

Insurance Sector Group webinar programme

Understanding war, nuclear risk and related hybrid war and political risks exclusions

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Your speakers today



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War exclusion

- Within the Lloyd's market war is understood to mean:
- “War, civil war, invasion ,act of foreign enemies, hostilities whether war be declared or not, rebellion, revolution ,insurrection, military or usurped power”
- Mandatory exclusion on all policies unless underwritten as specific war risks.
- Does it exclude all war related perils???

War exclusion variables

↓ War And Terrorism Combined	↓ War And Political Risks Combined	↓ Proximate Cause	↓ War	↓ Hostilities / Acts Of Foreign Enemies	↓ Invasion	↓ Civil War	↓ Revolution	↓ Rebellion	↓ Insurrection	↓ Military Or Usurped Power	↓ Martial Law	↓ Confiscation/ Nationalisation/ Requisition	↓ Standalone War	↓ Concurrent Cause	↓ Indirect Cause	↓ War-like Operations	↓ Civil Commotion/ Popular Uprising	↓ Cyber War/ Cyber Operation	↓ Territorially Limited	↓ Named States	↓ Writeback	↓ Loss Or Damage	↓ Liability, Costs And Expenses	↓ Reverse Burden Of Proof
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5 Powers – territorial limitation

- Notwithstanding anything to the contrary contained herein, this Policy does not cover loss consequent on:
- War, whether declared or not, between any of the following countries, namely, China, France, the United Kingdom, Russia and the United States of America; or
- War in Europe, whether declared or not (other than civil war but including any enforcement action by or on behalf of the United Nations), in which any of the said countries or any armed forces thereof are engaged.

Limitation war exclusion and limited writeback

1. This Contract excludes loss, damage, liability and expense arising from war or civil war.
2. Notwithstanding the foregoing, if specified in the Risk Details this Contract shall be extended to include loss, damage, liability or expense arising from war or civil war as covered in the original policies provided that such loss, damage, liability or expense would be recoverable under the terms and conditions of the relevant Institute War and Strikes Clauses or relevant London aviation clauses or their equivalent or as agreed by reinsurers at the inception of this Contract or at the time when war risks cover would have commenced under the direct policies within the terms of such clauses, whichever is the earlier;
 - under the terms and conditions of such marine war and strikes policies but only to the extent that the losses would be covered by the clauses referenced.

War and terrorism – territorial writeback

Notwithstanding any provision to the contrary within this Contract or any endorsement thereto, it is agreed that this Contract excludes loss, damage, cost or expense of whatsoever nature caused by, resulting from or in connection with any of the following:

1. War, invasion, acts of foreign enemies, hostilities or warlike operations (whether war be declared or not), civil war, rebellion, revolution, insurrection, or civil commotion assuming the proportions of or amounting to an uprising, military or usurped power

This exclusion shall not, however, apply to interests which at time of loss or damage are within the territorial limits of the United States of America (comprising the fifty States of the Union, the District of Columbia, and including bridges between the U.S.A, and Mexico provided they are under United States ownership), Canada, St. Pierre and Miquelon, provided such interests are insured under policies, endorsements or binders containing a war and terrorism exclusion clause, as appropriate.

Boarder form war and terrorism exclusion

Notwithstanding any provisions to the contrary within this reinsurance agreement or any endorsement thereto, it is agreed that this reinsurance agreement excludes all actual or alleged losses, liabilities, damages, injuries, defence costs, costs or expense(s) directly or indirectly arising out of, contributed by, caused by, resulting from, or in connection with any of the following regardless of any other cause or event contributing concurrently or in any other sequence of the loss:

1. War, invasion, acts of foreign enemies, hostilities or warlike operations (whether war be declared or not), civil war, mutiny, revolution, rebellion, insurrection, uprising, military or usurped power, confiscation by order of any public authority or government de jure or de facto, martial law;
2. Riots, strikes, or civil commotion

War

- Modern warfare is more complex and arguably opaque than in the past and has introduced the concept of hybrid warfare, which encompasses unconventional methods such as cyber disruption, foreign electoral interference and propaganda. These activities can be precursors or ancillary to more direct acts of foreign agents designed to incite political unrest. Where losses are incurred in such circumstances, but where war has not been declared formally, then it will be important to review other exclusions such as cyber and political risks to assess whether those perils are more applicable.
- It was held in *Janson v Driefontein Mines* [1902] AC 484 that a state of war has been reached when “differences between states reach a point at which both parties resort to force, or one of them does acts of violence which the other chooses to look upon as a breach of the peace”. However, subsequent decisions have not defined when it can be said that a state of war has been reached. The leading case of *Kawasaki Kisen Kaisha Ltd v Carter* [1939] 1 All ER 819 held that in determining whether the UK is at war, the courts may request and will take notice of confirmation from the UK government. In determining whether a foreign state is at war with another, any such confirmation from either the UK government or any other government is merely persuasive.

War (cont'd)

- Similarly, a state of war need not have been declared between any two nations for a state of war to exist. Therefore, in *Kawasaki*, war was held to have taken place between Japan and China even though no formal declaration had been issued by either state. The Judge went on to say that whether or not a state of war was prevalent would be determined in a common sense manner in accordance with the “common sense of business men”.
- In *Pan American World Airways Inc v Aetna Casualty & Surety Co* [1975] 1 Lloyd's Rep 77, it was held that hijacking and destruction of an aeroplane by the Popular Front for the Liberation of Palestine was not warfare. The court held that an organisation (such as the PFLP) had to have at least some attributes of sovereignty before its activities could be deemed as war.
- In *Allianz Insurance plc -v- University of Exeter* [2023 EWHC 630] the English Court concluded that damage caused by a controlled detonation of a World War II bomb fell within the War Risks exclusion of an insurance policy issued 80 years later. The decision, whilst logical, raises questions over when the passage of time or other intervening factors can become the sole effective cause of a loss, which may have implications for the interpretation of war-related and other insurance policy exclusions.

Civil war

- A civil war needs to be a war, internal within a country as opposed to on an international scale (*Spinneys Centres and Doumet v Royal Insurance Co* [1980] 1 Lloyd's Rep 406). Spinneys suggested that in order to determine whether a state of civil war existed, it would be necessary to consider:
 - (a) whether there was a conflict between opposing sides within a state;
 - (b) the objects of the sides; and
 - (c) the scale of the conflict.
- The war does not necessarily have to be against the State or government, but there must be a “degree of coherence and community of purposes” to distinguish a civil war from a mere “tumultuous internal upheaval”. The case also made a distinction between civil war and “activities of militarised bands of men”, with the judge remarking that if there were too many fighting factions with different objectives, the struggle would be no more than a melee and not civil war. Civil war connotes a stronger meaning than riot, civil commotion, insurrection, and rebellion.

Insurrection/Rebellion

- Insurrection and Rebellion have both been discussed in various cases. However, in a most recent case, *National Oil Company of Zimbabwe v Sturge* [1991] 2 Lloyd's Rep 281, the court provided a comprehensive definition, holding that Insurrection and Rebellion were similar to each other and implied “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 denotes a lesser degree of organisation than Rebellion”.
- In *Spinney's v Royal Insurance* [1980] 1 Lloyd's Rep 406, it was held that Insurrection and Rebellion fell between Riot and Civil War in terms of degree.

Invasion

- As stated by Colinvaux & Merkin (in Insurance Contract Law, Volume 2), there appears to be no English authority on the meaning of invasion in the context of English insurance law. In *Spinney's (1948) Ltd v Royal Ins Co Ltd* [1980] 1 Lloyd's Rep 406, 436, 1 it was argued that there had been an invasion. Mustill J questioned whether the entry of a foreign army into a neighbouring country as a peace-keeping force could be considered an invasion, although his Lordship held that on the facts no property was damaged as a result of the foreign army's presence in any event.
- As per Margo on Aviation Insurance, the "ordinary meaning of this term presupposes an incursion by an attacking army into a country". In *Kuwait Airways Corp'n v Kuwait Ins Co* [1999] 1 Lloyd's Rep 803, 803, HL, it was held that the cause of the airline's losses included invasion, in the context where Iraq overran the territory of Kuwait in August 1990.

Foreign enemies

- For individuals to be considered foreign enemies, there must be a war between the state of which the insured is a member and a foreign state (*Drinkwater v London Ass Corpn* (1767) 2 Wils 363, Wilm 282, 95 ER 863, 29 Digest (Repl) 460).
- In *Kuwait Airways Corpn v Kuwait Ins Co* [1999] 1 Lloyd's Rep 803, HL, it was accepted that where the armed forces of Iraq had invaded Kuwait and appropriated several aircraft and equipment which were the property of Kuwait Airways, the causes of the airline's losses included the acts of foreign enemies.

Appropriation

- The decision in *Kuwait Airways Corp v Kuwait Insurance Co SAK (No.1)* [1996] 1 Lloyd's Rep 664 is an example of property being appropriated in the context of war. The litigation arose out of the 1990 Iraqi invasion of Kuwait and capture of the airport. Aircraft were flown out of Kuwait and aircraft spares plundered. The decision did not focus on the definition of appropriation, but Rix J's judgment was clear that the aircraft and spares had been appropriated.

Revolution

- From the Oxford English Dictionary definition (as is the approach highlighted in Spinney's below), "revolution" requires an overthrow of the established government and can therefore relate to other terms such as "rebellion" and "insurrection". However, "revolution" would appear to have a greater degree of scale, objective, and success (see Arnold: Law of Marine Insurance and Average, ch.24).
- As per Colinvaux & Merkin's (Insurance Contract Law), "revolution" seems to have not been defined in the context of insurance in English law. In *Spinney's (1948) Ltd v Royal Insurance Co Ltd* [1980] 1 Lloyd's Rep. 406, Mustill J, adopted the definition of "rebellion" in the Oxford English Dictionary, namely "organised resistance to the ruler or government of one's country; insurrection, revolt", and added to it the further requirements that the object of the rebels must be "to supplant the existing rulers or at least to deprive them of authority over part of their territory".

Proximate cause/proximately caused by

- Proximate cause means the dominant, effective or efficient cause (Financial Conduct Authority v Arch Insurance (UK) Ltd [2021] UKSC 1; Stonegate Pub Co Ltd v MS Amlin Corporate Member Ltd [2023] EWHC 2548 (Comm); Brian Leighton (Garages) Ltd v Allianz Insurance Plc [2023] EWCA Civ 8); the proximate cause does not have to be the most recent cause (Leyland Shipping Co Ltd v Norwich Union Fire Ins Sy Ltd [1918] AC 350).
- Under English law, a reinsurer is liable for losses proximately caused by a peril covered by the policy but is not liable for losses proximately caused by a peril that is excluded by the policy. The doctrine of proximate cause is based on the presumed intention of the contracting parties and may be displaced if the policy language provides for some other connection between the loss and occurrence of an insured or an excepted peril, such as in connection with or indirectly caused by.
- Where there are concurrent proximate causes, one an insured peril and the other excluded, the exclusion will usually prevail (Wayne Tank and Pump Co Ltd v Employers Liability Assurance Corpn Ltd [1974] QB 57).
- In Allianz Insurance Plc v University of Exeter [2023] EWHC 630 (TCC), the court held that the dropping of a bomb during World War II was the proximate cause of physical damage to property and business interruption losses suffered by the university when a controlled detonation of the bomb was carried out in 2021. The judge went on to say that if that analysis was wrong, and the dropping of the bomb and controlled detonation were concurrent causes, as the dropping of the bomb was excluded by a war risks exclusion, the insurer was not liable.

Directly

- The term directly or direct has the same meaning as proximate. The direct cause means the *proximate cause* (*Oei v Foster* [1982] 2 Lloyd's Rep 170; *JJ Lloyd Instruments Ltd v Northern Star Insurance Co Ltd (The Miss Jay Jay)* [1987] 1 Lloyd's Rep 32).
- This position has been reaffirmed in later cases such as *Allianz Insurance PLC v The University of Exeter* [2023] EWHC 630 (TCC).

Indirectly

- The term indirectly caused by may appear in an exclusion clause and will exclude or limit the doctrine of proximate cause (Financial Conduct Authority v Arch Insurance (UK) Ltd and Others [2021] UKSC1). In Coxe v Employers Liability Association Corp Ltd [1916] 2KB 629, an accident policy contained a condition excluding cover for death or disablement directly or indirectly caused by war. The insured officer was killed by a train when, as part of his military duties, he was walking along railway tracks during a blackout. The death of the insured was found to have been indirectly caused by war, the word indirectly having removed the proximate cause doctrine.
- As further noted in Crowden v QBE Insurance (Europe) Ltd [2017] EWHC 2597 (Comm), “there has been a sound tradition in attributing to the word “indirectly” a sense which reduces the causative effect of the specified excluded peril downwards from a proximate cause.”
- In Spinney’s (1948) Ltd v Royal Ins Co Ltd [1908] 1 Lloyd’s Rep 406, businesses in Beirut were covered against damage by riot unless “occasioned by or through or in consequence directly or indirectly of...civil commotion assuming the proportions of or amounting to a popular rising”. On the issue of causation, Mustill J said that the commotion permitted and even encouraged acts of looting and vandalism and that was sufficient to establish that the loss was occasioned indirectly (if not directly) by, through or in consequence of the civil commotion.

Arising out of/arising from

- The terms arising out of and arising from require a causal link and may be found in a variety of clauses, such as Aggregation Clauses and Exclusions. In contrast to causal wording such as in connection with, arising out of and arising from require a strong causal connection, although there are conflicting judicial decisions on whether the test is one of proximate cause.
- In a number of decided cases the courts have construed arising out of as meaning proximately caused by (see for example *Coxe v Employers' Liability Assurance Corp Ltd* [1916] 2 KB 629, *British Waterways v Royal & Sun Alliance PLC* [2012] EWHC 460 (Comm) and *ARC Capital Partners Ltd v Brit Syndicates Ltd* [2016] EWHC 141 (Comm))
- In other cases the courts have taken a wider approach, EWHC 2548.
- In *Kajima*, the judge concluded that arising out of did not dictate a proximate cause test although a relatively strong degree of causal connection was required.
- In *Simmonds v Gammell* [2016] EWHC 2515 (Comm) the court found that there was a sufficiently significant causal link between the attack on the World Trade Centre in 2001 and multiple respiratory claims brought in the period following the attack, to constitute loss “arising from” one event:
- In *Stonegate Pub Co Ltd v MS Amlin Corporate Member Ltd* [2023] EWHC 2548 (Comm) it was noted that arising from one event required a significant causal connection but did not necessarily require proximate causation.

Concurrent cause

- Concurrent causes (or concurrent proximate causes) are two or more causes that together produce the loss. Concurrent proximate causes must be of equal efficiency or roughly equal efficiency (*Financial Conduct Authority v Arch Insurance (UK) Ltd and Others*)
- An example is *JJ Lloyd Instruments Ltd v Northern Star Insurance Co Ltd (The Miss Jay Jay) [1987] 1 Lloyd's Rep 32* where a yacht sank as a result of what was held to be a combination of causes that were equal, or nearly equal, in their efficiency: adverse sea conditions and the poor design and construction of the vessel.
- It has been commented (see, for example, Lord Mance in *Atlasnavios-Navegacao Lda v Navigators Insurance Co Ltd [2018] UKSC 26*) that instances where there are two concurrent causes are more commonly found when considering exclusions from cover.

In connection with

- The term in connection with requires a causal link and may be found in a variety of clauses, such as Aggregation Clauses and Exclusions. The term has been considered in a non-reinsurance context and has been interpreted more widely than arising out of.
- In *Standard Life Assurance Ltd v Ace European Group [2012] EWHC 104 (Comm)* the term in connection with appeared in an aggregation clause in a Professional Indemnity policy. The court said that the phrase was extremely broad and it was not necessary to show a direct causal relationship between the claims against the insured and the state of affairs identified as their originating cause or source.
- In *Stonegate Pub Co Ltd v MS Amlin Corporate Member Ltd [2023] EWHC 2548 (Comm)* the words in connection with appeared in the definition of Single Business Interruption Loss which was used in an aggregation clause. The court found that they were wide linking words and meant that only a relatively loose causal link was required. The term in connection with did not require that the occurrence be the proximate, sole, or main cause of the loss and indirect causation could be sufficient.

Resulting from/Result from

- The term resulting from indicates a causal link and the courts will generally apply the proximate cause test. In *Lloyds TSB General Insurance Holdings v Lloyds Bank Group Insurance Co Ltd* [2001] EWCA Civ 1643, the Court of Appeal said that the expression result from involves the application of the notion of proximate cause, applied with good sense, so as to give effect to the intention of the parties.
- In *Brian Leighton (Garages) Ltd v Allianz Insurance PLC* [2023] EWCA Civ 8 the Court of Appeal construed the phrase results from in wording in an exclusion clause writing back cover in specified circumstances as not necessarily meaning proximate cause. Lord Justice Popplewell drew a distinction between the use of results from as a link between insured/excepted perils and damage (where the words would be interpreted as proximate cause) and results from being applied to a causative relationship between insured/excepted perils in a chain. Furthermore it was held as “common ground” that the word “resulting” imported a requirement of proximate causation (*Stonegate Pub Company Limited v Ms Amlin Corporate Member Limited, Liberty Mutual Insurance Europe Se, Zurich Insurance Plc* [2022] EWHC 2548 (Comm)).

↓ Loss Or Liability	↓ Physical Damage Insurance	↓ Exception For Radioactive Isotopes	Writeback	Exception For Transit	↓ Cost, Expense Or Amount Incurred	↓ Indirect Cause	↓ Concurrent Cause	↓ Worldwide	↓ Comprehensive Radioactive Contamination	↓ Liability Insurance	↓ Nuclear Risks/pools	↓ Nuclear Power Plants/facilities	↓ Nuclear Reactors	↓ Fuel Fabrication/Installations	↓ Nuclear Fuel/materials	↓ Transportation Of Nuclear Material	↓ Nuclear Weapon	↓ Exception For Fire Following	↓ Exception For Car/ear	↓ Exception For Storage Of Nuclear	↓ Exception For Japanese Nuclear Pool	↓ Territory Specific	↓ Limited Radioactive Contamination	↓ Incorporation Of Statutory Definitions	↓ Deeming Provisions	↓ Cedant Sole Judge
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B	B		C	C						B		B	B	B				C	C			C				
B										B	B											C		B	B	
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B											B											C		B	B	
B	B	B	C								B	B	B	B								C	C	B		C
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Nuclear energy risks exclusion clause (Reinsurance) (Worldwide excluding U.S.A. and Canada)

- This agreement shall exclude Nuclear Energy Risks whether such risks are written directly and/or by way of reinsurance and/or via Pools and/or Associations.
- For all purposes of this agreement Nuclear Energy Risks shall mean **all first party and/or third party insurances or reinsurances** (other than Workers' Compensation and Employers' Liability) in respect of:
 - All **Property**, on the site of a nuclear power station.
 - **Nuclear Reactors**, reactor buildings and plant and equipment therein on any site other than a nuclear power station.
 - All **Property**, on any site (including but not limited to the sites referred to in I above) **used or having been used for**:
 - (a) The generation of nuclear energy; or
 - (b) The Production, Use or Storage of Nuclear Material.

Nuclear energy risks exclusion clause (Reinsurance) (Worldwide excluding U.S.A. and Canada) (cont'd)

3. Any other Property eligible for insurance by the relevant local Nuclear Insurance Pool and/or Association but only to the extent of the requirements of that local Pool and/or Association.
4. The supply of goods and services to any of the sites, described in 1 to 3 above, unless such insurances or reinsurances shall exclude the perils of irradiation and contamination by Nuclear Material.

Except as undernoted, Nuclear Energy Risks shall not include:

- (i) Any insurance or reinsurance in respect of the construction or erection or installation or replacement or repair or maintenance or decommissioning of Property as described in I to III above (including contractors' plant and equipment);
 - (ii) Any Machinery Breakdown or other Engineering insurance or reinsurance not coming within the scope of (i) above.
- Provided always that such insurance or reinsurance shall exclude the perils of irradiation and contamination by Nuclear Material.

Institute radioactive contamination, chemical, biological, bio-chemical and electromagnetic weapons exclusion clause

This clause shall be paramount and shall override anything contained in this insurance inconsistent therewith

1. In no case shall this insurance cover loss damage liability or expense directly or indirectly caused by or contributed to by or arising from
 - 1.1 ionising radiations from or contamination by radioactivity from any nuclear fuel or from any nuclear waste or from the combustion of nuclear fuel
 - 1.2 the radioactive, toxic, explosive or other hazardous or contaminating properties of any nuclear installation, reactor or other nuclear assembly or nuclear component thereof
 - 1.3 any weapon or device employing atomic or nuclear fission and/or fusion or other like reaction or radioactive force or matter
 - 1.4 the radioactive, toxic, explosive or other hazardous or contaminating properties of any radioactive matter. The exclusion in this sub-clause does not extend to radioactive isotopes, other than nuclear fuel, when such isotopes are being prepared, carried, stored, or used for commercial, agricultural, medical, scientific or other similar peaceful purposes
 - 1.5 any chemical, biological, bio-chemical, or electromagnetic weapon.

Cyber exclusion variables

↓ Loss Liability Claim	↓ Expense Or Costs	↓ Fines And Penalties	↓ Definition Of Cyber Loss	↓ Involving Use Of Computer System	↓ Computer System Defined	↓ Or Computer Network	↓ Computer Network Defined	↓ Indirect Or Concurrent	↓ Other	↓ Including Threat Or Hoax	↓ Time Element Losses	↓ Consequential Losses	↓ Caused By A Cyber Act/Incident	↓ Defined To Require Malicious Or Unauthorised Acts	↓ Ncbr Absolute Exclusion	↓ Physical Damage Writeback	↓ Other Writeback	↓ Reverse Burden Of Proof
B	B	B	B	B	B	B	B	R	R	R								
B	B	B	B	B	B	B	B		R	R								
B	B		B	B	B			R		R			B	B				R
		B	B	B	B			R		R	R	R	B	B	R	C		
B	B	B	B	B	B			R	R	R			B	B				R
B	B	B	B	B	B			R	R	R			B	B			C	R
B	B		B	B	B			R		R			B	B				R
B	B		B	B	B			R		R			B	B				R
B	B	B	B	B	B			R	R	R			B	B	R	C		R
B	B	B	B	B	B			R	R	R	R		B	B	R	C		R
B	B		B	B	B			R		R			B	B				R
B	B		B	B	B			R	R	R			B	B				R
B	B		B	B	B			R	R	R			B	B				R

Cyber war exclusions

- On 16 August 2022, Lloyds mandated that all standalone cyber-attack policies under risk Codes CY and CZ must include a suitable clause excluding liability for cyber war from 31 March 2023 at policy inception/renewal. See Lloyds' Market Bulletin Y5381
- Requirement arises as a result of the recognition that if not managed properly, state backed cyber-attacks have the potential to expose the market to systemic risks that insurers could struggle to manage and losses that greatly exceed what the insurance market is able to absorb
- The LMA's Cyber War working group published the following clauses in January 2023.
- LMA5564A & LMA5564B (rarely used)– excludes all loss arising out of war/ cyber operations. This includes all state-sponsored attacks. Bad for policyholders.
- LMA5565A & LMA5565B
- LMA5566A & LMA5566B
- LMA5567A & LMA5567B (most widely used) – provides cover for nation state cyber-attacks unless certain thresholds have been met.

War, cyber war and cyber operation exclusion

1. Notwithstanding any provision to the contrary in this insurance, this insurance does not cover any loss, damage, liability, cost or expense of any kind (together “loss”) directly or indirectly occasioned by, happening through or in consequence of **war** or a **cyber operation**.
2. The insurer shall have the burden of proving that this exclusion applies.

Attribution of a **cyber operation** to a **state**

3. The primary but not exclusive factor in determining attribution of a **cyber operation** shall be whether the government of the **state** (including its intelligence and security services) in which the **computer system** affected by the **cyber operation** is physically located attributes the **cyber operation** to another **state** or those acting on its behalf.
4. **Cyber operation** means the use of a **computer system** by or on behalf of a state to disrupt, deny, degrade, manipulate or destroy information in a computer system of or in another state
5. **State** means sovereign state.
6. **War** means:
 - **9.1** the use of physical force by a **state** against another **state** or as part of a civil war, rebellion, revolution, insurrection; and/or
 - **9.2** 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,

whether war be declared or not.

Cyber war exclusions

- The objections that are commonly raised can be broadly categorised as follows:
- The threshold points that determine whether a cyber operation falls within scope of ‘cyber warfare’ (i.e. cyber operations outside of war attributable to nation state that meet certain systemic event thresholds) are ambiguous – specifically the requirements that the cyber operation: (i) disrupts at least one “Essential service” (a defined as “a service that is essential for the vital functions of a state ...”) in a nation state; and (ii) the disruption of that “Essential service” leads to a “major detrimental impact” (not defined) on the functioning of that nation state;
- The attribution clause in the ‘A’ versions of the model clauses (which specifies the standard of evidence insurers can rely upon in support of any attribution of a cyber operation to a nation state (see items 2 and 3 above)) leaves it open for insurers to rely upon evidence which may lack credibility (e.g. uninformed presidential tweets).
- Of particular concern is the absence of a definition for the “major detrimental impact” threshold which, critics argue, is too open to interpretation.

Overview - Merck & Co. v. Ace Am. Ins. Co.

- In 2017, the state-sponsored NotPetya cyberattack caused significant global damage, including to the US firm Merck & Co.
- Merck sought to claim over US\$1.4 billion in losses from insurers under “all risk” property insurance policies.
- Insurers denied coverage, citing war exclusions in policies that barred coverage for loss/damage caused by “hostile or warlike action” by any government or sovereign power.
- The New Jersey Court of Appeal rejected the insurers' argument that the war exclusion barred coverage for losses from the cyberattack.
- The New Jersey Court of Appeal clarified that “hostile or warlike action” should involve, at minimum, “military action” connecting it to war or a military action or objective.
- The New Jersey Court of Appeal then ruled that the exclusion was not applicable to bar coverage for Merck's losses.



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