

AVIATION LAW—INSURANCE—NEITHER “WAR RISK” NOR OTHER STANDARD TERMS DENOTING CIVIL DISTURBANCE WITHIN THE EXCLUSIONARY CLAUSES OF ALL RISKS POLICIES ENCOMPASS THE DESTRUCTION OF AN AIRCRAFT BY HIJACKERS

In September 1970, plaintiff, an international air carrier, operated a Boeing 747 on a scheduled flight from Brussels, Belgium to New York when two of its passengers commandeered the aircraft. The hijackers, working for the Palestinian organization called the Popular Front for the Liberation of Palestine [hereinafter PFLP], demanded the plane be flown to Beirut, Lebanon. Aided by other PFLP people who boarded in Lebanon, they placed explosives throughout the aircraft which was then flown to Cairo, Egypt. Since the explosives were ignited before landing in Cairo the passengers fled only moments before the craft was totally destroyed. The plaintiff brought an action for the total value (\$24,288,759) of the destroyed aircraft based upon policies held by plaintiff and in force when the loss occurred. The defendants were composed of the all risk insurers, the United States government under the Federal Aviation Act,¹ and the war risk insurers; all of the insurers disclaimed liability.² *Held*, judgment for plaintiff against all risk insurers; complaint against war risk insurers and the government dismissed and all risk insurers' cross-claim dismissed.³ The destruction of aircraft by hijackers must be excluded with specif-

¹ 49 U.S.C. §§ 1531-42 (1970).

² The all risk insurers filed a cross claim for judgment due to lack of availability of CIA documents. The defendants represented three different types of insurance coverage encompassed by the plaintiff's five claims. First, claims one through three were made against the all risk insurers, comprised of one British (1/6 of total) and two American (5/6 of total) companies, covered the loss or damage for the full value of the aircraft with explicit exclusions:

- (1) Capture, seizure . . . or any taking of the property insured or damage to or destruction thereof . . . by any military . . . or usurped power, whether any of the foregoing be done by way of requisition or otherwise and whether in time of peace of war and whether lawful or unlawful . . . ;
- (2) War, invasion, civil war, revolution, rebellion, insurrection or warlike operations, whether there be a declaration of war or not;
- (3) Strikes, riots, civil commotion.

Secondly, the defendant in the fourth claim was the United States under the Federal Aviation Administration pursuant to the Federal Aviation Act, 49 U.S.C. §§ 1531-42 (1970), supplying insurance coverage to the extent of \$9,763,909. This policy comprehended loss or damage from: [w]ar, invasion, acts of foreign enemies, hostilities (whether war be declared or not), civil war, rebellion, revolution or insurrection, military or usurped power or confiscation and/or nationalization or requisition or destruction by any government or public or local authority or by any independent unit or individual engaged in irregular warfare.

In the fifth and final claim the defendant insurers in the London insurance market issued war risk policies covering 60 per cent of the total value of the aircraft. In essence, the coverage under the war risk policies at the time of the loss of the aircraft was analogous to the three paragraphs of exclusions enumerated in the all risk policies above.

³ The court summarily found that the charges of negligence and willful misconduct against the airlines would be inapplicable based on the facts. However, the court went even further and stated that even if the charges had been founded, they were not the proximate cause of plaintiff's loss. The court also found, based on the facts and the law, that the Government could not successfully

icity in the contract of an all risk insurance policy rather than employing standard "war risk" terminology to prevent liability for such occurrences. *Pan American World Airways, Inc. v. Aetna Casualty and Surety Co.*, 368 F. Supp. 1098 (S.D.N.Y. 1973).

Hijacking,⁴ though not modern in inception, in the sixties and seventies has reached new heights in regard to hazards for passengers and damage to aircraft;⁵ however, judicial examination of aircraft hull damage due to hijacking has been more infrequent and less prominent than inquiry into injury to passengers.⁶ While aviation policies must be construed and applied with reference to the general principles of insurance law, the aviation industry constitutes a specific division of insurance law based on aviation's particular characteristics.⁷ In addition, the cases frequently turn upon the phraseology of a particular insurance policy.⁸ The primary issue encountered in *Pan American World Airways, Inc. v. Aetna Casualty and Surety Co.*⁹ [hereinafter cited as *Pan American*] involved (1), the interpretation of the terminology of the all risk insurance policy and (2), the determination of whether or not such terms could be utilized to describe the PFLP and its activities so as to fall within the exclusionary clauses. The all risk policy contained war exclusion clauses similar to those used in marine insurance policies for almost three centuries. Originally, the terms "capture, seizure, arrest, restraint or detention" were used in marine insurance to designate a taking by the enemy who seized the vessel or

argue a defense of fraud underlying the Government insurance sold to the airlines. *Pan American World Airways, Inc. v. Aetna Cas. and Sur. Co.*, 368 F. Supp. 1098, 1141 (S.D.N.Y. 1973).

⁴ It is interesting to note that the word hijacking had its roots in the United States rather than England. The word was first used as an interjection given by robbers to their prey: "Hold your hands up high, Jack!" H. MENCKEN, *THE AMERICAN LANGUAGE* 719 (3d ed. 1963).

⁵ See Dowd, *Skyjacking: Problems and Potential Solutions (A Symposium)*, 18 VILL. L. REV. 985 (1973).

⁶ For cases involving hull damage see, e.g., *DuPont v. Indemnity Ins. Co.*, 292 F.2d 569 (5th Cir. 1961) (Destruction of aircraft while delivering weapons intended for Cuban revolutionaries within "warlike or hostile actions" exclusion from hull coverage insurance); *Sunny S. Aircraft Serv., Inc. v. American Fire & Cas. Co.*, 140 So.2d 78 (Dist. Ct. App. Fla. 1962), *aff'd*, 151 So.2d 276 (Fla. 1963) (Damage to plane by Cuban gunfire when pilot of plane hijacked to Cuba returned to the United States). For cases involving passenger injury see, e.g., *Block v. Compagnie Nationale Air France*, 386 F.2d 323 (5th Cir. 1967), *cert. denied*, 392 U.S. 905 (1968) (Action against French airline for wrongful death of passengers); *Husserl v. Swiss Air Transp. Co.*, 351 F. Supp. 702 (S.D.N.Y. 1972), *aff'd*, 485 F.2d 1240 (2d Cir. 1973) (Bodily injury and mental anguish suffered by passenger pursuant to hijacking of airplane); *Rosman v. Trans World Airways, Inc.*, 40 App. Div. 2d 963, 338 N.Y.S. 2d 664 (1972) (Bodily injury and mental pain and suffering of passenger caused by hijacking of airplane and subsequent detention in Jordanian desert).

⁷ See Convention for the Unification of Certain Rules Relating to International Transportation by Air [Warsaw Convention], July 31, 1934, 49 Stat. 3000 (1934), T.S. No. 876; Tokyo Convention on Offenses and Certain Other Acts Committed on Board Aircraft, September 14, 1963, [1969] 20 U.S.T. 2941; T.I.A.S. No. 6768 (effective December 4, 1969); Hague Convention for the Suppression of Unlawful Seizure of Aircraft, December 16, 1970, [1971] 22 U.S.T. 1643, T.I.A.S. No. 7192 (effective October 14, 1971).

⁸ *Harris v. Allstate Ins. Co.*, 309 N.Y. 72, 127 N.E.2d 816 (1955); *Cramer v. American Alliance Ins. Co.*, 72 S.D. 509, 37 N.W.2d 192 (1949).

⁹ 368 F. Supp. 1098 (S.D.N.Y. 1973).

its cargo as a prize or a reprisal during warfare.¹⁰ Usage has widened the meaning to cover the taking of neutral vessels in time of warfare,¹¹ the forcible taking by a non-belligerent power in time of peace,¹² and the governmental taking of a vessel under that government's registry.¹³ The particular insurance policy in issue makes this expansion of the term obvious by stipulating such seizure can occur in time of peace or war.¹⁴ The court almost summarily determined PFLP was not acting within the exclusions of paragraph one. "The record does not sustain on any theory the notion of the PFLP as a 'military or usurped power.' They had not at any pertinent time seized or controlled any territory over the opposition of the Jordanian government."¹⁵

The second paragraph of this policy also excluded from coverage "war, invasion, civil war, revolution or rebellion." War has been defined as an encounter between two governments or governmental entities.¹⁶ "Not only must the vessel's mission be one of war but the warlike character of its operation must be the dominant and effective cause of the resulting catastrophe."¹⁷ The definition of these terms has remained constant while their application to particular factual situations may have varied. If a war is in progress, there still must be a causal relation between warlike operations and the casualty.¹⁸ An insurrection can refer to a "revolt, rebellion, or seditious uprising against the government."¹⁹ But the same term has also been applied by courts to signify a less extensive objective such as where civil authority is defied during the course of a labor struggle.²⁰ In *Home Insurance Co. v. Davila*,²¹ Chief Judge Magruder distinguished at length the often merging socio-political terms utilized in insur-

¹⁰ *Mauran v. Alliance Ins. Co.*, 73 U.S. (6 Wall.) 1 (1868) (Taking by Confederate States of America of a vessel for their benefit); *Goss v. Withers*, 97 Eng. Rep. 511 (K.B. 1758) (Taking of an English ship by the French during war fell within exclusionary terms since there was no just hope of recovering a ship taken by an enemy).

¹¹ *Northwestern S.S. Co. v. Maritime Ins. Co.*, 161 F. 166 (9th Cir. 1908) (Taking of neutral American vessel running blockade during war between Japan and Russia constituted an act within exclusionary clause).

¹² *Powell v. Hyde*, 119 Eng. Rep. 606 (K.B. 1855) (Sinking of a British ship by Russian firing with the object to detain the ship constituted an illegal act and was within exception in policy coverage).

¹³ *Robinson Gold Mining Co. v. Alliance Ins. Co.*, [1902] 2 K.B. 489 (Gold belonging to a company incorporated and registered under laws of South African Republic was removed from train during transit by Government of South African Republic).

¹⁴ 368 F. Supp. at 1102.

¹⁵ *Id.* at 1130.

¹⁶ *See, e.g.*, *The Brig Amy Warwick (The Prize Cases)*, 67 U.S. (2 Black) 635 (1862); 2 OPPENHEIM, INTERNATIONAL LAW 203 (7th ed. H. Lauterpacht 1952).

¹⁷ *United States v. Standard Oil Co.*, 178 F.2d 488, 490 (2d Cir. 1949). *See also*, *Britain Steamship Co. v. The King (The Petersham)* and *Green v. British India Steam Navigation Co. (The Matiana)*, [1921] 1 A.C. 99.

¹⁸ *Libby, McNeill & Libby v. United States*, 87 F. Supp. 866 (Ct. Cl. 1950).

¹⁹ 5 J. APPLEMAN, INSURANCE LAW AND PRACTICE § 3111 (1970).

²⁰ *See Moyer v. Peabody*, 212 U.S. 78 (1909); *In re Charge to Grand Jury*, 62 F. 828 (7th Cir. 1894).

²¹ 212 F.2d 731 (1st Cir. 1954).

ance policies by arranging the terms on a continuum: An insurrection is a movement to take over the powers of a constituted government; when the affair has developed to a magnitude where the insurgents come into de facto control of a precise region of the country the insurrection matures into a "rebellion";²² the rebellion becomes a "revolution" when the rebels have overthrown the constituted government and established another one in its place.²³

The third paragraph excluded "riot or civil commotion." The definition of riot instituted by the common law authorities is still currently used in insurance practices, and there has been no substantial disagreement about the definition.

A 'riot' is where three or more actually do an unlawful act of violence, either with or without a common cause or quarrel, as if they beat a man, or hunt and kill game in another's park, chase, warren, or liberty, or do any other unlawful act with force and violence, or even do a lawful act, as removing a nuisance, in a violent and tumultuous manner.²⁴

There are five basic parts of any riot definition. A riot encompasses no less than three persons with a common purpose, the execution of that purpose with intent by those assembled to help one another by force, if necessary,²⁵ and such force must cause alarm in at least one person of reasonable firmness and courage.²⁶ A "civil commotion" involves a disturbance of civil order in a community by a mass of people, where the disturbance is not so great that it could be characterized as an insurrection or war.²⁷

A traditional doctrine within insurance contract law states that any imprecision or ambiguities found within the coverage terms must be construed against the insurer.²⁸ However, this court determined the canons of construction to be secondary since three strong rationales could be found for judgment against the insurers in any event.²⁹ The first rationale emphasized that the risk of hijacking was common knowledge when the insurance was written. The instances of hijacking had indeed been for some time prominent in both a domestic and an international context prior to the incident.³⁰ Sixty-six aircraft of United States

²² *Id.* at 736.

²³ *Id.* at 736.

²⁴ W. BLACKSTONE, COMMENTARIES 147 (Chitty Ed. 1893). *See also* Salem Mfg. Co. v. First American Fire Ins. Co., 111 F.2d 797 (9th Cir. 1940); Luckett-Wade Tobacco Co. v. Globe & Rutgers Fire Ins. Co. 171 F. 147 (5th Cir. 1908); Brous v. Imperial Assurance Co., 130 Misc. 450, 224 N.Y.S. 136 (Sup. Ct. 1927); Aron v. City of Wausau, 98 Wis. 592, 74 N.W. 354 (1898).

²⁵ BLACK'S LAW DICTIONARY 1490 (4th ed. 1968).

²⁶ Symonds v. State, 66 Okla. Crim. 49, 89 P.2d 970 (1939).

²⁷ Hartford Fire Ins. Co. v. War Eagle Coal Co., 295 F. 663, 665 (4th Cir. 1924).

²⁸ Imperial Fire Ins. Co. v. County of Coos, 151 U.S. 452 (1893); Moulter v. American Ins. Co., 111 U.S. 335 (1883); Insurance Co. of N. America v. Rosenberg, 25 F.2d 635 (2d Cir. 1928); Republic of China v. National Union Fire Ins. Co., 151 F. Supp. 211 (D. Md. 1957); Spring Garden Ins. Co. v. Imperial Tobacco Co., 132 Ky. 7, 116 S.W. 234 (1909); Jablonski v. Girard Ins. Co., 113 N.J.L. 465, 174 A. 689 (Ct. Err. & App. 1934); Ira S. Bushey & Sons v. American Ins. Co., 237 N.Y. 24, 142 N.E. 340 (1923); Sincoff v. Liberty Mut. Fire Ins. Co., 11 N.Y.2d 386, 183 N.E.2d 899, 230 N.Y.S.2d 13 (1962).

²⁹ 368 F. Supp. at 1118.

³⁰ The Tokyo Convention in 1963 began the initial work on aircraft hijacking to define the

or foreign registration were hijacked from January 1, 1961 through 1968; two hundred and seventy-seven aircraft were hijacked from January 1, 1969 through 1972.³¹ All risk insurers met in May, 1970, as the United States Aircraft Insurance Group (USAIG) to discuss hijackings and later that same year, insurance publications echoed doubts about whether hijackings were covered by traditional boiler-plate language originally adapted from marine insurance.³²

The second rationale emphasized that other insurers in the industry were utilizing terms which described the risk of hijacking with precision. Before 1969 the London all risk insurers were writing exclusionary clauses labeled "hijacking" which carefully delineated the absence of liability for the underwriters.³³

elements of the crime, extradition, and other technicalities of the international crime. In 1968 the Sixteenth Assembly of International Civil Aviation Organization in Buenos Aires began work on what would later culminate in the 1970 Hague Convention's document on hijacking. Horlick, *The Developing Law of Air Hijacking: Its Cause and Cure*, 63 AM. J. INT'L L. 695 (1969); Jacobson, *From Piracy on the High Seas to Piracy in the High Skies: A Study of Aircraft Hijacking*, 5 CORNELL INT'L L. J. 161 (1972); McClintock, *Skyjacking: Its Domestic Civil and Criminal Ramifications*, 39 J. AIR L. & COMM. 29 (1973); Shubber, *Aircraft Hijacking under the Hague Convention 1970 — A New Regime?*, 22 INT'L & COMP. L. Q. 687 (1973); Van Panhuys, *Aircraft Hijacking and International Law*, 9 COLUM. J. TRANSNAT'L L. 1 (1970); Volpe and Stewart, *Aircraft Hijacking: Some Domestic and International Responses*, 59 KY. L. J. 273 (1970).

³¹ Evans, *Aircraft Hijacking: What is Being Done?* 67 AM. J. INT'L L. 642 (1973).

The federal crime of aircraft piracy was created in 1961 by a Congressional amendment to the 1958 Federal Aviation Act, 49 U.S.C. §§ 1531-42 (1970). The amendment came as a reaction to five successful international and domestic hijackings of United States registration in three months of that year. The new crime was punishable by a minimum of twenty years imprisonment to death.

³² Shaw, *Collective or Individual Acts of Violence—The Risks Undertaken By Insurance Contracts and the Respective Roles of State and Private Insurance*, 8 FORUM 250, 257 (1972):

It is a reasonable contention that destruction of this kind really is not insurable . . .

But how can anyone conceivably foresee the whims of a cabal of wicked and destructive men? Their actions take underwriting out of mathematics and into the gambling hall—and no one can gamble at \$24,000,000 a throw.

It appears to look—at the last moment before printing this article—as if even the specialist war risk market has now decided it must look at things this way. Airline war risks cover, it is estimated, may well in future be limited to risks in flight only. At least, this way, war risks insurers will pay only for one aircraft at a time, and for proven war-like acts of destruction in which the perpetrators are themselves likely to suffer. . . . [quoted from REINSURANCE, Oct. 1970]

³³ Tompkins, *The Aftermath of a Hijacking—Passenger Claims and Insurance*, 39 J. AIR L. & COMM. 381, 396 (1973):

WAR, HIJACKING AND OTHER PERILS EXCLUSION CLAUSE
 ○
 (AVIATION)

This Policy does not cover claims caused by

- (a) War, invasion, acts of foreign enemies, hostilities (whether war be declared or not), civil war, rebellion, revolution, insurrection, martial law, military or usurped power or attempts at usurpation of power.
- (b) Any hostile detonation of any weapon of war employing atomic or nuclear fission and/or fusion or other like reaction or radio-active force or matter.
- (c) Strikes, riots, civil commotions or labour disturbances.
- (d) Any act of one or more persons, whether or not agents of a sovereign Power,

A BOAC plane destroyed the same week as the aircraft in question was covered by a war risk insurance policy that specially included hijacking activity; BOAC received prompt payment for its loss.³⁴ The third rationale stressed that the all risk insurers themselves were aware of the ambiguities of their clauses and exhibited uncertainties by their approach in the case. The all risk position was that either (1) paragraphs one and two excluded liability or (2) the loss would fall within paragraph three and so impose a maximum of \$10,000,000 liability.³⁵ Furthermore, within a short time after the destruction of the aircraft in Cairo, the all risk insurers changed the terminology in the policy to specifically exclude liability for hijackings.³⁶

The interpretation by the *Pan American* court of the existing laws involving insurance terminology rests upon a stable foundation; however, the weight of the court's decision rests upon its factual findings about the PFLP as a political group. The court delved at length into the history of the Palestinian area since World War II.³⁷ For insurance purposes the PFLP was viewed as a minute group somewhat at odds with the other fedayeen groups in the Middle East: a group who specialized in hijackings and other "external operations" (outside Israel and the area around it), rather than the overthrow of the Jordanian government whose territory the group utilized as a base of operations.³⁸ The objectives behind the hijacking were closely scrutinized and found to be "un-warlike" objectives.

The court seemed overanxious to compensate the plaintiff airline company for its loss. The court remarked that the first exclusionary paragraph of the all risk policy would not apply:

. . . to any such [destruction or taking] by a foreign government or foreign

for political or terrorist purposes and whether the loss or damage resulting therefrom is accidental or intentional.

(e) Any malicious act or act of sabotage,

(f) Confiscation, nationalisation, seizure, restraint, detention, appropriation, requisition for title or use by or under the order of any Government (whether civil military or de facto) or public or local authority.

(g) Hi-Jacking or any unlawful seizure or wrongful exercise of control of the Aircraft or crew in flight (including any attempt at such seizure or control) made by any person or persons on board the Aircraft acting without the consent of the Insured. Furthermore this Policy does not cover claims arising whilst the Aircraft is outside the control of the Insured by reason of any of the above perils. The Aircraft shall be deemed to have been restored to the control of the Insured on the safe return of the Aircraft to the Insured at an airfield not excluded by the geographical limits of this Policy, and entirely suitable for the operation of the Aircraft (such safe return shall require that the Aircraft be parked with engines shut down and under no duress).

³⁴ 368 F. Supp. at 1111, 1120.

³⁵ *Id.* at 1117. The rationale that the alternative pleadings used by the all risk insurers emphasized the ambiguous nature of the policy is seemingly unsound since FED. R. CIV. P. 8(e)(2) allows such pleading with theoretical impunity. The court here ignored a federal policy and utilized the misstatement to bolster its own position.

³⁶ *Id.* at 1120.

³⁷ 368 F. Supp. at 1104-10, 1115-16, 1124-29.

³⁸ *Id.* at 1110.

*governmental authority following the forceful diversion to a foreign country by any person not in lawful possession or custody of such insured aircraft and who is not an agent or representative, secret or otherwise, of any foreign government or governmental authority. . . .*³⁹

The court stated that the emphasized words precisely described the PFLP incident. The court stressed the recognition of the hijacking problem in the policy but noted that the policy chose not to exclude this possibility.⁴⁰ However, the court did not read the quoted limitation in its entirety. The emphasized words do describe the PFLP's actions; however, the limitation refers to a taking or destruction by a foreign government or foreign governmental authority. If the Egyptian government had taken or destroyed the aircraft after the PFLP's diversion to that country the all risks policy would have covered the loss. To fit within this phrase the PFLP would have to be considered a governmental entity since the case clearly states the PFLP demolished the aircraft. This proposition is blatantly inconsistent with the court's view; the court simply misread the limitation.

Although there are obvious shortcomings in the approach taken by the court, given the present trend of terrorists or criminal or political hijackers a factual analysis method would appear to be justified to reach a determination about coverage where the policy utilized indefinite language. Nevertheless, it should not be overlooked that the criteria of examination set by this court is both time-consuming due to the depth of the social and political issues to be resolved and leaves to the court a wide latitude for labelling a particular political movement in any manner the court deems appropriate. The PFLP is definitely a political group, but whether or not it is encompassed by the terms used in the exclusionary clauses is a value judgment when stripped of the verbiage. Admittedly there seems to be no other method of resolving the issues given the factual situation. Yet, the court's analysis was confused and its legal position was made unclear by its application of this technique. To some extent the specification of hijacking in the exclusionary clauses has resolved the tension between the all risk policies and the war risk policies.⁴¹ The exclusion of hijacking alerts the owner of the need to find coverage elsewhere for this specific exclusion. Then the courts can primarily concentrate on the causation of a particular hijacking to find whether or not it comes within the hijacking coverage. With the knowledge of the frequency of the hijackings and the amount of money involved in a 747 aircraft (\$24,000,000), the insurance market will understandably raise the premiums for such coverage; this vital addition to the policy could make finding coverage for the potential loss more difficult. But the conflict between the war risk policy and the all risk policy can not be viewed as if it were at an end. For instance, on February 21, 1973, a Libyan airliner was shot down by the Israeli Air Force over the Sinai Desert.⁴² Would this type of attack be found

³⁹ *Id.* at 1121.

⁴⁰ *Id.*

⁴¹ See note 33 *supra*.

⁴² N.Y. Times, Feb. 22, 1973, at 1, col. 8.

within an all risk policy or a war risk policy? The issue adjudicated by the *Pan American* court will remain alive as long as military and political conflicts occur without a declaration of war.

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