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Résumé de l'article

La présente analyse sur l'exclusion des risques de guerre n'est pas sans intérêt. L'auteur tente de définir les éléments permettant d'interpréter cette exclusion, en cas d'ambiguité. À titre d'exemples, les actes de terrorisme, les émeutes ou les explosions sont généralement couverts par l'assurance. À preuve, les émeutes de Los Angeles en 1991, l'explosion du World Trade Center en 1992 ou les explosions survenues à Londres en 1992 et en 1993 sont couvertes par les contrats d'assurance usuels. Toutefois, ces mêmes risques seraient exclus, s'ils survenaient à l'occasion d'un conflit armé entre deux nations ou d'une guerre civile déclarée. L'auteur examine l'importance de définir les termes, notamment la différence qui existe entre une guerre civile et une rébellion. Les actes de terrorisme faits dans le but de dénoncer l'intervention politique d'un pays dans un conflit armé entre deux autres pays sont-ils des actes de guerre ou simplement des actes de terrorisme usuellement couverts ? Selon l'auteur, il est crucial de bien définir les termes.

War Risk Exclusion Clauses: an Appraisal in the Light of Recent Developments*

by

G. Cornish

La présente analyse sur l'exclusion des risques de guerre n'est pas sans intérêt. L'auteur tente de définir les éléments permettant d'interpréter cette exclusion, en cas d'ambiguité. À titre d'exemples, les actes de terrorisme, les émeutes ou les explosions sont généralement couverts pas l'assurance. À preuve, les émeutes de Los Angeles en 1991, l'explosion du World Trade Center en 1992 ou les explosions survenues à Londres en 1992 et en 1993 sont couvertes par les contrats d'assurance usuels. Toutefois, ces mêmes risques seraient exclus, s'ils survenaient à l'occasion d'un conflit armé entre deux nations ou d'une guerre civile déclarée. L'auteur examine l'importance de définir les termes, notamment la différence qui existe entre une guerre civile et une rébellion. Les actes de terrorisme faits dans le but de dénoncer l'intervention politique d'un pays dans un conflit armé entre deux autres pays sont-ils des actes de guerre ou simplement des actes de terrorisme usuellement couverts ? Selon l'auteur, il est crucial de bien définir les termes.

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Introduction

The Gulf War, the bomb blast in the City of London on 10th April 1992, the activities of groups like Sendero Luminoso in Peru, the Los Angeles riots and the continuing political unrest in many parts of the world, including currently what used to be

* Reprinted from the *Quarterly letter*, Netherlands Reinsurance Group, September 1992, No 129.

Yugoslavia, have once again concentrated the minds of insurers and their reinsurers on the significance of War Risk Exclusion clauses.

The starting point for any insurer must be that it is willing to consider granting cover in respect of relatively normal risks which can be assessed with some degree of accuracy. As soon as an abnormal element is introduced into the picture, like the increased risk of losses due to war or a war-like activity, the insurer must consider whether it is still willing to write the

business subject to the payment of an appropriate premium or apply an exclusion clause.

If the exclusion clause option is chosen, there are many problems to be dealt with, one of the most significant being exactly what the various terms used in the exclusion clause chosen mean. Any ambiguity will usually be interpreted by a court or arbitrator against the insurer and this tendency is quite logical because, after all, an insured has every right to know precisely the extent of his insurance cover.

The Definition Problem

A War Risk Exclusion clause in an insurance policy or a reinsurance agreement will be interpreted in accordance with the system of law which is applicable to the policy or agreement. This in itself creates problems because a riot as defined in English law may mot be deemed to be a riot in the legal system which applied to the contract in question.

The problem of interpretation is exacerbated by the way in which some terms are used in the media. For instance, one often comes across reference to a 'civil war' raging in some country or other whereas, as will be seen below, it is sometimes doubtful whether the situation prevailing does in fact constitute a civil war in the strict insurance law sense of the term.

For a definition of the various constituent parts of a War Risk Exclusion clause, one must turn first of all to statute law and then to case law and in this respect British insurers are very

fortunate in that some terms, even though not defined by statute, have been looked at quite recently in the case of *Spinney's* v *Royal Insurance* (1980) Lloyds Reports 406.

The Spinney's Case

The background to this litigation was the unrest in Beirut during December 1975 and January 1976 when properties belonging to the plaintiffs were badly damaged. The defendant insurers refused payment of the claims made under various Fire policies by referring to a Riot and Strike Endorsement which excluded losses caused by inter alia civil war and commotion assuming the proportions of or amounting to a popular rising.

The court found that, just as a 'war' requires there to be an armed conflict between two sovereign states, irrespective of whether or not war has been declared, a 'civil war' will only be held to exist where there has been an internal conflict between two or more identifiable 'sides' which have as their objective the seizure or retention, as may be applicable, of political power in the country concerned.

The second pre-requisite for a civil war is that the conflict is on a large scale involving considerable sections of the populace with a resulting disruptive effect on public order and the way of life.

In the *Spinney's* case, the Easter rising of 1916 in Ireland was referred to as having been a civil war. At that time, various persons proclaimed a provisional government, occupied various public buildings in Dublin with armed forces and claimed the support of their 'gallant allies in Europe', i.e., the powers that were then at war with the United Kingdom.

With regard to the 1975-76 Beirut situation, the court was unable to satisfy itself that the prerequisites for a civil war had been fulfilled and so the defendants were held not to be able to rely on the civil war element of the exclusion.

However, the court did hold that there had been a state of civil commotion in Beirut at the time, i.e., the disturbances had

had sufficient cohesion to prevent them from being caused by a leaderless mob. Also, the civil commotion in question had 'assumed the proportions of a popular rising' because a really substantial proportion of the populace was involved with tumult and violence on a large scale. Therefore, the exclusion was held to apply.

The court took the opportunity of looking at some other terms used in typical War Risk Exclusion clauses. It held that 'rebellion' indicates organised resistance to the rulers or government of one's country, the purpose of which is to supplant the existing rulers or at least to deprive them of authority over part of their territory. An 'insurrection' suggests the notion of an incipient or limited rebellion.

'Hostilities' was found to indicate acts or operations of war committed by the parties to an existing war or civil war and 'warlike operations' to include the typical operations belligerents have recourse to in war, even though no state of war exists.

As has been indicated, one of the problems surrounding War Risk Exclusion clauses is the interpretation thereof according to different legal systems and so it was not only of interest, but also of great practical value that the US District Court for the Southern District of New York delivered judgment in the case of *Holiday Inns Inc.* v. *Aetna Insurance Company* in September 1983.

The background to the case was the damage to the Beirut Holiday Inn Hotel and the initial refusal by the insurers to settle the loss, claiming that it had been caused by civil war. In its fascinating 107-page judgment, the court referred at length to the decision in *Spinney's* and concluded that the damage to the Beirut Holiday Inn had been due to civil commotion - not civil war - and that Aetna had to settle the loss as a specific extra premium covering the civil commotion risk had been paid by Holiday Inns. In coming to its decision, the court gave definitions of some of the terms used in War Risk Exclusion clauses which accorded more or less with those given in the *Spinney's* case.

Riot and Terrorism

The terms dealt with so far cover activities by at least relatively large numbers of people, whereas the concepts of 'riot' and terrorism' include acts of violence in some shape or form by smaller groups or, in the case of terrorism, possibly individuals.

The term 'riot' has been given a statutory definition in English law in the Public Order Act 1986, according to which a riot is the use or threat of violence involving at least twelve persons.

'Terrorism' is defined in section 20 of the Prevention of Terrorism (Temporary Provisions) Act 1989 as: 'the use of violence for political ends and includes any use of violence for the purpose of putting the public or any section of the public in fear'.

In the circumstances where the government in spite of its intention to do so cannot protect life and property, can insurers and reinsurers be expected to pick up the bill?

The City Bomb

Responsibility for the human casualties and massive property damage following the explosion of Friday 10th April 1992 - the day after the British general election - was admitted by the IRA. One thing which is not established is how many persons were involved in planting the bomb, although it can be assumed that the number was very small. That being the case, it quickly became clear that British insurers were faced with losses resulting from an act of terrorism and so insurance policies and reinsurance agreements were checked with that conclusion in mind.

A look at how cover for terrorist attacks has developed in the British insurance market takes one as far back as the explosion at the King David Hotel in Jerusalem in July 1946 which caused the death of or injuries to over 200 people. This event caused insurers to deliberate about how to deal with losses caused by acts of terrorism, but it was only in 1958 that a

terrorism exclusion clause was included in insurance policies risks outside the United Kingdom. It is interesting to note that a similar clause was never introduced with regard to risks situated within the United Kingdom. The result of this was that insurers have always met claims caused by terrorist attacks in the United Kingdom as part and parcel of their normal business activities and an example of insurers meeting the cost of an IRA terrorist attack was the Grand Hotel, Brighton, loss in 1984.

Whereas property losses of this kind in Northern Ireland itself are covered by a government fund established for the purpose under the terms of the Criminal Injuries to Property (Compensation) Act (Northern Ireland) 1971, it was immediately recognised by insurers that losses on the British mainland are to be viewed in the context of insurance cover and of any possible exclusions and so the costs of the City loss must be borne by the industry.

A loss due to an act of terrorism can be less clear-cut from the insurance point of view than one would tend to think, as it is quite possible for a terrorist attack to be part of the overall concerted actions of a country which is at war. For instance, during the Gulf War, Iraq announced that it would carry the conflict to other countries away from the theater of war and many people were afraid that European and American cities could see banks and airline offices becoming the targets of terrorist attacks. Under those circumstances, it would have been difficult to isolate a terrorist attack from the warlike operations of which it was intended to form a significant part.

Insurance of the Persons

In the field of life assurance, United Kingdom policies have traditionally not contained a War Risk Exclusion clause of any kind, although in certain sensitive territories a distinction is drawn between so-called 'active' and 'passive' war risks, the object of which is to ensure that at least the innocent bystander enjoys full cover.

Other insurers, however, sometimes issue policies in a sensitive country with a full war risk exclusion and the decision of the Beirut First Instance Court in *Khoury* v *American Life* of 4th August 1983 is a good example.

On 12th December 1978, Mrs. Khoury was issued with a life policy by the defendant company for a sum assured of £ 100,000, Clause 8 of her policy excluded death due to strikes, riots, civil commotion, war (whether war be declared or not), civil war, and insurrection. On 20th July 1979, Mrs. Khoury was returning to her home and to do so had to cross a bridge. She consulted a policeman about the safety of the operation and he told her that it was safe to cross. Tragically she was shot and killed during the crossing and the insurers declined liability on the grounds of the SRCC clause.

The court held that all the acts of violence being perpetrated at the time were the result of civil war between the citizens of Lebanon and the court concluded that there was no doubt that the death of the assured was a direct result of these acts of violence. That being the case, her death was not covered under the policy by virtue of the exclusions and so the insurers were held to have been justified in denying the claim.

Real problems emerge, however, when a person dies or becomes totally disabled under circumstances which are not absolutely clear. What, for instance, is the position if a person in normal employment, who is, however, a terrorist in his spare time, is 'liquidated' by his opponents whilst peacefully sitting in a café? In all probability, his estate would not be able to claim the benefit of the argument that he was a 'passive' victim of the situation prevailing at the time.

Conclusions

There is no doubt that insurers and reinsurers need to protect themselves by including Was Risk Exclusion clauses in policies and reinsurance agreements. However, the problem of interpretation of the various terms used remains, although in any

policy or reinsurance agreement subject to English law, there is some very useful guidance as to what the terms mean.

In today's turbulent times it may be difficult to come to a clear policy definition, but it must be remembered that in the direct insurance context any ambiguity due to unclear terms or definitions will be interpreted against the insurer.

Be that as it may, as far as 'terrorism' is concerned, the recent IRA bombing in the City has brought home to insurers and reinsurers the vast claims potential of this kind of incident and has prompted them to give thought to the problem of how far they can cover the risk of terrorism in a technically justified way.