

NORWEGIAN MARITIME LAW DAY 2023

# Ship detention by a foreign State power

War v. Marine Peril

Nordic Marine Insurance Plan 2013 (2023)

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# Introduction

- Ships may be detained for various reasons; safety violations, failure to comply with custom regulations, environmental concerns, criminal investigations, ... etc
- Unfortunately, the current geopolitical situation causes great concern for interventions against ships by foreign states or militant groups (e.g. "Galaxy Leader", Red Sea 19<sup>th</sup> November)
- Numerous ships "stuck" in Ukraine since February 2022
- Under the Nordic Plan "all perils" are covered by the marine insurer (NP Cl. 2-8), with the exception of named war perils covered by the war risk insurer (NP Cl. 2-9)
- If the *same* losses are covered: "War" v. "Marine" = "Insurer v. Insurer"
- But this is normally *not* the case, because...

# Losses covered – marine v. war peril

- The ship will rarely sustain any *physical* damages from a detention
- Loss of time and other losses resulting from delays **not** covered: NP Cl. 4-2
- Loss of Hire, if no repairs:
  - Marine: **Not** covered – NP Cl. 16-1
  - War: **Covered** – NP Cls. 15-16 (2) and 15-17
- Total Loss, if the ship is *temporarily* detained:
  - Marine: **Not** covered – NP Cl. 11-1, the ship is not "lost"
  - War: **Covered** – NP Cl.15-11, if detained for more than 12 months
- War perils insurance offers a *wider* cover for financial losses resulting from delays



# The legal approach under NMIP 2013 (2023)

- Starting point for marine perils: NP Cl. 2-8 ("all perils")
  - Exception: "*other similar interventions by own State power*", Cl. 2-8 (b)
  - "Own State power is understood to mean the State power in the vessel's State of registration or in the State where the major ownership interests are located"
  - Therefore: Detention by a *foreign* State power is covered by "all perils", as a marine peril
- Starting point for war perils: NP Cl. 2-9 ("named perils")
  - The war risk policy only covers the perils listed in (a) to (e); war, captures at sea, terrorsim, piracy, etc
  - NP Cl. 2-12: "*The assured has the burden of proving that it has suffered a loss of the kind covered by the insurance ...*"



# The named war perils relevant for detentions

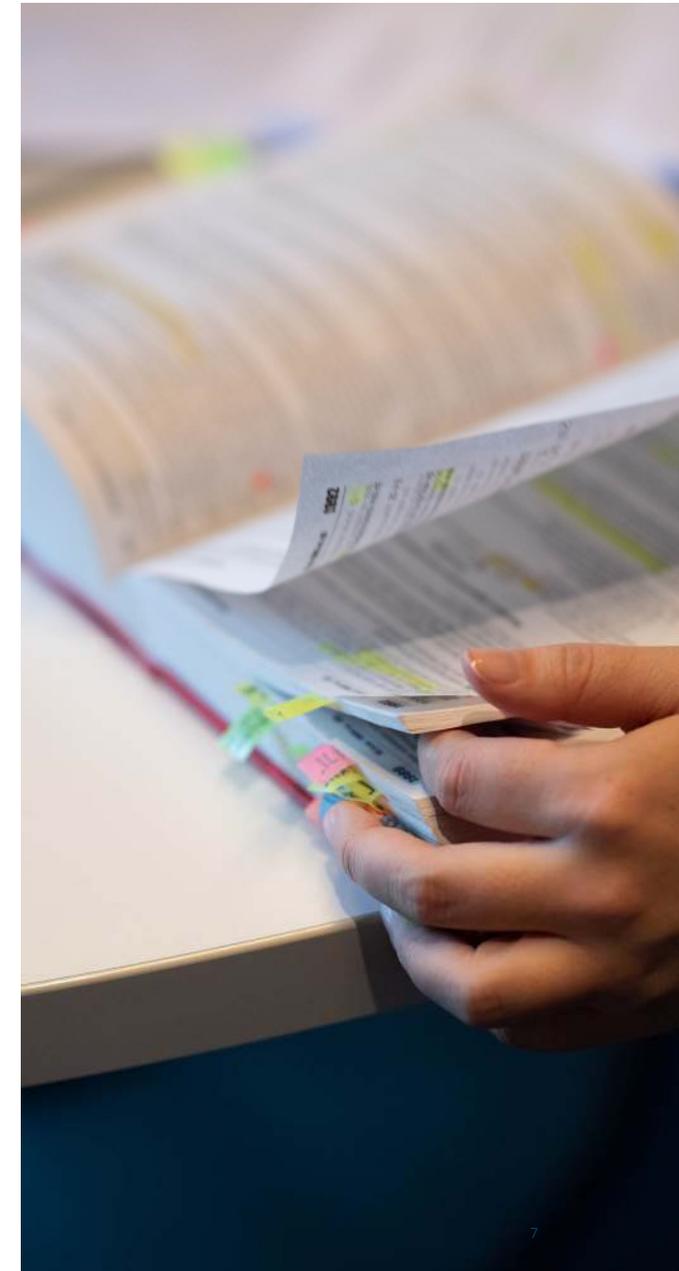
- NP Cl. 2-9 (a):
  - "war or war-like conditions, including civil war or the use of arms or **other implements of war** in the course of military exercises in peacetime or **in guarding against infringements of neutrality**"
  - Ships may be detained as part of a war in progress
- NP Cl. 2-9 (b):
  - "capture at sea, confiscation, expropriation and **other similar interventions** by a foreign State power, provided any such intervention **is made for the furtherance of an overriding national or supranational political objective**. Foreign State power is understood to mean any State power other than own State power as defined in Cl. 2-8 (b), second sentence, as well as organisations and individuals exercising supranational authority or who unlawfully purport to exercise public or supranational authority"
  - Detentions classify as "*other similar interventions*"
  - "*Furtherance of an overriding ... political objective*" is the "**war feature**" of this peril

# NIMP 2013 (2023) Cl. 2-9 (b) - Commentary

- Plan Commentary elaborates on the "war feature":
  - "...interventions in accordance with applicable law for the purpose of enforcing customs-, police-, safety- or navigation-regulations or any private law rights against the insured vessel are **outside** the scope of the war risks insurance cover"
  - "... if an overriding national or supranational political objective is detected, it does not matter if the State power formally justifies the interventions with for instance police or customs regulations, or if the intervention has the character of **abuse of power** or **corruption**"
  - "...interventions for the "furtherance of overriding political goals" are interventions that are **typical for war or times of international crisis**, and often can be explained by **foreign policy considerations**"
  - "It is not decisive that the **general political situation** in the State has contributed to the intervention. It follows from this that abuse of power is neither a necessary nor a sufficient condition for war risks cover"
  - "Overriding national political objectives will typically be outlined by the president, the parliament, the government at large, or a particular ministry"

# Arbitral case law etc

- Reported cases, some referred to in Commentary:
  - "Germa Lionel" in Libya – unpublished award (1985) – war peril
  - "Wil Drake" in Tunisia – adjuster opinion (1986) – war peril
  - "Chemical Ruby" in Nigeria – arbitration award (ND 1988 p. 275) – marine peril
  - "Sira" in Nigeria – arbitration award (ND 2016 p. 251) – marine peril
  - "Team Tango" in Nigeria – arbitration award (ND 2019 p. 6) – marine peril
- Emphasize the main "war feature":
  - Typical for war and times of international crisis – foreign policy considerations
  - Law enforcement by a "dysfunctional/corrupt/inefficient" state is in itself not a war peril, irrespective of how "unreasonable" the detention is



# Some conclusions and reflections

- Ship detentions will rarely qualify as a *war* peril under the NP
- The main causes for lengthy detentions are dysfunctional states, corruption, inefficient bureaucracy, etc.
- We see many examples from Indonesia, Angola, Nigeria, Venezuela, Mexico, etc.
- Would more "squared" rules be better?
  - The English IWSCH clauses
  - Every case is different, the "war feature" is in the *motivation*
  - The geopolitical context of a detention may often be decisive
- Need for a separate tailor-made insurance cover?

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