

HAS PUTIN TORN UP YOUR CONTRACTS?

Matters have been moving at pace in the Ukraine in recent weeks, culminating in the movement of Russian troops into Donetsk and Luhansk on 22 February 2022.

Whilst the conflict does not, at the moment, directly involve the USA or other western powers, there has certainly already been support behind the scenes and it is unknown how matters might develop. A direct declaration of war by a Western power against Russia is unlikely, but there are enough examples over the years of countries having "undeclared" wars i.e. wars without a formal declaration. If the situation continues to deteriorate in the coming weeks, greater involvement of the UN, NATO or a coalition of western forces acting outside of the UN or NATO may well be within the realms of possibility. If this were to happen, what does this mean for your contracts?

War Risks Insurance

P&I insurance offered by the International Group of P&I Clubs and the standard H&M insurance available in the London market, all exclude losses arising from war risks. The practice being that assureds will "buy-back" additional war risk insurance for their liability and property risks. H&M policies also often contain the Institute Notice of Cancellation Automatic Termination of Cover War and Nuclear which is an automatic termination provision for an outbreak of war between the UK, America, France, Russia or China.

The buy backs available for P&I war risks cover, either from the International Group, or the London market, all contain automatic termination provisions following the outbreak of war between any of the UK, America, France, Russia or China. The buy-backs for property insurance have the same provisions.

Charterparties

"War cancellation" clauses are also common in time charterparties (in standard forms or rider clauses) where parties are given the option to cancel the charterparty in the event of the outbreak of war between certain countries, often including Russia, the USA and the UK. This could be a powerful negotiating tool for Owners who wish to refuse to call at Ukrainian / or Russian ports or indeed any other ports for that matter, and perhaps even a "get out" to an unprofitable charterparty.

If it Looks Like a Duck and Quacks Like a Duck

So the key question is, has there been an outbreak of "war" (declared or otherwise) between Russia and the USA (or any other major powers)? This will depend on precisely what steps are taken by the USA, UK and other nations. There are a range of options that may be pursued by the USA, not all of which would be considered "war".

1. The USA and/or other nations could seek to deploy military assets with the support / backing of the United Nations. However the United Nations Security Council ("UNSC") normally makes resolutions which are "peace keeping missions" which are not war, and given that Russia is a permanent member of the UNSC (and can therefore "veto" proposed resolutions) it is highly unlikely that the UNSC will be able to act in the Ukraine.
2. The major powers could seek the support and backing of NATO, who have previously deployed military resources in a more conventional military role. However when member states dedicate personnel and supplies to NATO, those resources are deployed as NATO forces, not as forces of the country that provided them. NATO operations of this type could well be "war" but would be undertaken as NATO, and as such, would unlikely be considered a war between the USA/UK/France and Russia. Even if NATO operations could be considered a war between the USA and Russia, it seems unlikely that NATO will engage in direct military conflict with Russia as NATO was established as a military alliance with the purpose of establishing "collective defence" amongst its members and will not automatically commit to deploying troops to non-member states.
3. The USA could also choose to act outside of UN or NATO, with or without a coalition of supporting partners such as the UK or France. This is an option that has been adopted by the USA in the past even though post Afghanistan and Iraq, it is possible that their appetite for such conflicts has dwindled. There will almost certainly

already be US forces (or forces of their allies) operating in Ukraine in support, training or clandestine capacities currently. There is therefore possibility that if these forces came into contact with the Russian military, a conflict may ensue and have the potential to escalate.

From an English law perspective, the courts have been reluctant to adopt narrow, or technical, definitions of "war". If the parties include "war" in their contract and provide that certain consequences are to follow, "war" will be given its normal and popular meaning. It should be distinguished from "warlike activities and hostilities short of war". The English courts have expressly rejected any formal test or definition of "war" and rejected the suggestion that a "war" must be recognised by the UK Foreign Office. For example, the Sino-Japanese War of 1937 (where no declaration of war was made and where there were ultimately around 50 battles over 8 years with 10s of millions dead) was considered a "war", as were the Spanish Civil War, Korean War, Falklands War and periods of Gulf War 1 although the 9/11 Al Queda attacks were not.

It is not impossible that matters deteriorate in such a way in the coming weeks giving rise to an outbreak of "war" for the purposes of insurance contracts and charterparties, resulting in automatic termination of insurance policies and opening up options for parties to cancel their charterparties.

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