The Interpretation of War Clauses in Aviation and Marine Insurance Contracts

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As a rule, war risks are not included in the standard policy of protection and indemnity clubs and are insured on the basis of a separate insurance policy. On the contrary, any aviation or marine insurance agreement contains a "war clause", providing that certain regions are denied insurance, as air or sea travel in these regions is extremely dangerous, thus the risk of the occurrence of insured accidents is increasing considerably. If an insurance accident occurs to an aircraft or sea vessel in one of the regions excluded from the insurance protection area, insurance indemnity is not paid even if the cause of the insured accident is not related to military operations in any way. Inclusion of trouble-some regions in the area of insurance coverage increases insurance tariffs and premiums significantly.

When formulating war clauses, the parties use various expressions: for example, the war clause of the London Insurers' Institute, is used with such notions as: war, civil war, revolution, rebellion, insurrection, or civil strife arising from them, or any hostile act by or against a belligerent power.[1]

The parties to the case below — the insurer and the reinsured — agreed to apply insurance to the entire globe "excluding the areas of current war conflicts and the areas that will be declared as such". Although this war clause seems to adequately express the intent of the parties to exclude zones of instability from the area of application of the insurance policy, the Supreme Commercial Court of Ukraine (hereinafter — SCCU) resolved the following:

Supreme Commercial Court of Ukraine
Ruling of 24 June 2003 on Case No.17/386 (14/237)
Judges: I. Pliushko, N. Panchenko, S. Plakhotniuk
Excerpt

"The appellant's arguments that Sudan was an area of military conflict as of the time of conclusion of the agreement and damage of the aircraft, thus releasing the defendant from payment of insurance indemnity, are *unjustified*, as the *Letters of the Ministry of Foreign Affairs of Ukraine of 27 August 2000, 25 December 2000 and 31 August 2001*, contain information proving that in 2000 Sudan was an area of *armed* conflict. At the same time, the agreement of insurance and reinsurance excludes areas of *military* but not *armed* conflicts from the geographical area of its application".

The court agreed that the territory where the insured accident took place was an area of military conflict. Judging by the fact that the text of the agreement should express the intent of the parties, Sudan, as the area of political instability, should be denied insurance protection. However, in its ruling, the court stated only the terminological difference between the language of the insurance policy and the language of international public law. Such an approach knowingly dooms any war clause in a traditional insurance policy to judicial failure. This terminology that, according to C. Schmitthoff, should be searched for in numerous court decisions made for two hundred years[2], was developed long before the appearance of international humanitarian law and, therefore, has nothing in common with it.

As many vessels and aircrafts insured in Ukraine are reinsured with English protection and indemnity clubs, the insurance policies of Ukrainian insurers frequently reproduce English reinsurance policies. Thus, there is a threat that the war clauses in them will have no legal effect in Ukrainian courts.

In this article we'll try to give answers to the following questions:

1) Flow should a war clause be formulated in the correct manner in order to be sure that it excludes troublesome regions from the area protected by insurance?

2) What is proof of the existence of circumstances stipulated by a war clause in a certain region of the world?

International public law

While in their interpretation of war clauses, Ukrainian courts prefer to direct themselves to the concepts of international public law, it is necessary to consider the concept of "international armed conflict" and "non-international armed conflict".

"International armed conflict"

The systemic analysis of Article 2 of the 1949 Geneva Conventions, and Articles 1, 3 of the 1977 Protocol to the 1949 Geneva Conventions carries an inference that one can state the existence of an international armed conflict in either of the

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following cases: war declared between states accompanied by military operations (virtually impossible nowadays); military operations between armed forces of different states without the declaration of war (characteristic examples from the recent past are the operations of US armed forces and their allies in Yugoslavia, Iraq and Afghanistan); military operations between the armed forces of a metropolitan state, or a racist regime, and the armed formations of peoples fighting for the right to self- determination (in this case, the phraseology of the age when colonies fought against parent states does not quite comply with the practice of subsequent decades characterized by the dissolution of multinational states); occupation of territories.

Evidently, the concept of military operations is the key one in this case. It should be noted that while the English language version of the *I Hague Convention of 1907* uses the term "hostilities" for military operations (also mentioned in Article 118 of the *III Geneva Convention of 1949* — "active hostilities"), Protocol I of 1977 uses the phrase "military operations".

The authoritative commentary on Article 3 of Protocol P defines military operations as "movements, maneuvers and actions of any sort, carried out by the armed forces with a view to combat and explains that "military operations can often continue after such a ceasefire, even without confrontations". Therefore, movements of armed forces for deploying in battle order, occupying a better position and the blocking of facilities are military operations too, and the territories where such movements take place are parts of the theater of military operations.

So, the area of an **international military conflict** is limited to the theater (zone) of military operations and occupied territories.

"Non-international armed conflict". Article 1 of the 1977 Protocol II to *1949 Geneva Conventions* stipulates that the Protocol is applied to armed conflicts other than those subject to Protocol I, that is, the conflicts which take place in the territory of one state between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.

The conclusion can be drawn that the area of an **armed conflict of a non-inter- national nature** is limited to the theater of military operations between the armed forces of a state and dissident armed forces; the territory controlled by dissident armed forces.

Conflicts which do not have the status of military conflicts.

Part 2 of Article 1 of 1977 Protocol II stipulates that situations where there are internal disturbances and tensions (riots, isolated and sporadic acts of violence and other acts of a similar nature) are not military conflicts. Besides, unless armed forces of any state participate in conflicts they are not considered to be military conflicts (inter-tribe, inter-clan, interethnic) irrespective of their duration and intensiveness.

Resolving the clash in terminology of insurance policies and international public law

The most common English-language war clauses in insurance policies do not use the basic concepts of modem public law — "armed conflict" and "military operations".

At the same time, English judges refuse to interpret war clauses using the terminology of international public law even if the same term is used both in international law and in an insurance policy (for example, "war").

So, the leading case on this issue — Kawasaki Kisen Kabushiki of *Kobe v. Bantham SS.* — concerned a contract which gave liberty to cancel "if war breaks out involving Japan". Fighting broke out between Japan and China, without formal declaration of war and diplomatic relations remained intact. The court explicitly refused to interpret war only as the declared war: "to suggest that, within the meaning of this freight contract, war had not broken out involving Japan on the relevant date is to attribute to the parties to it a desire to import into their contract some obscure and uncertain technicalities of international law rather than the common sense of business men"[4]. New Ukrainian legislation makes this argumentation possible for Ukrainian judges as well: the rules for the interpreting of contracts in the 2003 *Civil Code of Ukraine* (hereinafter — CC) allow the concepts of international public law and common insurance clauses to be combined.

Article 213 of the CC establishes the priority of literal interpretation of contracts but allows the commonly accepted meaning of terms in the relevant fields to be taken into consideration. Thus, the terms *war, hostile acts, hostilities, acts of war, warlike acts, acts of Queen's enemies* can be understood as "international armed conflicts"; the terms *civil war* and *revolution* — "non-international armed conflict"; *captures, seizures, arrests, restraints or detentions, acts of belligerent power, exploded mines, bombs or torpedoes* - as specific instances of armed conflicts of either nature.

At the same time, while the term "military conflict" is not common, a court may declare that a literal interpretation and subsequent common terms do not allow the sense of a clause to be determined. In such a case, according to Article 213 of CC, a court may determine the actual will of the parties by using, *inter alia,* trade usages. Such usages with regard to interpretation of contracts are codified by the *1994 UNIDROIT Principles of International Commercial Contracts.*

Article 4.7 of *UNIDROIT Principles* establishes that interpreting the terms of agreements should not invalidate any of them. In the case above, the SCCU drew the conclusion that the meaning of the term "military conflict" differs from the meaning of the term "armed conflict", but did not specify the conditions for application of the clause using the term "military conflict". Thus, the court has actually invalidated the war clause, because if all conflicts are "armed" but not "military", the concept of a "military conflict" used by the parties is an empty class. Article 4.1 (2) of the *UNIDROIT Principles* establishes that where the common intention of the parties cannot be established, the contract shall be interpreted in accordance with the meaning that reasonable persons of the same kind as the parties would give to it in the same circumstances, and Item 2 of the commentary to Article 4.1 stipulates that "the test is not a general and abstract criterion of reasonableness, but rather the understanding which could reasonably be expected of persons with, for example,

the same **linguistic knowledge** (highlighted by L.A. and A.S.), technical skill or business experience as the parties"[5]. Thus, in our opinion, having the quantity and similarity of terms used in war clauses of insurance policies, the court had to establish that persons, unless they are experts in the field of international public law, have to consider the terms "war", "armed conflict" and "military conflict" as synonyms, specifically, taking into consideration that the concept of "military conflict" does not mean any phenomena that would differ in their nature from those of "armed conflict".

Problems with evidence and their resolution

In another dispute between an insurer and a reinsurer, the SCCU did not distinguish between a military conflict and an armed conflict and recognized them to be identical notions. The parties, however, came across a different complication.

Supreme Commercial Court of Ukraine
Ruling of 7 February 2002 Case No.17-5-20/01-6396
Judges: O. Shulha, V. Derepa, M. Cherkaschenko
Excerpt

"Rejecting the plaintiff's claim, the court judged that the accident with the plane does not have the features of an insured event: the plane landed on a plot of land other than an aerodrome in a country where armed conflicts are taking place. These conclusions, however, are based upon incomplete materials and contradictory documents, which caused a wrong legal evaluation of the parties' relations.

In this case, the court had to take measures to identify the authority (institution, *organization*) authorized in accordance with special legislation, regulations, including *international agreements (international law)* to establish the facts in the dispute. This refers to the procedures and conditions for identifying the aerodrome and declaring the territories of states as zones of military (armed) conflicts. Upon establishing such authorities, *the court had to receive from them justified and comprehensive answers (conclusions) with regard to the said circumstances.*

The court decisions do not contain said data. Therefore, they should be reversed".

The SCCU raised the issue of procedures and conditions to refer territories to arnred conflict zones.

The plaintiffs, who were concerned not to consider the territory of the plane crash as an armed conflict zone, stated that the body authorized to advise on this issue is either the Ministry of Foreign Affairs of Ukraine or the government of a relevant state. Tire plaintiffs' position was reinforced by tire *Letter of the Ministry of Foreign Affairs of 20 November 2001, No.524/19-2252,* signed by the Head of the Ministry's 6th Territorial Department which said that: "between 1 January, 2000 and 7 June 2000, from the standpoint of International Conventions, Sudan cannot be defined as a zone of armed conflict... separatists trends in the south of the country during said period sometimes grew into armed fighting with government forces, which however, did not have the nature of armed conflicts from the standpoint of international law... The Government of Sudan considers the situation in the country from this viewpoint and finds support with this regard on the part of Egypt and other countries of Africa."

The defendants, however, presented to the court a lot of letters by the Ministry of Foreign Affairs of Ukraine stating the contrary. For example, the *Letter of 28 December 2000, No.55/19-4751,* signed by the Head of the 5th Territorial Department stated that "...potentially dangerous for flights... may be tire southern territories of Sudan where the armed conflict between government forces and the People's Liberation Army of Sudan has lasted for over 17 years". In addition, the defendants referred to tire *Resolutions of the United Nations General Assembly No.54/182 of 29 February 2000 and No.55/116 of 4 December 2000,* that express "concern with regard to the impact of the ongoing armed conflict on the situation in the field of human rights in Sudan".

The plaintiffs, however, asked the court to ignore the references to the resolutions "as the texts were presented in copies lacking proper certification".

Thus:

1) The Ministry of Foreign Affairs of Ukraine turned out to be incapable of taking a clear and certain position in the responses to numerous inquiries from courts and lawyers by the parties to tire dispute. Therefore, one should not rely upon the explanations of the Ministry of Foreign Affairs on this issue.

2) The government of a state on whose territory a non-international armed conflict takes place, will tend to negate it, which is quite understandable. For a government, any civil war, as a rule, will be not more than "internal riots" and "violations of constitutional order by criminals".

3) The SCCU directs the courts to identify an international organization authorized to classify territories as zones of armed conflicts in accordance with international law, and receive "comprehensive responses from it with regard to the circumstances stated".

The SCCU drew this conclusion despite the fact that the case materials contained the texts of UN General Assembly resolutions received from the UN mission in Ukraine, which provide an evaluation of the status of the Sudan conflict. The SCCU considered this to be insufficient and that the United Nations had to provide the Ukrainian court with a "justified and comprehensive conclusion".

Could a lower court overcome such instructions of a high judicial instance? Taking into account the provisions of the *1965 Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters,* the lower court sent an inquiry to the UN Secretariat and determined the way of serving the document in accordance with Part 2 of Article 5 of the *1965 Convention* — "by delivery to an addressee who accepts it voluntarily".

Article 3 of the Convention empowers a "judicial officer to forward to the Central Authority of the State addressed a request conforming to the model annexed to the present Convention, without requirement of legalization or other equivalent formality".

As the court did not have information on the address and name of the Central Authority in the US, the request and the form have been sent to the Central Authority in Ukraine, that is, the territorial body of the Ministry of Justice asking for the request to be redirected to the US Central Authority. The territorial body, redirected the request to the Ministry of Justice asking "to direct the request to the competent authorities of the US and Canada". The Ministry of Justice, however, considered it necessary to turn to the Ministry of Foreign Affairs for explanations. Instead of explanations as to the procedure of serv-

ing the request, the Ministry of Foreign Affairs once again started explaining the essence of the issued referred to in the court's request.

The court continued insisting on serving the document to the UN Secretariat. However, the Ministry of Justice once again failed to send the request to the US. In its Letter of 28 November 2002 to the Ministry of Foreign Affairs, the Ministry of Justice asks "to facilitate inquiry and provision of information specified in the request by the Economic Court". Below is the response from the Ministry of Foreign Affairs:

Letter of the Ministry of Foreign Affairs of 17 February 2003 " The Permanent Mission of Ukraine to UN that was assigned with the said request consulted the UN Secretariat with regard to this issue. Representatives of the Ukrainian diplomatic institution were informed that, *as a rule,* the Secretariat does not provide explanations on such issues (*1946 UN Convention on Privileges and Immunities)* and that the documents sent by the Ministry of Foreign Affairs cannot be redirected to the UN Secretariat, as Ukraine is not a party to the *1965 Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters".*

The *Convention on Privileges and Immunities* does not say a word concerning the fact that requests for violations of peace or related issues within the UN's remit cannot be addressed to the UN Secretariat. Regarding the *Convention on the Service Abroad of Judicial Documents,* Ukraine joined it after enactment of the *Act of Ukraine No.2051-III* on joining this Convention on 19 October 2000.

Obviously, the higher judicial instances and state executive bodies of Ukraine authorized to resolve the disputes arising from insurance agreements and facilitate such resolution used their authority only to lead the case into deadlock. Thus, neither tire war clause phrased in the language of international public law, nor its interpretation by coordinating its terms with those of international public law, can guarantee effective judicial protection if an insurance agreement fails to stipulate the means of proving the fact of "instability" in certain regions.

Below, we suggest two ways to increase the effectiveness of a war clause in Ukrainian courts.

The authority of international organizations

If the parties are ready to rely on the evaluation of politically instable regions made by international organizations, they should include the following clause in insurance agreements:

"For the purposes of interpretation and application of this Agreement, any hostility described as an "international armed conflict" or "non-international armed conflict" (hereinafter — the conflict) by the UN General Assembly, Security Council or Secretary General shall be deemed as an armed conflict. The parties shall accept any documents in any official UN language generated by any of the above authorities and available from the official UN website, as the proper sources of evidence of the conflict. Documents shall contain references to the website and the dates of acquisition. Documents provided in any language other than Russian shall be properly translated into Ukrainian or Russian. A party may claim unreliability of the document referred to by the other party as the document retrieved from the UN website only if the latter party provides the court with proof of such unreliability received from the UN Mission in Ukraine".

In fact, there are hostilities evidencing of an armed conflict but not declared as such by UN (e.g., events in Chechnya). If the parties do not want to suffer as a result of geopolitical conjuncture the recommendation is to extend the list of international organizations whose opinion will be vital for the resolution of a dispute. For example, in addition to the UN's view, one may rely upon the opinion of European Council's bodies (the Parliamentary Assembly of the Council of Europe and the Council of Ministers) presented in the official resolutions of these bodies.

Using the authority of war-risk rating committees

War-risk rating committees created at the largest insurance clubs, evaluate the situation in the world and make lists of unstable regions every year. The list of the London **War-Risks Rating Committee** as of 7 May 2003 included: Abkhazia, Afghanistan, Angola, Armenia, Azerbaijan, Burundi, Chechnya, Columbia, the Democratic Republic of Congo (former Zaire), Eritrea, Guinea-Bissau, Indonesia, Iraq, Israel and the Palestine Autonomy, Cote d'Ivoire, Kuwait, Nigeria, Pakistan, Rwanda, Sierra Leone, Somalia, Sri-Lanka, Tajikistan, Yemen and Zimbabwe".

The **Joint War Committee** list as of 11 August 2003 included: the Persian Gulf and adjacent waters including the Gulf of Oman to the North of 24°, Angola (including Cabinda), Israel, Lebanon, Libya, Eritrea, Somalia, the Democratic Republic of Congo (former Zaire), Liberia, Sri-Lanka, Sierra Leone, the Gulf of Aqaba and the Red Sea, Yemen, Pakistan, Oman, Syria, Algeria, Egypt, Indonesia, except transit vessels, Cote d'Ivoire, Nigeria and the Bakassi Peninsula.[7]

The JWC list differs from that of WRRC, as it includes only maritime states and water territories (e.g. — Iraq and Kuwait are not included but the Persian Gulf is). In addition, the JWC list reflects a different evaluation of political instability in the world: the JWC list is broader as it includes Arab maritime states. Otherwise, the lists of the JWC and WRRC do coincide.

The lists can be used if the parties decide to look at the risk evaluation provided by the most authoritative insurance groups to identify politically unstable regions. In order to prevent courts from ignoring the data in the lists, any agreement should contain references to them and establish the procedure for their use. ■

[1] Institute Marine Cargo Clauses A, B, C. //http://www.jus.uio.no/lm/private.intema-tional. commercial.law/insurance.html

[2] Schmitthoff Clive M. Export trade: the law and practice of international trade. — London.: Stevens&Sons., 1990.

[3] ICRC Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949. — Dordrecht.: 1987, Martinus Nijhoff Publishers. — p.67, see also http://www.icrc.org/IHL.nsf/

[4] Quoted from: Howard N. Bennett. Marine Insurance and War Risks. —

[5] UNIDROIT Principles of International Commercial Contracts / / http://www.unidroit.org/english/principles/ contents.htm

[6] http://www.aon.com/nl/nl/WS- Schedule92.pdf

[7] http://www.britanniapandi.com/circulars/ august03_b.pdf