

# Watch What You Say: Hot Topics in Reinsurance Contract Wording

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# Wording Issues in an Interconnected World

- March 11, 2020 – Declaration by the World Health Organization of a pandemic
- Protests against stay-at-home orders begin as early as April, 2020 in the US
- Death of George Floyd on May 25, 2020 in Minneapolis
- Almost 60 different countries had protests and/or riots in response to George Floyd's death

# Wording Issues in an Interconnected World

- March 3, 1991 –brutal beating of Rodney King by Los Angeles police
- Beating is videotaped
- Rioting, looting and arson began on April 29, 1992 after the acquittal of the police officers
- Citywide curfew lifted on May 3, 1992
- At least 60 people died and over \$1B in damages in larger LA county area

# Wording Issues in an Interconnected World

- CNN was only global 24-hour satellite news network during First Gulf War at the time
- August 9, 2014 – shooting death of Michael Brown in Ferguson, Missouri by police officer
- Protests around the country in response to death of Michael Brown

# Burden of Proof

- Cedent has burden of proving losses arose out of one event
- Reinsurers have burden of proving an exclusion applies
- When emerging risks arose, LMA drafted exclusions switching burden of proof in the exclusions
  - Terrorism
  - COVID-19

# Communicable Disease Exclusion

## 1. Communicable Disease Exclusion:

A. Notwithstanding any provision to the contrary within this Contract, this Contract excludes any loss, damage, liability, claim, cost or expense of whatsoever nature, directly or indirectly caused by, contributed to by, resulting from, arising out of, or in connection with a Communicable Disease or the fear or threat (whether actual or perceived) of a Communicable Disease regardless of any other cause or event contributing concurrently or in any other sequence thereto.

B. As used herein, a Communicable Disease means any disease which can be transmitted by means of any substance or agent from any organism to another organism where:

1. the substance or agent includes, but is not limited to, a virus, bacterium, parasite or other organism or any variation thereof, whether deemed living or not, and
2. the method of transmission, whether direct or indirect, includes but is not limited to, airborne transmission, bodily fluid transmission, transmission from or to any surface or object, solid, liquid or gas or between organisms, and
3. the disease, substance or agent can cause or threaten damage to human health or human welfare or can cause or threaten damage to, deterioration of, loss of value of, marketability of or loss of use of property.

A. Subject to the terms, conditions and exclusions contained in the Contract, but notwithstanding the exclusion contained in this Article, loss, damage, liability, claim, cost or expense of whatsoever nature with respect to physical damage to property insured under the Policies and any Time Element Loss directly resulting therefrom, directly or indirectly caused by, contributed to by, resulting from, arising out of, or in connection with mechanical or electrical breakdown, theft, fire (e.g., bush fire, forest fire, brush fire, wildfire), lightning, explosion, sprinkler leakage, aircraft or vehicle impact, falling objects, storm (e.g., rainstorm, windstorm, ice storm, tropical storm, tropical depression, hail and tornado), hurricane, cyclone, typhoon, tsunami, tidal wave, flood, earthquake, seismic and/or volcanic disturbance/eruption, winter weather/freeze, avalanche, earth movement (e.g., landslip, landslide, mudslide), meteor / asteroid or other body of extra-terrestrial origin (whether impacting the ground or not), geomagnetic storm, looting, riot, riot attending a strike, civil commotion, vandalism or malicious mischief shall be covered.

B. Time Element Loss means business interruption, contingent business interruption or any other consequential losses.

C. Subject to the terms, conditions and exclusions contained in the Contract, but notwithstanding the exclusion contained in this Article, loss, damage, liability, claim, cost or expense of whatsoever nature with respect to physical damage to property insured under the Policies and any Time Element Loss directly resulting therefrom, directly or indirectly caused by, contributed to by, resulting from, arising out of, or in connection with mechanical or electrical breakdown, theft, fire (e.g., bush fire, forest fire, brush fire, wildfire), lightning, explosion, sprinkler leakage, aircraft or vehicle impact, falling objects, storm (e.g., rainstorm, windstorm, ice storm, tropical storm, tropical depression, hail and tornado), hurricane, cyclone, typhoon, tsunami, tidal wave, flood, earthquake, seismic and/or volcanic disturbance/eruption, winter weather/freeze, avalanche, earth movement (e.g., landslip, landslide, mudslide), meteor / asteroid or other body of extra-terrestrial origin (whether impacting the ground or not), geomagnetic storm, looting, riot, riot attending a strike, civil commotion, vandalism or malicious mischief shall be covered.

D. Time Element Loss means business interruption, contingent business interruption or any other consequential losses.

# Burden of Proof - Chile

- The 2019 - 2021 Chilean protests and severe riots originated in Santiago and spread to all regions of Chile
- Over 1.2 million people took to the streets
- Chilean government estimates damages to surpass USD \$4 Billion.
- Events took place in response to:
  - Initially, a raise in the Santiago Metro's subway fare,
  - And then:
    - Poor basic services,
    - Increased corruption,
    - Cost of living, and
    - Privatization and inequality prevalent in the country



# Is it One Event...?

- Aggregation is an issue... New Considerations in the interconnected world
- Property reinsurance agreements include factors that prescribe parameters for what constitutes a single event
  - time parameters (hours clause)
  - geographical proximity of the losses
- Underwriting intent may well be considered in conjunction with the relevant contract language

# Burden of Proof - Domestic Terrorism vs Hate Crime

- Domestic terrorism is defined by federal statute as:
  - Any act dangerous to human life that violates U.S. criminal laws; and
  - Appears to be intended to intimidate or coerce a civilian population, influence the policy of a government by intimidation or coercion, or affect the conduct of a government by mass destruction, assassination, or kidnapping; and
  - Occurs primarily within the territorial jurisdiction of the United States.
- Even though an individual's actions may be consistent with the definition of domestic terrorism, domestic terrorism is not a chargeable offense on its own
- Domestic terrorism may be an element of other federal crimes though or result in an increased sentence

# Burden of Proof - Domestic Terrorism vs Hate Crime

- Unlike domestic terrorism, there are federal criminal statutes that allow individuals to be charged with hate crimes and there are penalties for individuals convicted of hate crimes.
- Fine line between domestic terrorism and hate crimes
- Domestic terrorism is “driven by a cause or ideology”  
From Congressional Research Service on January 15, 2021
- Hate crimes may instead be “acts of personal malice directed at individuals”

# Burden of Proof - Domestic Terrorism vs Hate Crime

- DVEs are Domestic Violent Extremists
- FBI and Department of Homeland Security insist that DVEs are “the most persistent and lethal threat”
- In a May 8, 2019 FBI statement before the House Homeland Security Committee, FBI classified domestic terrorism threats into four main categories:
  - Abortion extremism,
  - Anti-government/anti-authority extremism,
  - Racially motivated violent extremism,
  - Animal rights/environmental extremism.

# Burden of Proof - War

- 2021 trial court decision of *Merck & Co., Inc. v. ACE American Insurance Co.*
- Held that insurer could not rely on the war exclusion in policy for cyber loss from NotPetya attack
- Even if it could be argued to be a “hostile act” by Russia against Ukraine, Court held that the war exclusion did not apply to cyber acts

# Cyber

- Capacity for cyber cover can be difficult to find
- Modeling for cyber is not commensurate with modeling for other perils (i.e. earthquake, wind, wildfire)
- Ensure Terms & Conditions are fine-tuned in light of the very real risk of increased severity and frequency associated with cyber
- Caution must be given to relying on other exclusions to preclude cyber cover

# War Exclusions

- Could excluding Belarus, Ukraine and Russia in the territory result in natural perils being excluded as well?
- Should the reinsurance contract only exclude those countries once the primary policy has excluded them?
- If the reinsurance contract contains this language, could it be argued that, if there is no war exclusion under the primary policy, then there is no war exclusion under the reinsurance contract?

“War risk as per the war exclusion appearing in the Company's original policies.”

# War Exclusions

- Is the reinsurer removing the typical language that the war exclusion in the reinsurance contract does not apply if there is a standard war exclusion under the primary? If so, this could be problematic for a cedent for the following reasons:
  - This could prevent any coverage under the reinsurance contract to follow the coverage provided by the cedent under the primary policy
  - The proposed war exclusion could exclude political violence as well, which could be a gray area
  - The proposed war exclusion could specifically exclude expenses as well for coverage questions or declaratory judgment actions in connection with war. These types of expenses could become quite high if there is a question of whether the war exclusion applied on the primary side or not



# War and Sanctions

- Is there a need to address Ukraine, Russia and Belarus if there is a Sanctions article?
- Burden of proving sanctions appears to rest on reinsurer

# Sanction Clauses

Typical Sanction provision:

“No Reinsurer shall be deemed to provide cover and no Reinsurer shall be liable to pay any claim or provide any benefit hereunder to the extent that the provision of such cover, payment of such claim or provision of such benefit would expose that Reinsurer to any sanction, prohibition or restriction applicable to that Reinsurer.”

# Sanction Clauses

- Customary for reinsurance agreements to include such exclusionary clauses; internal governance of certain companies even require them
- Parties should use caution when crafting; properly consider scope and burden of proof
- Sanctions change frequently; vital to keep aware as to applicability of sanctions

# Data Privacy

- Global Concerns – General Data Protection Regulation
- U.S. concerns - certain states (for example, California) are introducing their own privacy statutes, regulations
- All this impacts the handling of confidential personal information flowing under reinsurance agreements

# Loss Portfolio Transfers

- These types of arrangements are becoming more and more prominent (spurred on by Insurance Business Transfer acts in various states).
- Contracting parties must be careful as to how the overall deal is defined.
- Termination triggers

# Other Causes for Concern

- Changes to Credit for Reinsurance – impact on unauthorized reinsurance provisions
- Social inflation – how may contracting parties address this very real and increasing concern
  - Limits for Loss Adjustment Expenses
  - Characterizing this additional exposure – is it really LAE?

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