, you get the benefit of the deductible. We should have thought of that.

The outbreak of the Second World War in 1939 found the United States in a position where we hadn't really been involved with too many of the British decisions, and nobody really knew how we were going to look at them, and whether in fact we were going to follow them or not.

The case that came up that is worthy of review, is the *Coxwall* case. Before we get into this, it might be of interest to you to understand the reason for the alteration that arose. It was from the inordinate amount of litigation that went on to determine the meaning of "consequences of hostilities or warlike operations." Going back to 1881. This is now 1943.

I referred to several cases in the paper that eventually you will get, if you want it. I'm not going to get into that specifically on cases right now. But the paper will give you an idea of where all of this confusion comes about.

Lord Renberry made an interesting point in the *Peterson* case, which was a collision case, that revolved around the question of warlike operations. He concluded, if the operation is one which creates no new risk, but only aggravates or increases an existing maritime risk by removing something which, but for war, would have been a safeguard against the risk, then the risk is not a war risk.

But later, he also made a contrast by saying, if submarines had been sighted, and the escorting vessel had ordered a notoriously dangerous course in order to avoid a peril of war, namely, submarine attack, and in consequence, the vessel had gone on the rocks or had been in collision, the case, I think, he says, I think might have been different.

Later on, we come to reach the point where I will explain to you in the Iran/Iraq situation, where I think most underwriters today accept the fact that fear of war risk does not make it a war risk. Fear of it, because of a war peril, does not make it a war risk peril.

The point at which enhanced marine peril becomes a consequence of a warlike operation, is still difficult to determine, largely because of the need to draw a conclusion of fact from a particular circumstance.

Clearly, it would not be reasonable to assume that

use the vessel is engaged on a warlike operation, anything that befalls her during her voyage is proximately caused by a warlike operation, or is proximately a consequence of a warlike operation. Neither would it be correct to say that because the accident is of a kind which arises from a marine risk, a stranding or a collision, that particular accident cannot, in some circumstances, be regarded as a consequence of a warlike operation.

The solution, most often, lies between the two extremes.

Strangely enough, most of the decisions on the governing factor of a warlike operation have centered around collision cases. The *Peterson* I mentioned before, was a stranding after a collision. The *Coxwall* case, which I mentioned earlier, is something that I think we ought to look at, just a little bit more closely.

The case is important because the English FC&S clause was amended in 1943, as a direct result of the decision in the *Coxwall* case, with the result that the uneasy relationship that had existed between war and marine underwriters was largely overcome.

The facts of the case were that the *Coxwall* was carrying a cargo of petrol in tins, from Grenik to Norvik in Norway, for the use of his Majesty's forces and was thus admittedly engaged in a warlike operation. Such warlike operation being the proceeding from one war base to another war base, with military stores for the use of British forces in the field.

On the night of May 6, 1940, visibility was poor and at times there were heavy rain squalls, so that the *Coxwall*, which was in a convoy, having difficulty in following the reflection in the water of the dimmed and shaded stern light of the vessel ahead, no other lights being shown, and it was also difficult to see the nest light, which was a shore based light, at times, which was not being shown at full brilliancy, because of the war conditions. This prevented the Second Officer from taking a bearing.

Under the orders of the Naval Officer in charge of the convoy, the ship was taking a zigzagging position throughout. And at one point, a deviation was made for half an hour to

avoid what was thought to be an enemy submarine.

The next morning, at this time, the *Coxwall* again began an altered course, to pass through lights of some approaching vessels of the convoy that were retracing their course for a reason nobody knows.

After resuming the course, and almost immediately, broken water was seen ahead of the vessel and she grounded on Samsel rocks on the Isle of Skye. It was considered that the course set for the convoy was a safe one, this being accurately followed by the *Coxwall*. But there was an unexpected and unexplained tidal set which carried it some miles to the east.

So you have a whole combination of all things that could go wrong, and they did go wrong. The Arbitrator found that the stranding of the *Coxwall* was not due to the negligence of those on board. It was a direct consequence of the warlike operation that the vessel had been engaged in.

The award was affirmed by the Court, in the first instance, but it was reversed in the Court of Appeals. A little confusion on war risks?

In the House of Lords, however, it was again decided that the Arbitrator was correct, and that the stranding was a result of a warlike operation. The opinions of the Lordships, in this case are pretty interesting, and if someday you have a chance, I suggest you read it.

The concern of the marine market over this decision was primarily caused by the feeling that in the future, Courts would be over-influenced by a vessel being engaged in a warlike operation. Almost any accident, in time of war, would be classified as a war loss, and this would effectively nullify the point of taking out a policy against marine insurance.

Anxious to perform their normal function of providing cover against the recognized marine perils, the marine market rapidly amended the FC&S Warranty, so that it did not exclude perils essentially marine in nature.

Stranding situations, such as those of the *Coxwall* type,

are obviously meant to be treated as marine claims, since that was the reason for amending the FC&S Clause. And heavy weather damage, enhanced by the need for speedy delivery of essential stores, would likewise fall into the same category.

At this point, I would like to say something about the use of the FC&S Clause in our market, the American market, just before and after the Second World War. Our Courts did not lay down definite principles to guide American underwriters, in the meaning of consequences of hostilities and warlike operations. In 1942, there were few major American cases construing the FC&S Clause, and there were a group of American cases that involved charters between the United States and private owners - - the United States Government, that is - - but they all referred to war risk and not warlike operations. Since war risk is much more limited than the consequences of hostilities or warlike operations, these cases were of no particular value, except that everybody felt that they should be freely quoted as authorities. So you have an additional ingredient into the confusion, and Is this War.

When the implications of the British decisions were realized in the United States, namely the *Coxwall* decision and warlike operations, a controversy immediately arose in legal circles in the United States, as to whether our Courts would follow the English decisions.

At that time, in 1942, the United States Governments' representatives took the position that our Courts would not follow English law. Their position was that in cases involving negligence, the proximate cause of a stranding or a collision is the negligence of the navigators and therefore the nature of the cargo or the service in which the vessel is engaged, is immaterial.

There were, however, several post war decisions by our Lower Courts, construing the the FC&S Clause in use when the United States entered the war, would have followed English decisions.

Most interesting was the *John Worthington* case, involved in a collision with the *YMS-12* which is a minesweeper, that was a warlike operation and the Court, in effect, what they

did with that, was add to the confusion by saying, in addition to a warlike operation, the collision clause in the war risk policy should be looked at totally separate from the basic war risk coverage of other types of accidents.

They separated out the collision clause, and the Court did it by adding their own wording, by inserting their own wording into the policy as it existed, and the decision they came to, they said that you must read the FC&S Clause, especially when it involves a collision clause, as though it said, notwithstanding anything to the contrary contained in the policy, including the collision clause, this insurance, including the collision clause, is warranted free from any claim or loss, damage or expense caused by or resulting from all consequences of hostilities or warlike operations.

The Court then said that when so read, the FC&S Clause in the marine policy excludes the running down clause, when the collision is a consequence of warlike operations. And because of the use of the words "including the collision clause" in the war policy, these liabilities are included in the war policy.

It is interesting to note that the Court's reasoning depends on the paragraph in the FC&S Clause which commences: If war risks are hereafter insured by endorsements on the policy.

This phraseology was clearly intended to apply only to those cases where marine and war risk are insured by the same policy. This was not the case in the *Worthington*. The U.S. Government issued the war risk policy. The *Worthington's* owner, Standard Oil of New Jersey, was self-insured. It was intended that the forms go back to back, but it didn't in this case, and the Court added a few more words to add to the confusion.

Recent changes in coverage by war risk underwriters came about in order to clarify some of the confusion that became obvious with the closing of the Suez Canal in 1967, the evacuation from Vietnam in 1975, the trapping of vessels in the "Shahr Do Arab" at the head of the Persian Gulf some eight years ago, and the experience of the Iran/Iraq conflict of the last eight years. Also the 1982 case involving the *Hercules*, which was attacked during the

Falkland Islands, played a part in some of the recent revisions.

The geographical area in which our thoughts are currently concerned today is the Gulf, where the experience of those underwriters concerned with the interesting details of claims presented would indicate that they are paying for losses which are not only expensive, but somewhat unusual and maybe somewhat questionable.

Indeed, perhaps, the question poses a title subject for the workshop that I chaired, should more correctly be stated, Marine or War or What. Perhaps some of the losses should not be for the account of underwriters.

Our prime task, as underwriters, is to provide the necessary cover to enable international trade to continue, and for that we are entitled to a fair reward for the service. But as responsible underwriters, we must offer that service intelligently, recognizing the dangers, not only physical, but the dangers of interpretation of clauses, and the laws applied to those clauses by the various countries involved.

Many responsible shipping lines withdrew from the Persian Gulf area, but crude oil is a vital commodity to exporting countries and vital to certain importing countries. Trade did continue and will continue. It is only the patterns that change.

But we are all aware of the depressed state of the shipping market. It seems to be a little better these days, but it's still depressed. And if freight rates are sufficiently attractive, certain ships and crews who would otherwise be laid up, will use the opportunity to trade in any area, because the price is right. The crews need not be the regular crew of that vessel. Frequently, they are put together just for the trip. Sometimes they have no experience with the individual ship. Sometimes they speak different languages from the officers. At any one time, a number of ships will congregate in the Gulf of Oman waiting for a crew and their turn to sail through the straits, just another large exposure for underwriters. But which underwriters? Marine or war or what?

Apart from the heat of the natural environment in the area, with the known danger of attack, and wish to be able to abandon ship more easily, engine room crew would pre-

fer to be nearer the deck than in the bowels of the engine room. I can't say as I blame them. All too often, there's no one in the engine room watching vital gauges or listening for unusual vibrations, which would spell the beginning of trouble for the experienced engineer, who knows his ship. Instead, the engine is left turning at the same revolution, pressures in the valve is not reduced and before long, marine underwriters have a claim for engine room damage under their policy.

Was it through crew negligence? Should it be under marine policy? What really is the proximate cause of that damage?

While the normal institute trading warranties may be included in the policy, trading in an unusual or warlike situation, i.e., trading in the Persian Gulf, must be a material fact, and therefore has to be disclosed to marine underwriters.

Various clauses have been proposed in the London market and the American market, to satisfy such disclosure. Things that they could do in trading in the Persian Gulf or sailing without lights, sailing closer to the coast and out of normal shipping lanes, or seriously undermanned, these actions might seem sensible from the point of view of the war risk underwriter, but they definitely add to the marine risk, and they may even reach a point where a claim could be declined on the grounds of unseaworthiness or false "epriveny". It could be declined, except that the underwriters have already agreed to clauses to the effect that they can do this and we've waived our defenses.

We know that some ships have been fitted with various electronic devices, scatter equipment, or others tow decoys to deviate the missiles. But what if these devices, themselves, are an extra hazard to navigation and actually contribute to a casualty?

Some have suggested that merchant ships, during the heat of the war in the Gulf, be fitted with guns or helicopters. And what about the Naval escort ships? Were they really a benefit and a protection or did they actually encourage attack? Flagging out may have been legal, but what does it do for underwriters? Marine or war or P and I?

If we pretend that we know what we are covering under the basic institute war clauses, American, Norwegian or Japanese, dare we ask how many vessels are insured only on those basic war clauses these days? How often do additional clauses appear, such as trapping, blocking, detention, hijacking, terrorism, confiscation, nationalization, and a whole variety of political and private broker's clauses, frequently thrown in without additional premium, either as a further form or an unnecessary competition or as a sleep-easy to sweep up some gaps in coverage, which may or may not be there in the first place.

Do we know what we mean when we use these terms and offer them as cover to our clients? Each has a meaning which needs to be considered with care and sometimes resorting to the law. But do lawyers know what they mean?

Responsible underwriters should know what they cover, what they are giving, and what claims they are prepared to pay if they are accepting the premium.

When 72 ships were trapped in the "Shahr Do Arab" in September 1980, at the eruption of the conflict between Iran and Iraq, many of those ships were insured on different clauses, such as institute of war, American, Norwegian, Japanese, some included detainment clauses, some had private untried broker's clauses, such as blocking and trapping, ambiguity, overlapping, uncertainty, confusion. You had all the ingredients of a real mess.

So there could be no general agreement as to what peril, if any, was covered, and what claim was recoverable under the policies. The ships weren't damaged. The crews were on board. They could have sailed. Do you remember, we agreed before, fear of loss is not covered by the policy.

In fact, there is little case law in recent times, to pronounce on issues arising out of war losses, or which may be attributable to perils covered or not covered. But the plethora of clauses now in use, boy, we have problems.

The lack of litigation is not because the issues are simple, as black and white, but I submit fear of the real outcome of the litigation.

There is ambiguity and confusion on these matters. In September, 1970, when three aircraft were hijacked on

international flights by members of the Popular Front for the Liberation of Palestine, they were subsequently blown up at Dawson's Field, an airstrip in Jordan. The debate was whether the loss was caused by theft, hijacking, which is not a legal term, explosion, deprivation, abandonment. They knew they were constructed total loss, but what kind? War? Whatever.

One of those aircraft was covered by two insurance policies with overlapping clauses, which eventually had to be resolved in the American Courts. A prolonged affair, during which time the owners of the aircraft would have been out of their money, had the aviation market not arrived at an agreement, that each policy would contribute fifty percent, until the matter was resolved. This became a standard form in the aviation market. It certainly helps in a situation, but it is essential that an identical clause appear in both policies. What different brokers use for placing the different war policies, and with different underwriters and different periods, which are not necessarily concurrent, we then have a recipe for more errors.

The Norwegians also deliberately introduced a fifty-fifty clause into their insurance plan, to protect their ship owners from the danger of falling between two policies. The collision of the vessel, *Nova*, in the Gulf, while sailing without lights, raised certain doubts as to the proximate cause of loss. Faced with a dispute between marine and war underwriters, under Section 91 of the Norwegian plan, it should have been invoked and it was invoked.

In the event that war underwriters refuse to respond, marine underwriters made an on account payment to the owners, and the matter was resolved by arbitration in Norway. Please note, arbitration and in Norway. Arbitration, because that's what the Norwegian insurance plan calls for, but if the problem had gone to a Court of Law and not necessarily in Norway, would the result that the marine underwriters had to pay the loss, had been the same? I don't know.

With several insurance markets involved in the same policy, with part orders placed around the world, these days our task as underwriters becomes even more complicated. Many slips in contracts underwritten, may be as reinsurance, with a local domestic insurance company. In a country

whose laws are different from the more established insurance market, that local company may have issued its policy, using English clauses, but may be subject to local jurisdiction, interpretation and application. Because the English clauses used have been based upon experience in case history, those clauses will frequently contain the overrider, subject to English law and practice.

While we all suspect, that in some countries, the true legal issue and judgments may be clouded by political considerations, we must have some sympathy for the foreign judge in his confusion, and an impossible situation if he has to set aside his own interpretation and pronounce his verdict based upon English law and practice.

The London market has moved a long way from the old concept where the war clauses buy back the coverage that was excluded from the marine policy. That exclusion, we talked about read; free of capture, seizure, arrest, restraint, etc. The new clauses, in 1983, spelled out the details, named perils covered and the main object of that change, coupled with the introduction of the new marine clauses, was clarification. Congratulations to the London market.

Yet even today, we see a multitude of private clauses tacked on, clauses devised by brokers and underwriters, which may be well intentioned, but do nothing but add to the confusion. We, in the American market, are still hanging on to the old buy back approach, in our approach to war risk coverage. To further add to the confusion you have in American Institute War Risk policy, and American Hull Insurance amendment to the Institute form, and if that isn't more confusion, I don't know what it is. The time is maybe for a new American form, and maybe you, as average adjusters can help us write a few clauses to clarify the situation.

No loss adjuster has any difficulty with war coverage, when there is loss or damage directly caused by a missile attack, a mine or a bomb, and such an isolated incident poses no fear for the underwriter. The greatest danger lies in not knowing what we are covering or not knowing the true cause of the loss.

While we are all aware of the inherent catastrophic nature of war, which is why most responsible underwriters

do not offer cover for war on land, with ordinary marine losses, engine damage, collision, fire, grounding, etc., the loss occurs and that is that.

Whenever a war or warlike act occurs, there is a very real danger that it will lead onto other situations. If there is provocation, there may very well be retaliation, and with that comes an even greater danger of escalation.

The isolated incidents of a terrorist hijacker on board the cruise ship, *Achille Lauro*, eventually led to American Air Force planes forcing a civilian air liner to land for a passenger on board to be removed by third party authorities. In Athens, in June of 1988, the *City of Poros*, a day time cruise ship vessel, was attacked by terrorists. This one was a particularly noteworthy event for Alan Birch and myself because his wife was on that ship, and my wife was on that ship one week before it was attacked. I don't think either one of us will forget this incident.

Certainly, they're frightening incidents, by international terrorists, but the accumulated exposure to war underwriters, which may have been attributed to the original incident, the escalation potential needs very careful consideration.

Underwriters have too glibly accepted insurance conditions without really having considered what they might be letting themselves in for. In other words, they have let themselves be deceived into thinking that wordings produced by lawyers take care of all problems. Nothing could be further from the truth.

The lawyer knows that he can't solve all the problems, and certainly not within a reasonable number of words, but he consoles himself with the thought that everything must be all right, if the wording is accepted by the underwriter. After all, the underwriter is the man who knows where the real practical problems lie. The underwriter accepts the wording because it has been approved by the lawyer who knows all the legal pitfalls and can place an individual clause within the context of the total system of marine insurance. Thus, we have a perfect conspiracy of mutual self-deception. If you don't ask me any hard questions, I won't ask you any hard questions.

I would suggest that the time has come for lawyers and underwriters and average adjusters to join together in looking reality squarely in the face. Underwriters cannot afford to treat the legal aspects of their trade as something they can leave entirely to the lawyer.

I mentioned the *Hercules* case, earlier. The interesting thing about the *Hercules* case right now, is that this case will go to the United States Supreme Court this Fall, and it has to do with the right of free passage of a merchant vessel in international waters. The *Hercules* was attacked by the Argentinian Air Force in 1982, during the Falkland War. An unexploded bomb was discovered aboard. The decision was made to scuttle the vessel.

The Supreme Court will decide whether the owner and charterer, who had been seeking ten million dollars for the vessel, and 1.9 million for bunker fuel, can file suit for damages in a U.S. Court. When Argentina refused to negotiate directly, the owner and the charterer brought suit in Federal District Court in New York, which held that the case be dismissed, due to Argentina's immunity under Foreign Sovereign Immunities Act of 1976.

The U.S. Court of Appeals for the Second Circuit then overruled the Lower Courts, stating that attacking a merchant ship without warning on the high seas, requires restitution.

It should be very interesting to see what the Supreme Court says, especially when you keep in mind the vast implication for tankers damaged in the Iran/Iraq Arabian Gulf conflict.

Although lawsuits have been filed by owners or charterers who have experienced losses in the Gulf, an upholding of the Appeals Court decision in the *Hercules* case, may spur some to reconsider. Such lawsuits would, at least, perhaps, send a message to the wrong-doers, and it might, in turn, engender a modicum of restraint with respect to future attacks.

Finally, (I see a great sigh of relief from many people) under the heading of "Is This War," I'm going to take a little

poetic license. I wonder if those of you who are practicing average adjusters have noticed the insidious little war that has been going on against your very existence.

Underwriters and brokers started this terrorist attack when we changed from the franchise to a deductible type of coverage in the late 60's and early 70's. We then, being the nice gentlemen that we are, gave almost everybody a liner negligence clause, and we encouraged larger deductibles, followed by AAD's, partial self-insurance plan, all because we're nice people and we wanted to lessen your burden.

Our next ingenious device was to offer the GA absorption clause, and then slowly increase the absorption problem. Currently, having already cut your legs off at the knees, we're pushing for a simplified adjustment format. Is this war? I think not. I feel that these changes have evolved out of commercial and competitive necessity, but I do think you must be aware of the danger signs and find ways to meet the challenge or you, too, will become casualties of war.

One of the most valuable employees in my company is our claims manager. Ray Hicks, an average adjuster. His job is much more than adjusting. His technical expertise, his advice on policy wordings, his insight into ship operations, has made his position a key to our underwriting success. His counsel is invaluable. And like Mr. Hicks, I would suggest that you must expand your horizons, become working partners with your underwriters and brokers, and use your vast knowledge for the benefit of the entire marine community. Don't just think any longer of simply adjusting claims, adjust your sights.

I want to give proper credit to Mr. J. K. Goodacre, A.C.I.I., for invaluable assistance and research that he did for his excellent treatise on War Risks in his book on Marine Insurance Claims. My paper would not have been possible without his tremendous contribution.

Thank you. *(Applause)*

Mr. Alan Birch: Alan Birch from London. I have been a company claims settler for over forty years, and a Foreign Associate Member of your Association since 1983. This is, in fact, the first occasion in which I have been able to

attend these meetings. In May of this year, back in London, I was privileged by being elected Chairman of the British Association of Average Adjusters, and it is in that capacity that I'm here today.

May I thank you, Chairman, for your very warm welcome and for your fine hospitality. I always enjoy visiting the United States and your welcome has made this particular visit doubly enjoyable.

It's my great pleasure to convey to you and your members, the greetings of the members of the British Association of Average Adjusters. I bring you their very best wishes and warmest regards.

May I, on their behalf, and for myself, congratulate you on what I consider to be a quite brilliant survey of the history of the insurance of war risks, and a fascinating paper. I do warmly congratulate you.

If I may, I would like to take the opportunity to thank you for your kind remarks about the British markets and revision of its policy forms and clauses in 1983. And we do hope that we have lost - - at least, we have, in fact, abandoned the warlike operation reference to all our corporations, and we hope with that, we have lost some of the ambiguities that have been thrown up in the case law for many years, to which you referred.

I must confess, I have been a little surprised that the American market has, to date, retained the buy back, as you call it, method of insuring war risks, but maybe your excellent and stimulating address will give rise to some reconsideration of that position.

Thank you once again, Chairman. *(Applause)*

The Chairman: Thank you, Mr. Birch.

Alan said to me last night that he hoped, because I put out a topic, Is This War, that I wasn't going to take credit for the ending of the war in the Persian Gulf. *(Laughter)* Yes, I am taking credit for the ending of that war. Yes, sir.

Mr. Beard: Good morning, my name is Graham Beard. I'm the Chairman of the Canadian Average Adjusters

Association for this year.

I'd like to follow Mr. Birch in thanking you for your kind hospitality last night, John. Also for your speech this morning.

We are sorry you couldn't attend the meeting in Toronto this year, but you were well represented by Ray Hicks and Jack Ellard, and we hope the incoming Chairman can see us in Montreal next year.

Thank you. *(Applause)*

The Chairman: Thank you, Graham.

Mr. Gerritzen: Mr. Chairman, my name is Jalf Gerritzen, I come from Rotterdam, and I'm representing the International Association of European Average Adjusters.

As you see, I came to a microphone which is suitably a few paces behind the microphone taken by the Chairman of our elder and very respectable sister from London.

Mr. Chairman, I would like to thank you very much, indeed, for a very cordial welcome and the grand traditional American hospitality which I have enjoyed here.

Our Association is extremely pleased, and honored that members of your Association take part in the work of AIDE, as the Association is called, and that they do attend our general assemblies. We had the general assembly in 1987 in Venice, in Italy, and American members were taking active part in the work there, and so they did in Brugges in 19-- sorry, Venice was '85 and in Brugges in 1987.

The next general assembly, Mr. Chairman, where I hope to meet you, will be in York in September of next year, exactly 125 years after the date that the York Conference was held, which led to the York rules.

I hope that American members will be there, and we will be able to welcome them there.

Finally, Mr. Chairman, may I thank you very much and congratulate you on the excellent and very learned speech that you have given us this morning. Personally, being in America and hearing you talk about war and warlike operations, I cannot help being reminded of a beautiful day

in April, 1945, when to me, as a nine year old boy, there came an end to war and warlike operations, due to the fact that your compatriots and the Canadian forces liberated us. And that is an occasion that you do not forget for the rest of your life.

Thank you very much, Mr. Chairman. *(Applause)*

The Chairman: Thank you very much.

Mr. Pereira: Rucemah Pereira, Brazilian Association of Average Adjusters.

Mr. Chairman, ladies and gentlemen, it is really a privilege for me on behalf of the Brazilian Association of Average Adjusters to be here on the occasion of the 110th Annual Meeting of the American Association.

I want to stress that I have considered the Chairman's address, "Is This War?" a subject of high interest for all people involved in maritime business.

Thank you. *(Applause)*

Mr. Palmer: M. Chairman, I'm Richard Palmer, President of the Maritime Law Association of the United States, and may I add my thanks for a very scholarly and interesting discussion on our mutual struggle with the unpredictability of legal process.

Thank you, again. *(Applause)*

The Chairman: Mr. Hicks.

Mr. Hicks: Raymond Hicks, member of the Association of Average Adjusters of the United States. I want to add my congratulations, Mr. Chairman. Your speech should be useful to us average adjusters and claims persons, who after all, are on the front line, in trying to separate the war from the marine perils, when claims do arise.

It would be also ungracious of me not to say thank you for the kind personal words and that I hereby do. *(Applause)*

The Chairman: You deserve them, Ray.

Any other discussion on the Chairman's speech? If not, we can proceed with our regular agenda.