REVISITING THE FIVE-POWERS WAR RISK EXCLUSION

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Abstract Marine war risk insurance fundamentally contemplates casualties caused by international conflict. Curiously, however, standard clauses also exclude cover and automatically terminate war risk policies in the event of an outbreak of war between a select group of historically powerful States: China, France, the United Kingdom, the United States and Russia. This article aims to demystify the origins of this five-powers clause and evaluate its prospective application through the lens of an emerging breed of confrontation among the world's major powers.

Keywords: private international law, marine insurance, war risk, political risk, geopolitics, legal history, NATO, Russia, China.

I. INTRODUCTION

Recent geopolitical upheaval impacting trading conditions worldwide is once again provoking an analysis of the customary language used in commercial maritime agreements. Rooted in long-standing practice, maritime contracts have a gravitational tendency to hold firm to time-honoured clauses, which paradoxically fosters both an expectation of stability and uncertainty over their contemporary application. Among the contracts relying on such decades-old wordings are war risk insurance policies designed for the unique challenges of turbulent times. Although war risk policies explicitly cover many of the risks excluded by conventional marine insurance arrangements, they also carry narrow carveouts that beckon re-examination. Buried among them is a curious clause that denies recovery and even automatically terminates the war risk insurance if an 'outbreak of war' occurs between any members of a select list of historically powerful States: China, France, the United Kingdom (UK), the United States (US) and Russia.[1]

[1] See, eg, Institute War and Strikes Clauses (1/11/95) cls 5.11, 6.2.1. These listed States are the five permanent members of the United Nations (UN) Security Council. See UN Security Council, 'Current Members' <https://www.un.org/securitycouncil/content/current-members>.

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The grave nature of the conflict envisioned by this so-called 'five-powers' exclusion has been virtually inconceivable since the end of the Cold War. But ongoing diplomatic complexity between the listed nations and the evolution of innovative warfare tactics are raising questions over its scope. In recent years, the nations listed in the clause have engaged in 'hybrid' or 'grey zone' hostilities, sometimes targeting one another's interests with cyber interference, espionage, infrastructure sabotage, drone-administered violence and increasingly sophisticated economic coercion. These measures have layered in conjunction with a conventional war on the European continent directly involving one of the listed nations and indirectly implicating several others coalescing as allies.[2] Alongside the peace and security discourse flowing from these developments are timeless questions regarding how the concept of war should be interpreted in commercial documents but through the new lens of an emerging breed of confrontation brewing among the world's major powers.

Revisiting the five-powers war risk exclusion and automatic termination clause, this article aims to demystify its origins and assess its prospective application. First, it situates the war risk market in the broader marine insurance landscape by explaining the development of its role in providing cover for exclusions contained in other marine insurance arrangements. It then discusses the evolution of the five-powers language adopted in both the British and US war risk markets, including exploring its interaction with government-provided insurance programmes equipped to deploy during significant wars. Finally, it examines potential application challenges by evaluating relevant case law and placing the clause in the context of contemporary geopolitical conditions.

II. THE DEVELOPMENT OF THE FIVE-POWERS CLAUSES

A. War Risk in Marine Insurance

Modern marine war risk insurance is recognised as a specialist market distinct from marine risk underwriting. This division, however, developed over centuries of practice. The Lloyd's SG Policy, which was utilised in the London market for more than 200 years, referenced an expansive list of insured perils, including a broad range of war and warlike risks.[3] Along with sea perils, the SG Policy also contemplated cover for losses caused by 'men-of-war', 'enemies', 'takings at sea' and other similar threats.[4] This

[2] See Section III.

[3] Although there are alternative theories, Lloyd's SG Policy is believed to stand for 'Ship and Goods'; see R Merkin, *Marine Insurance: A Legal History* (Edward Elgar Publishing 2021) para 6-013.

[4] See M Davey, J Davey and O Caplin, *Miller's Marine War Risks* (4th edn, Informa 2020) para 1.9: 'No fewer than 12 (some would say more) of the perils we would today describe as war risks were insured by the same policy which also insured such marine risks as "perils of the seas".'

understanding of the fused nature of marine and war risks is also reflected by the fact that many of the early marine insurance cases involved losses caused by human force—especially by political adversaries—rather than the nautical hazards entrenched today as the perils of the sea.[5]

In part due to geopolitical volatility affecting maritime commerce during the eighteenth and nineteenth centuries—including major conflicts between England, France and the US—the London market began to view war risk through a different lens.[6] Addressing exposure through revised language, the market started circulating wordings called free of capture and seizure (FC&S) clauses, which allowed marine underwriters to exclude certain war-related risks otherwise insured by the unamended SG Policy.[7] These excluded risks could then be insured under a separate war risk policy by those insurers willing to underwrite them.

By the end of the nineteenth century, the separation of marine and war coverage led to the formal recognition that the two policies should be subject to distinct ratings.[8] In 1898, the Lloyd's market passed a resolution expressing the consensus that there should be a harmonised method for dividing marine and war risks through the standard inclusion of the FC&S clause in all marine policies.[9] At that time, the FC&S clause took the following form:

> Warranted nevertheless free of capture, seizure and detention, and of the consequences thereof, or any attempt thereat, piracy excepted, and also from all consequence of hostilities or warlike operations, whether before or after the declaration of war.[10]

A similar division developed in protection and indemnity (P&I) insurance. P&I clubs had formed in response to insufficient coverage for collision-related liabilities under a 'Running Down Clause' adopted at Lloyd's reacting to case law holding that collision was not a peril of the sea covered under the SG Policy.[11] Shipowners formed mutual insurance organisations to provide stop-gap cover. However, these P&I clubs eventually took on a much broader role to insure a range of other liabilities not covered by conventional hull or cargo clauses,

[5] Merkin (n 3) (preface) notes that 'until 1815 there was scarcely a decided marine insurance case that had not involved loss at the hands of enemies'.

[6] Davey, Davey and Caplin (n 4) para 1.9.

[7] There are also cases preceding the advent of the SG Policy referencing an early version of the FC&S clause. See Merkin (n 3) para 7-039 (discussing *Green v Brown* (1743) 2 Stra 1199).

[8] See Davey, Davey and Caplin (n 4) para 1.15. See also Merkin ibid, para 7-040, who notes that the FC&S clause briefly 'declined in importance' during a period of peace after the end of the Napoleonic Wars 'until it re-emerged in the wars from 1850 onwards'.

[9] See Davey, Davey and Caplin and Merkin, ibid. See also FD Rose, *Marine Insurance Law and Practice* (2nd edn, Informa 2012) para 17.2.

[10] The 1889 version of the clause is printed in Davey, Davey and Caplin (n 4) para 1.11. The phrase 'warranted nevertheless free of' is recognised as equivalent to exclusionary language.

[11] See *Delanoy v Robson* (1814) 5 Taunt 605.

including personal injury, marine pollution and other losses.[12] The P&I clubs were also careful to exclude cover for war perils. Similarly structured Mutual War Risk Associations emerged as one option to procure war risk cover.[13]

Although the US marine insurance market had developed as early as the colonial period, it gained traction at the dawn of the twentieth century.[14] The losses caused by the American Civil War had nearly ruined the domestic industry. However, it enjoyed a healthy rebound after territorial expansion following the Spanish–American War, culminating in the establishment of the American Institute of Marine Underwriters (AIMU) in 1898.[15] At that time, there was a synergistic relationship between the British and US markets, utilising similar clauses.[16] This included the US market following the British practice of excluding war risks from primary marine policies via an FC&S clause, leaving those perils to be insured under a separate war policy.[17]

B. War Risk During the World Wars

These insurance industry practices were tested during the two world wars, as profound hazards to merchant ships shook the foundations of the war risk markets. World War I created widespread dangers to shipping, including the pervasive use of floating mines, submarine torpedoes and aircraft-administered attacks—risks of a scale that commercial underwriters were unable to absorb.[18] These challenges led the UK and the US to reformulate war risk insurance quickly through public intervention.[19]

Anticipating the outbreak of war, the British government secured arrangements with domestic war risk associations to reinsure a significant proportion of hull underwriting, and it created a State Insurance Office to write cargo risks.[20] The UK also began requisitioning merchant ships and agreeing to indemnify shipowners for war risk casualties through charterparty

[12] See generally, SJ Hazelwood and D Semark, *P&I Clubs: Law and Practice* (4th edn, Routledge 2010).

[13] For a discussion of the role of the Mutual War Risk Associations, see Davey, Davey and Caplin (n 4) paras 2.6–2.10, 4.39–4.48.

[14] See HE Gillingham, *Marine Insurance in Philadelphia 1721–1800* (Privately Printed 1933); AL Parks, *The Law and Practice of Marine Insurance and Average* (Cornell Maritime Press 1987) 12.

[15] See AE Schumacher, 'The Hull Policy: An Introduction and Brief History' (1967) 41 TulaneLRev 233, 238.

[16] See WD Winter, *Marine Insurance: Its Principles and Practice* (McGraw-Hill 1919) 109. But see Gillingham (n 14) 11 (noting minor wording changes as early as 1792 credited to 'patriotic motives and a desire to show our independence from England').

[17] Winter ibid 276. See also SS Huebner, *Marine Insurance* (D Appleton and Company 1920) 64.

[18] Winter (n 16) 277–9.

[19] This was not the first time that governments had provided war risk indemnities. In the American Civil War, for instance, the US government provided a form of war risk cover for merchant ships operating during the rebellion. See, eg, *Morgan v United States* 81 US 531 (1871); *Schooner Mannahasset* 3 Ct Cl 76 (1867); *Clyde's Case* 9 Ct Cl 184 (1873).

[20] J Gilman, C Blanchard and M Templeman, *Arnould: Law of Marine Insurance and Average* (20th edn, Sweet & Maxwell 2020) para 24-05.

language in which the government covered war risk losses while the shipowner continued to insure marine perils in the commercial market.[21]

The US government, too, began propping up its domestic war risk market even before it was forced to abandon plans to remain neutral due to German U-boat attacks on merchant ships. In 1914, referencing the 'absence of adequate facilities for the insurance of American vessels and their cargoes against the risks of war', Congress passed the War Risk Insurance Act, which established the US Department of Treasury Bureau of War Risk Insurance.[22] After the US entry into the war in 1917, Congress expanded the Bureau's authority to provide insurance for loss of life and personal injury to crew caused by the war and later for vessels and crews under 'friendly foreign flags' chartered by the US government if it was not possible to secure war risk insurance 'on reasonable terms'.[23]

In the interwar period, as part of a broader push to promote national defence and stimulate commerce, the US Congress took a special interest in developing domestic maritime capacity, including marine insurance.[24] It passed the Merchant Marine Acts of 1920 and 1936, which envisioned a commercial shipping apparatus capable of serving as an auxiliary to the US military during times of emergency.[25] Even during the economic tumult of the Great Depression, these government-led initiatives coincided with the formation of domestic marine insurance associations, which adopted new US clauses closely mirroring those of the Institute of London Underwriters.[26] Meanwhile, US courts continued citing English cases on marine insurance matters, with Justice Holmes memorably describing the 'special reasons' to keep US law in harmony with English law in the field.[27]

[21] Rose (n 9) para 17.7.

[22] See 38 Stat 711, PL 63-193, 2 September 1914. For a contemporaneous view on the work of the Bureau of War Risk Insurance throughout World War I, see US Department of Treasury, Document No 2886, Annual Report of the Director of the Bureau of War Risk Insurance for the Fiscal Year Ended 30 June 1920.

[23] See 40 Stat 102, 65 PL 20, 12 June 1917; 40 Stat 398, 65 PL 90, 6 October 1917; 40 Stat 897, 65 PL 195, 11 July 1918. The World War I war risk insurance programme concluded after the signing of the armistice. See US Department of Treasury ibid 23–4.

[24] Reflecting the protectionist sentiments of the era, a Report on the Status of Marine Insurance in the US submitted to Congress endorsed the view that marine insurance could serve as a 'national commercial weapon'. See SS Huebner, *Report on Status of Marine Insurance in the United States* (Government Printing Office 1920) 75.

[25] US Merchant Marine Act of 1936, 49 Stat 1985, 74 PL 835, 29 June 1936.

[26] Schumacher (n 15) 243. The experiences of World War I also spawned further modifications in the FC&S clause, which was again circulated at Lloyd's in 1937 with new exclusions referencing hostilities 'whether there be a declaration of war or not' and further exclusions for 'civil war, revolution, rebellion, insurrection, or civil strife arising therefrom'. The 1937 version of the clause is printed and discussed in Gilman, Blanchard and Templeman (n 20) para 24.02. Similar language was adopted in the US market: see LJ Buglass, *Marine Insurance and General Average in the United States: An Average Adjuster's Viewpoint* (3rd edn, Cornell Maritime Press 1991) 66.

[27] *Queen Ins Co v Globe & Rutgers Fire Ins Co (The Napoli)* 44 S Ct 175 (1924) 177. Professors Gilmore and Black even viewed this approach as a 'policy of deference to the English decisions in

The UK and US government-led war risk insurance frameworks were deployed on a far greater scale during World War II, as German U-boats again terrorised convoys of merchant ships in the Atlantic.[28] The UK government provided war risk indemnities to merchant ships under the War Risks Insurance Act of 1939, which named the Ministry of War Transport as the reinsurer of participating war risk underwriting associations.[29] Shortly after the US entered the war, the US government transferred the marine war risk underwriting role to a new War Shipping Administration.[30] Even before the war concluded, the War Shipping Administration negotiated a large-scale settlement, which involved categorising losses as either government-covered war risks or market-covered marine risks, with some cases—such as those involving 'missing ships' lost by unknown cause—resulting in 50/50 splits between the government and the commercial underwriters.[31]

C. *The Emergence of Automatic Termination Clauses*

After the conclusion of World War II, the UK and US governments sought to wind down their respective roles in providing marine insurance while also maintaining the legislative and administrative capacity to reinstate coverage in the event of some future outbreak. Helping to clarify the moment at which government-led cover should re-engage, by 1949, representatives of the marine insurance industry in both the British and US markets announced that they would immediately discontinue issuing war risk policies if another major war began.[32] To mark this red line, British and US underwriters indicated they would only provide war risk insurance subject to an automatic termination clause that would end the insurance 'in the event of an outbreak of war' between any of four States: France, Great Britain, the US and the Union of Soviet Socialist Republics (USSR).[33]

the field'; see G Gilmore and CL Black, *Admiralty and Maritime Law* (2nd edn, Foundation Press 1975) para 2-2.

[28] See ES Land, *The United States Merchant Marine at War (Report of the War Shipping Administrator to the President, January 15, 1946)* (War Shipping Administration 1946).

[29] 2 & 3 Geo 6, c 57. See MG Kendall, 'Losses of UK Merchant Ships in World War II' (1948) 15 Economica 289.

[30] Executive Order 9054—Establishing the War Shipping Administration (FD Roosevelt) (7 February 1942) <https://www.presidency.ucsb.edu/documents/executive-order-9054-establishing-war-shipping-administration-the-executive-office-the>.

[31] See Overall War-Marine Risk Settlement Agreement 1945 AMC 1014. Note that similar problems of untangling coverage between war or marine policies occurred in World War I. See Winter (n 16) 277.

[32] See US Maritime Commission, 'Report to Congress for the Fiscal Year Ended June 30, 1949' (1950) 20 <https://www.maritime.dot.gov/sites/marad.dot.gov/files/docs/outreach/history/historical-documents-and-resources/7496/usmcannualreport1949.pdf>.

[33] See War Risk and Certain Marine and Liability Insurance, Hearing Before the Subcommittee on Maritime Affairs, 4 October 1949, 6, Letter to Congress, by Philip B Fleming, Chairman of US Maritime Commission (17 August 1949) ('Experience in the two world wars has shown that only the Government can provide the necessary insurance protection in time of war or serious threat of war.

When hostilities again erupted on the Korean Peninsula in 1950, Congress amended the US Merchant Marine Act of 1936, granting the Secretary of Commerce new authority to provide marine insurance during wartime or emergency declared by the President. The legislation specified that such insurance facilities could be provided for US or foreign-flagged vessels if they could not obtain insurance from an authorised vendor in the commercial market 'at a reasonable rate or upon reasonable conditions'.[34] Signing the bill into law, then-US President Truman praised its authorisation to offer war risk cover 'when such insurance is not available from private sources'.[35] Upon presidential approval, the Secretary of Commerce found that due to the use of automatic termination clauses, commercial war risk insurance would be inadequate to support maritime trade in the event of war between 'the four great powers'.[36]

By 1952, the US Maritime Board and Maritime Administration began issuing 'interim binders' designed to provide standby war risk insurance that would attach back-to-back when the commercial insurance ended under the automatic termination clause.[37] The interim binders were to apply for up to 30 days after commercial insurance providers offered notice of automatic termination due to an outbreak of war. This would fill potential cover gaps and facilitate the arrangement of a full-scale government war risk insurance programme.[38]

In the UK, Parliament passed similar but narrower legislation in the form of the Marine and Aviation Insurance (War Risk) Act 1952, which granted the government the authority to insure and/or reinsure British ships, aircraft, and

The magnitude of enemy action, the variety of the means of destruction, and the unpredictable times and places of attack, together with the vast concentration of values, put the provision of insurance coverage beyond the financial capacity of the insurance companies. This is recognized by the automatic termination provisions inserted in policies now being provided by private companies.')

[34] See US Merchant Marine Act 1936, Title XII, 64 Stat 773, 81 PL 763, 7 September 1950.

[35] See HS Truman, Statement by the President Upon Signing Bill Regarding Marine War-Risk Insurance, 7 September 1950; see also HL Haehl, Jr, 'Hull Policy: Coverages and Exclusions Frequently Employed: FC and S, War Risk, SR and CC, Automatic Termination, Cancellation' (1966–7) 41 TulaneLRev 277, 284–5.

[36] The clause referenced by the Secretary of Commerce is printed in US Department of Commerce, General Order 75, 17 FR 8295 (16 September 1952). By 1950 at least some policy language appears to have referenced 'Great Britain, and/or the British Commonwealth of Nations'. See HR 6061, A Bill to Authorize the United States Maritime Commission to Provide War Risk and Certain Marine and Liability Insurance, Hearings before the Subcommittee on Marine Affairs (Letter to Congress, dated 13 April 1950, by Thomas WS Davis, Acting Secretary of US Department of Commerce). In 1950, the British Commonwealth included eight States: Australia, Britain, Canada, Ceylon, India, New Zealand, Pakistan and Union of South Africa. See Commonwealth Secretariat, *The Commonwealth at the Summit: Communiqués of the Commonwealth Heads of Government Meetings, 1944–1986* (Commonwealth Secretariat 1987) 30.

[37] See US Department of Commerce, Annual Report of the Federal Maritime Board and Maritime Administration (13 November 1953) 31.

[38] Still utilising interim binders, the current US programme is administered under the US Department of Transportation, Maritime Administration (MARAD). In 2006, Congress recodified Title XII of the Merchant Marine Act 1936. See 46 USC ss 53901–53912, PL 118-7, 30 June 2023.

cargo in times of war.[39] Although the British legislation did not explicitly mention the automatic termination clauses, under its terms, government insurance could be provided when 'reasonable and adequate' war risk facilities were 'not available'.[40]

As Cold War sentiments festered during the 1950s, the scope-defining language of the automatic termination clause wavered with each iteration. Demarcating the fault lines of a new geopolitical order, stark ideological divisions appeared between the new North Atlantic Treaty alliance members and its Soviet-influenced counterparts who had united under the Warsaw Pact.[41] In the wake of its participation in the Korean War, the People's Republic of China had also emerged as a new powerful player in Asia's incipient communist bloc.[42] Reacting to these developments, a much broader automatic termination clause was circulated by the Institute of London Underwriters in 1959, stating that the war risk insurance would terminate automatically:

> … upon the outbreak of war or upon the inception of a hostile act or occurrence which results in a state of war (whichever may first occur and whether there be a declaration of war or not) between any member of the North Atlantic Treaty Organization and any of the Contracting parties to the Treaty of Friendship Cooperation and Mutual Assistance Pact signed at Warsaw May 14th, 1955, or the Central People's Government of the People's Republic of China.[43]

Perhaps too wide in scope, this clause was abandoned within two years. A new clause published in 1961 removed the reference to the then-15-member North Atlantic Treaty Organization (NATO) and eight-member Warsaw Pact

[39] 15 & 16 Geo 6 and 1 Eliz 2 c 57. See also Gilman, Blanchard and Templeman (n 21) para 24-05.

[40] 15 & 16 Geo 6 and 1 Eliz 2 c 57 ibid, s 2. See also R Merkin, *Marine Insurance Legislation* (4th edn, Lloyd's List 2010) 137.

[41] The original signatories of the North Atlantic Treaty alliance in 1949 included 12 States: Belgium, Canada, Denmark, France, Iceland, Italy, Luxembourg, Netherlands, Norway, Portugal, the UK and the US; see North Atlantic Treaty (signed 4 April 1949, entered into force 24 August 1949) 34 UNTS 243. By 1955, three more States had joined: West Germany, Greece and Turkey. See The North Atlantic Treaty Organization, Facts about NATO (2nd edn, 1959) A1. The eight States that agreed to the Warsaw Pact were Albania, Bulgaria, Czechoslovakia, German Democratic Republic (East Germany), Hungary, Poland, Romania and the USSR. See Treaty of Friendship, Co-operation and Mutual Assistance (signed 14 May 1955, entered into force 6 June 1955) 219 UNTS 3.

[42] The Korean conflict began with the surprise invasion by the communist North into the allied-backed South. The newly formed UN Security Council (boycotted by the USSR) issued a resolution condemning the invasion, which the US, UK and others used to justify military support of the South. The People's Republic of China, which had formed in 1949 under Mao Zedong, joined the fight on the side of the North. See UN Security Council Res 82 (25 June 1950) UN Doc S/RES/82; Davey, Davey and Caplin (n 4) para 6.21: 'Whether a state of war existed between China and North Korea on one hand and the other nations on the other is a most tangled matter with plenty of room for diverging views …'

[43] This London Institute clause is reprinted in US Department of Commerce, General Order 75, Rev, Amnt 5, 25 Fed Reg 3624 (27 April 1960). An identical American Institute clause is printed in US Department of Commerce, 24 Fed Reg 8083 (7 October 1959).

alliances and instead incorporated the original four powers plus the People's Republic of China, albeit encapsulating not only Great Britain but also 'any other member of the British Commonwealth'.[44] At that time, the British Commonwealth—although a voluntary political association, not a military alliance—had grown to 13 independent nations, including large populous States such as India, Canada and Australia.[45] In 1962, this group of affiliates continued to expand in number, with Jamaica, Sierra Leone, Tanganyika and Trinidad and Tobago joining.[46] Apparently for this reason, by 1963 the reference to the British Commonwealth was deleted from the clause, which brought the total of listed nations down to five.[47]

With its scope defined, the five-powers clause created a fundamental link between the automatic termination language used in the markets and the government-orchestrated marine insurance prepared to deploy during a major conflict.[48] The activation of the clause would not only end the commercial insurance, it would also trigger the government-led standby arrangements, paving the way for the execution of a full-scale wartime programme.[49] But this was not the only new war risk clause subject to exclusions and automatic termination. The proliferation of weapons of mass destruction and the Cold War's sabre-rattling generated the adoption in 1963 of additional exclusions that would automatically terminate the war risk insurance in the case of the hostile use of a nuclear bomb.[50] Although a detailed analysis of this separate species of clause is beyond the scope of this article, it is important to note that governments had recognised that they were not equipped to provide unqualified commitments of indemnification for merchant ships in the event of a nuclear war.[51] Nevertheless, by the mid-1960s, it was believed that only

[44] This clause is printed in US Department of Commerce, General Order 75, 2d Rev, 26 Fed Reg 4541 (1961).

[45] In 1961, the British Commonwealth included Australia, Britain, Canada, Ceylon, Cyprus, Federation of Malaya, Federation of Rhodesia and Nyasaland, Ghana, India, New Zealand, Nigeria, Pakistan and the Union of South Africa. See Commonwealth Secretariat (n 36) 71.

[46] ibid 79.

[47] See Haehl (n 35) 288. The timing suggests that this change may also be attributable to the 1962 conflict between the People's Republic of China and India. Davey, Davey and Caplin (n 4) para 4.32 argue that this Sino-Indian conflict's implications for the automatic termination clause had the potential to cause further problems because it coincided with the Cuban Missile Crisis, noting that '[a]t the time, there was no War Risk cover for ships, freight, containers or cargo stored afloat, this having been automatically terminated by the India/China conflict'.

[48] See Gilman, Blanchard and Templeman (n 20) para 24-05, fn 26: '… war risk insurers preserve themselves the freedom to adapt to the changed conditions of wartime with appropriate government participation; they do not set out to cover on any continuing basis, under a policy drawn in time of peace, the greater risks that result from major hostilities'.

[49] At least in the US, the early stages of this interrelationship produced contentious negotiations between regulators and shipping industry participants; see Haehl (n 35) 285, fn 45.

[50] On the nuclear clauses, see Haehl (n 35) 288.

[51] The US government was non-committal regarding the scope of cover it could provide in the case of a nuclear attack that triggered the automatic termination clause. The Treasury Department reported to Congress that 'while such insurance was adopted in World War II and earlier, it is not a feasible means for handling war losses of the magnitude which might be expected in a nuclear

the States listed in the clause had direct access to nuclear weapons. In this way, the five-powers and nuclear automatic termination clauses worked in aggregation to articulate for the insurance markets and the relevant governments the ominous nature of a major—and commercially uninsurable—war.

D. Reforms

Even with the advent of State-administered war risk insurance arrangements in the post-world war period, the British and US marine insurance markets continued to use and update the FC&S clause with some revisions driven by court decisions testing its wartime application.[52] Although these modifications were intended to respond to the real commercial challenges raised during wartime, the jumbled language of the FC&S clause and the process by which war risks were covered began to be criticised as unnecessarily convoluted, especially in the British market (still the leader in hull war risk underwriting).[53] The process involved a circuitous method of referencing the SG Policy with its FC&S exclusions to determine the scope of cover that would be 'reinstated' by the separate war risk policy.[54] By the 1970s observers and judges on both sides of the Atlantic had criticised this complicated process, even calling for war risk underwriting to be 'radically overhauled'.[55]

The underwriting process at Lloyd's was indeed substantially reformed in the 1980s as the market finally abandoned the SG Policy for a new Lloyd's 'MAR Form' to serve as the base contract structure for underwriting.[56] These reforms answered critics by offering a more elegant and straightforward method of describing coverage. Along with the new MAR Form, the Lloyd's market relied on updated clauses, including the 1983 Institute Time Clauses Hulls, which covered many of the marine risks

conflict. Neither private insurance companies nor the Federal Government realistically can be expected to provide full indemnification for nuclear war losses.' See Extension of War Risk Insurance for an Additional 5 Years, HR Rep No 346, 89th Cong, 1st Sess (1965) (Letter of Fred B Smith, Acting General Counsel, US Department of Treasury).

[52] See Davey, Davey and Caplin (n 4) paras 1.18–1.19. See, eg, *Yorkshire Dale Steamship Co Ltd v Minister of War Transport (The Coxwold)* [1942] AC 691 (HL). This 'final' version of the Lloyd's clause contained amendments reacting to case law during World War II, which is aptly described as 'a very tangled clause': see Davey, Davey and Caplin (n 4) para 1.20.

[53] ibid, para 1.20.

[54] ibid.

[55] See, eg, *Panamanian Oriental SS Corporation v Wright (The Anita)* [1970] 2 Lloyd's Rep 365, 371, where Mocatta J famously described the process as 'tortuous and complex in the extreme'. See also Davey, Davey and Caplin (n 4) paras 1.22–1.24 (discussing criticism in a report published by the UN Conference on Trade and Development (UNCTAD) on 20 November 1978) and *Calmar SS Corp v Scott* 345 US 427 (1953) where US Supreme Court Justice Frankfurter wrote that 'construing such conglomerate provisions requires a skill not unlike that called for in the decipherment of obscure palimpsest texts'.

[56] See DR O'May, 'The New Marine Policy and Institute Clauses' (1985) LMCLQ 191.

that had been insured by the SG Policy but in more digestible language reflecting commercial realities. Instead of utilising an all risks-minus-exclusions framework, the clauses employed an enumerated perils method.[57] Although these new clauses continued to exclude war and war-related risks, they accomplished this without reference to the unwieldy FC&S Clause.[58] War risks remained separately insured under a new Institute War and Strikes Clause.[59] This clause, like its predecessors, contained the five-powers exclusionary and automatic termination language.[60]

Throughout the Cold War, marine insurance markets in the US continued to mature, largely following English practice but with some regional peculiarities.[61] One difference is that the US market independently adopted its own updates to the FC&S Clause even after the conclusion of World War II.[62] Until reforms in the 1960s under the auspices of the AIMU, the FC&S Clause remained printed vertically in the margins of US hull policies.[63] Substantive marine insurance law in the US also appeared to destabilise in the aftermath of the now infamous *Wilburn Boat*[64] decision of the US Supreme Court in 1955, which indirectly diluted the relevance of English decisions on marine insurance issues due to a perceived need to defer to US state law in lieu of US federal maritime law. Nevertheless, observers have noted only minor substantive divisions between English and US marine insurance law, and procedurally the process of marine and war risk underwriting using harmonised clauses remained largely aligned.[65] Even as the US market grew, the need for US-based underwriters to procure re-insurance abroad, especially at Lloyd's, continued to bolster uniformity in the use of similar wordings, including war risk clauses.[66] Reflecting this synergy, the American Institute Hull War and Strikes Clauses circulated in 1977 contained nearly identical exclusionary and automatic

[57] See Davey, Davey and Caplin (n 4) para 1.6.

[58] See, eg, Institute Time Clauses Hulls (1/10/83) cl 23 (War Exclusion), cl 24 (Strikes Exclusions), cl 25 (Malicious Acts Exclusion), cl 26 (Nuclear Exclusion).

[59] Institute War and Strikes Clauses (1/10/83).

[60] ibid. See cl 4 (Exclusions), cl 5.2.2 (Termination).

[61] Indeed, the language of the US FC&S Clause used in the post-war settlements is noticeably different from the British version. Both clauses are printed at 1945 AMC 1014.

[62] See, eg, American Institute FC&S Clause (Hulls) (8 September 1959); Haehl (n 35) 279.

[63] See RM Hicks, Jr, 'The American Institute Hull Clauses' (1971) 2 JMarL&Com 787, 806.

[64] *Wilburn Boat Co v Fireman's Fund Insurance Co* 348 US 310 (1955). Observers have noted that prior to the *Wilburn Boat* decision, there was remarkable harmony between England and the US in cases involving marine insurance, as US courts regularly cited English decisions as persuasive authority. For an overview on the controversies caused by the *Wilburn Boat* problem, see MF Sturley, 'Restating the Law of Marine Insurance: A Workable Solution to the Wilburn Boat Problem' (1998) 29 JMarL&Com 41.

[65] See generally, TJ Schoenbaum, *Key Divergences Between English and American Law of Marine Insurance: A Comparative Study* (Cornell Maritime Press 1999).

[66] See Davey, Davey and Caplin (n 4) para 2.5: '… the willingness of the London market to give war risk cover outside the Institute War and Strikes Clauses is itself very limited, and the wish of a foreign underwriter to give cover for a risk for which he does not have reinsurance is correspondingly inhibited'.

termination language in the event of an outbreak of war between the five powers.[67]

After the fall of communism, both the British and US markets revised their respective exclusionary and termination clauses by dropping reference to the USSR and replacing it with the Russian Federation. Clause 5 of the 1995 Institute War and Strikes Clauses reads in relevant part:

> This insurance excludes:
> 5.1 loss damage liability or expense arising from
> 5.1.1 the outbreak of war (whether there be a declaration of war or not) between any of the following countries: United Kingdom, United States of America, France, the Russian Federation, the People's Republic of China.[68]

The corresponding Clause 6 reads in the relevant part:

> 6.2 Whether or not such notice of cancellation has been given this insurance shall TERMINATE AUTOMATICALLY
> 6.2.1. upon the outbreak of war (whether there be a declaration of war or not) between any of the following countries: United Kingdom, United States of America, France, the Russian Federation, the People's Republic of China.[69]

With these commercial exclusions firmly rooted, the US and UK governments have continued to keep standby government-led war risk insurance infrastructure at the ready.[70] In fact, this framework was invoked occasionally by the US government during the last quarter of the twentieth century and the first quarter of the twenty-first century, including to insure support vessels and crews involved in hostilities and interventions in Vietnam, Haiti and the Persian Gulf.[71] In the wake of the attacks of 11 September 2001 (9/11), President George W Bush also issued a memorandum approving war risk insurance and reinsurance of vessels, cargo and crews for vessels 'entering the Middle East region … for purposes of responding to the recent terrorists attacks' if such insurance could not be obtained 'on reasonable terms and conditions' in the commercial market.[72]

[67] The clause is slightly different from the British version, with language indicating the insurance 'shall terminate automatically upon and simultaneously with the outbreak of war …': American Institute Hull War Risks & Strike Clauses (1 December 1977).

[68] Institute War and Strikes Clauses Hulls – Time Limited Conditions (1/11/95) cl 5.1.1.

[69] ibid, cl 6.2; see also American Institute Hull War Risks and Strikes Clauses (29 September 2009).

[70] In practice, if the commercial market is not able to provide insurance on reasonable terms, MARAD (see n 38) may request a memorandum from the President invoking the criteria laid out in the governing statute codified in 46 USC ss 53901–53923. Details of the UK standby war risk insurance approach are discussed in Davey, Davey and Caplin (n 4) Ch 31.

[71] For instance, during a UN Security Council-authorised intervention in Haiti, US President Clinton issued a Memorandum authorising the procurement of war risk insurance, if necessary, at the order of the Department of Defense. See Presidential Memorandum (Clinton) on Vessel War Risk Insurance Under Title XII of the Merchant Marine Act 1936 (7 October 1994).

[72] Presidential Memorandum of GW Bush, Marine War Risk Insurance Under Title XII of the Merchant Marine Act, 1936 (12 December 2001). In the months following 9/11, the US Congress

President Bush also issued a memorandum in 2008 authorising the use of government insurance for merchant vessels in the Black Sea as a part of a humanitarian aid package in the wake of Russia's invasion of neighbouring Georgia.[73] But since the end of World War II, neither the US nor the UK has had to rely on the full scale of their government-led standby war risk insurance arrangements.[74]

III. APPLYING THE FIVE-POWERS CLAUSE

A. Clauses in Use

Since the reforms of the 1980s, there have been several wholesale updates to the hull clauses used in the London market, including most recently in 2003.[75] Due to familiarity and practice, hull underwriting at Lloyd's continues to rely on the 1983 version.[76] War risk underwriting utilises the 1995 clauses.[77] Due to the possible change in risk dynamics arising out of war and warlike conditions, modern war risk policies also recognise the possibility of an additional war risk premium to be charged by the insurers on top of the base war risk premium. Under the terms of the Institute War and Strikes Clauses, underwriters are at liberty to make such designations unilaterally even during the policy period by giving seven days' notice by way of Notice of Cancellation provisions.[78] In the Lloyd's market, this designation is informed by the work of the Joint War Committee when developments in particular sea

passed the Terrorism Risk Insurance Act, which was designed to offer government insurance cover excluded in the market after the attacks. While the Act does reference the possibility of covering vessels outside of US territory, this has not been used in practice: see Terrorism Risk Insurance Act of 2002, 11 Stat 2322, PL 107-297 (2002), as amended, para 5(B); US Department of Treasury, Federal Insurance Office, Report on the Effectiveness of the Terrorism Risk Insurance Program (June 2022).

[73] Presidential Memorandum of 25 November 2008, Marine War Risk Insurance under 46 USC Ch 539.

[74] In the wake of 9/11, the US invoked a large-scale government insurance framework in the civil aviation market. See D Moore, Government-Provided Insurance as an Instrument of War, US Transportation Command (2020).

[75] See International Hull Clauses (01.11.03). Anecdotally, it appears that the 2003 clauses have not been commonly adopted in practice.

[76] See Gilman, Blanchard and Templeman (n 20) para 2-27.

[77] Similar language is used in other non-hull war risk policies, such as those designed for freight, cargo stored afloat, containers, and other forms of coverage. However, the five-powers language is not included in cargo clauses designed for use on a voyage rather than a time basis. The various London Institute clauses referencing the five powers are discussed in Davey, Davey and Caplin (n 4) Ch 4.

[78] This practice relies on the Institute War and Strikes Clauses, cl 6.1: 'This insurance may be cancelled by either the underwriters or the Assured given seven days' notice (such cancellation becoming effective on the expiry of seven days from midnight of the day on which notice of cancellation is issued by or to the Underwriters). The Underwriters agree however to reinstate this insurance subject to agreement between the Underwriters and the Assured prior to the expiry of such notice of cancellation as to new rate of premium and/or conditions and/or warranties.' See also Davey, Davey and Caplin (n 4) paras 3.9–3.10.

areas suddenly create a higher likelihood of war-related casualties.[79] Consequently, for marine war risk insurance written in the London market, proximately caused losses are excluded and the insurance will automatically terminate in the event of an outbreak of war between any of the five powers, but even during geopolitical conflicts falling short of a major war, underwriters maintain the freedom to impose additional war risk premiums with little notice.[80]

In the US market, the 2009 American Institute Hull War Risks and Strikes Clauses remain current. Anecdotally, there appears to be limited appetite among US insurers to write hull war risk, but US insurers do regularly write cargo war risks. With these insurers in mind, the AIMU published a new '5 Powers War Exclusion Clause' in January 2023.[81] The language of this clause is nearly identical to the 2009 hull clause, with only 'liability' added to its material terms.[82] A Background Explanation published along with the clause reveals the rationale for its circulation. It notes that the clause was drafted by the AIMU Management Committee 'at the request of its members' and that it is designed to be used not only in hull policies, but also 'various marine lines of coverage'.[83] The Background Explanation also states that an outbreak of war between any of the five powers 'could result in claims that are potentially beyond the resources of any insurer or indeed the industry to pay, and therefore could cause an insured loss that likely would impair the solvency of an (re)insurance company and potentially the industry overall'.[84]

The mutual war risk associations in the UK and elsewhere also utilise clauses referencing exclusions and automatic termination in the case of an outbreak of war between the five powers. These associations are structured like P&I clubs, with losses shared between members, and claims governed by published rules. The language of the rules closely mirrors the exclusion and automatic termination clauses used in the British and US war risk markets. For instance, the members of the Combined Group of War Risk Clubs utilise rules which both exclude cover and automatically terminate the insurance in the event of an

[79] This concept of an additional premium to maintain cover is analogous to the framework executed by 'held covered' clauses. For a discussion of held covered clauses, see Gilman, Blanchard and Templeman (n 20) paras 19-72–19-75.

[80] As early as 1971, the London market also circulated five-powers exclusion clauses for use in the civil aviation context. See, eg, Extended Coverage Endorsement (Aircraft Liabilities), AVN 52 (26 August 1971).

[81] AIMU, 5 Powers War Exclusion Clause (01/31/2023). The clause reads: 'This insurance excludes loss, damage, liability, or expenses arising from the outbreak of war (whether there be a declaration of war or not) between any of the following: United States of America, United Kingdom, France, the Russian Federation, the People's Republic of China.'

[82] The new clause also diverges from the 2009 version by dropping the word 'countries' after the word 'following'. The reasons for this change are unclear.

[83] AIMU, Background Explanation for AIMU's 5 Powers War Exclusion Clause.

[84] ibid.

outbreak of war between any of the five powers.[85] The Hellenic Mutual War Risk Association adopts similar language in its rules.[86]

Evidencing the proliferation of such wordings across the shipping industry, charterparty language has also circulated with reference to cancellation in the event of war between the five powers. As early as 1989, the Baltic and International Maritime Council (BIMCO) endorsed charterparty contracts that grant the parties the liberty to cancel the contract 'in the event of an outbreak of war (whether there be a declaration or not) between any two or more of the countries as stated' in a box provided on the first page of the charterparty.[87] Cases demonstrate that some parties have employed such language, expanding the right of cancellation referencing conflicts involving a surprising range of States.[88] But by 2001, BIMCO's Barecon 2001 charterparty contract contained pre-printed language granting the right of cancellation with explicit reference to an outbreak of war between any of the five powers.[89] In 2004, similar language referencing the five powers was adopted as a stand-alone War Cancellation Clause that could be incorporated into various charterparty forms.[90]

B. Outbreak of War

For an insurer to invoke the five-powers clause properly first depends on whether an 'outbreak of war' has occurred. Because of the relative peace between the listed nations since its adoption, the clause has not been directly examined by British or US courts. Yet the question of whether a state of war

[85] See, eg, The Standard Club UK Ltd, War Risks Rules, Rule Book 2023/2024, Rule 4.D.8.2; London P&I Club, Class 7 War Risk Rules, 2023/2024, Rule 4.D.8.2 ('cover … shall terminate automatically upon the outbreak of war (whether there be a declaration of war or not) between any of the following countries: The United Kingdom, the United States of America, France, the Russian Federation, the People's Republic of China').

[86] Hellenic Mutual War Risk Association (Bermuda) Ltd, Hellenic War Risks Rules 2023 and Bye-Laws, Rule 4.2; see also K Michel, *War, Terror, and the Carriage by Sea* (Informa 2004) para 6.09.

[87] See Barecon 1989, cl 24; New York Produce Exchange Form (NYPE) 1993, cl 32.

[88] See, eg, *Golden Strait Corp v Nippon Yusen Kubishika Kaisha (The Golden Victory)* [2007] UKHL 12, [2007] 2 AC 353 (referencing the right to cancel the charterparty 'if war or hostilities break out between any two or more of the following countries: USA, former USSR, PRC [People's Republic of China], UK, Netherlands, Liberia, Japan, Iran, Kuwait, Saudi Arabia, Qatar, Iraq'); *In the Matter of the Arbitration between Progress Bulk Carriers Ltd and Sunbulk Shipping, Under a Gencon Charter Party Dated July 15th 2005*, SMA No 3990 (2007) (referencing the right to cancel the charterparty 'in the event of an outbreak of war involving Mexico or any major powers' including 'U.S.A., Russia, Great Britain, France, Germany, Norway, Denmark, and Liberia'); *Owners of the Danish Motor Tanker Katrine Maersk and Balboa Transport Corporation* 1951 AMC 324 (referencing the right to cancel the charterparty 'in case of war or warlike operations involving the United States of America, Denmark and/or two or more of the following European countries: Great Britain, Russia, Germany, Poland, Spain, Italy, or one of the aforesaid countries and Japan or China …').

[89] See Barecon 2001, cl 26(e). Cl 26(f) further provides for cancellation in the event of an outbreak of war 'between any two or more of the countries stated in box 36', which allows the parties to expand its scope by agreement.

[90] See BIMCO War Cancellation Clause 2004.

exists is a threshold issue that courts have long grappled with in other contexts, both public and private.[91] Courts have made such determinations in a broad range of cases with commercial consequences, including to examine potential violations against prohibitions on trading with the enemy or to delineate the scope and duration of wartime service agreements.[92] In property and life insurance cases, courts have also evaluated the presence of war to assess whether an assured is entitled to recovery based on wartime status or to determine whether the proximate cause was war or some other source.[93] As discussed in Section II above, historically, courts also routinely examined whether marine casualties fell within the 'hostilities' and 'warlike operations' language of the FC&S clause or whether they were the result of marine perils.[94]

In each of these scenarios, whether a state of war exists is a question of fact that depends on the inexact standards of the term as understood in a commercial document.[95] Although there are definitions of war found in various sources of public international law, courts typically emphasise that war does not have a precise technical meaning when embedded in a contract such as a marine insurance policy or a charterparty. For this reason, the commercial meaning of the term may differ from its use in scholarly or political discourse.[96] Rather than defining war's commercial meaning as synonymous with the definitions found in international law writings, courts interpreting the term through a contractual lens have expressed more interest in imagining how a person engaged in business would understand its meaning.[97] For this reason, courts do not constrain their analysis to technical elements derived from scholarly treatises, nor do they exclusively rely on whether governmental authorities have made political pronouncements declaring a state of war. Instead, courts generally find that the meaning of war for a business person

[91] See Merkin (n 3) para 1-067.

[92] These and other cases are discussed in GJ Webber, *The Effect of War on Contracts* (2nd edn, Solicitor's Law Stationery Society 1946). See also A McNair, 'The Effect of War Upon Contracts of Insurance of Property' (1942) 24 JCompLeg 15.

[93] See *International Dairy Engineering Co of Asia Inc v American Home Assurance Co* 474 F 2d 1242 (9th Cir 1973); *Ope Shipping Ltd v Allstate Insurance Co Inc* 687 F 2d 639 (2nd Cir 1982); *New York Life Ins Co v Durham* 166 F 2d 874 (10th Cir 1948); *New York Life Ins Co v Bennion* 158 F 2d 260 (10th Cir 1946).

[94] As noted in Davey, Davey and Caplin (n 4) para 6.3, the cases interpreting hostilities and warlike operations may still be relevant for defining war, 'at least used sparingly and with a degree of caution'. A survey of the leading English and US cases up to the *Coxwold* amendment is provided in SH Derby, 'What Are Warlike Operations Under F.C.&S. Clause in Marine Policies' (1945) 33 CalLRev 129.

[95] Davey, Davey and Caplin ibid, para 4.30.

[96] At least one US court has recognised that the interpretation of 'acts of war' language embedded in legislation should not be determinative of its meaning in insurance contract cases. See, eg, *Cedar & Washington Associates LLC v The Port Authority of New York & New Jersey* 751 F 3d 86 (2nd Cir 2014).

[97] Davey, Davey and Caplin (n 4) para 6.42. Nevertheless, for persuasive authority courts deciding contract cases do regularly reference public international law definitions of war derived from scholarly treatises and legal dictionaries.

depends on fluid 'common sense' principles such as the ferocity of fighting and the collective identities and objectives of the actors involved.[98]

An illustration of this approach is presented in *Spinney's (1948) Ltd v Royal Insurance Co Ltd*, in which the English Commercial Court sought to define the meaning of 'civil war' in an insurance policy.[99] In that case, the question was whether several businesses based in a shopping area in Beirut could recover from their insurers for property damage caused by looters during a period of politically charged rioting in the mid-1970s. The insurer denied the claim on the grounds that the looting was part of a broader movement of internal political strife within Lebanese society that had risen to the level of a civil war. To justify its position that the violence fell within a civil war exclusion, the insurers sought a declaration from UK government officials on whether a state of civil war existed at the time of the looting. Mustill J baulked at this approach and instead reasoned that the question was not whether the events amount to a civil war as used in public international law, but rather 'whether there was a civil war within the meaning of the policy'.[100]

To answer this question, the court sought to define the term civil war in its 'ordinary business meaning'.[101] Mustill J wrote that 'a civil war is still a war' although it has the 'special characteristic' of being 'internal rather than external'.[102] He explained that it was 'difficult to visualise a war of any kind which is not fought between sides'.[103] To analyse the motivations of these sides, it was 'necessary to look closely at the events to see whether they display the degree of coherence and community of purpose which helps to distinguish a war from a mere tumultuous internal upheaval'.[104] Applying these and other fact-intensive principles to the conflict in Lebanon leading up to the looting, Mustill J found that the 'violence itself was of a sporadic and incoherent nature', 'the fighting appears to have broken out, died out and flared up again, either spontaneously or by way of reaction to some other act of violence' and 'the lines of the fighting … are impossible to draw'.[105] For this reason, the conflict did not reach the 'stage of a civil war' in the ordinary sense of the term as used in the insurance policy, so the insurer could not rely on that exclusion.[106]

Even if war conditions are found to be present, the five-powers clause raises a second layer of complexity—whether an 'outbreak' has occurred. The term conjures an image of a sustained and continuous series of events that is expanding in scope. While there are apparently no marine insurance cases analysing the 'outbreak of war' language, analogous jurisprudence can be found in cases examining charterparty language addressing the right to cancel

[98] ibid, para 4.30. However, US courts appear more willing than British courts to find relevance in the public international law definitions of war when interpreting the term in insurance coverage disputes. [99] *Spinney's (1948) Ltd v Royal Insurance Co Ltd* [1980] 1 Lloyd's Rep 406. [100] ibid 426. [101] ibid 429. [102] ibid. [103] ibid 430. [104] ibid 432. [105] ibid. [106] The US District Court for the Southern District of New York reached a similar result on analogous facts in *Holiday Inns Inc v Aetna Insurance Co* 571 F Supp 1460 (SDNY 1983).

the contract at the onset of a specified conflict.[107] In the 1939 case, *Kawasaki Kisen Kabushiki Kaisha v Bantham Steamship Co Ltd (No 2)*,[108] the English Court of Appeal reviewed an arbitral award on the issue of whether a shipowner properly invoked a cancellation clause which granted it the liberty to cancel the charterparty 'if war breaks out involving Japan'. According to the umpire in arbitration, Japan and China had engaged in fighting of varied scale throughout the summer of 1937. During that period, the Japanese bombed Chinese cities, heavy casualties occurred on both sides, and political leaders openly described the conflict as an 'undeclared Sino-Japanese War'.[109] In the autumn of 1937, the shipowner invoked the clause cancelling the charterparty. When solicited about the status of the conflict, the British Foreign Office provided letters describing the situation in China as 'indeterminate and anomalous' and repeatedly stated the British government was 'not prepared to say that in their view a state of war exists'.[110]

Both the umpire in arbitration and the trial court judge held that the shipowner had properly invoked the clause because an outbreak of war involving Japan had indeed occurred. The Court of Appeal affirmed, with Sir Wilfred Greene MR explaining that the words 'if war breaks out' did not mean that the British government needed to recognise that war had broken out officially, or that the court should be confined to technical meanings of war described by 'various writers on international law'.[111] Instead, he wrote, '[w]e are concerned, and concerned only, with the question whether upon the true construction of a particular private document the owners were entitled to cancel the charterparty, which they are only entitled to do if war breaks out involving Japan'.[112] This question must be answered by considering the 'general tenor and purpose of the document, in what may be called a common-sense way' that does not 'import into [the] contract some obscure and uncertain technicalities of international law rather than the common sense of business men'.[113]

Applying this pragmatic approach, British and US courts have further wrestled with the question of whether hostile acts performed by non-State actors can rise to the level of war as understood in a commercial document. Among the leading cases is *Pan American World Airways, Inc v The Aetna*

[107] Although the charterparty framework is distinct from marine insurance, there are relevant analogies that can be useful for addressing similar contract interpretation challenges. See Gilman, Blanchard and Templeman (n 20) 1297.

[108] *Kawasaki Kisen Kabushiki Kaisha v Bantham Steamship Company Ltd (No 2)* [1939] 2 KB 544 (CA).

[109] *Kawasaki Kisen Kabushiki Kaisya v Bantham Steamship Company, Ltd* (1939) 63 Ll L Rep 155, 159 (not included in the King's Bench Report of the case).

[110] *Kawasaki Kisen Kabushiki Kaisha* (n 108) 553.

[111] ibid 556. Sir Wilfred Greene MR (ibid 559) also suggested that '… even the most revered names in international law, such as Bynkershoek or Grotius' would have agreed with the arbitrator's finding that a war had broken out.

[112] ibid 554.

[113] ibid 558–9.

Casualty & Surety Co.[114] In that case, the US Second Circuit Court of Appeals examined whether an insurer properly denied a claim for a commercial aircraft that had been bombed and destroyed on a runway in Egypt after a mid-flight hijacking by terrorists acting on behalf of a group called the Popular Front for the Liberation of Palestine.[115] The insurer denied the claim by citing a provision excluding loss or damage resulting from war.[116] Rejecting the argument that the damage caused by the terrorists fell within the war exclusion and affirming the decision of the trial judge, the court reasoned, 'war refers to and includes only hostilities carried on by entities that constitute governments at least de facto in character'.[117] Since the terrorists acted as agents of a 'radical political group, rather than a sovereign government', the loss could not have been caused by an act of war.[118]

Following the 9/11 attacks, this question of the *de facto* character of the aggressor has been further examined by British and US courts, demonstrating diverging views on the issue. In *IF P&C Insurance Ltd (Publ) v Silversea Cruises Ltd*,[119] the English Court of Appeal tangentially addressed the question of whether the 9/11 attack on the World Trade Center was an 'act of war'. In that case, a cruise line company sought to collect insurance covering loss of income alleging that the 9/11 events and subsequent travel warnings issued by US authorities caused widespread cancellation of customer bookings recoverable under an act of war provision in the applicable policies. Although the court found that it was unnecessary to determine whether 9/11 was an of war because it dismissed the claims on other grounds, two of the justices engaged in a stimulating discussion on the issue in *obiter dicta*.

Rix LJ took a broad view that the phrase 'acts of war' might encapsulate actions beyond the scope of the word 'war' because such acts 'could arise even in the absence of war'.[120] In his view, even if 9/11 was clearly a terrorist attack, there was still an open question 'whether it amounted to something more'.[121] Having considered expert reports indicating Afghanistan under the Taliban had been a State sponsor of Al Qaeda, Rix LJ wrote, 'I am doubtful whether it is particularly helpful to think of war in its international law sense as armed conflict between sovereign states …'.[122] Responding to this line of reasoning, Ward LJ expressed a more narrow approach focusing on the experience of an ordinary business person. Despite politicians referencing 9/11 as the basis for the subsequent 'war on terror', including the

[114] *Pan American World Airways, Inc v The Aetna Casualty & Surety Co* 505 F 2d 989 (2nd Cir 1974).

[115] The trial court held in favour of the claimant, reasoning that the insurers failed to meet their burden of proving the loss fell within the intended scope of the exclusions. *Pan American World Airways Inc v Aetna Casualty and Surety Co* 368 F Supp 1098 (SDNY 1973).

[116] The Second Circuit also rejected the argument that the loss occurred during a 'warlike operation' since it was 'not near or over the territory of any belligerent or any theater of war': ibid 1017.

[117] ibid 1015.

[118] ibid.

[119] *IF P&C Insurance Ltd (Publ) v Silversea Cruises Ltd* [2004] EWCA 769, [2004] Lloyd's Rep IR 217.

[120] ibid, para 143.

[121] ibid.

[122] ibid.

invasion of Afghanistan, Ward LJ took the view that a neutral observer would simply consider the events of 9/11 as a terrorist attack performed by an extremist group.[123] He wrote evocatively, 'I do not believe that men of business, the underwriters and the insured, would have said as they watch those aircraft smash into the Twin Towers, "That's an act of war!".'[124]

The US Ninth Circuit Court of Appeals has since expressed a novel approach to a similar question. In *Universal Cable Products LLC v Atlantic Specialty Insurance Co*,[125] the US District Court for the Central District of California held that an insurer properly invoked war exclusions to deny claims for expenses the assured incurred when it was forced to move the production of a television series out of Israel after Hamas repeatedly fired rockets into Jerusalem where filming was scheduled to take place. Israel responded with major military operations in Gaza, which contributed to a deadly and damaging 50-day conflict.[126] Applying the 'ordinary and popular sense' of the term 'war' and the phrase 'warlike actions by a military force', the court held that the events 'easily would be considered a "war" by a layperson' because of the duration of fighting, the degree of the casualties on both sides, and the fact that the conflict involved the nation of Israel on one side and Hamas—a 'quasi-sovereign' organisation with 'military overtones'—on the other.[127]

On appeal,[128] a Ninth Circuit panel reversed this decision, holding that the lower court should have applied a technical 'specialised meaning' of war drawn from customary usage in the insurance industry.[129] Citing case law, insurance treatises, and documents submitted by insurance industry experts, the court found that the special meaning of the term required the hostilities to be between *de jure* or *de facto* sovereigns.[130] The court explained that some Western governments, including the US, did not recognise Hamas as a 'legitimate authority' over any relevant territory at the time it was firing rockets into Jerusalem and that questions regarding its potential sovereignty were political rather than judicial and should therefore be deferred to the executive branch of government.[131] Branding Hamas a 'political group' rather than a *de jure* or *de facto* sovereign and describing its conduct as 'far closer to acts of terror', the court found that the rocket attacks could not amount to war under the policies.[132]

[123] ibid. [124] ibid, para 147.

[125] *Universal Cable Products LLC v Atlantic Specialty Insurance Co* 278 F Supp 3d 1165 (CD Cal 2017). [126] ibid 1169. [127] ibid 1174–5.

[128] *Universal Cable Products LLC v Atlantic Specialty Insurance Co* 929 F 3d 1143 (9th Cir 2019).

[129] ibid. The court justified this approach by citing the mandatory application of s 1644 of the California Civil Code, which indicates that a term in an insurance policy should be understood in the ordinary and popular sense 'unless a special meaning is given to them by usage'.

[130] ibid 1154. [131] ibid 1159. [132] ibid 1160.

C. Between the Powers

If an outbreak of war has occurred, the application of the five-powers clause would then require an assessment of whether the war is 'between' the listed States. The term implies that war must directly involve at least two of the listed nations as opposing belligerents, which would clearly distinguish such events from a strictly domestic civil war, a war involving only one of the listed nations, or a war involving more than one of the listed nations fighting on the same side. If the *de facto* sovereign rule applies, the conflict meeting the threshold of war must be attributed to the governments of at least two nations listed in the clause. This would appear to exclude hostilities performed by non-State actors originating from or connected to the listed States, such as political organisations, terrorist groups, militias and perhaps even governmental contractors.

A further line of inquiry raised by the 'between' language is whether a nation's contributions to a military operation performed by coalition forces might demonstrate individual State responsibility for war. Charterparty case law is again instructive since there is a dearth of directly applicable marine insurance cases on this point. A 1951 New York arbitration hinged on a bareboat charterparty clause that authorised the contract to terminate 'in case of war involving the United States'.[133] The question before the arbitrators was whether the fighting on the Korean peninsula in the summer of 1950 rose to a level of war and, if so, whether the US was involved. The arbitrator answered yes to both questions. The arbitrators reasoned that in the summer of 1950, the United Nations (UN) had sent a large coalition of soldiers to support the South in its fight against the North, which received its own troop support from the People's Republic of China. Most of these coalition forces were American soldiers. In fact, by 1951, the US had sent upwards of 90 per cent of the 160,000 troops fighting in Korea, and the casualties to American soldiers were higher than in many of the other wars previously fought in the nation's history.[134] It was immaterial that President Truman denied that the US was at war or that the soldiers were fighting in conjunction with other allies under UN auspices.[135] For this reason, the arbitrators found that the termination clause applied because 'the United States has been involved in the Korean war practically from its outset and the fact that it has been fighting as a member of the United Nations and not independently is clearly immaterial'.[136]

CMA CGM SA v KG MS Northern Pioneer[137] involved a similar question of State attribution for coalition operations in the charterparty context. In that case,

[133] *Seven Seas Steamship Corp of New York v Prudential Steamship Corp of New York* 1951 AMC 585. [134] ibid 592. [135] ibid 593.

[136] ibid. A divided panel of New York arbitrators reached a different conclusion on similar facts in *Manning Bros Inc of Delaware v Albatross Steamship Co Inc* 1951 AMC 579 (finding the conflict in Korea was a 'police action' not a war).

[137] *CMA CGM SA v KG MS Northern Pioneer* [2002] EWCA Civ 1878, [2003] 1 Lloyd's Rep 212.

the English Court of Appeal reviewed an arbitral award on the issue of whether the charterers had properly invoked a war cancellation clause granting the right to cancel the contract 'in the event of the nation under whose flag the vessel sails becoming involved in a war …'.[138] The vessels under charter were German-flagged.[139] In the spring of 1999, NATO forces performed an operation in Kosovo, which included the participation of Germany. Just over one month after this NATO operation began, the charterers invoked the war cancellation clause terminating the relevant charterparties, alleging that Germany 'had become involved in war in Kosovo and Yugoslavia'.[140] A majority of the arbitrators held in favour of the shipowner on the basis that the charterers improperly delayed invoking the clause, the conflict in Kosovo did not amount to war, and even if it did, Germany was not involved. The Court of Appeal did not fully address the merits of these arguments because it was constrained by the reviewability standards governing arbitration. Nevertheless, Lord Phillips of Worth Matravers MR pointed out that '[t]he nature of international conflict has changed over the years' and highlighted that the arbitrators were split on the question of whether the events in Kosovo constituted a war and whether Germany's participation in the NATO operation meant that it was involved.[141]

A further challenge involving war attribution to a particular government is whether actions performed by non-State actors, such as political organisations, hackers, militias or contractors, can generate State responsibility for the war. A recent case in the state court of New Jersey addressed a novel question of whether a cyberattack apparently attributable to a nation-State was subject to a war exclusion. In *Merck & Co v Ace American Insurance Co*,[142] the issue was whether an 'all risks' property insurance policy covered damage caused by the NotPetya cyberattack. The insurer denied coverage under an exclusion for loss or damage 'caused by hostile or warlike action in time of peace or war', including action by 'any government or sovereign power (*de jure* or *de facto*) or by any authority maintaining or using military, naval, or air forces' or 'by an agent of such government, power, authority, or forces'.[143] The cyberattack was administered by malware that gained access to the assured's computers through accounting software developed by a Ukrainian company. Referencing testimony provided by a cyber security consultant, the insurers submitted that the attack was 'very likely orchestrated by actors working for or on behalf of the Russian Federation'.[144] For this reason, the insurers argued that the loss was subject to the 'warlike action' exclusion.

The trial court dismissed the claim on summary judgment, holding that the insurer was liable for the claim because the events, even if performed on behalf of Russia, were not captured by the language of the exclusion, which

[138] ibid 214. [139] ibid 212. [140] ibid. [141] ibid 216.
[142] *Merck & Co v Ace American Insurance Co* 293 A 3d 535 (NJ Super AD 2023).
[143] ibid 539. [144] ibid 541.

did not explicitly cover cyberattacks. On review, the Appellate Division agreed, holding that 'the plain language of the exclusion did not include a cyberattack on a non-military company that provided accounting software for commercial purposes to non-military consumers, regardless of whether the attack was instigated by a private actor or a government or sovereign power'.[145] Citing British and US cases addressing marine war risk policy language, the court reasoned that there is a 'long and common understanding that terms similar to "hostile and warlike action" by a sovereign power are intended to relate to actions clearly connected to war or, at least, to a military action or objective'.[146] Since the cyberattack at issue was not clearly linked to such an objective, the court found the exclusion clause inapplicable.

D. Looking Ahead

Mercifully, a truly global war has yet to materialise since the adoption of the five-powers clause in the late 1940s. Although it might be tempting to brand the clause a historical relic, during periods of geopolitical instability—the present moment included—its language looms. A review of the relevant cases indicates that a war sufficient to trigger the clause must involve at least two of the governments of the five listed nations.[147] An outbreak of war between them does not need to be formally declared, nor does it need to satisfy the criteria of war as defined in public international law, but the hostilities must reach such a level of violence that an ordinary business person would deem them to constitute a continuous and substantial physical conflict rather than a fleeting or isolated event. The case-refined framework indicates that kinetic engagement is an indispensable element. For this reason, if used in isolation, tactics such as economic coercion, hacking and espionage would not satisfy the standard of war in the commercial sense of the term.[148]

However, as warfare practices continue to evolve with technological innovations and strategic adaptations, new interpretive questions are surfacing. Modern warfare may include the widespread use of drones and semi-autonomous weapons systems, infrastructure-damaging cyberattacks, undersea cable and pipeline sabotage, anti-satellite missile strikes and the imminent prospect of warfare machinery enabled by artificial intelligence.[149]

[145] ibid 546.

[146] ibid 551.

[147] If the *de jure* or *de facto* sovereign rule applies, the war must involve government actors directly representing the nations listed in the clause rather than paramilitary forces, militias or terrorists.

[148] See generally, Center for Strategic & International Studies, 'Competing in the Gray Zone: Countering Competition in the Space between War and Peace' (7 December 2018) <https://www.csis.org/analysis/competing-gray-zone-countering-competition-space-between-war-and-peace>.

[149] See, eg, H Nasu, 'Targeting a Satellite: Contrasting Considerations between the Jus ad Bellum and the Jus in Bello' (2022) 99 IntlLStud 141; J Johnson, 'Artificial Intelligence, Drone Swarming and Escalation Risks in Future Warfare' (2020) 2 RUSIJ 165; MN Schmitt and J Biller,

As these and other hybrid or grey-zone methods are deployed in real-world conflicts, it provokes contemplation regarding which events may cumulatively rise to the level of war in the military and political sense of the term. This uncertainty carries commercial implications, too, because an ordinary business person might not have a clear opinion on the matter, which could muddy judicial assessments of whether the deployment of these tools meets the threshold for contractual interpretation.

Contemporary military methods not only obscure measures of the ferocity of the fighting, but they also complicate determinations of whether hostile actions are attributable to a particular government.[150] Nations may delegate or outsource military functions to proxy fighters such as private contractors, mercenaries, militias and other non-State actors.[151] When hostile acts are performed by these private actors instead of conventional soldiers acting as direct agents of sovereign governments, this can further disrupt determinations of State responsibility.[152] Moreover, if a war is fought by coalition forces, attempts to ascribe attribution to a singular nation may involve viewing the conflict through an artificial lens. Thus, even when an outbreak of war has clearly occurred, attribution challenges may unsettle judicial determinations of whether a war is 'between' the five powers, especially given that the question must be considered from the vantage point of an ordinary business person.

The 'elephant in the room' is that hostilities continue to rage in Ukraine, with Russia—one of the five powers—engaged in a massive military campaign against its sovereign neighbour along NATO's eastern border.[153] Russia has described its actions as a 'special military operation'.[154] But irrespective of any tempering messaging, the conflict has caused a staggering number of casualties, widespread civilian displacement, broad infrastructure and

'Classification of Cyber Capabilities and Operations as Weapons, Means, or Methods of Warfare' (2019) 95 IntlLStud 179; D Azaria and G Ulfstein, 'Are Sabotage of Submarine Pipelines an "Armed Conflict" Triggering a Right to Self-Defense?' (*EJILTalk!*, 18 October 2022) <https://www.ejiltalk.org/are-sabotage-of-submarine-pipelines-an-armed-attack-triggering-a-right-to-self-defence/>.

[150] See B Boutin, 'State Responsibility in Relation to Military Applications of Artificial Intelligence' (2023) 36 LJIL 133; W Banks, 'Cyber Attribution and State Responsibility' (2021) 97 IntlLStud 1039; J Maddocks, 'Outsourcing of Government Functions in Contemporary Conflict: Rethinking the Issue of Attribution' (2019) 59 VaJIntlL 47.

[151] See S McFate, *The Modern Mercenary: Private Armies and What They Mean for World Order* (OUP 2014). See also SJ Yoo and MG Koo, 'Is China Responsible for its Maritime Militia's Internationally Wrongful Acts? The Attribution of the Conduct of a Parastatal Entity to the State' (2022) 24 Bus&Pol 277.

[152] There may also be political reasons for the target of an attack not to publicly attribute it to a governmental actor in efforts to de-escalate diplomatic fallout.

[153] A UN General Assembly resolution described Russia's aggression as 'on a scale that the international community has not seen in Europe in decades': UN General Assembly, 'Resolution Adopted by the General Assembly on 2 March 2022' (18 March 2022) UN Doc A/RES/ES-11/1.

[154] UN Security Council, 'Press Release: Russian Federation Announces "Special Military Operation" in Ukraine as Security Council Meets in Eleventh-Hour Effort to Avoid Full-Scale Conflict (SC/14803)' (23 February 2022) <https://press.un.org/en/2022/sc14803.doc.htm>.

property damage, and wholesale diplomatic and trade disruption. Surveyed in total, it is virtually irrefutable that the conflict satisfies the standard of an outbreak of war in both the public and private sense of the phrase.[155]

Whether the conflict in Ukraine is verging on a war between Russia and any of the other nations listed in the five-powers clause is far less clear. A broad coalition of nations, including the Group of Seven (G7), the European Union (EU) and others, has responded with comprehensive economic sanctions targeting Russian interests.[156] NATO has also expanded its membership with the recent additions of Finland and Sweden and even committed to creating a path for Ukraine to join the alliance eventually.[157] The US, the UK and France have been integrally involved in these initiatives, with each providing significant funding and lethal aid to Ukraine.[158] China, meanwhile, has apparently not provided direct lethal aid to either side, although it has supported Russia diplomatically through a 'no limits' partnership.[159]

The provision of financial assistance, military training, lethal aid and other support has been deployed in proxy conflicts between the five powers for decades, especially during the Cold War.[160] This historical practice enabled customary line drawing to define statecraft tolerably balancing power and influence with containment and deterrence. Informed by this experience, in the

[155] A related question could be whether the 'outbreak of war' between Russia and Ukraine was in February 2022 or much earlier at some point during the annexation of Crimea in 2014. A parallel issue was recently addressed in *Hartford Fire Insurance Co v The Western Union Co* 630 F Supp 3d 431 (SDNY 2022) (finding the downing of a Malaysian Airlines flight by a surface-to-air missile launched by a Russian-backed separatist group operating in Eastern Ukraine an 'insurrection' subject to an insurance policy exclusion).

[156] See The White House, 'G7 Leaders' Statement on Ukraine' (19 May 2023) <https://www.whitehouse.gov/briefing-room/statements-releases/2023/05/19/g7-leaders-statement-on-ukraine>.

[157] See NATO, 'Vilnius Summit Communiqué' (11 July 2023), remarking 'Ukraine's future is in NATO' <https://www.nato.int/cps/en/natohq/official_texts_217320.htm>.

[158] See Kiel Institute for the World Economy, 'The Ukraine Support Tracker: A Database of Military, Financial and Humanitarian Aid to Ukraine' (February 2023) <https://www.ifw-kiel.de/topics/war-against-ukraine/ukraine-support-tracker/>. Some of France's contributions can be measured through its participation in the EU, which has provided substantial funding and resources to Ukraine. French President Emmanuel Macron has also made statements suggesting ground troops might be sent to Ukraine. See DB Baer and S Besch, 'Making Sense of Macron's Hint at Troops in Ukraine' (*Foreign Policy*, 1 March 2024) <https://foreignpolicy.com/2024/03/01/russia-ukraine-war-macron-troops-nato-france-eu/>.

[159] See Joint Statement of the Russian Federation and the Peoples' Republic of China on International Relations Entering a New Era and Global Sustainable Development (4 February 2022). The US has alleged that Chinese State-owned enterprises have supported Russia through financial, technical and logistical assistance: see US Office of the Director of National Intelligence, 'Support Provided by the People's Republic of China to Russia (July 2023) <https://democrats-intelligence.house.gov/uploadedfiles/odni_report_on_chinese_support_to_russia.pdf>. The US Secretary of State has also alleged that China is Russia's leading supplier of components and dual-use items to build weapons for use in Ukraine. See US Mission China, 'Remarks of Secretary Antony J. Blinken, April 26, 2024' (US Embassy and Consulates in China, 27 April 2024) <https://china.usembassy-china.org.cn/secretary-antony-j-blinken-and-peoples-republic-of-china-president-xi-jinping-before-their-meeting-2/>.

[160] See, eg, P Clancy, 'Neutral Arms Transfers and the Russian Invasion of Ukraine' (2023) 72 ICLQ 527.

absence of direct involvement of American, British, French or Chinese troops, it is doubtful that the provision of financial resources or weapons to either side in Ukraine would tip the conflict into a broader war between the five powers. Without a direct physical confrontation between them, the conflict is even less likely to fall within the commercial conception of an outbreak of war as understood in war risk policies. Yet the threat of escalation endures.[161]

Regrettably, the emerging risk of a major war is not confined to Eastern Europe, as tensions are also rising in the Asia-Pacific region.[162] Although the US and China are economically co-dependent, in recent years there has been a pronounced decoupling between them evidenced by a 'trade war' paired with provocative political and military manoeuvres.[163] With fears now percolating over China's ambitions regarding the use of force to re-incorporate Taiwan or to enforce its territorial claims in the South China Sea, there is a disquieting unknown whether the US and its allies would militarily engage China on these issues.[164] Alarmism aside, this is all to say that it is not entirely coincidental that new war risk clauses have recently circulated to address the prospect of an outbreak of war between the five powers.

IV. CONCLUSION

At the time of writing, the world feels on edge with hostilities raging and tensions flaring in areas of strategic significance.[165] War risk insurance remains a fundamental risk management tool designed to facilitate trade during such periods of geopolitical instability. The flexible application of additional war risk premiums also secures continued insurance even as vessels move through dangerous sea areas. However, if current or future conflicts spiral into a broader war pitting the five powers against one another,

[161] See, eg, J Garamone, 'NATO Begins Largest Exercise Since Cold War' (US Department of Defense, 25 January 2024) <https://www.defense.gov/News/News-Stories/Article/Article/3656703/nato-begins-largest-exercise-since-cold-war/>; A Troianovski, 'Russia to Hold Drills on Tactical Nuclear Weapons in New Tensions with West' *New York Times* (New York, 6 May 2024).

[162] Simultaneously, major hostilities involving Israel, Hamas, Iran, and other actors are also destabilising the Middle East. Red Sea attacks on commercial ships by Houthi rebels based in Yemen have further disrupted the commercial availability of war risk insurance for ships linked to Israel and its perceived allies. See D Osler, 'War Risk Market Split on Covering US and UK-linked Vessels for Red Sea Transits' *Lloyd's List* (London, 26 January 2024).

[163] This contentious trade policy has continued under two consecutive US administrations. See Peterson Institute for International Economics, 'Trump's Trade War Timeline: An Up-to-Date Guide' (31 December 2023) <https://www.piie.com/sites/default/files/documents/trump-trade-war-timeline.pdf>.

[164] President Biden has repeatedly warned that the US would defend Taiwan if the island were to be attacked by China, although this rhetoric conflicts with the US policy of 'strategic ambiguity'. See D Savastopulo, 'Joe Biden Says US Would Defend Taiwan From Chinese Attack' *Financial Times* (London, 19 September 2022).

[165] The Joint War Committee has recently expanded designations of 'Listed Areas' that may be subject to additional war risk premiums: see, eg, Joint War Committee Circular, JWC Listed Areas: Hull War, Piracy, Terrorism, and Related Perils, JWLA-030 (4 April 2022) <https://www.skuld.com/contentassets/1a1acf82e62745af988d93460064e215/joint-committee-circular-jwla-030.pdf>.

commercial war risk insurance could cease to be available on reasonable terms and existing policies could automatically terminate to make way for State-administered arrangements. History and case law reveal the vital role of standby public war risk insurance programmes in keeping energy, commodities and supplies flowing during major wars, but these emergency initiatives are not built to sustain a global economy that necessarily depends on the free movement of merchant ships. To avoid such catastrophic scenarios, on humanitarian grounds above all else, the international community cannot succumb to fatalistic narratives that a major war is inevitable. Instead, embracing the prospect of persistent peace, the five-powers war risk clause must be dispatched into indefinite dormancy.

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