

insurance policies, so what does the ordinary man in the street understand as Comprehensive ? The insurance policy will initially explain to him everything that is covered and then there will be the list of standard exclusions and then the added ones, often many times greater in volume than the passages of the policy that tell the person what is covered. In this day and age also, all insurers face the prospect of having to adopt and incorporate additional clauses imposed by their reinsurers at the beginning of each new account year.

All Risks is even worse. All Risks to a lay-man (and we have to understand that most insurance purchasers are lay-people) to them means exactly what it says, All Risks/everything. Perhaps we should re-label the policy All Risks except those risks that are excluded ?

My argument here is firstly, that we need to explain to insurance purchasers exactly what their policies cover even if they understand differently from the policy type description. Conflicts on policy interpretation always happen at the worse time and that is during claims negotiations when the customer is faced with having paid a premium for risks that he was willing to transfer to an insurer and thought were covered and then finds that he is not covered for the event that he has suffered. I am not advocating that insurers should cover everything just suggesting that better education especially with the clauses that exclude elements of the cover concept are better explained to the insurance customer. Perhaps it is important to explain what is not covered rather than what is covered.

There is an oft misunderstood concept that the customer assumes that he is covered for All Risks and as suggested above that the exclusions/clauses are not really explained in depth to them. There are so many clauses now that are incorporated in your treaty contracts and which to safeguard yourself you need to incorporate annually into your insurance contracts. If this is not done annually then there is a very real risk that the coverage you are granting will be out of line with your treaty coverage. In this case you could find yourself holding the risk and the loss net for your account. My concern here is for a more logical approach to the incorporation of reasonable clauses applicable for African risks, i.e. African solutions for African problems, not European solutions for African problems !!

This is a very general review of some elements of concern that I have regarding the application of clauses, many of which I feel are inappropriate to Africa.

War and all that !!:

“The general understanding of what we define as ‘War’ also raises issues as to whether for example the events of 9/11 were acts of War for the purpose of the exclusion clauses that were applicable at that time”

This, as I have referred to earlier, is an emotive subject not least because of where we are today and recent history. I could have littered my paper today with legal definitions and case law (and there is a lot) as well as past judgements on what is and what is not War or indeed any of the related elements that are referred to in the universal War Clauses. I have referred to these sparingly later in the paper. I will attempt to give an overview as well as a personal opinion based on a 42 year insurance career as well as a 42 year connection to the beautiful continent of Africa.

War and its related acts are horrific. I guess that there has never been a war that has actually resolved an issue straight away. The fall-out from any form of a conflict always lingers on. Seething hatred, fear and elements of retribution always follow even in the mildest form, and yet the insurance industry continues to strive to find solutions for the many elements that war seeks to destroy or tamper with. Here in Liberia there are still hints of litigation from the first conflict that effectively ceased over 10 years ago. I also assume that the hints of litigation also are still real relative to the 2nd conflict that ceased in 2003.

The history of mankind has sadly been marked by the development of more destructive methods of inflicting harm to persons and property. In terms of insurance, however, until the 17th century even the threat of war was not considered a significant risk to London based insurers who were admittedly mainly exposed to domestic and marine risks at the time. Since the 17th century international trade accompanied of course by insurance has become increasingly globalised. While threats of terrorism and even war were once considered largely bearable in insurance terms (and indeed profitable in the marine market) the experiences of the 20th century wars and 11th September 2001 (9/11) undoubtedly reversed those presumptions and the routine exclusion of liability for such phenomena is now taken for granted.

Increased political tensions, trade and better understanding of these activities from an insurance perspective led to more war risks being excluded by endorsement throughout the 18th and 19th centuries, often in response to particular events. For instance in 1739 following heightened tension between Britain and France, exclusions for ‘capture’ and ‘seizure’ began appearing in marine policies. Exclusions and covers for war related risks evolved and multiplied in response to the many armed conflicts of the 18th and 19th centuries. By 1883 for example underwriters at Lloyd’s started excluding loss related to ‘warlike operations’ following a bombardment of Alexandria (Egypt)

even though no state of war could have clearly existed. During the 1890's the consequences of riot and civil commotion exclusion clauses started to appear.

In 1898 Lloyd's resolved that on marine risks the war element would become a separate risk.

State Intervention:

"The perils of war, civil war and related perils are regarded as the responsibility of the State rather than the insurer"

On land the British Government effectively acted temporarily as State war risks insurer under the War Damages Act 1941 just into the 2nd World War. In addition the state (in the UK) has accepted liability for damage from riot loss on the basis that as the employer of the police forces that it is the police forces responsibility to deal with and indeed control riots or potentials thereof.

Non-Marine War Risks:

In 1936 Lloyd's and the British Insurance companies drew up the War & Civil War Exclusion Agreement in response to events in the Spanish Civil War, in particular the first large aerial bombardment of an urban area, which it was conceded constituted a threat of catastrophe losses. This led directly to the incorporation of the War Exclusion clause in all non-marine based insurances. The clause (NMA 464) read as follows;

"Notwithstanding anything to the contrary contained herein this policy does not cover Loss or Damage directly or indirectly occasioned by, happening through or in consequence of war, invasion, acts of foreign enemies, hostilities (whether war be declared or not) civil war, rebellion, revolution, insurrection, military or usurped power or confiscation or nationalisation or requisition or destruction of or damage to property by or under the order of any government or public or local authority"

Determining what a particular word means is rarely as simple as looking up a definition in a book. It is important to understand that the definition of a term as derived from case law may only be the starting point when considering coverage, since courts may also take into account other factors, including variation of terms that may appear in All Risks or named perils policies or whether the policy modifies the normal proximate cause (proximate causation) rules through the use of indirect causation and/or reverse burden of proof clauses.

Standard exclusions nearly always exclude phenomena ranging from war down to rebellion, insurrection etc but may vary considerably as to whether or not phenomena such as strikes, riots and civil commotion are routinely excluded. As a general rule of thumb, riots and civil commotions are more

likely to be excluded on standard property covers in potentially unstable parts of the world than in the so called industrialised, well ordered economies.

For current purposes, however, some of the terms found in the classic non-marine war etc. exclusion clause NMA 464 which was introduced in 1936 are considered (see full clause stated above).

Now the definitions, not legal these, but from books and encyclopaedias;

1. War – a contention by force between two or more independent Nations carried on with the authority of their respective Governments. To legalize a War one of the two entities needs to declare same.
2. Civil War – is a war between organised groups to take control of a nation or region or to change Government policies. A Civil War is between parties within the same Nation. The forces in conflict belong to the same Nation or political entity and are vying for control of that Nation or political entity.
3. Military or Usurped Power – an invasion of a kingdom (country) by foreign enemies to give laws and usurp the power thereof, or an internal armed force in rebellion assuming the power of the Government by making laws and punishing those not obeying
4. Acts of Foreign Enemies – self defined in that if the Nation receiving attrition from outside of its borders has defined that force as an enemy then any such act of attrition would be excluded.
5. Hostilities – deliberate acts of warfare, enmity and antagonism.
6. Rebellion – to rise up against authority; to wage dissent. An organised and violent internal uprising in a country with, as its main purpose the object of trying to overthrow or supplant the government of that country though. Insurrection may denote a lesser degree of organisation and size than rebellion.
7. Revolution – to revolt, the act of revolting. The overthrow of the Government or social system.
8. Insurrection – an act or instance of revolting against civil authority or an established Government (see Rebellion).
9. Usurped power – power seized or appropriated unlawfully.
10. Riot – a form of civil disorder characterised by disorganised groups lashing out suddenly and intensely with violence, vandalism and other criminal intents. In the UK this means a gathering of 12 or more people who are present together and who use or threaten unlawful violence for a common purpose.
11. Strikes – primarily labour disputes against work and labour conditions
12. Civil Commotion – an insurrection of the people for general purposes. A stage between Riot and Civil War.

“After the events of 9/11 it has to be accepted that the line between war and terrorism is increasingly ambiguous”

The advent of change in the War exclusion clauses:

Now, no one knows exactly when Terrorism started, although in its various forms it has been with us for hundreds of years.

What has changed dramatically is the increase in the form that terrorism now takes, these forms being totally unknown and indeed impracticable in the past. Globalisation in its various forms has been the greatest aid to the terrorist perpetrator, enabling them to travel more easily and gain knowledge and access to others via the worldwide web, all elements that say were not available a few years ago.

It is said that the events of 9/11 changed the world forever, especially in the concept of governments and all forms of business towards their understanding of terrorism and the enhanced new perceived and real threat that this posed to world order. The world will never be the same, we have to accept that. The terrorist will always be there as they have been for a thousand years; all we can do is to try to nullify their threat and re-educate potential perpetrators that there is a better way of resolving issues.

In the meantime, as acceptors of risk, both insurers and reinsurers have to try to establish ways whereby their potential catastrophe exposures and indeed exposures that are actuarially impossible to analyse are minimised by the introduction of the appropriate exclusion clauses.

Now this is where the problem now occurs for as Terrorism and indeed in many cases War, have devolved into multi-faceted type operations then the past definitions, legal as well as technical, are just not appropriate any more. As a result, rather than the standard War Clause that was still acceptable up until the late 1980's, the vastly expanded War and Civil War, Political Risk and Terrorism Exclusion Clause has now been designed, which is an attempt to embrace all aspects of modern day risks (see attached version).

This vast exclusion clause now caters for all the risks that the modern day unsettled society seems to present to the world of insurance. It will no doubt be added to as the terrorists (and that is what they are – they are not Religious fanatics or fundamentalists) find more ingenious methods of plying their murderous way.

Causation:

Perhaps the crux of the matter.

A sufficient casual connection must exist between the peril or damage described in the policy of insurance and the loss suffered by the insured. In most jurisdictions in the absence of special wordings it is the proximate cause of a particular incident that is relevant to the application of the wordings (proximate cause has been said to equate to the direct dominant or effective cause). Industry practitioners will be aware that the doctrine of proximate causation is often easier to state than to apply to any loss; the nuances are debated at length in many legal documents. Problems of causation in the field of political losses can sometimes cause special problems in the determination of the proximate cause of a particular loss event. Often one will need to show a link between an event such as riot or explosion with the intentions of the perpetrators in order to fit the events within the political peril in question. For example is property destroyed by drunken soldiers an act of war or simply an act of ordinary criminality ?

Were the goods stolen from a warehouse by rioters or by ordinary looters ? Was a road accident during a blackout caused by war or was it due to negligent driving ? The answer to each of these and similar questions depends entirely upon the wording and particular facts in each case. Each question will involve a very careful examination of the policy wording and of the immediate facts and general background of the events.

Burden of Proof:

It cannot be overemphasised how crucial the burden of proof can be to how a court applies wordings in practice. It is common to find clauses expressly dealing with burdens of proof in both the context of exclusions and covers found for war, terrorism and associated perils.

The standard 'Reverse Onus of Proof Clause' (issued these days in so many various forms) could read as follows;

"Where the company (insurer) alleges that by reason of the provisions of this Condition any loss or damage is not covered by this insurance, the burden of proving that such loss or damage is covered shall be upon the insured"

These are often applied in relation to certain clauses/conditions in policies especially where the event excluded could be contentious.

They are not safe in every event. In 1975 there was a famous case in the UK courts relating to a loss in Beirut, Lebanon during the civil unrest, where the insurer held that the burden of proof was fairly and squarely on the insured to

prove that the loss was covered. That court in that instance held that the insurer first had to prove that an excluded event was in fact applicable before the insured has to prove that his loss was recoverable.

I mention these reverse onus of proof clauses as they are now universally applied to the war exclusion clauses, given that the modern day versions seek to cover (or rather exclude) a vast array of un-definable events all of which are classed as war and war related type events.

The War market:

There is and always has been various forms of insurance that could be purchased to cover these excluded events, especially marine war cover and in the 1920's and forwards for aviation war coverage. These markets are still booming as you can imagine, but part of their success of course is the fact that ships and aircraft are moveable objects and can move away from danger real and perceived. Not so fixed property of course.

The Non-Marine land based war capacity came to fruition during the Iraqi invasion of Kuwait in the early 1990's when a number of American insurers perhaps seeking massive almost instantaneous premium growth of vast proportions announced limited war cover for land based property. Certain limited capacity is still available. Indeed, I recently gained terms for a risk in Liberia from the London market.

A personal perspective:

I have trawled through books and other forms of literature as well as applied some of my limited knowledge of a deep and interesting subject.

I first travelled to Liberia in February 1988 over 20 years ago now. It was a busy town (Monrovia) surrounded with vast acreages of green lush vegetation and a country that has vast potential. I liked it, so the next year I came back and indeed came at least twice a year. In April 1991 I think, certain rumblings were beginning about civil war and sadly everyone's worse fears were eventually realised.

As I have referred to earlier in this paper I was aware throughout the late 1990's that many investors in the economy of Liberia had lost vast amounts of property in the first (as well as the second) conflict. It was not so much the losses from War as War (or as this was, Civil War) was an excluded peril, but it was rather from the interpretation I seem to recall of what was the peril of 'Riot' or maybe 'Civil Commotion'.

In my office in London I still retain sets of legal papers prepared by all parties to various cases stating their particular positions in relation to these events that sadly resulted in millions of dollars of lost property.

Now the two side's contentions were –

Insurer – the losses were not as a result of riot the proximate cause being Civil War.

Insured – the losses were occasioned by rioters therefore as Riot was a peril that was included the losses were covered.

Whilst I am aware from rumour that some losses might have been paid 'ex-gratia' by some foreign reinsurers on behalf of local insurers, the vast majority were declined, the basis simply being that the proximate cause (causation) was a civil war that had occasioned a breakdown in general law and order and security which had then allowed rioters (or what we may now call looters) to take advantage of the situation to steal.

Looking at it from the other perspective you have to ask yourself that if the civil war, which was at that time in the country and quickly approaching the capital Monrovia, was not actually taking place would these losses have actually occurred. The general consensus is NO !

I will leave it there as it is an emotive subject and there may be many among you that have arguments for and against this stand, but to date the UK legal standpoint is I believe as stated above.

Summary:

Its been a short and perhaps tortuous route this paper. The ideas and opinions expounded here as well as taken from other more literary exponents of the insurance industry can never have total finite definitions attached to them.

There are a lot of humans in this world, thankfully the vast minority, that have counter ideas to logic and law and order as well as how they should treat and respect their fellow human beings. We are all of the same gene pool. We are the most intelligent form of life on this our planet yet we can impose on others the cruellest of punishments all in the name of ideology.

At the end of the day the business man seeks to transfer those risks that he cannot retain or assume himself to a body that is better equipped to do so, but as insurance is a practice of actuarial appreciation and risk analysis there will always be risks that cannot fall into this method of science and therefore are too complex or just too risky to allow an insurance contract to be in place.

Perhaps governments around the world, all of them, should wake up to the real as well as perceived threat of global terrorism and war and start to do something about it – then we can all look forward to a peaceful life, again.

Attachments:

- i. **New York Times paper announcing introduction of War exclusions 5th February 1917**
- ii. **Standard War & Civil War Exclusion Clause**
- iii. **Revised War & Civil War, Political Risks and Terrorism Exclusion Clause (2009)**

Peter King
London – March 2009

MAY ALTER LIFE POLICIES.

Insurance Companies Will Probably Insert a War Clause.

Life insurance companies will probably insert a war clause in their policies if they do not already have one, in view of the breaking off of diplomatic relations with Germany. At the time of the mobilization of the National Guard on the Mexican border a conference of Presidents of insurance companies was held to discuss this matter. Some companies inserted a war clause at that time, but others did not. Many policies written during the last year provide for an additional premium of approximately 20 per cent., or a corresponding scaling down of the policy in case the insured goes into active service.

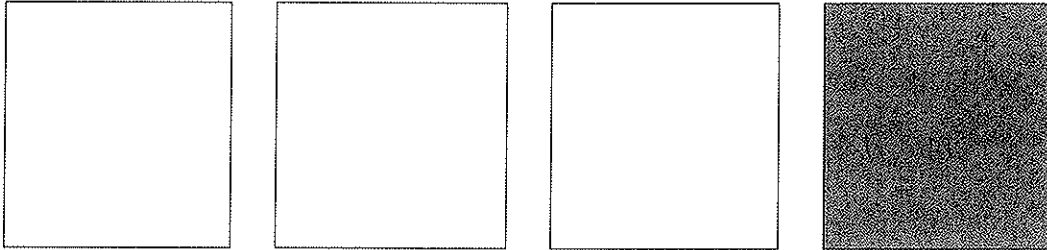
W. A. Hutcheson of the Mutual Life Insurance Company said yesterday that while most companies probably would insert a war risk clause in the new policies, an agreement might be reached not to avail themselves of it should the Government request it. This would follow a precedent established in England.

Miles M. Dawson, an insurance actuary, said he believed the insurance companies would agree upon a special clause in the event of hostilities calling for an additional premium of about \$150 for each \$1,000.

The New York Times

Published: February 5, 1917

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WAR AND CIVIL WAR EXCLUSION CLAUSE
(Approved by Lloyd's Underwriters' Non-Marine Association)

Notwithstanding anything to the contrary contained herein this Policy does not cover Loss or Damage directly or indirectly occasioned by, happening through or in consequence of war, invasion, acts of foreign enemies, hostilities (whether war be declared or not), civil war, rebellion, revolution, insurrection, military or usurped power or confiscation or nationalization or requisition or destruction of or damage to property by or under the order of any government or public or local authority.

4.2 War and Civil War, Political Risk and Terrorism

The following shall be excluded from this Agreement:

Any loss or damage occasioned by or through or in consequence, directly or indirectly, of any of the following occurrences, namely:

- 1 War, invasion, act of foreign enemy, hostilities or warlike operations (whether war be declared or not), civil war.
- 2 Abandonment and/or permanent or temporary dispossession resulting from detention, confiscation, seizure, restraint, commandeering, nationalisation, appropriation, destruction or requisition by order of any government de jure or de facto or by any public authority.
- 3 Mutiny, civil commotion, military rising, insurrection, rebellion, revolution, military or usurped power, martial law or state of siege or any of the events or causes which determine the proclamation or maintenance of martial law or state of siege.
- 4 Any act, including but not limited to labour disturbance, lock-out, riot or strike, which is calculated or directed to bring about loss or damage in order to further any political aim, objective or cause, or to bring about any social or economic change, or in protest against any State or Government, or any political or local authority, or for the purpose of imposing fear in the public or any section thereof.
- 5 The act of any lawfully established authority in controlling, preventing, suppressing or in any other way dealing with any occurrence referred to in clauses 4 above.
- 6 Plundering, looting, war pillage in connection with civil commotion or any of the activities referred to in clause 4 above.

For the purposes of clauses 4, 5 and 6, any loss or damage occasioned directly by a labour disturbance, lock-out, riot or strike or in order to bring about any social or economic change which is not politically motivated as envisaged in clause 4 shall not be excluded.

In any action, suit or other proceeding where the Reinsurer alleges that by reason of these provisions any loss, damage, cost or expense is not covered by this Reinsurance Agreement, the burden of proving that such loss, damage, cost or expense is covered shall be upon the Reinsured.

Terrorism Exclusion Clause

Notwithstanding any provision to the contrary within this agreement or any endorsement thereto, this reinsurance agreement does not cover any liability, loss, damage, cost or expense of whatsoever nature directly or indirectly caused by, resulting from, happening through or in connection with any act of terrorism, regardless of any other cause contributing concurrently or in any other sequence to the loss, damage, cost or expense.

For the purpose of this exclusion, terrorism means an act, including but not limited to the use of violence or force and/or the threat thereof, whether as an act harmful to human life or not, by any person or group(s) of person(s), whether acting alone or on behalf of, or in connection with any organisation(s) or government(s) or any person or body of persons, committed for political, religious, personal, ethnic or ideological reasons or purposes including any act committed with the intention to influence any government and/or for the purpose of inspiring fear in the public or any section thereof.

In any action, suit or other proceeding in which the Reinsurer alleges that by reason of this definition any loss, damage, cost or expense is not covered by this Reinsurance Agreement, the burden of proving that such loss, damage, cost, or expense is covered shall be upon the Reinsured.