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The sanctions and war clauses in insurance contracts – International and European approach

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Abstract

The purpose of this article is to trace the evolution of insurance coverage for war risks and to draw conclusions about the insurability of these risks in the future. This problematics is extremely topical due to the current geopolitical situation, but not only. War risks have also become the number one topic due to the growing cyber threat which is not necessarily related to the traditional meaning of war. This paper analyzes the importance of both sanctions and war clauses in insurance, points out the differences and similarities between them and the impact they have on the operation of the insurance market in general, as well as on the scope of coverage under individual insurance contracts.

The assumption is the different nature of sanctions and war clauses. Though their effects may be the same, i.e. the impact on the insurance coverage, though they act in completely other way. The difference between sanctions and war risk coverage is related to, accordingly, the public and private nature of the war sanctions and war clauses. As a rule, sanctions are public in nature, thus there is no possibility of negotiating them or waiving between the parties. They can have broad sectoral application, that is, to the entire product line and all entities. War clauses, on the other hand, are element of private law, applicable to individual insurance contracts, based on an assessment of the risk, the scope of protection offered and its ability to be financed. War clauses as an element of an insurance contract may depend on the insurer‘s individual risk assessment and may be subject to negotiation between the parties. The analysis made in the paper shows however also some doubts whether, what seemed to be a private matter of the parties to the contract remains so ‘private' in face of so public issue as war. This is perfectly illustrated by the NotPetya cyber-attack case, the perception of which was so influenced by the opinion of the US and UK governments qualifying it as war. This time, the court expressed a different opinion, but the future may be different. Blurring differences between public and private law on the example of insurance is an undeniable fact. As a result, it seems that it may not be insurers that determine the insurability of war risks in the future, but the attitude of the state. As in the situation of imposing sanctions.

Key words: war clauses, war sanctions, insurability

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1. INTRODUCTION: GOAL AND STRUCTURE OF THE STUDY

The purpose of this article is to trace the evolution of insurance coverage for war risks and to draw conclusions about the insurability of these risks in the future. This problematics is extremely topical due to the current geopolitical situation, but not only. War risks have also become the number one topic due to the growing cyber threat which is not necessarily related to the traditional meaning of war. At the same time, there seems to be insufficient awareness about the possibilities of covering war risks in order to consciously build strategies for managing these risks in companies, including directing these risks to insurance. The state of confusion is exacerbated by a lack of understanding of at least the differences between sanctions imposed by states or, for example, the European Union and international organizations, and insurance contractual clauses used by insurers with respect to the war and war sanctions. An interesting issue within this topic is the role of the state(s) not only as regards the sanctions imposed as public law measure, but also an impact the politics may have on functioning of the insurance coverage under individual insurance contract.

For the above reasons, this study analyzes the importance of both sanctions and war clauses in insurance, points out the differences and similarities between them and the impact they have on the operation of the insurance market in general, as well as on the scope of coverage under individual insurance contracts.

The first assumption to be made is the different nature of sanctions and war clauses. Though their effects may be the same, i.e. the impact on the insurance coverage, though they act in completely other way. The difference between sanctions and war risk coverage is related to, accordingly, the public and private nature of the war sanctions and war clauses. As a rule, sanctions are public in nature, thus there is no possibility of negotiating them or waiving between the parties. They can have broad sectoral application, that is, to the entire product line and all entities. War clauses, on the other hand, are element of private law, applicable to individual insurance contracts, based on an assessment of the risk, the scope of protection offered and its ability to be financed. War clauses as an element of an insurance contract may depend on the insurer's individual risk assessment and may be subject to negotiation between the parties. It should however be taken into account, that though the insurers are formally independent in taking the risk decisions, practically they follow the market position and trends set by the industry organizations. This is specially true for the transportation insurance. The body which acts as a kind of 'barometer' is the Joint War Committee at Lloyd's which monitors the risk situation and gives recommendations with respect to the underwriting of transportation risks in the context of the risk of war. Its influence on the behaviour of the insurers resembles the impact of the statutory regulations. Also, in most of the cases the measures proposed by the Committee react quicker and more precisely.

2. WAR RISKS VERSUS WAR SANCTIONS: LAW OR POLITICS?

2.1. War in insurance: evolution

Despite the conviction that "wars have always been regarded as large-scale events, with an unpredictable catastrophic impact, leading to aggregation of many losses", the first commercial insurance (Vaughan, Vaughan, 2008, 615), i.e. marine insurance, had a very different approach to covering the risk of war. However, this was not due to a lack of awareness of war risks, but quite the opposite. According to historical data, maritime insurance policies in the seventeenth and eighteenth centuries covered fifteen risks, eleven of which were specifically related to war, piracy and other violence potentially associated with shipping. Citing the sources, "eighteenth century merchants and underwriters gave great importance to the possibility of capture at sea, both in times of peace and war" (Vicent 1995). Such an approach, however, was the result of a specific geopolitical situation involving a conviction on the supremacy of the British Navy, which was never challenged until that time. It follows that while the risk of war was taken into account as much as possible, it was not considered serious enough to be a reason to exclude war risk from coverage. The situation began to change with advances in technology, and changes in the political situation. This was particularly true of the launch of the first submarine in 1893, and with it the destructive powers of the propelled torpedo, which up until that time, had seldom been used in practice (Vicente, 1995). This began to lead to an increasing degree of uncertainty and a sense of loss of control towards what the war risks. As a result, it led to the exclusion of war risks from insurance coverage.

At the end of the 19th century, according to the suggestion of the London Assurance‘s to the Committee of Lloyd‘s, the marine policies began to include an exclusion of the risk of war unless a special agreement had been reached that it should be covered. This was implemented by the clause of the ‚Free of Capture and Seizure Clause'. This approach began to dominate insurance at first in marine insurance and then, with the development of other modes of transportation, in aviation insurance as well. By their very nature, these insurances were always international in nature. A kind of market consensus meant that, although in a different form (by shifting war risks into separate coverage), in these lines off insurance, taking out coverage for wars was common. What should be considered distinctive is the approach taken by the insurers from the beginning that recognized the need to standardize clauses covering (or excluding) war risks. This approach is still in place today and applies to insurance for all modes of transportation. This is represented by the Institute Cargo Clauses applicable to all modes of transportation (Lloyd's Market Association, N/a(a)).

The war risk at modern times is qualified as fundamental risk, along with inflation, earthquakes, and floods are all fundamental risks. As states Prof T. Vaughan, fundamental risks involve losses that are impersonal in origin and consequence. They are risks caused mostly by economic, social, and political phenomena, although they may also result from physical occurrences. They affect large segments or even all of the population (Vaughan, Vaughan, 2008). That is also why they are recognized as essentially uninsured

risks in majority of lines of insurance. This has been accepted by some of the lawmakers and the statutory exclusions can be met in Belgium, where according to art 63 of the Act of 4 April 2014 on Insurance "unless stipulated otherwise, the insurer shall not cover loss caused by war or similar events and by civil war. The insurer must provide proof of the fact releasing it from the obligation to provide cover. However, the King may adopt rules easing the burden of proof of the fact releasing the insurer from the provision of cover" (Loi relative aux assurances, 2014; AIDA Report, 2022). Similar concept has been provided with respect to reinsurance, maritime insurance, transport insurance and aviation insurance and states: "War risk and loss or damage caused by riots are not insured unless the contrary has been stipulated" (Loi relative aux assurances, 2014, art. 243; AIDA Report, 2022). Similar approach has been adopted in France, where with respect to property and liability insurances, Article L.121-8 French Insurance Code provides that: "the insurer shall not be liable for losses and damage caused either by a foreign war, civil war, riots or by civil commotion, unless otherwise agreed. When such risks are not covered by the contract, the insured must prove that the loss has been caused by an act other than the foreign war. The insurer shall have the burden of proving that the loss has been caused by civil war, riots or civil commotion. Same applies to marine insurance by force of Article L.172-16 French Insurance Code (Code des Assurances, art. 28). Analysis of the insurance contract law in other European countries, brings similar effects as regards Greece (art.13 par of the Greek Insurance Contract Act), and Italy (art 1912 of Italian Civil Code). Exclusion of the coverage in case of war (military action) is present also in Russian law, by virtue of art 270 of the Marine Code. All the statutes, apart from the Russian one allow for different agreement between the parties, i.e. extension of the coverage to the war risks (AIDA Report, 2022).

The last stage of the evolution with respect to the insurance coverage of war risks concerns the digital revolution and the emergence of cyber risks. Along with their escalation and evolution into organized cyber-attacks, the question of qualifying cyber incidents as war has arisen. An ascent to such an understanding was provided by the NotPetya cyber-attack, which in 2017 has crippled ports, paralyzed corporations and frozen government agencies, causing total losses in the amount of more than $10 billion in total damages. It might just be a big loss if not the US and UK government's accusation of Russia's armed forces as authors of the attack and claiming its hostile and warlike character (Wolff, 2021; Nakashima, 2018). Following this, insurers in cases such as the *Merck v. ACE American Insurance Co.* began using the war risk exclusion as an argument for denying claims. This has also resulted in a general interest in war exclusions in cyber insurance contracts, especially in view of the increasing cyber incidents, and the attribution of some of them to State authorities using the cyber-attacks against their enemies. At the moment, there is no specific response from legislators specifically with regard to cyber insurance, so in those legal systems where general war risks have been regulated, they will apply appropriately to cyber-attacks.

An important part of the market evolution is the gradual development of standard clauses both excluding war risks and introducing the possibility of insuring them. This responds to the general provisions of the law, as well as the retained freedom of the parties to include the risk of war in insurance. A market standard has been developed

in this regard by the British market, i.e. by the Institute of London Underwriters (now International Underwriting Association). Also participating in the standardization of clauses is Lloyd's of London, which recently published draft war clauses for cyber insurance.

2.2. War clauses in insurance contract

Despite the standardization of war clauses in cargo insurance contracts, thanks mainly to the work of the Institute of Insurance Underwriters, doubts remain in this regard, as evidenced by numerous court decisions resolving disputes between policyholders and insurers. These doubts manifest themselves in two contexts. First, whether there is a war in a given factual situation, i.e. whether a given facts exhaust the prerequisites for war. And second, what relationship should exist between the war and the loss (the event insured) in order for the war clause to be satisfied. Both of these issues cause disputes between the parties to the insurance contract. The first of them is however particularly interesting as it includes potential of being influenced not only by the facts but even by the mere political declarations of the States, as it proved to be in case of NotPetya cyber-attack.

A definition of war is very difficult to find in legislation (including insurance legislation). Even such advanced legislations as French or Belgian, where war is statutorily excluded from insurance coverage, do not contain a definition of war. Also common law has not developed a uniform definition of war, although precedents provide plenty of guidance in this regard (Clarke, 2009, 615). Doubts in this regard mainly concern war that has not been formally declared. This is not, as history shows, common, as France, for example, has not declared war since 1939, and other countries even for several hundred years (such as Sweden, Switzerland and other neutral states) (Vicente, 1995). The only legislation that has introduced a definition of war is Russian legislation, where, a military conflict is a way of resolving contradictions between different states or within one state by employing military force. This definition embraces all kinds of military confrontation including large scale, regional, local wars and armed conflicts (AIDA Report, 2022).[1]

Standard contract clauses provide a fairly broad exclusion for loss or damage caused by hostile or warlike acts in time of peace or war, including acts of hindering, combating or defending against an actual, imminent or expected attack: a) by any government or sovereign authority (de jure or de facto) or by any authority maintaining or using military, naval or air forces; b) or by military, naval or air forces; c) or by an agent of such government, authority, body or force.

According to the standard Institute Cargo Clauses, war occurs in a broad sense, as it includes war, hostilities, war operations. It is characterized as being conducted by a state (between sovereign states); measures of war, e.g., the use of weapons or military/physical means, are not listed as an essential element of the definition; not only losses directly

[1] It has been included in the Military Doctrine of the Russian Federation and adopted by Presidential Decree of 25.12.2014 N Pr-2976.

caused by war are excluded, but also losses "directly or indirectly resulting" from war or "in connection with war", which gives the exclusion a broader scope and coverage.

The risk of war appears in the exclusions along with insurrections, rebellion, or revolution. Any discharge of a nuclear weapon—even though accidental—is excluded under this provision. Following the terrorist attack on the World Trade Center on September 11, 2001, questions arose concerning the application of this exclusion to such acts of terrorism. The consensus has been reached however by the industry that the "traditional" notion of war does not apply to acts of terrorism. A leading case in this area states "War refers to and includes only hostilities carried on by entities that constitute governments at least de facto in character."[2] Since the attack on the World Trade Center, some insurers have inserted a separate terrorism exclusion in their policies (Vaughan, Vaughan, 2008, 466).

In the context of the above, numerous doubts have arisen as to whether the concept of war also means civil war. This issue became the subject of consideration in the case of the Spinney's v. Royal Insurance case (1980) and its background was the unrest in Beirut in 1975/ 1976 when properties covered by a fire insurance policy were badly damaged as a result of looting and vandalism. The insurers denied liability on the basis of a Riot and Strike Endorsement which excluded losses caused, inter alia, by "civil war" and "commotion." The court considering the case distinguished some necessary prerequisites of qualifying the events as a war, i.e. there has been an internal conflict between two or more identifiable 'sides' which have as their objective the seizure or retention of political power in the country concerned and the conflict is on a large scale involving considerable sections of the population with a resulting disruptive effect on public order and the way of life. Finally, the court stated that the civil war is "a war which has the special characteristic of being civil – i.e. internal rather than external. This special characteristic means that certain features of international war are absent. Nevertheless, a civil war is still a war" (Vicente, 1995). This confirms the established views of the common law doctrine saying that civil war does not have to be excluded under distinctive clause and in case it is not, is covered by the common notion of war (Clarke, 2009, 615).

It does not come as a surprise that the majority of cases and doctrine views refer to property and liability insurance. These days however we have to face a new type of war playing in the cyber space. Though the cyber insurance have to adopt the traditional notions to the new reality. The concept of war in cyber risk insurance was initially adopted from other types of insurance, but the market has begun to work on war clauses that would suit the specifics of cyber risks.

The issue of war as part of insurance coverage entered a new stage of discussion in response to the Merck case. The case involved a cyber-attack aimed at damaging another country's infrastructure with the goal of destroying it through digital cyber means; a New Jersey court was tasked with assessing whether the exclusion covered "digital warfare." Merck's computer system was attacked by the NotPetya malware, resulting in damages of more than $1.4 billion. The insurer refused to pay the claim under the "All-Risk' insurance contract with ACE based on the war exclusion for 'hostile and warlike acts." In January 2022, the New Jersey Supreme Court issued a ruling awarding damages

[2] *Pan American World Airways v. Aetna Casualty and Surety,* U.S. Second Circuit Court of Appeals (1974).

to Merck based on a restrictive interpretation of the exception, which was supposed to be "war." It found that despite its awareness of cyberattacks, which can be "acts of war", ACE had failed to tailor the expressions in the exception to this possibility. Moreover, he said, Merck was "entitled to anticipate that the exclusion applied only to traditional forms of warfare." An appeal was filed in 2022. It is to be expected that similar events will become part of the risk landscape.

Fresh market practice in the field of cyber insurance thus provides for the inclusion of the above clauses in the terms of standalone cyber-attack policies, as an attempt to respond to market demand as to coverage for risks that can be qualified as a war. In this regard, it is worth noting that insurers offering coverage for cyber risks were forced to develop a definition of the war on their own. A rather broad concept has been proposed as regards losses arising from any state-backed cyber-attack. These clauses are to be applied in addition to any war exclusion. The market practice established the course of action when insuring cyber risk and the way the war exclusion clause should. First of all the cyber war criterion consists of the state-backed cyber-attack and at minimum, the exclusion must exclude losses arising from war (whether declared or not), where the policy does not have a separate war exclusion. It should also exclude losses arising from state-backed cyber-attacks that (a) significantly impair the ability of a state to function or (b) that significantly impair the security capabilities of a state. It should also be clear as to whether cover excludes computer systems that are located outside any state which is affected in the manner outlined above (Lloyd's, 2022).

In late December 2021, the Lloyd's Market Association published its new war risks exclusion clauses for cyber war and state-attributed cyber operations. They were drafted with the participation of the industry stakeholders. The new clauses strike a welcome balance between the needs of a commercial sector facing ever-evolving cyber threats, and an insurance market seeking to insure against knowable risk. Given the difficulties in defining war, it is perhaps unsurprising that this effort represents the first update to the war risk exclusions and also to tackle the cyber risk in direct terms. There are four new clauses, which allow for a scalable approach to coverage, depending on the economic impact of a given cyber operation (Lloyd's Market Association, 2021).[3]

2.3. Sanctions and insurance contracts

Sanctions are inherently a category of public international law and signify the negative response of the international community to a state that violates the norms of international law. The purpose of sanctions is to prevent the continuation of international cooperation in response to certain political events that are contrary to international agreements or the accepted values of a particular society. Sanctions are

[3] LMA 1: Excludes cover for any losses happening through or in consequence of war or a cyber operation. LMA 2: Places specific sub-limits on pay-outs in the event of cyber operations, but excludes absolutely those operations launched in war, in retaliation by specified states, or which cause major detrimental impacts to the functioning of a state. LMA 3: As LMA 2, but with no specified sub-limits on pay-outs to claims. LMA 4: As LMA 3, but allowing for coverage to by standing assets (i.e. those caught up in, or damaged by a cyber operation, but not those targeted) resulting from cyber operations causing major detrimental impacts to the functioning of a state.

adopted in the context of target states acting either in violation of international law or failing to act in the manner prescribed by international law (D'Amato, 2010). They form coercive measures applied against States, non-State entities, or individuals that pose a threat to international peace and security. The objective of imposing the sanctions are to modify the behaviour of the "perpetrator", reduce its capacity for maneuver or weaken its position and publicly denounce those that pose a threat. Sanctions are fundamentally preventive and as such should be proportionate, not too excessive. They are used as an alternative to the use of armed force. From a practical point of view, sanctions are restrictions on access to financial resources, e.g. the US dollar, or impediments to the flow of goods, e.g. the fuel embargo. Sanctions apply to individuals, companies, and other entities, economic sectors, and countries and are imposed by economically powerful countries (e.g., the US) or organizations (e.g., the EU, the UN), which usually have separate bodies responsible for monitoring compliance. From the European perspective, at present, there are three main authorities imposing sanctions: the United Nations, the European Union, and the Organisation for Security and Cooperation in Europe. The legal basis for imposing the sanctions by the United Nations is Chapter VII of the United Nations Charter (United Nations, 1945; Ruys, 2017). Art. 39 od the Charter says that it is the Security Council who determines the existence of any threat to the peace, breach of the peace, or act of aggression and makes recommendations, or decide what measures shall be taken in accordance with to maintain or restore international peace and security (United Nations, 1945).

Despite being a category of public law, sanctions have a direct impact on private economic relations. Within the objectives of this paper, the intention is to analyze the impact of sanctions on private insurance contracts. This issue will be discussed based on an example of the most recent sanctions implemented by the European Union. Given the current state of the law, there are essentially two types of sanctions. These are sectoral sanctions included in the set of Regulations which apply to the specific activities and objects (listed in the Regulations), although with reference often to their use in the sanctioned country or by entities under the jurisdiction of such country. In addition, there are personal sanctions, which forbid, based on the lists of personal data of specific individuals (Council Regulation (EU) No 269/2014), to conclude or perform the specific transaction with respect to such persons, by entities under the jurisdiction of the sanctioning state (e.g., an EU member state). It should be noted that also sectoral sanctions refer to specific persons or entities (remaining under the jurisdiction of the State addressed in the sanction's instrument). Thus, in consequence, the interpretation of the scope of applying the sanctions must always take into account the personal and subject-matter factor.

Having the above in mind, it is worth adding a few examples of legal provisions to determine their impact on the insurance contract. Thus, taking Regulations 833/2014 and 765/2006 as an example, insurance is subject to provisions on insurance services, as well as investment services. This is indicated by both the definition of financing and financial assistance and the definition of investment services in the Regulations. Also to be taken into account are those provisions of the Regulations that relate to activities customarily performed by an insurance company in the performance of insurance contracts, such

as unit-linked insurance, which may go beyond the typical understanding of insurance activities. In the case of insurance contracts, these may include activities relating to the placement of funds, and in the case of property insurance, salvage activities or sales transactions in post-lost adjustment activities. That all, makes the process of properly applying the sanctions quite complex.

In order to understand the manner of applying the EU sanctions in insurance, the first clue is analyzing some of the definitions. Crucial one turns out to be the term "financing or financial assistance", which means any activity, regardless of the specific manner, whereby a person, entity or body, conditionally or unconditionally, provides or undertakes to provide from its own funds or economic resources, among other things, insurance guarantees and insurance and reinsurance products of all kinds. The necessary addendums are annexed to the Regulations and include lists the objects and activities to which the prohibition of financial assistance refers. The second concerns the concept of "intermediation services" which means, inter alia negotiating or concluding transactions for financial and technical services or selling or purchasing financial and technical services. In addition, the concept of "investment services" may apply to insurance, meaning, at a minimum, the acceptance and transmission of orders in connection with one or more financial instruments, the execution of orders on behalf of clients, the execution of transactions for own account or the management of investment portfolios.

Taking the above into account, it should be noted that laws regulating the sanctions often use (as it is in the case of the EU Regulations) vague and undefined concepts, the interpretation of which under private law is at least difficult. In order to properly apply the provisions, it is necessary to use an interpretation that serves the purpose of the sanctions, but even this sometimes does not bring satisfactory results. Thus, for example, when analyzing how to apply the prohibition on providing financing or financial assistance) in connection with goods and dual-use technologies, it is not at all clear what specific activities are covered by the prohibition. Only the clarification provided by the EU Council, as well as the supervisory authorities, indicates that it is both a prohibition on the conclusion and execution of all types of insurance contracts that meet the criteria specified in the regulations. In addition, it can be noted that in life insurance, it is not so much the prohibitions that apply to financial "assistance", but also the provision of investment services or assistance in issuance, or any other activities related to transferable securities and money market instruments of a certain type, as well as the sale of transferable securities to certain entities (Council Regulation (EU) No 833/2014). According to the explanations drawn up by the European Commission as to the application of the provisions on sanctioning measures, those introduced apply to any entity or person that is party to a transaction or arranges or otherwise facilitates the sale, purchase or issuance of securities of entities sanctioned under these articles, and apply to all market participants, including asset managers, fund administrators, depositaries, etc. At the same time, the supervisory authorities confirm the purposive interpretation of the regulations, stating that the absence of or insufficient measures to ensure compliance with the ban on indirect investment would be tantamount to a violation of the ban. Thus, in the case of EU Regulations, e.g. Council Regulation (EU) 833/2014, the territorial criterion is the obligation to comply with the prohibitions (i) within the territory of the

Union; (ii) to any legal person, entity or body, inside or outside the territory of the Union, which is registered or established under the laws of a Member State; (iii) to any legal person, entity or body in respect of any economic activity carried out in whole or in part within the territory of the Union. Given the ambiguity raised above as to the scope of the binding of certain sanctions, attention is drawn to the obligation to adequately verify and refrain from carrying out activities where there are reasonable grounds for suspicion of the grounds for the application of sanctions.

An aggregate analysis of the provisions introducing restrictive measures leads to the conclusion that their operation directly affects the conclusion and execution of individual insurance contracts in such a way that insurance contracts concluded during the period of the sanctions are void if their subject matter or party is within the scope of the restrictive measures. On the other hand, in the case of contracts already concluded, the broad scope of prohibited activities indicate that such contracts cannot be performed. However, there are no sufficient arguments to consider their termination *ex tunc* or *ex nunc*, especially the majority of the European countries impose quite restrictive provisions as regards the possibility of terminating the insurance contracts. Sanctions affect heavily the sustainable character of insurance relations and this makes their interpretation so difficult. The prohibition to execute the contract means not only a ban on paying the claim, but also to carry out any activities related to the processing of such a claim, i.e. loss adjustment, or even to establishing technical provisions for such a claim. This is due to the fact that even if the sanction is lifted before the claim is time-barred, it seems that still, insurer is not liable if the event insured materialized at the time the sanction was in force. Of course, the above conundrums are only necessarily a proposed approach to this extremely difficult matter, regulated in a vague manner and not yet crowned by court decisions. Regardless of whether there is a convergence of views here, it is necessary to realize that it is necessary to apply economic analysis of the law and conduct a discourse based on such methodology. Economic analysis of law is understood as the emerging field under which the standard tools of microeconomics are employed to identify the effects of legal rules and their social desirability (Kaplow, Shavell, 2002). It seems clear that the sanctions, even if apply to the specific insurance contracts, they have an impact on overall situation of the insurer, including its finances and compliance.

In conclusion, the impact of sanctions on the insurance contract is heterogeneous and depends on the type of sanction and the type of insurance contract. In the case of property insurance, the decisive element for both the conclusion and execution of the contract may be the risk covered and whole circle of stakeholders in that insurance, not just the policyholder or insured. In the case of personal insurance, restrictions may relate to insurers' investment policies (e.g., restrictions on investing in certain assets of certain entities). In contrast, for all types of insurance, personal sanctions will have a homogeneous effect. Thus, the conglomerate of legal effects of applying the sanctions will consist of prohibitions to conclude or execute an insurance contract, sanctioned by the invalidity or ineffectiveness of the acts performed, respectively.

In view of the peremptory nature of sanctions, which does not leave much room for the arrangement of relations in this regard, the question arises whether the situation in which sanctions have been imposed allows for any contractual intervention, in order to safeguard

the interests of the parties, or at least of the insurer, which is the primary addressee of the obligation to apply sanctions to the entities or transactions covered by them.

2.4. Sanction clauses in insurance contracts

The insurance market has recognized that the proper application of restrictive measures requires cooperation between the parties to the insurance contract by regulating the matter in the insurance contract. Sanctions clauses in an insurance contract have several purposes. First, they clarify the effects of sanctions on the insurance relationship between the parties, when sanctions will prevent its performance in whole or in part. They are peculiarly similar in nature to force majeure clauses, written with a specific type of such force such as sanctions in mind.[4] These clauses provide for the suspension or complete exemption of the insurer from liability in the event that the performance of the contract would mean a violation of the sanctions. Secondly, these clauses contain assurances by the insured that its activities, the performance of particular activities that are covered by the insurance, are not subject to the sanctions (not prohibited by the sanctions). And third, as a consequence of the assurances, they impose an obligation on the insured to pay compensation to the insurer in the event that the insured causes the insurer to violate the sanctions.

This way insurers seek to protect their position in a situation where the insurer's performance of the insurance contract would be a violation of the sanction (e.g., due to the specific subject matter of the insurance). In such a scenario, a sanctions clause will act as an exception clause that will allow the insurer to refuse to perform the contract by paying a claim without exposing itself to a claim by the insured for breach thereof. By using sanction clauses, insurers also protect themselves with indirect risks, i.e. reputational risks when they co-create an ecosystem of specific industries exposed to sanction obligations, e.g., they may reflect the requirements of reinsurers or customers who are subject to sanction obligations more broadly than insurers themselves. The introduction of sanctions clauses, particularly those imposing obligations on insureds to inform or act with due care, reflect insurers' obligation to act with due diligence This, of course, does not exhaust their obligations to actually verify the insured risk through other methods. Finally, effective sanctions compliance policies may also address other areas of interest (e.g., terrorist financing, proliferation financing, human rights violations).

The example of the sanction proposed by the London Market provides as follows:

Sanction Limitation and Exclusion Clause

No (re)insurer shall be deemed to provide cover and no(re) insurance shall be liable to pay any claim or to provide any benefit hereunder to the extent that the provision of such cover, payment of such claim, or provision of such benefit would expose that (re)insurer to

[4] Possibility of understanding the sanctions as a type of force majeure was confirmed in the case of *MUR Shipping BV v RTI Ltd*, where the court confirmed the contracting party's right to invoke force majeure where the parent company of its counterparty is subject to sanctions. Such a standpoint was expressed as well by ICC in explanation to the force majeure clauses (ICC, 2020).

any sanction, prohibition or restriction under United Nations resolutions or the trade or economic sanctions, laws, or regulations of the European Union, United Kingdom or the United States of America. (LMA3100) (Lloyd's Market Association, (N/a(b))

An extensive explanation of the need to introduce sanction clauses in the insurance contracts has been provided by Lloyd's. It was said among others that the insurers intend to avoid two extremes, by adopting an overly lax approach to compliance, with the risk of committing a crime or, an overly cautious approach, which runs the risk of insurers rejecting significant premiums for risks that may have been quite legitimately written. This is, of course, a delicate balancing act, with severe consequences for errors of judgment. Introducing the clauses in the contracts does not eliminate the risk of a dispute between the parties.[5]

They are intended to protect against risks that could not reasonably be identified through pre-contract due diligence and the uncertainty associated with sanctions regimes, including post-contract changes in the law. Sanctions clauses can also be perceived as a risk mitigation tool in business lines of business that represent a higher risk of exposure to sanctions, such as marine, offshore, aviation or energy and are intended to promote contractual certainty.

Another positive aspect is that the sanctions clause forms a part of the compliance program and it apart from regulating this issue in the insurance contract, it includes also appropriate due diligence in action, such as screening, etc. In addition, insurers apply ancillary actions such as using specific geographical or territorial exclusions in the wording of the contract, excluding specific entities, persons or activities from coverage, as well as not offering coverage to them (Lloyd's, (N/a)).

3. CONCLUSIONS: SANCTIONS AND WAR CLAUSES DIFFERENT OR THE SAME SIDE OF THE COIN?

As stated in the premise of this article, insurance is set up to deal with crisis situations. However, there are limits beyond which insurance cannot ensure effective transfer of damage risk in a war situation. War risk has come a long way since the 19th, and is now entering a new one - the cyber space. Observing this evolution, one might be tempted to conclude that with the rise of global risks, and fundamental risks in particular, the freedom of parties to shape the rules for providing insurance coverage is diminishing, and insurance is increasingly becoming part of a public-private

[5] See for example the case *Mamancochet Mining Limited v Aegis Managing Agency Limited and Others [2018] EWHC 2643 (Comm),* where the court did not share the argument of the insurer and states that it is liable to pay an insurance claim under a marine cargo insurance policy, as doing so was not prohibited under EU or US sanctions against Iran. The court held that: "this clause suspended the insurer's liability only if (and for as long as) payment of the claim would in fact be illegal under the foreign sanctions regime. On a true construction, the mere risk of being sanctioned by a regulator did not suffice to invoke the clause. It was common ground that payment of the claim after 4 November 2018 would be in breach of US sanctions (being the date on which the 'wind-down' provision accompanying President Trump's revocation of the US's participation in the Joint Comprehensive Plan of Action on Iran will come to an end). On the facts, payment of the claim before 4 November 2018 would not be a breach of sanctions. The insurers were therefore liable to pay the claim" (Commercial Court, 2018).

partnership in managing risks, including political risks. And while it is not true that war risks have always been uninsurable, it is certainly the case that political considerations are having an increasing impact on insurers' freedom as to when they will or will not provide risk coverage. This is highlighted throughout by sanctions, which can affect the validity or effectiveness of a contract, or significantly limit its ability to be enforced. Given the nature and purpose of sanctions, this is not particularly surprising.

It is different, however, in the case of war risk insurance, which has been covered freely by the parties for centuries, and the legislation of those countries that have regulated the issue also leaves it up to the parties themselves to negotiate coverage on an individual basis. Thus, what appeared to be a private matter of the parties to the contract turned out to be very fragile. This is perfectly illustrated by the NotPetya cyber-attack case, the perception of which was so influenced by the opinion of the US and UK governments qualifying it as war. This time, the court expressed a different opinion, but the future may be different. Blurring differences between public and private law on the example of insurance is an undeniable fact. As a result, it seems that it may not be insurers that determine the insurability of war risks in the future, but the attitude of the state. As in the situation of imposing sanctions.

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