

The Impact of Terrorism on Insurance

Presentation to:
Claims Discussion Group

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Evolution of terrorism

- ❑ History of terrorism
- ❑ Interpretation

“Methods of pursuing political aims and of waging an armed struggle do not stand still. A situation existing today might fall outside a definition formulated in the past, not because the Judge or scholar who proposed it considered that the situation should be excluded but simply because the possibility that it might exist had not crossed his mind...”¹

¹ *Spinneys (1948) Ltd v Royal Insurance Co Ltd* [1980]

- ❑ *IF P&C Insurance Limited v Silversea Cruises Ltd & Ors* [2004] EWCA Civ 769

Interpretation (cont.)

- ❑ *United States v Yousef* 327 F.3d 56 (2Cir.2003):

"We are regrettably no closer now... to an international consensus on the definition of terrorism or even its proscription... there continues to be strenuous disagreements among States about what action do or do not constitute terrorism, nor have we shaken ourselves free of the cliché that 'one man's terrorist is another man's freedom fighter.' We thus conclude... that terrorism - unlike piracy, war crimes, and crimes against humanity - does not provide a basis for universal jurisdiction under customary international law."

- ❑ *Cedar v Washington* 931 F. Supp. 2d 496

Evolution of terrorism insurance market

- ❑ September 11 and impact
- ❑ Market withdrew capacity
- ❑ Government schemes set up to encourage insurers back into the market
- ❑ Market has recovered somewhat
- ❑ Types of specific cover available

The Terrorism Insurance Act

Section 7 of the Act

- (1) A contract of insurance is an **eligible insurance contract** to the extent that it provides insurance cover for one or more of the following:
- a) loss of, or damage to, **eligible property** that is owned by the insured;
 - b) business interruption and consequential loss arising from:
 - i. loss of, or damage to, **eligible property** that is owned or occupied by the insured; or
 - ii. the inability to use **eligible property**, or part of **eligible property**, that is owned or occupied by the insured;
 - c) liability of the insured that arises out of the insured being the owner or occupier of **eligible property**.

Cover that is affected by the Act

- ❑ Damage to commercial property
- ❑ Losses arising from business interruption
- ❑ Public liability arising from owner/occupier's liability

Cover that is NOT affected by the Act

- ❑ Home, contents and car insurance
- ❑ Professional liability and D&O
- ❑ Life and TPD insurance
- ❑ Travel insurance
- ❑ Product liability
- ❑ Marine and aviation insurance
- ❑ Computer crime
- ❑ Commonwealth, State or Territory insurance
- ❑ And more...

How the Act works

- ❑ Treasurer considers declaration
- ❑ When declaration made, terrorism exclusion is void
- ❑ Insurer can claim against reinsurance pool for claims made by insureds
- ❑ Application of Reduction Percentage

Australian Reinsurance Pool Corporation (ARPC)

- ❑ ARPC covers most losses above the insurers' retentions
- ❑ Backed by Government guarantee
- ❑ Cover for losses up to \$13.6 billion (possibly more)

Issues arising under the Act

- ❑ Eligible property
- ❑ Timing of declaration
- ❑ Market sensitivities
- ❑ Computer crime vs cyber terrorism
- ❑ Contract works policy

Policies not affected by the Act

- ❑ If the Act does not apply, insurers can rely on the terrorism exclusion
- ❑ Common law approach to exclusions
- ❑ Effectiveness and pitfalls when relying on terrorism exclusions

Terrorism exclusions

□ Compare:

“any actual or threatened act of terrorism or any action taken to, or taken in an attempt to, control, prevent or suppress any act of terrorism.”
(note: no definition of “terrorism”)

With:

*“We shall not indemnify You for any loss or damage to Insured Property, Personal Injury or Property Damage, costs or expense directly or indirectly caused by, contributed to by, resulting from, or arising out of or in connection with any **Act of Terrorism**, regardless of any other cause or Event contributing concurrently or in any other sequence to the loss.”*

*“**Act of Terrorism** includes any act, or preparation in respect of action, or threat of action designed to influence the government de jure or de facto of any nation or any political division thereof, or in pursuit of political, religious, ideological, or similar purposes to intimidate the public or a section of the public of any nation by any person or group(s) of persons whether acting alone or on behalf of or in connection with any organisation(s) or governments(s) de jure or de facto and which involves violence..., damage to property, endangers life..., is designed to interfere with or disrupt an electronic system.”*

SCENARIOS

Future trends

- Future of legislation
 - Commission of Audit 2014
 - US TRIA and European regimes
 - Alternatives