

AIDA WORLD CONGRESS 2006

INSURANCE, REINSURANCE AND THE IMPACT OF TERRORISM

General Reporters:
Professor Rob Merkin
Professor Jerome Kullmann

I THE QUESTIONNAIRE

1. MEANING OF TERRORISM

(a) Is there any general definition of “terrorism”, “terrorist activity” or any related term in the general law within your jurisdiction?

(b) If there is a definition, for what legal purposes is the definition relevant?

2. TERRORISM AND POLICY WORDINGS

(a) To what extent do insurance and reinsurance policies written in your country exclude the liability of insurers and reinsurers for war risks? If so, is any distinction drawn between commercial and consumer contracts. Please answer this question on a class/sector by class/sector basis.

(b) To what extent do insurance and reinsurance policies written in your country exclude the liability of insurers and reinsurers for terrorism risks? If so, is any distinction drawn between commercial and consumer contracts? Please answer this question on a class/sector by class/sector basis.

(c) To what extent do war risks or exclusions and terrorism risks or exclusions or those for other acts of political or other violence such as malicious damage overlap?

(d) Are there any market definitions of terrorism in use for insurance or reinsurance contracts? Please answer this question on class/sector by class/sector basis. If these have been introduced in response to recent developments how do these differ from previous provisions?

(e) If there are policy restrictions on or exclusions of terrorism cover, when were these first introduced and have they been changed in the light of recent events?

(f) More particularly, do any market definitions of terrorism require actual physical damage to be sustained and if so of any particular kind?

(g) Upon whom falls the burden of proving any loss was caused by an act of terrorism?

(h) Are rules of causation varied in relation to terrorism? In particular, does a terrorism exclusion operate when the loss is proximately caused by terrorism or is the exclusion narrower, eg, the loss has to be “solely and directly” caused by terrorism?

(i) Describe what, if any, significance is attributed to: the identity/identification of the perpetrator(s); their identification/association with recognised terrorist groups; the motive attributed to any act of terrorism (and whether this must be political, religious or ideological in nature); the modus operandi employed in perpetrating any act of terrorism; and/or the target of the physical act, ie those directly suffering loss and/or those (eg the Government) intended to be influenced?

(j) To satisfy any definition or test of terrorism is there any dependence upon any Government, judicial or other form of certification or declaration of any kind?

(k) Is there any specific reference, provision or known problem relating to acts involving biological, chemical, nuclear or other forms of contamination?

(l) To the extent that terrorism risks are covered, do policies use aggregation provisions to limit insurance/reinsurance exposure and oblige insureds/reinsureds to bear retentions of any kind?

3. TERRORISM AND GOVERNMENT INTERVENTION

(a) Does national legislation impose any restrictions on terrorism exclusions in insurance policies? If so, describe them and their application.

(b) Does the Government provide any scheme whereby terrorism cover is made available to direct policy holders by the Government itself? If so, please outline the date of the introduction of the scheme, the nature of the scheme including any limits, deductibles and so forth, its original purpose, its success and funding arrangements.

(c) Does the Government provide any scheme whereby terrorism reinsurance is made available to insurers by the Government itself? If so, please outline the date of the introduction of the scheme, the nature of the scheme including any limits, deductibles and so forth, its original purpose, its success and funding arrangements.

4. INTERNATIONAL OR CROSS-BORDER ARRANGEMENTS

(a) Can you identify any international or cross-border schemes or initiatives whereby insurance or relief from financial consequences of acts of terrorism is guaranteed or supported for particular sectors, eg, aviation, shipping?

(b) Are you aware of any international or cross-border initiatives or schemes which have been devised or developed since September 11 to protect insureds, insurers or reinsurers against exposure to terrorist activities?

5. DECIDED CASES OR OTHER RULINGS

Have there been any court decisions or other rulings in your country in which the coverage of an insurance or reinsurance policy in respect of an act of terrorism has been considered?

II ANALYSIS

1. INTRODUCTION

It was in London, in 2004, that the theme of terrorism and its impact on insurance and reinsurance was selected. Obviously, every member of the Presidential Council was thinking at the time of the September 11 attacks. The influence of current events on AIDA world congress themes is nothing new. One just has to take, for example, the theme of the 1990 Copenhagen congress, “Damage from international disasters in the light of tort and insurance law”, and to refer to the introductory remarks by AIDA's then-president, Mikael Rosenmejer: “the subject is highly topical and inspired by the Chernobyl disaster that took place in 1986”.

As a matter of fact, current affairs affect not only the choice of world congress themes but also the actual content of the reports on the selected themes. So, while terrorism is a major concern nowadays, that was not always the case. The 1978 Madrid congress dealt with two themes, “Pollution and Insurance” and “Prevention and Insurance”: not a word was said about terrorism. Is it conceivable that a congress held in Madrid in 2006 would fail to address pollution resulting from acts of terrorism and the prevention of such acts? At the 1986 Budapest Congress, the theme relating to “Aggravation and other modifications of the risk situation” made no reference to terrorism. Today, terrorism would probably be addressed at least in relation to risk aggravation (how many insurance contracts, eg contracts covering major sports events, were cancelled for aggravation of risk following the September 11 attacks?). It is interesting to note that in 1990, disasters related to wars and warlike actions, which encompass terrorism, were expressly excluded from the aforementioned congress on international disasters. That exclusion would be difficult to justify now. And even going back to 1974, the year of the Lausanne World Congress devoted to “Insurance and acts of violence against a community, affecting persons or property”, the general report certainly gave a large place to acts of war, while stressing, however, “On the question of terrorism, the reports submitted generally remain silent, because of the scarcity of facts”. If that congress were held today, there is no doubt that the national reports would be far from silent on terrorism. Since then, there have been more than 20,000 acts of terrorism, 7,000 of which caused injury or death to persons, in more than 180 of the 200-odd countries in the world (“Scale Invariance in Global Terrorism”, Aaron Clauset and Maxwell Young, Dept. of Computer Science, University of New Mexico, April 2005).

In short, although terrorism is a very old phenomenon, and terrorism risk insurance is not, in itself, a new concept, reaction to terrorism is not the same in 2006 as it was in 1974, when Professor Isaac Halperin stated: “The insurance of damages due to terrorism is not, or not much, taken in consideration in a specific way. Insurance laws and contracts stress on acts of war and sabotage” (General report, 4th AIDA Congress, 1974, Insurance and acts of violence against a community, affecting persons or property).

2. THE REPORT

Early policies – and in particular the English Lloyd's Marine Policy which was developed during the 18th century – did not distinguish between ordinary perils and war perils. The increasingly destructive effects of war produced reluctance on the part of insurers and reinsurers to issue cover against losses caused by war, based on both the potential extent of losses and on the risk of losses concentrated in particular places or at particular times. Over the years insurers have relaxed their attitudes towards the insurance of war risks, and it is now possible to obtain war risks cover for virtually all forms of policy, albeit in many cases at an increased premium or under a separate form of cover.

The rapid growth of terrorism from the middle part of the twentieth century initially did not impact significantly on insurance or reinsurance, as the phenomenon was for the most part localised. However, in recent years, and particularly since September 11, 2001, the potentially destructive international power of terrorism has become all too apparent and has led to insurers and reinsurers refusing to provide cover against some or all risk of loss from terrorism. The AIDA Presidential Council determined that the response by the insurance industry (with or without government support) to the terrorist threat would form an appropriate and timely subject for discussion at the World Congress in Buenos Aires, as the topic is concerned with all forms of cover and affects all countries individually and collectively.

A questionnaire was prepared in 2004 and circulated to AIDA's National Chapters. Responses were received from: Argentina, Australia, Belgium, Brazil, Chile, Colombia, Denmark, Ecuador, France, Great Britain, Greece, Hungary, Israel, Italy, Japan, Mexico, South Africa, Spain, Uruguay and the United States. Grateful thanks are extended to the

National Chapters of each of those jurisdictions. Our gratitude is also due to Tim Hardy who provided invaluable assistance with the preparation of the questionnaire and to Yasmin Lilley and Paula Andrea Pérez Alcobé for providing English translations of material originally submitted in Spanish.

3. THE LEGAL DEFINITION OF TERRORISM

International initiatives

United Nations. The United Nations has been at the forefront of the fight against terrorism. Its various measures are listed on its website, <http://www.un.org/terrorism/>. The UN's Conventions include:

- (a) Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, adopted by the General Assembly of the United Nations on 14 December 1973.
- (b) International Convention against the Taking of Hostages, adopted by the General Assembly of the United Nations on 17 December 1979.
- (c) International Convention for the Suppression of the Financing of Terrorism, adopted by the General Assembly of the United Nations on 9 December 1999.
- (d) International Convention for the Suppression of Terrorist Bombings, adopted by the General Assembly of the United Nations on 15 December 1997.
- (e) International Convention for the Suppression of Acts of Nuclear Terrorism, New York, 13 April 2005.

Specific UN measures against terrorist acts involving aircraft include: Convention on Offences and Certain Other Acts Committed on Board Aircraft, signed at Tokyo on 14 September 1963; Convention for the Suppression of Unlawful Seizure of Aircraft, signed at the Hague on 16 December 1970, supplemented by a Protocol on the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, signed at Montreal on 24 February 1988; and Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, signed at Montreal on 23 September 1971. Measures against terrorism involving vessels include the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, done at Rome on 10 March 1988. Other measures include Convention on the Physical Protection of Nuclear Material, signed at Vienna on 3 March 1980 and Convention on the Marking of Plastic Explosives for the Purpose of Detection, signed at Montreal on 1 March 1991.

The UN has not adopted a single definition of terrorism, but a working definition is to be found in the International Convention for the Suppression of the Financing of Terrorism (1999). This treats a terrorist act as one which is designed to intimidate a population or to compel a government or international organisation to do or abstain from doing any act.

European Union. The EU has promulgated a number of initiatives on terrorism. On 3 December 1998 the Council of Ministers adopted an Action Plan on the implementation of free movement of persons within the EU, facilitated by the Schengen Agreement which dispenses with border and passport controls between those Member States of the EU which have signed up to this Agreement: the subject has been dealt with by Council Regulation 871/2004/EC.

On 21 September 2001 the Council discussed the need for an action plan to combat terrorism. On the same day the Council adopted a decision instructing Europol (the European Union's police force) to deal with terrorist crimes (published in [1998] OJ C19/1), and has adopted specific measures to establish a Directory of specialist counter-terrorist competences (published in [1996] OJ L273/1), to establish a European Judicial Network with responsibility for terrorist offences (published in [1998] OJ L191/4, to criminalise participation in a criminal organisation within the EU (published in [1998] OJ L351/1) and to counteract the financing of terrorist groups (Council Regulation 2580/2001/EC, published in [2001] OJ L344/70).

By Council Framework Decision 2002/475, published in [2002] OJ L164/3, every Member State is required to take the necessary measures to ensure that their definition of terrorism includes the following acts committed with the aim of seriously intimidating a population, unduly compelling a Government or international organisation to perform or abstain from performing any act, or seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or an international organization (article 1):

- (a) attacks upon a person's life which may cause death;
- (b) attacks upon the physical integrity of a person;
- (c) kidnapping or hostage taking;
- (d) causing extensive destruction to a Government or public facility, a transport system, an infrastructure facility, including an information system, a fixed platform located on the continental shelf, a public place or private property likely to endanger human life or result in major economic loss;
- (e) seizure of aircraft, ships or other means of public or goods transport;
- (f) manufacture, possession, acquisition, transport, supply or use of weapons, explosives or of nuclear, biological or chemical weapons, as well as research into, and development of, biological and chemical weapons;
- (g) release of dangerous substances, or causing fires, floods or explosions the effect of which is to endanger human life;
- (h) interfering with or disrupting the supply of water, power or any other fundamental natural resource the effect of which is to endanger human life;
- (i) threatening to commit any of the above acts.

Member States are also required to include in their criminal law the offences of: directing a terrorist group or participating in the activities of a terrorist group (article 2); committing theft, extortion or drawing up false documents with a view to committing one of the acts of terrorism set out above (article 3); and inciting, aiding or abetting and attempting any of the above acts (article 4). The penalties for any of these offences are to be effective, proportionate and dissuasive, and in particular the custodial sentences are to be heavier than for other offences (article 5) although punishment may be reduced if the offender renounces terrorist activity or provides assistance to the administrative or judicial authorities (article 6). The Framework Decision is also concerned to ensure that international terrorism does not fall into a legal vacuum, and article 9 provides that a Member State may assert jurisdiction where the offence is committed in whole or in part in its territory or on board a vessel flying its flag or an aircraft registered there, where the offender is a national or resident of that Member State, where the offence is committed for the benefit of a legal person established in its territory, and where the offence is committed against the institutions or people of the Member State in question or against an institution of the European Union or a body set up under EU law in that Member State. Rules are also laid down for the allocation of jurisdiction where more than one Member State is empowered to take proceedings. Measures to protect victims are also required (article 10). Fundamental rights or freedoms such as the right to strike, freedom of assembly, of association or of expression, including the right of everyone to form and to join trade unions with others for the protection of his or her interests and the related right to demonstrate, are all protected.

Council of Europe. This organisation was founded in 1949 and has the aim of promoting European values and defending human rights: it is distinct from the European Union, although all Member States of the EU also belong to the Council of Europe. In 1977 the Council of Europe adopted a European Convention on the Suppression of Terrorism the purpose of which is to “depoliticise” terrorism so that the exception to extradition in respect of political offences does not extend to terrorism (27 January 1977). The EU adopted this Convention in 1979. The Convention is to be amended by a Protocol which was formally adopted on 13 May 2003 but which has not yet come into force. A list of European Council measures countering terrorism is listed on its website, http://www.coe.int/T/E/Legal_Affairs/Legal_co-operation/Fight_against_terrorism/default.asp. The relevant measures include suppression of terrorism, extradition, mutual assistance in criminal matters, compensation of victims, seizure of proceeds and witness protection.

Domestic terrorism legislation

Nature of domestic terrorism legislation. In most jurisdictions anti-terrorist legislation is of recent origin, much of it post-dating the events of 9/11. A number of countries have of course been grappling with the problem of regional terrorism for a number of years, in particular the Basque attacks in Spain, the Irish Republican Army attacks in the United Kingdom, CCC terrorism in Belgium and attacks by various Palestinian organisations in Israel. Italy also suffered a series of atrocities, and there is a long history of guerrilla war in many parts of South America. These terrorist movements were nationalistic in nature, seeking independence for their territories from what was perceived to be foreign control. For the most part terrorist activities were confined to the affected region, although there were illustrations of terrorism extending to attacking external interests, primarily as a method of drawing attention to the cause: the spate of aircraft and vessel hijackings in the 1970's indicated the potential for terrorism on an international scale. Although there had been isolated examples on Western interests in the Middle East and Africa by religious

groups, the world changed on 9/11 when it became apparent that terrorism knew no boundaries and also that it was no longer possible to point to a single underlying grievance for which terrorism was thought to be the solution.

Terrorism legislation is for the most part concerned with the creation of criminal offences, restrictions on the flow of money and assets to terrorist groups (this being a key aspect of national laws on money laundering) and the confiscation of assets from terrorist groups. Enhanced criminal sanctions (normally in the form of lengthier prison sentences) are imposed on terrorists than on ordinary criminals. Most of the jurisdictions surveyed have anti-terrorist legislation which contains controls of these types. However, in some jurisdictions, terrorism legislation deals directly with insurance and reinsurance matters (Australia – which prohibits terrorism exclusions in return for reinsurance cover; United Kingdom – which provides reinsurance cover for those insurers willing to write direct terrorism risks. France – compulsory cover of terrorism risks, United States – compulsory cover of terrorism risks), and in others the state provides compensation for the consequences of terrorist acts (Argentina, France).

Some national definitions. National definitions of terrorism reflect the changing times. In the days before 9/11, when terrorism was widely regarded as only politically motivated, legal definitions of terrorism focused on the motivation of the perpetrators. One reason for this approach was to distinguish violence in support of political objectives from violence in the course of an industrial dispute or public protest or even from violence by football fans. One of the earliest legislative measures was that introduced by the United Kingdom in 1973, the Prevention of Terrorism (Temporary Provisions) Act 1973, originally intended to be a short-term response to IRA bombing attacks: this defined terrorism as “the use of violence for political ends” by “putting the public or any section of the public in fear”. The Reinsurance (Acts of Terrorism) Act 1993 continued the same theme, section 1(2) defining acts of terrorism as “acts of persons acting on behalf of, or in connection with, any organisation which carries out activities directed towards the overthrowing or influencing, by force or violence, of Her Majesty's government in the United Kingdom or any other government de jure or de facto.”

However, the introduction of religious elements into terrorism, to say nothing of an underlying objective to challenge all social and market structures incompatible with the religious views of the terrorists, has rendered this type of definition inappropriate. Defining terrorism in the light of these wider objectives has proved to be far from easy. A number of jurisdictions have no definition of terrorism. Of those jurisdictions that do define terrorism, some focus on the nature of the acts carried out by terrorists, some have defined terrorism by the intentions of the perpetrators, and others have adopted a combined approach whereby terrorism is defined by reference to the nature of the acts committed and the intention of those carrying it out.

Countries with no definition. A number of countries have no definition of terrorism at all in their laws. Argentina does not have a specific statutory definition, although it is thought that terrorism depends upon the nature of the action, relevant factors being attacks by organised and armed groups which disturb society and increase pre-existing social tensions with the result of weakening constitutional order. There is no legislative definition of terrorism in Argentina, although Section 5, item XLIII of the Constitution treats terrorism in the same way as torture and drug-smuggling, all of these being crimes “defined as hideous, as non worthy of bail, mercy or amnesty”. The Federal Supreme Court has decided (26 August 2004) that terrorism, which it defined as “macro-delinquency capable of affecting the safety, integrity and peace of citizens and organised societies. Chile, Japan and Uruguay have no definition. Israel does not have a specific definition, although has legislation dealing with “hostile acts” under which the state provides compensation to victims.

Definition based on conduct Some jurisdictions define terrorism in terms of the nature of the acts committed. Thus, Article 343 of the Colombian Criminal Code provides that a terrorist is a person who “provokes or maintains the population or a fragment of it in worry or terror, throughout acts that put in danger the life, integrity or liberty of persons or edifications or communication means, transport, processing or conduction of fluids or motor forces, using the means capable of causing damage”.

Definition based on intention. There are various illustrations of this possibility. The Spanish Criminal Code refers to fire and other devastations committed by persons belonging to “armed gangs, organizations or groups whose purpose is subvert the constitutional order or to alter seriously the public peace”. The Greek Penal Code refers to “the commission of any act in such a manner or to such extent or under such circumstances that is likely to severely harm a country or an international organization and with the ultimate purpose to severely intimidate the population or to illegally compel to a public Authority or international organization to undertake any act or to omit any act, or to severely harm or to destroy the fundamental constitutional, political, financial structures of one country or an international organization.” Italian

law, in articles 270bis and 280 of the Criminal Code, define terrorism as “acts of violence having the purpose of overthrowing the democratic order”.

Definition based on intention and conduct. This is the most common approach. In the United Kingdom, a detailed definition of terrorism is contained in section 1 of the Terrorism Act 2000, which creates a series of criminal offences and imposes other controls in respect of terrorism: subsequent legislation has been passed, but the 2000 definition is used for this as well. Section 1 refers to both the motivation of the terrorists (political, religious or ideological) and the nature of the acts committed by them, and deems acts on behalf of specific groups identified by the government as terrorist in nature (proscribed groups) to be terrorist acts. Section 1 provides that an act of terrorism is one which is designed to influence the government or to intimidate the public or a section of the public, and the use or threat is made for the purpose of advancing a political, religious or ideological cause. The Act itself must: involve serious violence against a person, involves serious damage to property, endanger a person's life, other than that of the person committing the action, create a serious risk to the health or safety of the public or a section of the public, or is designed seriously to interfere with or seriously to disrupt an electronic system. The UK also has a structure whereby particular organisations can be identified and proscribed, so that any conduct taken for the benefit of a proscribed organisation is automatically a terrorist act.

A similar approach has been adopted in Australia, in the Terrorism Insurance Act 2003, section 5 of which defines terrorism by reference to intention and act. The intention of the perpetrator must be to coerce, or influence by intimidation, a government, to intimidate the public or a section of the public. The act itself must be one which: causes serious harm that is physical harm to a person, causes serious damage to property, causes a person's death, endangers a person's life, other than the life of the person taking the action, creates a serious risk to the health or safety of the public or a section of the public, seriously interferes with, seriously disrupts or destroys an electronic system including but not limited to an information system, a telecommunications system, a financial system, a system used for the delivery of essential government services, a system used for, or by, an essential public utility, or a system used for, or by, a transport system..

In Belgium an Act of 19 December 2003 has introduced a definition of terrorism into Article 137 of the Criminal Code. An act constitutes terrorism if, by its nature or context it is designed to intimidate a government, population or international organisation and challenges the fundamental political, constitutional, economic or social structure. Relevant acts include: homicide; mass destruction or degradation of infrastructure or transport; threats to aircraft and vessels; production and distribution of explosives and biological agents; and interference with natural resources such as water and electricity. This definition is relevant also for the Act of 11 January 1993 to prevent the use of the financial system for money laundering and financing of terrorism. Belgium also has an Act of 30 November 1998 establishing the intelligence and security services, Article 8 of which defines terrorism as recourse to violence for ideological or political motives.

The Danish Penal Code, Article 114, requires of a terrorist the intention “to frighten a population to a serious degree or to unlawfully coerce Danish or foreign public authorities or an international organisation to carry out or omit to carry out an act or to destabilise or destroy a country's or an international organisation's fundamental political, constitutional, financial or social structures”. The acts which amount to terrorism must be capable of inflicting serious damage, and include homicide, gross violence, deprivation of liberty, impairment of the safety of traffic, seizure of transportation, gross weapons law violation, arson and pollution.

Mexican law imposes criminal sanctions on “anyone who, using explosives, toxic substances, firearms or fire, flood or any other violent means carries out acts against people, things or public services which produce alarm, fear, terror in the population or in a group or sector of the population, in order to disturb the public peace or try to undermine the autonomy of the State or to force the State to take a decision.”

South Africa has a lengthy definition of “terrorist activity” in section 1 of the Protection of Constitutional Democracy against Terrorism and Related Activities Act 33 of 2004. The relevant prohibited intention is “in whole or in part, for the purpose of the advancement of an individual or collective political, religious, ideological or philosophical motive, objective, cause or undertaking.” An act to further this purpose is a terrorist act if its purpose is to: (i) threaten the unity and territorial integrity of the Republic; or (ii) intimidate, or to induce or cause feelings of insecurity within, the public, or a segment of the public, with regard to its security, including its economic security, or to induce, cause or spread feelings of terror, fear or panic in a civilian population; or (iii) unduly compel, intimidate, force, coerce, induce or cause a person, a government, the general public or a segment of the public, or a domestic or an international organisation or body or intergovernmental organisation or body, to do or to abstain or refrain from doing any act, or to adopt or abandon a particular standpoint, or to act in accordance with certain principles. The acts which constitute terrorism are: the systematic, repeated or arbitrary use of violence by any means or method; the systematic, repeated or

arbitrary release into the environment or any part of it or distributing or exposing the public or any part of it to any dangerous, hazardous, radioactive or harmful substance or organism, any toxic chemical any microbiological or other biological agent or toxin; endangering life, or violating the physical integrity or physical freedom of, or causing serious bodily injury to or the death of, any person, or any number of persons; causing serious risk to the health or safety of the public or any segment of the public; causing destruction of or substantial damage to any property, natural resource, or the environmental or cultural heritage, whether public or private; causing serious interference with or serious disruption of an essential service, facility or system, or the delivery of any such service, facility or system, whether public or private, including a system used for, or by, an electronic system, including an information system, a telecommunication service or system, a banking or financial service or financial system, a system used for the delivery of essential government services, a system used for, or by, an essential public utility or transport provider, an essential infrastructure facility, or any essential emergency services, such as police, medical or civil defence services; causing any major economic loss or extensive destabilisation of an economic system or substantial devastation of the national economy of a country; or creating a serious public emergency situation or a general insurrection in the Republic. South Africa also recognises a series of “Convention offences” which includes offences associated or connected with the financing of specified offences, or offences relating to explosive or other lethal devices, to hijacking, destroying or endangering the safety of a fixed platform, to the taking of a hostage, to causing harm to internationally protected persons, to the hijacking of an aircraft, and to the hijacking of a ship or endangering the safety of maritime navigation.

The Hungarian Penal Code, article 261, also defines terrorism in terms of the nature of the crime and its intended purposes. Terrorism any violent crime that endangers the public or involves the use of a firearm, the purpose of which is to: (A) coerce a government agency, another state or an international body into doing, not doing or countenancing something; (B) intimidate the general public; or (C) conspire to change or disrupt the constitutional, economic or social order of another state, or to disrupt the operation of an international organisation. The term “violent crime” means “homicide, battery, wilful malpractice, violation of personal freedom, kidnapping, crimes against transportation safety, endangering railway, air or water traffic, violence against public officials, violence against persons performing public duties, violence against a person aiding a public official, violence against a person under international protection, public endangerment, interference with public works, seizure of an aircraft, any means of railway, water or road transport or any means of freight transport, criminal misuse of explosives or explosive devices, criminal misuse of firearms or ammunition, arms trafficking, criminal use of radioactive materials, criminal misuse of weapons prohibited by international convention, crimes against computer systems and computer data, vandalism and robbery.

The French Penal Code contains a general definition of “terrorism” which refers to both the intention of the perpetrator and the nature of his acts. Four separate situations are dealt with. First, article 421-1 (laws of 9 September 1986, 22 July 1996 -17 June 1998 and 15 November 2001) provides that certain acts constitute acts of terrorism where they are intentionally connected to an individual or collective enterprise, the aim of which is to cause serious disturbance to public order by means of intimidation or terror. Those acts are: wilful attacks on life, wilful attacks on the physical integrity of persons, kidnapping and false imprisonment as well as hijacking of aircraft, ships or other means of transport; theft, extortion, destruction, defacement and damage, as well as computer offences; offences with respect to combat units and disbanded movements; the manufacture or possession of deadly or explosive machines or devices; the production, sale, import or export of explosive substances; the acquisition, possession, transport or unlawful carrying of explosive substances or of devices made with such substances; the possession, carrying, and transport of arms and munitions; receiving the proceeds of any of the above; money-laundering offences; and insider-trading offences. Secondly, Article 421-2 (laws of 22 July 1996 and 9 March 2004) provides that the introduction into the atmosphere, on the ground, in the subsoil, into foodstuffs or foodstuff ingredients, or into waters, including territorial waters, of a substance liable to endanger the health of humans or animals or the natural environment is an act of terrorism where it is intentionally connected to an individual or collective enterprise, the aim of which is to cause serious disturbance to public order by means of intimidation or terror. Thirdly, Article 421-2-1 (law of 22 July 1996) states that it also is an act of terrorism to participate in a group formed, or an association established, for the preparation, evidenced by one or more *actus reus* elements, of any of the acts of terrorism specified in the preceding articles. Finally, Article 421-2-2 (laws of 15 November 2001 and 18 March 2003) states that it is an act of terrorism to finance a terrorist organisation by providing, collecting or managing funds, securities or property of any kind, or by giving advice for this purpose, intending that such funds, securities or property be used, or knowing that they are intended to be used, in whole or in part, for the commission of any of the acts of terrorism listed in this chapter, irrespective of whether such an act takes place. French law recognises the significance of intention: that damage may also be caused by someone acting outside the context of a war or a terrorist enterprise, eg by blowing up a neighbour's car out of revenge (see Cass. Civ. 1, 11 October 1983, No 82-14118, Bull. civ. I, No. 222: whenever an attack involving an explosive device is not part of a series of concerted actions of the same kind, the attack is not an act of terrorism within the meaning of insurance law since the victim may have been the object of personal revenge or the target of a mentally unbalanced person).

Exclusions. In all jurisdictions – and in particular those which define terrorism purely by reference to the nature of the conduct involved rather than by reference to its intention – there is a line to be drawn between terrorism on the one hand and ordinary criminality.

Some jurisdictions specifically distinguish between terrorist acts which attract the full range of sanctions appropriate to terrorists, and other conduct which is permissible. In Greece, any act which is designed to establish, protect or restore democratic rule or as an act towards liberation or which aims to exercise a fundamental civil, political or labour freedom or other right protected by the Constitution of Greece or the European Convention for the Protection of Human Rights and Fundamental Freedoms is deemed not to be a terrorist act. The Australian legislation attempts to distinguish terrorism from other activities, by excluding from this definition any act of advocacy, protest, dissent, or industrial action which is not intended: (i) to cause serious harm that is physical harm to a person; or (ii) to cause a person's death; or (iii) to endanger the life of a person, other than the person taking the action; or (iv) to create a serious risk to the health or safety of the public or a section of the public. South Africa excludes from the definition of terrorism: any act which is committed in pursuance of any advocacy, protest, dissent or industrial action and which does not intend prohibited harm; and any act committed during a struggle waged by peoples, including any action during an armed struggle, in the exercise or furtherance of their legitimate right to national liberation, self-determination and independence against colonialism, or occupation or aggression or domination by alien or foreign forces, in accordance with the principles of international law. However, a political, philosophical, ideological, racial, ethnic, religious or any similar motive will not for any reason be considered a justifiable defence in respect of an offence for which the definition of terrorist activity forms an integral part.

4. THE INSURANCE AND REINSURANCE OF TERRORISM RISKS

War risks

Nature and insurability of war risks. There is no single definition of “war”, but it is generally accepted in international law that for most purposes the term implied the existence of two opposing sides. “War” is understood to encompass war between nations and civil war. Thus in French law the term “war” presupposes hostilities between clearly identified nations, even though there may have been no official declaration of war. Civil war presupposes hostilities between citizens of the same country (during the 1954-1962 Algerian War, the French courts held that damage caused in Algeria came within the scope of the civil war and that attacks committed in Paris and elsewhere in mainland France were events arising from the civil war). although it is less clear whether a guerrilla war is always to be regarded as “war”. Some countries do recognise guerrilla war as war, including Belgium (Labour Court Brussels, 17 January 1975, *Journal des Tribunaux*, 265 and Brussels labour court of appeals, 25 October 1976, *Pasicrisie*, 1977, II, 124) and the United States (*Pan American World Airways Inc v Aetna Casualty & Surety Co* [1975] 1 Lloyd’s Rep 77).

The point is important, because guerrilla war – which may involve the planting of explosive devices or the theft of property – uses many of the same techniques as terrorism. Further, war perils where they are covered are not restricted to pure war, but also extend to allied perils such as riot, civil commotion, invasion, hostilities and malicious acts. Typical London market exclusionary wording is as follows:

... damage occasioned by war, invasion, act of foreign enemy, hostilities or warlike operations (whether war be declared or not), civil war, rebellion, revolution, insurrection, civil commotion assuming the proportions of or amounting to an uprising, military or usurped power...

Accordingly, a policy which covers war risks may well also provide insurance against certain forms of terrorism. Related perils, generally referred to as political risks, are also insurable although normally under separate cover. Such risks typically include “nationalisation, confiscation, requisition, seizure or destruction by government or any public authority”.

As noted above, war risks were insurable from the earliest times, but the increasingly destructive and widespread nature of warfare has led to war risks exclusions from many classes of commercial policy. In practice, however, and with exceptions for the use of nuclear weapons, war risks cover can be obtained either by way of an extension to the basic cover or by means of entirely separate cover. The position in the jurisdictions surveyed is that war risks are typically excluded from all classes of policy unless there is express wording to the contrary.

Some countries provide for the exclusion of war risks in their domestic legislation. In Argentina, article 17 of Law 17418 on Insurance Contracts provides that “The insurer will not cover damage caused by civil or international war or by riot or popular uprising, unless proved to the contrary”: this applies to commercial and consumer policies alike. The various pieces of Belgian legislation are to similar effect. In Greece, the Insurance Contract Act, 2496/1997, provides that no insurance cover is to be provided if the occurrence of the insured risk results from war, civil war, rebellion, or civil commotion. However insurers provide coverage for war risks in marine insurance against a higher premium. In Italy, Article 1912 of the Civil Code expressly states: “Except as otherwise agreed in the contract, the insurer is not liable for damage that may be caused by earthquakes, war, insurrection or population uprising”. It is open to insurers to offer such cover, but in practice this is rare. In Spain, Insurance Contract Law (Ley 50/1980, de Contrato de Seguro) excludes war risks claims: this measure is compulsory for consumer contracts but not for commercial contracts, although in the latter case policies themselves (other than export credit covers) exclude the coverage of war risks. In Brazil the insurance regulator has authorised but not required such exclusions.

Some jurisdictions have no law on the matter, but it is the practice for such risks to be excluded as a matter of contract. In Australia war risks are almost always excluded from consumer contracts, although war risk cover for large commercial risks can be purchased. The position in Chile, Israel, Mexico and the United Kingdom is the same. Policies issued in Colombia exclude war risks as a matter of course, although policies on aircraft, vessels or goods issued by insurers operating in the international insurance and reinsurance markets. In the US property policies have historically provided an exclusion for losses caused by acts of war for both personal and commercial lines of business, and commercial general liability policies have added such an exclusion in recent years.

The following classes of insurance are worthy of specific mention.

War and land risks. The survey revealed that it is usual as a matter of contract for war and related exclusions to be used in household (buildings and contents) insurance, motor and travel insurance, as well as commercial property/all risks insurance, public liability/employers’ liability insurance and professional indemnity insurance. In Belgium the Land Insurance Contract Act 1992, article 9, excludes “war, similar events or civil war” from cover unless the policy provides to the contrary, and a similar provision operates in respect of land transport under article 19 of the Belgian Insurance Act 1874. In France, as regards property insurance, Article L.121-8 of the Insurance Code excludes the liability of insurers for losses and damage caused by war (whether foreign or civil), riots and civil commotion (concepts that do not encompass acts of terrorism). But the statutory exclusion is not mandatory. The parties may depart from it and agree to cover damage due to foreign and/or civil war and/or riots and civil commotion.

War and marine risks. The exclusion of war risks from marine policies is more or less standard although this is normally a matter of contract. In France, Article L.172-16 of the Insurance Code states that, unless otherwise provided, insurers shall not cover risks of civil or foreign war, mines or engines of war, and riots and civil commotion. The position is similar under articles 201-204 of the Belgian Maritime Code, which expressly exclude war risks from marine policies.

Marine policies are written in the London Market on the terms of the “Institute Clauses”, the reference being to the Institute of London Underwriters (ILU), which in 1998 merged with the London Insurance and Reinsurance Market Association (LIRMA) to form the International Underwriters Association (IUA). London market practice is for marine and war policies to be written on an identical but mutually exclusive basis, so that marine policies cover all marine perils but exclude war risks whereas war policies – known as the Institute War and Strikes Clauses – cover all war risks but exclude marine perils. Neither the exclusions, nor the covering clauses are however confined strictly to “war” and “strikes”. The drafting of marine and war risks policies attracted widespread criticism in the 1970’s largely because the policies did not adopt “mirror image” wording. However, that problem was resolved when the wordings were revised in the early 1980’s.

As far as cargo is concerned the Institute Cargo Clauses 1982 exclude war and strikes. The war exclusion removes from cover all loss damage or expense caused by:

war civil war revolution rebellion insurrection, or civil strife arising therefrom, or any hostile act by or against a belligerent power
capture seizure arrest restraint or detainment, and the consequences thereof, or any attempt thereat
derelict mines torpedoes bombs or other derelict weapons of war

As far as hulls are concerned, the clauses adopted in 1983 were redrafted, in 1996, 2002 and 2003. However, the majority of marine policies written in London incorporate the 1982 wording so that the more elaborate war risks

clauses contained in the recent wordings are rarely used. The Institute Hulls Clauses 1983 (freight being treated in the same way) echo the Institute Cargo Clauses 1982, although the Hulls Clauses also exclude loss, damage, liability or expense arising from the detonation of an explosive or any weapon of war, in either case caused by a person acting maliciously or from a political motive. The International Hulls Clauses 2003 add to the 1983 exclusions loss, damage, liability or expense directly or indirectly caused by: ionising radiations; radioactive, toxic or other hazardous contaminating properties of any nuclear installation; any weapon or device employing atomic or nuclear fission; the radioactive, toxic, explosive, hazardous or contaminating properties of any radioactive matter; and any chemical or biological weapon.

The coverage afforded by the War and Strikes Clauses is not, however, wholly unqualified in scope. Such policies themselves regularly contain general exclusions of various kinds, one being an exclusion of losses arising from nuclear weapons of war. The precise ambit of such an exclusion may vary, but one in common use involves the automatic termination or cessation of effect of the policy in the event of the use of any nuclear weapon of war.

War and aviation risks. As far as the London market is concerned, aviation insurance has traditionally excluded war and allied risks from standard combined all risks hull and liability covers. The same exclusion operates in relation to policies for non-aircraft operators such as airports and service providers. The exclusion was introduced following a spate of hijackings and other losses principally sustained in and around Beirut. The London Market developed a new form of exclusion in the late 1960s for aviation underwriters, AVN48, which replaced an earlier and more extensive version. This was replaced by AVN48B, which encompassed claims arising from war, hostile detonation of nuclear weapons, civil commotion, terrorist acts, sabotage, political seizure, hijacking and the like. War risks hulls insurance, other than in respect of nuclear risks, can nevertheless be obtained from the specialist Aviation War risk market. The result, reflecting the London marine market, is seamless cover, and it is common practice for the two hull covers to incorporate a 50:50 clause whereby the all risk and war risks insurers each advance to the insured 50% of a commonly agreed insured value in the event of a loss leaving any dispute as to the proximate cause of loss as between the two policies to that of the insurers concerned. For liability covers the AVN48B perils are written back into policies through the extended coverage clause, AVN52C. Nuclear detonation and associated radioactive contamination remains uninsurable. As a result of the 9/11 attacks insurers offering AVN52C cover threatened to cancel their policies by giving seven days notice: had this occurred, all commercial flights would have been grounded, but this was averted by the Government setting up a captive insurer, Troika Insurance Company. By the end of 2002 this assistance was no longer needed as the insurance of aviation war risks returned to the independent market. There is a market for excess cover in respect of any limitation of liability under AVN52C.

In June 2005 a pan-European group of aviation insurers established the Aviation Insurance Clauses Group (AICG), a body charged with the development of standard form aviation insurance clauses. In August 2006 AICG produced a series of new clauses whose use is recommended but not mandatory. Once these clauses come into general use, the present standard form clauses will be added to by alternative form clauses which aviation buyers and insurers may use more selectively in the negotiation of the covers. The origin was a call by some aviation insurers for the more specific exclusion within the framework of an AVN48B-type clause for losses caused by terrorists using chemical, biological, radioactive or nuclear weapons ("dirty bombs" and/or "weapons of mass destruction - WMDs" in pursuit of their aims with the possibility of such risks not being written back under AVN52C type clauses. New clause AV48C excludes:

- (a) War, invasion, acts of foreign enemies, hostilities (whether war be declared or not), civil war, rebellion, revolution, insurrection, martial law, military or usurped power or attempts at usurpation of power.
- (b) Any
 - (i) hostile detonation of any device employing atomic or nuclear fission and/or fusion or other like reaction.
 - (ii) hostile use of radioactive contamination or matter.
 - (iii) hostile use of an electromagnetic pulse.
 - (iv) use of chemical or biological materials that are poisonous or pathogenic arising from war, invasion, acts of foreign enemies, hostilities (whether war be declared or not), civil war, rebellion, revolution, insurrection, martial law, military or usurped power or attempts at usurpation of power, or use of such materials for political or terrorist purposes and whether the loss or damage resulting therefrom is accidental or intentional.
- (c) Strikes, riots, civil commotions or labour disturbances.
- (d) Any act of one or more persons, whether or not agents of a sovereign power, for political or terrorist purposes and whether the loss or damage resulting therefrom is accidental or intentional.
- (e) Any malicious act or act of sabotage.
- (f) Confiscation, nationalisation, seizure, restraint, detention, appropriation, requisition for title or use by

- (g) or under the order of any government (whether civil, military or de facto) or public or local authority. Hi-jacking or any unlawful seizure or wrongful exercise of control of the Aircraft or crew in flight (including any attempt at such seizure or control) made by any person or persons on board the aircraft acting without the consent of the Insured. For the purpose of this exclusion (g) only, an aircraft is considered to be in flight at any time from the moment when all its external doors are closed following embarkation until the moment when any such door is opened for disembarkation or when the aircraft is in motion. A rotor-wing aircraft shall be deemed to be in flight when the rotors are in motion as a result of engine power, the momentum generated therefrom, or autorotation.

New clause AV48D, which may be used as an alternative, is narrower in that clause (b)(iv) is replaced by a provision which excludes hostile emission, discharge or release of chemical or biological materials that are poisonous or pathogenic: clause AV48D does not, therefore, provide coverage for accidents. Further alternative extended coverage endorsements for hulls have also been adopted. New clause AVN51(A) brings back into cover the risks excluded by AV48C in paragraphs (c) (strikes, etc), (e) (malicious acts) and (g) (hi-jacking) only. As regards aviation liability, new clauses AV52H, AV52J, AV52K and AV52L allow the parties to bring back into cover such provisions of AV48C as they might agree.

Life insurance. Life policies do not normally exclude war risks, although in Belgium the Royal Decree of 14 November 2003 on Life Insurance, while removing an express exclusion of war risks from life policies, refers to the exclusion in article 9 of the Land Insurance Contract Act 1992. In France, since 1989, the law no longer contains any provision relating to life assurance during wartime. Consequently, the parties to a life assurance contract may elect to cover or exclude death resulting from civil or foreign war.

Reinsurance of war risks. As far as the London market is concerned, war and civil war exclusions have been a traditional feature of reinsurance wordings, generally following the form and content of war exclusions for direct London market policies. Immediately following the September 11 attacks there was considerable activity among direct insurers and reinsurers alike to establish whether the attacks (or any response described as a “war on terror”) were to be excluded from cover by the war exclusions, which themselves came to be re-examined along with all forms of terrorism exclusions: these are described more fully below. The war and civil war elements of these exclusions themselves have not been radically altered, although, that is not true of some elements of “war and terrorism” exclusions. Belgium adopts the same approach in excluding war risks from reinsurance agreements. South African reinsurance contracts use standard exclusions which mirror direct exclusions.

In many jurisdictions much of the reinsurance business is conducted through the use of foreign reinsurers, often by local fronting policies which are reinsured elsewhere. Accordingly, there are no standard provisions in use.

Specific provisions relating to terrorism risks

Exclusion of terrorism risks. In most jurisdictions the exclusion or otherwise of terrorism from insurance policies is a matter of contract, and it is usual for such risks to be excluded by express terms although in some situations it may be possible to buy back the excluded cover. In Australia terrorism exclusions have become increasingly common since September 11 (although these are subject to legislation, discussed below). In France, up to 1983 the law allowed contractual freedom, and in general insurers would exclude the consequences of acts of terrorism. In 1983 a procedure for the insurance of terrorism risks was introduced in the wake of the development of regional terrorism in France (Corsica, Basque country and Brittany, in particular). This did not involve legislation but arose from an agreement between the French Government and the Fédération Française des Sociétés d’Assurances (FFSA) under which insurers would send their policyholders an offer to extend coverage to property damage due to a terrorist attack, provided the attack caused an explosion or a fire. The policyholders were free to decline the offer. Between 1983 and 1986 there was a wave of terrorist attacks, which led to the law of 9 September 1986 prohibiting clauses excluding coverage of damage caused by terrorist action, a law subsequently amended to require coverage (see below).

In the United Kingdom terrorist exclusions have gradually been introduced into policies, in particular since the activities of the IRA in the early 1990’s, and this was extended to marine and aviation policies in the light of the September 11 attacks. Before September 2001 the private market in London routinely covered terrorism risks related to property losses sustained in most countries under policies which would provide compensation for fire and explosion damage other cause than war. In countries which were particularly prone to terrorism or other forms of political unrest, however, these perils were excluded by means of an extended form of “war and civil war” exclusion clause. Specialist political risk underwriters would then meet demand for any insurance cover required. Those covers would not

necessarily distinguish the specific peril of “terrorism” from broader categories or descriptions of “political violence” in various forms. No terrorism exclusions in respect of UK-based risks were usual until IRA terrorist activity, first in the province of Northern Ireland, then on mainland Britain, prompted specific provisions to be implemented. From 1993 standard UK terrorism exclusions were introduced. After the events of September 11 had made the risk of potential future major terrorist strikes a very real threat to the solvency of many reinsurers, the imposition by reinsurers of wide terrorism exclusion clauses, led in turn to insurers seeking drastically to reduce their own exposure to terrorism risks both in the UK and around the world. The outcome is that, with some notable exceptions, (especially in the cases of some personal lines and compulsory insurance covers), terrorism risks will now usually be excluded from cover in insurance and reinsurance policies written in Great Britain across most classes and sectors., although underwriters may agree to reinstate terrorism cover. Insurers withdrew terrorism cover from the Northern Ireland commercial property market in 1977 and to date they have chosen not to re-enter the market. Insurance of terrorism risks on property in mainland Great Britain has been facilitated by the existence since 1993 of a statutory reinsurance scheme (see below) operated by Pool Re, so that commercial property and blocks of apartments are offered terrorism cover: the Pool Re scheme does not apply to consumer property but insurers have nevertheless chosen to offer terrorism cover for such property (other than in respect of biological, chemical or nuclear contamination). Some London market insurers continue to offer cover for terrorism risks in travel, life and motor policies, subject to aggregate limits. In practice terrorism cover is not offered under public liability and professional indemnity policies, although it is provided in employers’ liability policies as there is a view that such cover is required by the rules on compulsory insurance in respect of liability to employees.

September 11 was also the trigger for the introduction of terrorism exclusions in Belgian reinsurance policies and some Danish, Italian, Japanese and Mexican policies. In the US policies have historically not addressed terrorism exposure by name, although loss caused by acts of terrorism may be affected by other policy terms such as those relating to nuclear and pollution exclusions. Terrorism exclusions for commercial properties were used in the aftermath of the events of September 11, 2001, although those exclusions are now precluded by the US TRIA 2000 insofar as they relate to acts of terrorism with a foreign element. In Brazil the exclusion of terrorism risks was first authorised in 2003. Insurers in Chile exclude terrorism risks in all forms of policy, although it is possible in some cases for cover to be purchased at an additional premium. Policy exclusions in Colombia stem primarily from September 11, although prior to that date there were terrorism exclusions in specific forms of policy, in particular those relating to the energy and telecommunication sectors, to infrastructure projects and to some government-sector properties: it was nevertheless possible to obtain reinsurance for such risks in the specialist Sabotage and Terrorism reinsurance market. Other countries with a long history of terrorism adopted terrorism exclusions some years ago: South Africa, for example,

Denmark is somewhat exceptional, in that consumer policies of all classes, and life policies, typically do not contain any exclusion of terrorism risks. As far as commercial risks are concerned, there is a distinction between smaller and larger risks, the former typically being for insured sums up to about €67,000,000: there are no terrorism exclusions for smaller risks, whereas terrorism is normally excluded in respect of larger risks.

The position is statutory in Argentina: terrorism forms a part of the war risks exclusion in article 17 of Law 17418 on Insurance Contracts. In Brazil, Circular Letter de No. 168, of the Superintendence for Private Insurance, dated 31 October 2001, authorises insurance companies to adopt terrorism exclusions.

Governmental restrictions on the use of terrorism risks exclusions are considered below.

The meaning of terrorism in insurance and reinsurance contracts. In a small number of jurisdictions the market has adopted specific definitions of terrorism, although on occasion the definitions are out of date and do not respond to modern conditions. Thus in Argentina, a definition was introduced in 1969 and has not been revised. In Australia clause NMA 2390c is of modern origin, and is based on the definition in the Terrorism Insurance Act 2003.

In producing a contractual definition of terrorism, relevant considerations may be:

- (a) the identity of the terrorists (in the text *Marine War Risks* by Michael D Miller , LLP, 3rd ed (2005) at pp 197-8, the author identifies three decisions taken by the London insurance market where liability was accepted even in the absence of proof of the identity of the perpetrators and their cause – in 1987 the destruction of an Air India Boeing 747 over the North Atlantic by a bomb, the perpetrators suspected of having been Sikh extremists living in Canada, bringing public attention to their cause for an independent state; in 1988, the destruction of a Pan American Boeing 747 over Lockerbie in Scotland by a bomb, the loss being attributed to an indiscriminate terrorist attack; and in 1988, the killing of a number of passengers aboard a Greek holiday ship, the City of Poros, it being thought that the inference of terrorism was self-evident);

- (b) the affiliation of the perpetrators to known terrorist groups (Argentina, Belgium, Colombia);
- (c) the motive of the act (assuming that responsibility has been claimed or motive can otherwise be imputed) and whether it is political, religious or ideological with a view to pressurising the government (Australia, Chile, Denmark, Greece, Hungary, Italy and Spain, although this aspect is played down in Israel due to the difficulty of proving motive);
- (d) the nature of the act, eg, whether it is designed to cause injury or disruption (Argentina, Australia, Israel);
- (e) the timing of the act, eg, whether it coincides with an anniversary or other public event (Argentina, Greece).

Basically, terrorism presupposes a certain *organisation* by the perpetrators and that the aim of their action extends beyond the victim.

There is no definition in the US: under the Terrorism Risk Insurance Act 2002, whether or not an act amounts to an act of terrorism for insurance purposes is a matter for certification by the Secretary of the Treasury in consultation with the Secretary of State and the Attorney General. Such certification triggers recovery under commercial insurance policies. For the TRIA 2002 to apply, the act must occur within the US or on an aircraft or vessel. The act must also cause aggregate losses of at least US\$5 million. The definition of a “certified” act refers to a violent act that is dangerous to human life, property or infrastructure and is committed by individuals acting on behalf of foreign persons or foreign interests, as part of an effort to coerce the civilian population or influence the policy or affect the conduct of the United States Government by coercion.

In France, in the absence of any policy definition, the definition in the Penal Code is applied to determine whether there has been a terrorist act. It is for the court to determine any dispute between an insurer and an insured regarding the originating cause of a harmful event. The court will take several indicia into account in considering terrorism: an organization claiming responsibility for the act; several attacks committed within a certain period or time or a certain area; the modus operandi (sophisticated or unsophisticated bomb); the specificity of the target (public building, prominent politician, religious leader, etc.). Although France's highest court, the Cour de cassation, has ruled on this point, it should be emphasized that the courts below (in practice, the courts of appeal) are free to form their assessment of the significance of the circumstantial evidence produced before them.

In South Africa the standard form policy in general use (MultiMark III (1997), contains two provisions whereby terrorism risks are excluded. The first is concerned with acts calculated to overthrow or influence a government by means of terrorism, and the second refers to acts of terrorism which focus on the motive of the act, namely, “political, religious, personal or ideological reasons or purposes including any act committed with the intention to influence any government or for the purpose of inspiring fear in the public or any section thereof.”

In the United Kingdom, before 1993 the standard LIRMA/IUA G55 and NMA 2751 clauses, those most widely used for excluding terrorism, defined the concept as “...an act of any person acting on behalf of or in connection with any organisation with activities directed towards the overthrowing or influencing of any government de jure or de facto by force or violence.” Concerns among reinsurers about the adequacy of the definition itself grew even before the September 11 attacks, it having been noted “terrorism” used in the counter-terrorism legislation, the Terrorism Act 2000 (see above) was much wider. In the months immediately following the September 11 attacks, a series of revised clauses were circulated by the London Market associations for intended use in both direct and reinsurance covers. The Non-Marine Association (NMA) circulated four revised terrorism exclusion clauses, which still currently form the basis of exclusions most widely used in direct and reinsurance wordings (NMA 2918-2921), whereby the definition of an “act of terrorism” was revised so as to extend to include any act:

...including but not limited to the use of force or violence and/or the threat thereof, of any person or group(s) of persons, whether acting alone or on behalf of or in connection with any organisation(s) or government(s), committed for political, religious, ideological or similar purposes including the intention to influence any government and/or to put the public, or any section of the public, in fear.

Further market-generated exclusions circulated in November and December 2001 by the IUA and the NMA respectively introduced alternative and still more widely-drawn definitions of ‘terrorism’. When issuing IUA Clauses G51A and G57 in November 2001 to replace the existing G51 and G55 (G51 and 51A for use where war and related perils and terrorism were being excluded; G55 and 57 for terrorism only), the IUA stressed their concern to take account of the need to consider the widest possible set of circumstances in which an act of terrorism might manifest itself. This was with reference to the perpetrator of the terrorism, the motive for the terrorism, the modus operandi and any reaction to an act of terrorism. Accordingly, the definition of ‘terrorism’ was extremely wide:

...an act or acts (whether threatened or actual) of any person or persons involving the causing or occasioning or threatening of harm of whatever nature and by whatever means made or claimed to be made in whole or in part for political, religious, ideological or similar purposes.

At that time the IUA announced that the definition of “terrorism” in existing clauses might also be subject to amendment depending upon the outcome of discussions between the IUA and Pool Re and other representative bodies such as the Association of British Insurers (ABI) and the Association of Insurance and Risk Managers (AIRMIC). As no revision of the Pool Re definition resulted (refer 3(c) above), no withdrawal, nor amendment of G55 (nor G51) occurred. In December 2001, in the light of the market’s evolving response to the aftermath of 9/11, the NMA issued further Terrorism Exclusion Clauses, (such as NMA 2930a for use in Property Treaty Reinsurance) in which yet another definition of ‘terrorism’ was employed, this time drawing upon much of the wording of the Terrorism Act 2000. This read (in full):

An 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, 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 government(s) de jure or de facto, and which :

- (i) involves violence against one or more persons; or
- (ii) involves damage to property ; or
- (iii) endangers life other than that of the person committing the action; or
- (iv) creates a risk to health or safety of the public or a section of the public; or
- (v) is designed to interfere with or disrupt an electronic system.

Types of loss. No distinction is usually drawn in the countries surveyed between between physical and non-physical harm in the application of terrorism exclusions, although in Belgium marine policies may exclude non-physical loss. Equally no distinction is drawn between the various means of committing an act of terrorism, with the exception of losses arising from nuclear explosions which are generally excluded as a matter of contract in each of the countries surveyed. In Australia the Terrorism Insurance Act 2003 applies to eligible policies where the loss is the result of biological or chemical contamination but not where it is the result of the detonation of a nuclear device. In Belgium loss resulting from nuclear incidents is also outside the compulsory cover for terrorist losses. Italian policies treat terrorist losses as entirely separate from nuclear and biological risks.

Causation and proof. The doctrine of proximate cause is accepted almost universally in domestic insurance laws. Where there is an exclusion for terrorism risks, that exclusion will be effective only if the loss was proximately caused by terrorism. Three questions arise here. The first question is whether the proximate cause rule is varied in the case of terrorism, so that losses resulting from terrorism are excluded even where terrorism is a remote cause or, conversely, where it is the sole cause. The second question is whether the burden of proving terrorism is borne by the underwriters or by the policyholder. The third question is whether proof of terrorism depends upon any form of official certification.

Turning first to the proximate cause rule, there are a few examples of policy wordings varying the usual proximate cause rule. The standard wording used in Chile, Italy and South Africa excludes losses resulting directly or indirectly from terrorism. As far as the United Kingdom is concerned, the aviation exclusion clause adopted by the AICG retains the phrase “caused by”, although the International Hulls Clauses use the word “arising from” in respect of terrorism risks while retaining “caused by” for war risks, thereby indicating a broader concept of causation for terrorism. The London Market War and Terrorism Endorsement for Reinsurance, NMA 2919, excludes for losses “directly or indirectly caused by, resulting from or in connection with [terrorism] regardless of any other cause or event contributing concurrently or in any other sequence to the loss”. Belgian policies adopt the same approach: road transport risks exclude loss caused by terrorists whereas, certain marine policies remove cover for damage “directly or indirectly, wholly or partly caused by or arising from – terrorism”, and reinsurance contracts may contain the same provision.

Secondly, in most jurisdictions the ordinary principle of “he who alleges must prove” operates. Thus, if losses resulting from terrorism are excluded from a policy, the burden of proving the operation of the exclusion is borne by the underwriters. In Brazil the point is confirmed by Circular Letter No 168/2001 issued by the Insurance Regulator. Exceptions are Belgium, where it is the law that the assured bears the burden of proving that loss was not caused by an excluded peril unless the policy is all risks, or the insurers allege that the loss was caused by war or a related peril (Land Insurance Contract Act, article 9), and Greece. It is also the case that some contracts provide reverse the burden

of proof in respect of terrorism risks: this phenomenon has been identified by Denmark and Israel, and such clauses have been held to be valid in England in war risks cases (*Levy v Assicurazioni Generali* [1940] AC 791; *Spinney's (1948) Ltd v Royal Insurance Co* [1980] 1 Lloyd's Rep 406) and in South Africa. In both England and South Africa the courts have ruled that the reverse burden of proof clause does not discharge the insurers from the obligation to produce at least some evidence of terrorism.

Thirdly, as to actual proof of terrorism, the general rule is that the existence or otherwise of terrorism (and, for that matter, war) is a matter for the proper construction of the insurance policy as a commercial document rather than a matter of official governmental view. See, for the establishment of this proposition in English law, *Kawasaki Kisen Kabushiki Kaisha of Kobe v Banham Steamship Co* [1939] 2 KB 544. That said, a number of jurisdictions surveyed provide a mechanism of official certification that there has been terrorist activity, such certification being binding on the parties. As far as Australia is concerned, the Terrorism Insurance Act 2003 states that the Government must, if so satisfied, declare that a terrorist act has happened, and that declaration triggers the operation of the 2003 Act. Such a declaration is not relevant to any policy falling outside the scope of the Act, although it is likely that the presence or absence of a declaration would be a material consideration in determining whether or not there has been a terrorist act. The Belgian draft legislation similarly provides for the establishment of a committee whose function is to determine whether an event amounts to terrorism. In Brazil the burden of proving terrorism rests upon the insurers, and for this purpose it is necessary for the insurers to obtain a certified report from the applicable public authority that there has been a terrorist attack. In Italy certification is available, but not essential, to establish the nature of the loss. Official certification is also provided for under the Reinsurance (Acts of Terrorism) Act 1993 in the United Kingdom, although for the purpose of determining whether a fallback reinsurance scheme for the reinsurance of terrorism risks is triggered. In the United States, the coverage provided by the TRIA is triggered by certification that a terrorist act has taken place. In France there is no certification for terrorism, although any official declaration by the Government or arrest of suspects would constitute circumstantial evidence likely to influence a court: this contrasts with the occurrence of natural or technological disasters, where a declaration by the French Government that an event constitutes a disaster triggers insurance coverage and indeed such coverage is conditional on governmental declaration.

Express terrorism provisions in particular classes of policy

Aviation insurance. The August 2006 hulls and liability clauses promulgated by the AIGC, set out above, specifically exclude the insurers' liability for losses caused by terrorist action. As stated earlier, paragraph (d) of clause AV48C expressly removes liability for loss caused by "Any act of one or more persons, whether or not agents of a sovereign power, for political or terrorist purposes and whether the loss or damage resulting therefrom is accidental or intentional."

Marine insurance. The Institute Clauses in use in the London marine market for cargo (the Institute Cargo Clauses 1982) exclude war and strikes risk but make no reference to terrorism. The Institute Hulls Clauses 1983 (which remain those most heavily used similarly exclude losses caused by war and strikes risks, but also exclude losses arising from malicious acts, ie, the detonation of an explosive or any weapon of war, in either case by any person acting maliciously or from a political motive. The 2003 Hulls Clauses by contrast specifically extend the malicious acts exclusion in the earlier Hulls Clauses to "any terrorist". Belgium also provides terrorism cover under cargo insurance, but it is usual for hulls policies to exclude terrorism.

Reinsurance. Domestic laws do not on the whole require reinsurers to provide terrorism cover, neither do they prevent them from doing so. In the result, the matter is one for the market, and the norm is for reinsurers to exclude terrorism risks although such cover may be purchased in some circumstances. In Brazil where IRB Brasil Resseguros S/A, the regulation agency for the Brazilian reinsurance market, issued a circular letter on 8 January 2003 by which it established a terrorism exclusion for direct terrorism risks under policies on maritime hull, transport and petroleum risks, subsequently extended on 29 July 2003 to personal accident, tourism, group life insurance and individual life insurance. Reinsurers in Brazil are, however, free to offer reinsurance on a case-by-case basis. In Colombia it is possible to obtain reinsurance covers known as HMCCoP (Strike, Riot, Civil Commotion or Piracy) and AMIT (Malicious Acts of Third Parties) including Sabotage and Terrorism, for an additional premium and with higher deductibles: such cover is in practice limited to the primary layer, as excess layer reinsurers do not offer terrorism cover. In France the parties are free to agree as they think fit, but industry agreements (insurance companies belonging to the FFSA (Fédération Française des Sociétés d'Assurances) and mutual insurance companies belonging to the GEMA (Groupement des Entreprises Mutuelles d'Assurances) do exist to provide reinsurance cover for terrorism risks under the GAREAT co-reinsurance pool (see below).

In South Africa there are two standard exclusions in frequent use: a War and Terrorism Exclusion Endorsement (NMA2919) which excludes reinsurers' liability for loss, damage, cost or expense caused by "any act of terrorism"; and the War and Civil War Endorsement (drafted and suggested for use by the South African Reinsurance Offices Association) which excludes from protection by the reinsurance contract any loss or damage occasioned by any of a number of occurrences, including "any act of any person acting on behalf of or in connection with any organisation with activities directed towards the overthrow by force of any Government de jure or de facto or to the influencing of it by terrorism or violence."

Deductibles and aggregation provisions. Where terrorism is covered, both direct and reinsurance policies use high deductibles and per event aggregation provisions, often providing for a lesser recovery than for ordinary risks.

Indirect exclusion of terrorism risks

The question which is here considered is whether loss caused by terrorist activity is excluded by standard war and malicious acts wordings which do not specifically refer to terrorism. This question is important where the latest versions of clauses which incorporate an express terrorism exclusion have not been used and the only exclusion is for war and related risks. It has been recognised in a number of jurisdictions that an act of terrorism may, for the purposes of the construction of an insurance policy, also be an act of war or an act of malicious damage. The point is of particular significance in Australia for the independent reason that an act of war cannot be an act of terrorism for the purposes of the Terrorism Insurance Act 2003, although an act causing malicious damage is not precluded from constituting terrorism under this legislation.

The distinction between war and terrorism has been considered in a number of jurisdictions and the position varies as between them. A number of countries treat war and terrorism as mutually exclusive. Thus, in Belgium, the travaux préparatoires of the 1992 Land Insurance Contract Act indicate that acts of terrorism do not fall within the ambit of the notion "war and similar events" of Article 9. Denmark adopts the same view. In France, it is recognised that damage to property or individuals may arise from an event (fire, explosion) caused by one or more persons acting in the context either of a foreign or civil war, or of a terrorist activity. Consequently, the legal regime of the loss occurrence depends on the originating cause of the act of violence: foreign or civil war, or terrorism.

By contrast, in others – such as South Africa and the United Kingdom – an overlap is recognised. The English courts have considered at length the standard war risks terms such as civil war, revolution, rebellion, civil commotion and riot, and while the view has been expressed that each connotes a disturbance less extensive than the one before (*Republic of Bolivia v Indemnity Mutual Marine Assurance Co Ltd* [1909] 1 KB 785) the generally accepted view is that the same events may give rise to more than one peril (see *Motor Union Ins Co v Boggan* (1924) 130 LT 588 – same acts held to amount to riot and civil commotion) and that they do not "lie in a straight line" (*Spinney's (1948) Ltd v Royal Ins Co Ltd* [1980] 1 Lloyd's Rep 406). The specific question of overlap between war and terrorism was considered in *If P&C Insurance Limited (Publ.) v. Silversea Cruises Limited* [2004] Lloyd's Rep IR 217, the trial judge stating that it was unnecessary for him to consider whether the events of September 11 were properly to be characterised as acts of war but expressing the view that "English law would approach this question as one of construction of the policy. In the light of the cover afforded in the relevant section in respect of the consequences of actions by terrorists, and the express reference ... to terrorist activities in a list of perils which includes acts of war and armed conflict, I would be surprised if it were concluded that, for the purposes of deciding whether cover is available under this policy, the events of 11 September fall to be characterised as acts of war or armed conflict when action by terrorists or terrorist activities seems more appropriately to encapsulate what occurred". On appeal, [2004] Lloyd's Rep IR 217, the Court of Appeal was divided on the question whether the attack – which was clearly terrorism – could amount to an act of war: Ward LJ thought not, but Rix LJ preferred not to express a concluded view. In an earlier case, *National Oil Co of Zimbabwe (Pte) v Sturge* [1991] 2 Lloyd's Rep 281 supporters of the Mozambique National Resistance (Renamo) blew up a pipeline causing losses of gas oil, which were the subject of a subsequent insurance claim. It was accepted that the losses came within the term "any terrorist or any person acting from a political motive" and also within the exceptions for "rebellion" and "insurrection". There is a decision of the New York courts – *Pan American World Airways Inc v Aetna Casualty and Surety Co* [1975] 1 Lloyd's Rep 77 – which holds that a terrorist act (in that case, blowing up an aeroplane by the Popular Front for the Liberation of Palestine) could not be an act of war because the PFLP did not represent a sovereign power.

As regards the distinction between terrorism and malicious acts, there seems to be a consensus that the two phrases may cover the same conduct. In Chile and Colombia, for example, a terrorist act is by definition regarded as malicious. In South Africa, by contrast, a distinction is drawn between the losses caused by "purely" malicious or intentional

conduct by third parties and malicious conduct by third parties in some way or other attributable or linked to political or terrorist motives: the former is, as a rule covered; the latter, as a rule, not. It has been held in England that a malicious act is one targeted at a particular person rather than against society as a whole, a ruling which appears to prevent random terrorism from amounting to a malicious act for insurance purposes (*Tektrol Ltd v International Insurance Co of Hanover Ltd* [2006] Lloyd's Rep IR 38).

5. GOVERNMENTAL RESPONSE TO UNDERWRITING TERRORISM RISKS

Possible approaches

The survey has shown that there are four broad approaches which may be taken where the market, left to its own devices, refuses to provide terrorism cover to private persons, businesses by way of insurance or to insurers by way of reinsurance. First, nothing may be done. Secondly, the law may simply require terrorism cover to be offered in some or all cases: South Africa and Spain have comprehensive schemes of this nature, while Belgium also requires insurers to offer terrorism cover but on a less wide-ranging basis. Thirdly, the law may require insurers to provide terrorism cover, although insurers are protected by reinsurance arranged under some form of state scheme: this is the approach adopted in Australia and the United States, is the practical position in France and is pending in Belgium. Finally, the law may not require insurers to provide terrorism cover, but may encourage them to do so by providing reinsurance under a state scheme: this is the approach adopted in the United Kingdom. These schemes are considered in more detail in the following paragraphs.

Absence of provision

Most jurisdictions do not seek to interfere with the market and have not sought to make provision for the insurance or reinsurance of risks which underwriters are unwilling to accept. In Colombia, in a decision dated 12 December 2002, it was decided by the court that insurers were under no obligation to provide terrorism cover at all, and in particular to state-owned property. The Colombian courts have further held, in a decision dated 2 May 2002, that insurers who paid a claim on 23 cars damaged in a terrorist attack had no right of subrogation against the state, as the state itself had not contributed to the risk.

In most of the countries surveyed there are state compensation schemes in place which compensate the victims of all crimes, including terrorism. Brazil is noteworthy here, in that it operates a scheme for the provision of compensation to the victims of acts of war and terrorism against Brazilian aircraft, up to a maximum of US\$1 billion. In Greece, Law 2093/1992, Article 18, §3 provides that natural and legal persons are entitled to be reimbursed tax free by the Government for any injury and for damage caused to their movable or immovable property due to an act of terrorism, although the Government's liability is limited to the difference between the insurance coverage and the actual damage. Decision 24/1997 of the Athens Court of Appeal held that a shooting attracted compensation because its object had been to cause terror in the neighbourhood and was not solely due to the personal characteristics of the victim. In the UK the Criminal Injuries Compensation Scheme provides compensation for victims of all crimes of violence, including terrorism, although as yet the scheme does not extend to injury from terrorist acts committed outside the jurisdiction. In France, the law of 9 September 1986 created a compensation fund for victims of acts of terrorism (*Fonds de garantie contre les actes de terrorisme*), funded by taxes collected on property insurance policies. Compensation is granted to all victims, whether or not they carry insurance. Compensation is payable to any French or foreign national who is injured in France; and to any French national injured in France or abroad and, since the law of 23 January 2006, even the beneficiaries — e.g. the spouses — of victims of acts of terrorism can obtain compensation under the same conditions. The compensation is meant to provide full redress (ie without any ceiling) for all manner of personal injury (bodily harm, pain and suffering, emotional distress, economic loss). The *Fonds de garantie* is not an insurance undertaking, but a body created by law. Its funding comes exclusively from property insurance policyholders via a tax on their policies. The amount of the tax is set by Minister of Economy and Finance (the current rate is €3.30 per property insurance policy; in 2005, the total amount of such tax was 240 million euros — which corresponds to about 70 million property insurance policies). Since 1990, about 13,000 claims have been lodged with the *Fonds de garantie* in respect of acts of terrorism (in France, Israel, Egypt, etc.), aircraft attacks, the 9/11 attacks in New York, etc.).

Compulsory terrorism insurance

In Belgium, coverage for terrorism risks is compulsory in workers' compensation for labour accidents (Act of 10 April 1971), third party motor liability insurance (Act of 21 November 1989), fire and explosion in public premises (Act of 30 July 1979 and Royal Decrees of 2 February and 5 August 1991) and fire and other perils of simple risks (where the value of the property does not exceed €743,680, index linked – Royal Decree 24 December 1992). At the time of writing there is a draft bill under discussion in Belgium, the effect of which would be to require terrorism to be insured under motor, property, workers' compensation, life, accident and hospitalisation policies. In other insurance classes, where party autonomy applies, losses caused by terrorism are generally excluded by an express provision.

In Denmark there is a limited requirement for terrorism cover, in respect of fire policies on buildings. In order to protect secured lenders, insurance companies are bound to provide insurance and cannot adopt restrictions in coverage. As referred above it is not possible to make restrictions in the Fire Building Insurances. Similar restrictions apply to motor liability insurance and workmen's Compensation, although Danish insurers have not sought to include terrorism exclusions in such policies.

In South Africa there is an interesting scheme under which the insurance industry and government have combined to ensure that terrorism cover is included in property and transport policies, the scheme operating by means of the imposition of compulsory cover paid for as an addition to premiums charged for the policies themselves. The scheme developed in the light of the fact that the short-term insurance industry in South Africa was neither prepared to insure nor capable of insuring the risks arising after the widespread political unrest which occurred in South Africa in 1976. At this time South African Special Risks Association (SASRIA) was incorporated as an association not for gain (and therefore exempt from tax), to provide insurance cover against damage to property caused by political acts. SASRIA enjoyed monopoly status in South Africa and provided political risks cover on a non-refusable and non-cancellable basis to all prospective assureds: its premiums were derived as a small percentage of the premiums paid to conventional insurers covering the property in question against loss or damage from non-political risks. In the absence of available reinsurance for SASRIA from the market, the South African government agreed to act as reinsurer of last resort. SASRIA's business was extended by the Reinsurance of Damage and Losses Act 56 of 1989 to public disorder risks. By 1998 SASRIA had accumulated substantial reserves, and in that year was converted into a public company with a share capital and with the State as its sole shareholder (see the Conversion of SASRIA Act 134 of 1998 which also repealed the Reinsurance of Damage and Losses Act 56 of 1989). As a part of the new arrangements the South African Government withdrew from its role as reinsurer of last resort, and SASRIA Ltd. now obtains reinsurance in the open market. The losses covered by SASRIA Ltd are those arising from: any act calculated to overthrow or influence any state or government, or any provincial, local or tribal authority, with force or by means of fear, terrorism or violence; any act 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 provincial, local or tribal authority, or for the purpose of inspiring fear in the public or any section thereof; and riots and other acts of public disorder. War risks and losses arising from nuclear, chemical and biological agents are specifically excluded, and there is a reverse burden of proof clause. The cover is subject to an annual limit of R300,000,000 for any one assured, and extends to consumers and businesses alike, although only in respect of property situated within South Africa (although there are reciprocal arrangements with Namibia, which operates a similar scheme through NASRIA). It remains the case that SASRIA Ltd's premiums are derived from premiums payable to other direct insurers, so that the premiums are collected by other insurers who also have limited authority to settle various types of claims on behalf of SASRIA Ltd. For further detail, see <http://www.sasria.co.za>)

The Spanish approach to terrorism cover bears a number of similarities to that of South Africa. Terrorism risks – consisting of violent action designed to destabilise the political system or to cause dread or insecurity – are excluded from the cover of ordinary policies. Coverage is nevertheless provided by the Consorcio de Compensación de Seguros (CCS), under Real Decreto Legislativo 7/2004. CCS is a public body attached to the Ministry of Economy and Finance and has its own assets independent from those of the State. CCS provides compulsory cover for losses caused by “extraordinary events” occurring in Spain and affecting persons on goods. The scheme applies where the assured has a policy covering: fire and natural events; land vehicles; railway vehicles; goods; business interruption; personal accident; and (since 2006) life. CCS imposes a surcharge on the premium for the coverage of extraordinary risks, the amount of the surcharge depending upon the type of insurance and the risk itself. See www.consorseguros.es. The scheme is supplemented by state compensation for the victims of terrorist acts who do not have insurance.

Compulsory terrorism insurance backed by a reinsurance scheme

The most sophisticated scheme of this type is operated in Australia, under the Terrorism Insurance Act 2003, although a similar scheme is presently under consideration in Belgium. Following the attacks on September 11, there was a dramatic reduction in the availability of terrorism risks cover in that jurisdiction. It is the usual practice of insurers for terrorism risks to be excluded from consumer contracts, and a similar exclusion operates in respect of commercial contracts although insurers do allow terrorist cover to be obtained for additional premium and normally with a maximum limit of cover of Aus\$10 million. All of this is modified in the case of “eligible contracts of insurance”, defined by section 7(1) as contracts that provide insurance cover in relation to loss of or damage to “eligible property” owned by the assured, business interruption losses flowing from loss of use of eligible property owned or occupied by the assured, or liability of the assured arising out of his ownership or occupation of “eligible property”. The term “eligible property” is defined by section 2 as property located in Australia and consisting of buildings, property located in and on buildings, and property on, in or under the seabed (within 12 miles from the coast). The Act does not apply to reinsurance contracts or to a range of other contracts specified in regulations made under the Act. These include: insurance of domestic or residential property; policies on government property; professional indemnity cover; life insurance; mortgage insurance; marine insurance; motor insurance; insurance of goods in transit; and nuclear risks. In practice, therefore, the Act applies to policies on commercial property, in respect of physical damage and business interruption.

Where a policy is an “eligible contract of insurance”, a terrorism exclusion in the policy is ineffective only where a terrorist act has occurred. A terrorist act is taken to have occurred only where there has been a declaration to that effect by the Government. A threat of a terrorist act which has caused business interruption losses is also covered by the scheme. Section 5 of the 2003 Act (discussed above) defines terrorism in terms of the intention of the perpetrator, which must be to coerce, or influence by intimidation, a government, to intimidate the public or a section of the public.

Insurers required to offer terrorism cover are protected by a government-backed reinsurance scheme, the Australian Reinsurance Pool Corporation, which began its operations on 1 July 2003 and which is backed by government guarantees totalling Aus\$10 billion. If an insurer participates in the scheme, which it may do by paying a reinsurance premium based on the location of the property which it insures (such property being banded in three tiers, so that the premium is not in the form of a levy but is directly related to the risk), then any payments made by it in respect of a declared terrorist incident are treated as reinsured by ARPC and the insurer is entitled to an indemnity. That entitlement exists, however, only if the loss is one which falls outside the insurer’s terrorism exclusion: the loss must, therefore, be one which is only covered by the policy because of the operation of the 2003 Act. Assuming that the scheme applies, the amount of indemnity is restricted by retentions: the insurer is required to bear an annual retention covering all terrorism losses, of Aus\$1 million or 4% of notified relevant premium (whichever is less); and if in relation to a declared terrorist incident, the total retentions of all insurers exceed \$10 million, there is a pro rata reduction in each insurer’s retention. The amount payable by insurers in respect of a declared terrorist act may be reduced by a “reduction percentage”, which is triggered when the Government considers that the amount otherwise payable would exceed Aus\$10 billion, the amount of the government’s exposure. The Government is required by section 6 to specify a reduction percentage which is to be borne by policyholders and not by their insurers.

The Belgian proposal is similar. What has been suggested is the creation of a public/private partnership which will provide reinsurance cover for direct insurers of terrorist risks, of up to €1 billion per year. Priority is to be given to bodily injury rather than property damage and financial losses. The scheme is to be administered by a pool of reinsurers. The scheme intends to compensate to the extent possible the individual bodily injuries. If the maximum does not cover all losses, priority will be given to compensation of bodily injury rather than of property and to financial losses rather than moral damages for pain and suffering. The individual victims’ claims will have priority over the social insurers’ right of subrogation.

As far as the United States is concerned, the Terrorism Risks Insurance Act 2002 provides for compulsory cover for terrorism risks backed by state reinsurance. TRIA is a temporary measure, although has now been extended to the end of 2007. TRIA applies – with exceptions relating in particular to non-commercial premises (where terrorism exclusions are not in practice used anyway) – to all property and casualty insurers (whether writing primary or excess layers), although not to reinsurance or retrocession. Exclusions for terrorism risks are void, and coverage must be offered on terms and in amounts that do not differ materially from other perils. The assured may, however, opt out of the coverage. TRIA permits insurers to apply a deductible, and thereafter they must meet losses. The insurers have the benefit of 90% reinsurance provided by the Federal Government, up to an annual aggregate limit of US\$100 billion. Any reinsurance payments are funded by policy surcharges of up to 3% on property/casualty policy premiums.

In France there is compulsory terrorism cover for property insurance backed by a reinsurance scheme which is not compulsory as a matter of law but in practice operates to provide reinsurance cover. By the law of 9 September 1986 a new article, L.126-2 was introduced into the Insurance Code making terrorism coverage compulsory for property

insurance contracts by prohibiting clauses excluding coverage of damage caused by terrorist action. The provision was substantially amended by a law of 23 January 2006. Article L. 126-2 of the Insurance Code now reads as follows:

Insurance contracts covering property situated in the national territory against fire damage as well as damage to the frame of land motor vehicles shall entitle the policyholder to coverage for direct material damage caused within the national territory to the insured property by an attack or an act of terrorism as defined in articles 421-1 et 421-2 of the Penal Code.

The law no longer prohibits exclusions for acts of terrorism; rather, it positively provides for coverage of damage resulting from such acts. The law no longer requires insurance contracts to cover all damage caused by acts of terrorism but only direct property damage (personal injuries are covered by a non-insurance state compensation scheme) and consequential losses arising therefrom. Hence, consequential losses that do not arise from direct damage to property will no longer be mandatorily covered. However, any business interruption coverage afforded by a policy will extend to damage caused by attacks and acts of terrorism under the conditions specified in the policy. Derogations and exceptions to cover are to be determined by decree, but to date no decree has been issued. The compulsory cover applies to both large (commercial) risks and to mass (consumer) risks on property including motor vehicles, as long as the property is already insured against fire and situated in the territory of France. Cover extends to material damage and to consequential loss arising from material damage, including decontamination costs: business interruption losses are covered if they are otherwise insured under the policy. The amount of terrorism coverage is limited by the deductible and the limit of coverage specified in the insurance contract in respect of fire risks. For mass risks, the insurance benefits cannot be less than such deductible and limit. For large risks, the decree of 28 December 2001 (article R.126-1 of the Insurance Code) provides that the amount of terrorism coverage may be reduced: for goods carried, 20% of the limit of coverage, net of deductible, specified in the contract for damage of the same kind not caused by an act of terrorism or an attack; for other risks, 20% of the limit of coverage, net of deductible, specified in the contract for damage of the same kind not caused by an act of terrorism or an attack, and, in any event, €20 million. There is nothing in French law which requires an insurer to issue terrorism cover only because compulsory cover is only available as part of a fire policy, and the law does not require any insurer to issue a fire policy. This has led some French insurers to withdraw fire cover from particular assureds, thereby preventing the operation of compulsory terrorism cover.

The French Government has not directly provided any reinsurance scheme to cover insurers providing terrorism cover. There is, however, a French state-controlled public body dedicated to reinsurance, the Caisse Centrale de Réassurance (CCR), the legal status of which is established in articles L.431-1 *et seq.* of the Insurance Code. After the introduction in 1986 of compulsory terrorism coverage for all property situated in France or a French overseas department or territory and in the wake of the attacks of 11 September 2001, a pool was set up on 1 January 2002 by insurers, reinsurers and the CCR to cover terrorist acts: GAREAT (*Gestion de l'Assurance et de la REassurance contre les Attentats* – management of insurance and reinsurance against [terrorist] attacks). In December 2001, the Minister of Economy and Finance authorised the CCR to provide unlimited coverage with the guarantee of the French state, under a layered risk-sharing system for large risks whereby insurers bear a retention, followed by reinsurance and ultimately unlimited state cover through the CCR for losses in excess of €2 billion. For mass risks there is a similar scheme in place, although reinsurance is not necessarily obtained through GAREAT.

Voluntary terrorism insurance backed by a reinsurance scheme

The most extensive scheme of this nature is that adopted in the UK under the Reinsurance (Acts of Terrorism) Act 1993, which was developed following a series of IRA bomb attacks in London and the consequent withdrawal of terrorism cover for commercial buildings. The scheme was modified in the aftermath of the September 11 attacks. The 1993 Act does not require insurers to offer terrorism cover, but for those that do offer such cover a body established by the Act, Pool Re, the members of which are insurers, acts as their mutual reinsurer. In the event that Pool Re exhausts its financial resources following claim payments, HM Treasury is the “reinsurer of last resort” for Pool Re under a retrocession agreement. To fund this, the Government collects a surcharge on premiums, which are then ‘pooled’ to pay for losses covered by the Treasury. Before September 11, Pool Re covered acts of terrorism causing fire and explosion. Cover has since been extended to ‘all risks’, thus including nuclear risks and damage having causes other than fire and explosion, such as flood and contamination. Hacking and virus damage to electronic components are excluded because it is likely to be hard to prove source and motive. War risks are also excluded. In December 2004, after consultation with the insurance and commercial property industries, the Treasury published a set of general principles of interpretation that it would expect to be guided by in its application of the definition of an “act of terrorism”. The definition requires an “organisation” whose objectives are directed towards overthrowing or

influencing a Government, anywhere in the world, by force or violence, and it also requires an “act of terrorism” (see the definition above).

A further illustration is provided by Italy. Since the late 1950s, the Italian government has a back-stop guarantee, similar to reinsurance, for export related risks insurance including risks related to terror acts. No indemnities have been claimed to date.

6. INTERNATIONAL ARRANGEMENTS

At present there is very little in the way of international or cross-border agreement to deal with the problem of insuring or reinsuring terrorism risks. In 2005 the Organisation for Economic Co-operation and Development (OECD) published its report *Terrorism Risk Insurance in OECD Countries* in which it put forward suggestions for the provision of compensation for large-scale terrorist acts. Inter-governmental discussions are taking place at ICAO on the drafting of a text for one or more international conventions on liability for damage on the surface of the earth arising out of aviation activities. One convention would address such liability arising out of terrorist acts.

7. CONCLUSION

Usually classed as a catastrophe risk along with natural and technological disasters, terrorism appears to be the most feared by all: by the population, of course, but also by insurers and reinsurers. Various studies conducted under the aegis of the OECD ring the alarm bell: the transfer of the harmful consequences of terrorism to insurance and reinsurance is not being carried out properly (see, eg, OECD, *Terrorism Risk Insurance in OECD countries*, July 2005). Yet, a perusal of the national reports and of the summary contained in the general report bring to light a paradox, namely, some of the characteristics of terrorism and its insurance are unspecific while others are quite specific. And the former seem to outnumber the latter.

A. The unspecific characteristics of terrorism risks

1. Difficulty in defining terrorism risks

All the studies on insurance of terrorism-related risks emphasise the difficulty in defining the risks. This difficulty allegedly hinders their coverage by the insurance market. And yet the problem of defining a risk is a common and constant one in all lines of insurance. Just think, for instance, of the distinction between "accident" and "illness" in personal insurance, or the concept of "corruption" in relation to IT or telephony systems. In reality, as shown by the national reports, the concept of terrorism seems to be clearer now than it was in the past, probably because of the increase in the actions that reveal it. In the final analysis, characterizing an act of terrorism is not more problematic than characterizing events and occurrences in many other areas.

2. Insurability of terrorism risks

Damage arising from an act of terrorism is always legally insurable *per se*: there is never an intent on the part of the insured to cause such damage. In reality, the issue is not whether the risk is insurable but whether the burden of the risk can be transferred to the insurer. This gives rise to economic issues, which translate on a legal level into adjusting insurance contracts.

3. Transferability of terrorism risks

Ordinarily, insurance contracts do not systematically exclude cover for risks that pose no particular insurability problem. Thus, fire is a very commonly covered risk, and, until twenty or thirty years ago, fire caused by an act of terrorism would usually be covered. It was when this cause of loss began to proliferate that insurers gave it special attention, either to exclude it, or to limit indemnities or increase premiums. And it was when the extent of damage

caused by acts of terrorism reached an unprecedented magnitude that the exclusion option was preferred by reinsurers and – hence, perhaps – insurers. The period following the September 11 attacks in the United States evinces this trend. The trend was not, however, confined to terrorism insurance. Relatively speaking, malpractice insurance for certain medical practitioners (in particular obstetricians and, anaesthetists) experienced it too. Insurers reacted to the growing number of medical malpractice suits, the widening of the range of compensable injury, the increase in the amount of damages awarded to victims, etc. by substantially increasing the premiums, or simply withdrawing from the market.

Remarkably, neither terrorism coverage nor medical malpractice insurance, though very different from each other, ever completely disappeared. It has even been observed that premiums for terrorism coverage, which had gone up sharply in the months following September 11, 2001, fell considerably, sometimes on the order of 25%, in the ensuing years. Obviously, analysis of the reasons for maintaining terrorism coverage is distorted, at least in part, when the public authorities make terrorism coverage compulsory or contribute financially to compensation for victims of terrorism. But even in countries where no such state intervention occurred, insurers have not completely abandoned the market. The deep-set reasons for the market's resilience are hard to determine. Some people might say that an appetite for premiums, i.e. a desire to raise revenue, is the most plausible explanation. Be that as it may, terrorism risks cannot be characterized either as an uninsurable (because they always involve an element of fortuity) or as non-transferable, even from the viewpoint of their probability and their intensity.

4. Premiums and amounts of cover

Assuming an insurance contract were to provide terrorism coverage, how much coverage would it provide and at what cost? Unless these matters are regulated by law, contractual freedom prevails. Accordingly, the parties (with the insurer probably having decisionary power) will set both the premium and the amount of cover (deductible and limit of cover). There is nothing original in that, but a few grey areas remain.

Except where the amount of the premium (or of the tax levied on insurance contracts to finance a compensation fund) is imposed by law, are policyholders aware of how much they are being charged for terrorism risks? Insofar as a personal or property insurance contract covers, for example, fire or personal accident, it is hardly possible to differentiate among the various causes of the insured peril. It is therefore very difficult for a vast majority of policyholders to know what portion of their premium corresponds to terrorism risks. In contrast, it seems that the cost of terrorism risks is more perceptible for industrial and commercial undertakings, particularly in the aviation and oil and gas industries, which are more exposed to the peril: the sharp rise in premiums in the wake of the September 11 attacks obviously made it possible to measure the cost of terrorism coverage.

Does the amount of cover vary according to whether the damage is caused by an act of terrorism or another event? In times of contractual freedom, the answer depends on what the parties agreed. But where terrorism coverage is mandatory, various solutions may be contemplated. Under property insurance, the amount of cover for damage caused by an act of terrorism may be the amount contractually provided for damage caused by another insured peril (eg fire), or the amount determined by law, or the amount required to make good the damage (eg the cost of restoring a damaged building to its pre-damage condition). The last and – and most original – of those three options infringes the principle that policyholders are free to use insurance indemnities as they wish, but it was the one adopted by French lawmakers for technological disaster insurance: the indemnity must be used to repair the damage. Under personal insurance, the option is also between the amount specified in the contract and the amount determined by law, possibly according to the principle of full compensation of the damage suffered by the victim.

Finally, reference should be made to a problem common to all liability insurance. If, on account of a terrorist attack affecting a large number of people, a company manager, or a company (eg an airline) incurs liability that is covered by insurance up to a specified limit, how will the insurance indemnity be allocated among the victims if it is less than the aggregate amount of compensation owed by the insured? Should claims from victims be paid as and when received, until exhaustion of the indemnity, or should the insurer wait until all the victims are known and then distribute the indemnity pro rata among them? This is a classic insurance-law question in matters of widespread or serial losses.

B. The specific characteristics of terrorism risks

1. Insurance lines of business: and liability insurance?

At the Copenhagen congress, on the theme of international disasters (eg industrial accidents, toxic clouds or shipwrecks of vessels laden with hazardous substances), the general reporter, Professor Peter Wetterstein, stressed that the debated issue was whether emphasis should be placed on the liability system or on other bases for compensation

(eg public funds). Yet, studies on terrorism risks – which may now be classed in the category of major international disasters – disregard liability insurance and deal solely with property and personal insurance. Is that silence warranted, even though terrorism can cause such disasters?

In the case of a technological disaster, such as the explosion of a factory, the issue of liability arises immediately; the same may hold true for natural disasters because questions regarding the existence or absence of risk-prevention and damage-containment measures will systematically need to be raised. On the other hand, liability arising from an act of terrorism is, apparently at least, more difficult to apprehend, except with regard to the liability of the terrorists themselves, the organization to which they belong and the states that support them). In truth, such liability is evident: it is easy to understand that a victim of an act of terrorism may sue a person whose conduct was wrongful in that the person contributed to bringing about the damage caused by the act of terrorism (and if the lawsuit is not brought by the victim, it may be brought by the victim's property or personal insurer, insofar as the latter is subrogated to the rights and remedies of the victim). An example of this would be a company or corporate executive or public body (a local authority, for instance) that failed to do everything reasonably possible to prevent the commission of terrorist action. Individual sensitive industrial enterprises should prevent malevolent persons from entering their premises, and airlines should vet their passengers and inspect their baggage; it may even happen that a small travel agency is reproached for failing to inform its customers that they were travelling to a part of the world where terrorism was particularly rife.

Hence, a person having nothing to do with the organisation of terrorist action is exposed to a real risk of incurring liability. Such liability does not seem to be governed by a specific regime. In certain areas, however, insurers have subjected terrorism liability coverage to special contractual treatment. Such is the case, for example, of directors and officers who may incur liability if, for instance, they fail to take steps to prevent foreseeable attempted acts of terrorism against their companies; it seems that the general attitude of insurers is to deny cover in such circumstances. The same problem may be encountered in insurance contracts covering the liability of local authorities. In any event, no state intervention seems to exist in this area.

2. Loss prevention and mitigation

An explosion occurs: we know how to fight explosions, by endeavouring both to prevent them and to mitigate their consequences. The explosion of an industrial boiler is due to a flood that qualifies as a natural disaster: we know how to fight floods, including those due to a natural disaster, by building dykes, etc. If it is not a flood but an earthquake, we know how to alleviate the effects of the occurrence, eg through antiseismic building techniques. The means of combat are limited and more or less effective, but they may to a greater or lesser extent be within the control of the insured, and the insurance contract may require the insured to take certain preventative measures. Now, the explosion is due to an act of terrorism: apart from the classic means of preventing explosions or of preventing malevolent persons from entering the premises (as in any insurance against theft or vandalism), how can terrorism be fought? It is difficult to imagine that the insured, possibly in collaboration with the insurer, would be capable of fighting terrorism. The parties to insurance contracts are clearly ill-equipped to deal with terrorism. Arguably, preventing a hurricane from forming is just as impossible as preventing terrorists from banding together in a terrorist group. That is true, but it is possible to foresee and monitor the former but not the latter. Therein lies the most salient specific feature of terrorism risks: the ignorance in which both the insured and the insurer and reinsurer most often remain, even if the insurer and reinsurer conduct thorough studies into the phenomenon.

Basically, it could be said that fortuity, i.e. uncertainty as to whether the harmful event will occur, is present here in its purest state. Theoretically, this should satisfy specialists in insurance contracts (lawyers) because insurance contracts are precisely based on the existence of a true contingency. In practice, this bothers specialists in the economics of the insurance business, who hate not knowing the risk intensity and probability factors. And the situation is compounded by another characteristic of terrorism risks, namely, secrecy.

3. Secrecy

Any policyholder, insurer or reinsurer can more or less easily have access to all manner of studies on natural or technological disasters and to public health data. The same does not hold true for terrorism. States are reluctant to disclose the information they possess. This cult of secrecy, whether warranted or not, results in insurers and reinsurers lacking information on the fundamental elements of terrorism risks and therefore having to rely on their own resources to try to analyse information enabling them, in principle, to accept, and set a rate for, coverage, or to exclude the risk outright, save where coverage is mandatory by law.

Can insureds be of any help? Except in cases of mandatory coverage (with the premium determined by the executive), nothing prevents an insurer from questioning insurance applicants about their personal exposure to terrorism risks. Industrial and commercial undertaking may therefore have to disclose, both upon taking out and during the continuance of an insurance contract, facts related to this danger (in addition to answering the traditional questions about means of protection against fire, break-in, unauthorized entry, etc.). The applicants' past is obviously highly instructive: for example, department stores that have already been the target of attacks or threats of attacks are required to disclose that fact to the insurer. Such information does not, however, throw light on the future.

The insurance of terrorism risks therefore seems to be still shrouded in some obscurity, but the ability of insurers and reinsurance to adapt should, as always for risks ill-identified at a given time and as shown by the history of so-called emerging risks, enable terrorism risks to continue to be transferred.

III NATIONAL RESPONSES

ARGENTINA¹

1. DEFINITIO OF TERRORISM

(a) Is there any general definition of “terrorism”, “terrorist activity” or any related term in the general law within your jurisdiction?

There is no general definition for “terrorism”, “terrorist activity” or any related term. In general, Argentinian legislation and case law closely links the concept of “terrorism” with the action of armed groups which generate individual or collective attacks with the aim of disturbing society and increasing pre-existing social tensions and with the ultimate objective of weakening constitutional order.

The defining elements of terrorism would be:

- (a) active subject: organised and armed groups;
- (b) action: individual or collective attacks;
- (c) immediate finality: disturb society and increase pre-existing social tensions;
- (d) final finality: weaken constitutional order.

In addition, and linked to today’s international reality, generic reference is made to long-distance movements set up by cross-border terrorist organisations.

(b) If there is a definition, what legal aim does it have?

The concept of “terrorism” has been used with the following aims:

- (a) to organise systems of repression of terrorist groups;
- (b) to establish a system of compensation and subsidies for victims of terrorist activity;
- (c) to establish procedural systems in the courts which tried those who took forward the operations with the motive of repressing terrorism;
- (d) to incorporate into national legislation those provisions of Public International Law relevant to the repression of money laundering.

2. TERRORISM AND POLICY WORDING

(a) Do insurance and reinsurance policies written in your country exclude the liability of insurers and reinsurers for war risks? If so, is there any distinction between insurance contracts entered into with consumers and insurance contracts entered into with companies/professionals? Please answer this question in relation to different branches or sectors.

(b) Do insurance and reinsurance policies written in your country exclude the liability of insurers and reinsurers for terrorism risks? If so, is there any distinction between insurance contracts entered into with consumers and insurance contracts entered into with businesses/professionals? Please answer this question in relation to the different branches or sectors.

With respect to insurance contracts:

Policies across various branches of insurance exclude cover for war risks. Article 71 of Argentinian Law 17418 on Insurance Contracts establishes that “The insurer will not cover damage caused by civil or international war or by riot or popular uprising, unless proved to the contrary”.

¹ The original Spanish version is reproduced in Part 4 of this Report.

There is no specific legal provision which distinguishes between insurance contracts entered into with consumers and those entered into with businesses or professionals. Despite this, and the existence of a doctrinaire and legal tendency to favour the consumer in insurance contracts, the exclusion of cover for war acts is uncontroversial.

War Risk Exclusions in the Various Branches of Insurance:

- On 3 October 1969 the Superintendence of Insurance of the Nation passed Resolution 9786 in which each of the assumptions for the exclusion of guarantees were defined.
- One paragraph of that Resolution establishes that: “When the damage or loss occurs in the place and at the time that the actions occur, it will be presumed that it is a consequence of the same, without prejudice to proof to the contrary by the insured, if they are excluded, and of the insurer, when it is agreed to include them”.
- Before insurers can insert clauses into the general conditions of insurance policies, insurers must first of all obtain authorisation from the Superintendence of Insurance of the Nation. This controlling entity, as per the Resolution set out above, approves the inclusion of exclusions to cover with a text similar to the following: “For the purposes of the present policy, the following definitions will apply:

With respect to reinsurance contracts

In the Argentinian market, there are local private reinsurers and agencies or representatives of foreign reinsurers. Contracts entered into with the intervention of agencies or representatives of foreign reinsurers include clauses and conditions approved and in the style of the countries of the reinsurers’ head offices. As a result, the text of these clauses has to have an effect on the national reports of the different members of AIDA and on the people filling in the present questionnaire.

(c) Are war risks or their exclusions and terrorism risks or their exclusions or risks of other kind of political act or violence considered to be malicious damage?

As explained previously, risks of war, terrorism and other risks which fall under the label of collective violence are excluded in all cases equally. Malice and malicious damage are excluded in cases of vandalism (the harmful acts arising from the destructive actions of a crowd acting irrationally and disorderly) and popular uprising (the harmful acts arising from a mass gathering of people (whether organised or not), in which one or more participants commit an outrage or violent act, generally without arms even though some may use them. Riot, disturbance of the public order, disorder, disturbances, revolt and commotion are also understood to be equivalent to acts of popular uprising.)

(d) Do definitions of terrorism exist in insurance and reinsurance contracts? Please answer this question in relation to different branches or sectors. If these definitions have been introduced as a response to recent occurrences, are there differences between these and previous provisions?

There are indeed, as outlined, definitions of terrorism in insurance contracts, but these were incorporated years ago, and not in response to recent events.

(e) If restrictions or exclusions in terrorism insurance cover exist, when were these restrictions introduced for the first time, and have these restrictions undergone any kind of change due to recent occurrences?

The restrictive provisions in respect of terrorism were inserted in 1969 and have not been amended in the light of recent events.

(f) Do any definitions of terrorism used in the market require there to have been actual physical damage? If so, please explain what particular type of damage is required.

There is no need for actual physical harm in market definitions of terrorism. As a general rule, the exclusion refers to all types of damage.

(g) Upon whom does the burden of proving that any loss was caused by an act of terrorism fall?

In general, policies state that, unless the insured can prove otherwise, it is presumed that incidents occurring in the place and at the time of occurrences set out in the clauses are presumed to be a consequence of these occurrences. However, it is worth noting a tendency in recent case law to nullify so-called “abusive clauses in insurance contracts” (see the work of Stiglitz, Ruben SED. Abeledo Perrot, Buenos Aires, 1994), among which this presumption established against the insured might fall.

(h) Do the rules of causation in relation to terrorism vary? In particular, does a terrorism exclusion operate when the proximate cause of the damage is the terrorism or is the exclusion more strict, for example, does the loss have to be caused “solely and directly” by terrorism?

As previously indicated, usual market contractual clauses state that, unless the insured proves to the contrary, it is presumed that incidents occurring in the place and at the time of occurrences set out in the clauses are presumed to be a consequence of these occurrences.

It may be concluded from this that “the place” and “the time” are determining factors in the causal relationship between the terrorist act and the incident. As a result, the insurer does not need to prove this presumed causal link.

(i) Describe, if any, the importance attributed to: the identity/identification of the perpetrators of the acts of terrorism; their identification/association with known terrorist groups; the motive attributed to the act of terrorism (if it must be of a political, religious or ideological nature); the modus operandi used to carry out an act of terrorism; and/or the target of the physical act - that is to say those who suffer a loss directly and/or those intended to be influenced by the terrorist act (e.g. a government).

In standard market policy wordings, no importance is attributed to the identity/identification of the perpetrators, but importance has been given to whether or not the perpetrators can be said to belong to any kind of organisation.

The first case makes the point that the fundamental difference between an individual violent act which is covered by the insurance policy, and a violent act of terrorism which is excluded, is in the aim of the action, as there is no difference between the violent act itself.

The second case places emphasis on the aim of the act, the organisation of those perpetrating the act and the characteristics of the execution of the act. This case involved the theft and bombing of a car when the car door was opened. The point was made that if only the destruction of the car had been intended, rather than the putting of people’s lives in danger, then this could have been done by other means. Instead, the perpetrators left the car planted with a bomb in a densely populated area, which is evidence of an aim to create indiscriminate destruction, an act of collective damage, alarm and terror. The case also noted that the fact that the perpetrators used arms of many different kinds indicated subversive behaviour.

In the third case, it was held that the explosion of a bomb in the gents’ toilets of a golf club on the anniversary of the death of a public national figure, in circumstances where other bombs had exploded in other public places at more or less the same time, was an act of terrorism.

(j) To define or prove the type of terrorism, is there a need for any governmental, judicial or other certification or declaration?

The contractual clauses approved by the Control Body (Superintendence of Insurance of the Nation) do not lay down the need for any statement from any governmental or judicial body to confirm whether or not the incident constitutes an act of terrorism. There is no uniform concept in the body of case law on what “terrorism” is. On the other hand, and in accordance with our system of government, any decision of an administrative organ of the State which classifies an act as a “terrorist” act can be judicially reviewed if there is sufficient evidence and conviction against it.

(k) Is there any specific reference, condition or known problem in relation to terrorist acts which include biological, chemical, nuclear or any other contamination?

In standard Argentinian market clauses, there is no specific reference, condition or problem linking or relating terrorist acts with the method or instruments which are used to carry out those acts, which could be explosives, biological, chemical or nuclear weapons.

(l) To the extent that risks of terrorism are covered, do policies use aggregated limits to limit the insurance or reinsurance exposure and to oblige insureds and reinsureds to bear retentions of any kind?

There is no specific cover for terrorism risks in the Argentinian insurance market. However, it is likely that in the branch where this type of cover could operate, such as public liability, a low and selective cover currently exists, with significant exemptions and obligatory retentions.

2. TERRORISM AND GOVERNMENT INTERVENTION

(a) Do terrorism restrictions and exclusions exist in insurance covers under your national legislation? If so, describe them and their application.

Our legislation does not impose any restrictions on terrorism exclusion clauses in insurance covers. However, as insurance law only refers to damage caused by acts of civil or international war, or by riot or public uprising, the only requirement established by case law is “the reasonableness” of the exclusion, and the requirement that the exclusion does not denaturalise the aim of the insurance and the cover of the principal risk contemplated in the contract.

(b) Does the Government provide any scheme whereby terrorism cover is made available to insureds by the Government itself? If so, please outline the date of introduction of the scheme, the nature of the scheme including any limits, deductibles and so forth, its original purpose, its success and funding arrangements.

In Argentina there is no insurance or terrorism cover offered by the government. However, the government has established by law, or executive decree, different subsidies and compensation schemes in some cases of terrorism (for example, in relation to the so-called “State terrorism”, or for victims of the attack on the AMIA (Argentine Israelite Mutual Association building in Buenos Aires), among other cases).

(c) Does the Government provide any scheme whereby terrorism cover is made available to insurers by the Government itself? If so, please outline the date of the introduction of the scheme, the nature of the scheme including any limits, deductibles and so forth, its original purpose, its success and funding arrangements.

There is no governmental entity or organ which provides reinsurance cover to insurers and, therefore, none which provides terrorism cover either.

3. INTERNATIONAL CROSS-BORDER AGREEMENTS

(a) Can you identify any international or cross-border scheme or initiative whereby insurance or relief from the financial consequences of acts of terrorism are guaranteed or supported for specific sectors, e.g. aviation, shipping?

(b) Are you aware of any international or cross-border initiative or scheme which has been devised or developed since September 11 to protect insureds, insurers or reinsurers against exposure to terrorist activities?

We are not aware of any international or cross-border agreement entered into by Argentina, with the exception of its obligations as a member of the UN and of the OEA (Organisation of American States).

4. JUDICIAL DECISIONS AND OTHER RESOLUTIONS

Are there any judicial decisions or other resolutions in your country in which the cover of an insurance/reinsurance policy in respect of an act of terrorism has been considered?

In our system of government and in the current development of case law, judges do not have the authority to impose on the executive or legislative powers the implementation of damage cover for acts of terrorism.

As far as the existence of administrative resolutions is concerned, there is no record that the creation of a special insurance in relation to acts of terrorism has ever specifically been considered.

AUSTRALIA²

1. MEANING OF TERRORISM

(a) Is there any general definition of “terrorism”, “terrorist activity” or any related term in the general law within your jurisdiction?

Prior to the enactment of the Terrorism Insurance Act 2003 (Cth) (*TIA*), (and also the Terrorism Insurance Regulations 2003 (Cth) (*the Regulations*)), made under it) there was no specific legal definition, of terrorism or a terrorist activity. The general position so far as insurance contracts is concerned is that the meaning of words such as "terrorist", "terrorism", "terrorist act" or "terrorist activity", like words such as "war", "warlike action" or "armed conflict" must be ascertained according to the normal principles of construction relating to commercial agreements. That requires a court to construe such terms according to their plain meaning in light of the context in which they are used in a particular agreement, and the commercial context of the agreement itself. The result may be as in other common law jurisdictions, that as a matter of construction of insurance contracts the boundaries between war, terrorism and malicious damage are blurred. (See for example in the context of September 11, *If P & C Insurance v Silversea* [2004] EWCA Civ 76). This blurring may be exacerbated where as is often the case the language used in many exclusion clauses covering war, terrorism and malicious damage goes well beyond simple references to each of these three concepts (see further at 2L below).

However, the TIA (in force since June 2003) specifically defines a "terrorist act". Whilst the legal significance of that definition is strictly speaking confined to the purposes of the TIA, given the background to that legislation, its operation, and the commercial importance of the scheme of government backed terrorism cover that it provides, the TIA definition can be expected to have a major impact on the commercial context in which "eligible contracts of insurance" and contracts of insurance more generally are negotiated, and construed.

A terrorist act is defined in the TIA section 5. There are 3 main requirements. The first is intention. Section 5(1)(b) requires that the perpetrator of the act intends to advance a political, religious or ideological cause. Section 5(1)(c) requires a further intention on the part of the perpetrator to:

- (i) [coerce], or [influence] by intimidation, the Government of the Commonwealth or a State, or Territory, or of part of a State or Territory or a Foreign Country; or
- (ii) [intimidate] the public or a section of the public.

The second requirement is set out at section 5(2) and requires that the act be one that:

- (a) causes serious harm that is physical harm to a person; or
- (b) causes serious damage to property; or
- (c) causes a person's death; or
- (d) endangers a person's life, other than the life of the person taking the action; or
- (e) creates a serious risk to the health or safety of the public or a section of the public; or
- (f) seriously interferes with, seriously disrupts or destroys an electronic system including but not limited to:
 - (i) an information system; or
 - (ii) a telecommunications system; or
 - (iii) a financial system; or
 - (iv) a system used for the delivery of essential government services; or
 - (v) a system used for, or by, an essential public utility; or
 - (vi) a system used for, or by, a transport system.

Finally, an act will not be a terrorist act under section 5(3) if it:

- (a) is advocacy, protest, dissent, or industrial action; and
- (b) is not intended,
 - (i) to cause serious harm that is physical harm to a person; or
 - (ii) to cause a person's death; or

² Oscar Shub. The assistance of Robert Carey and Michael Pennell is acknowledged with grateful thanks

- (iii) to endanger the life of a person, other than the person taking the action; or
- (iv) to create a serious risk to the health or safety of the public or a section of the public.

(b) If there is a definition, for what legal purposes is the definition relevant?

Strictly speaking the definition of a terrorist act set out at section 5 of the TIA is only relevant for the purposes of the Act. A fuller description of the Act is set out below. For present purposes it should be noted that the nature of the scheme is such that we would expect that the definition at section 5 will begin to inform the drafting of policies seeking either to exclude terrorism risks, or for that matter to cover them. There is some evidence that this is beginning to happen. There are a number of policies available in the market which purport to exclude terrorism, defining it using similar concepts, most importantly the political, religious or ideological motives of the perpetrator as well as the character and physical consequences of the act, for example that used by the National Market Association in its form NMA2930c terrorism exclusion (discussed at section 2D below). The definition in TIA section 5 was itself based upon definitions of terrorism developed and used in the market following the attacks on September 11, in particular those used by the major international reinsurers immediately prior to the enactment of the TIA.

2. TERRORISM AND POLICY WORDINGS

(a) To what extent do insurance and reinsurance policies written in your country exclude the liability of insurers and reinsurers for war risks? If so, is there any distinction drawn between commercial and consumer contracts. Please answer this question on a class/sector by class/sector basis.

So far as consumer contracts are concerned, war-risks are almost always excluded. So far as commercial insurance is concerned the usual practice is to exclude them. However war-risk cover for large commercial risks is available to a limited extent in the Australian market.

(b) To what extent do insurance and reinsurance policies written in your country exclude the liability of insurers and reinsurers for terrorism risks? If so, is there any distinction drawn between commercial and consumer contracts. Please answer this question on a class/sector by class/sector basis.

So far as consumer contracts are concerned terrorism risks are almost always excluded. So far as commercial contracts are concerned, this is also generally the case. However a write back is generally available for domestic policies usually with a maximum limit of cover of \$10 million. Most significantly, so far as "eligible contracts of insurance" under the TIA are concerned, terrorism must be excluded for the insured to obtain the benefit of the Act and for the insurer to obtain the benefit of the reinsurance cover provided by ARPC (see sections 3A ad 3B below).

(c) To what extent do war risks or exclusions and terrorism risks or exclusions or those for other acts of political or other violence such as malicious damage overlap?

The language used in exclusion clauses relating to war, terrorism and malicious damage can often overlap (see section 1A above). It is important to note that to the extent that a terrorist act in Australia constitutes an "act of war", the Treasurer is prohibited under TIA section 6(2) from declaring it a terrorist act under section 6(1) (see sections 2K and 3C below). This obviously raises some difficult issues especially in the current climate, where the concept of "war" is changing. However an act of war would probably still require an act of state. The difficulty may therefore be if a terrorist act is committed in Australia by a group with very close connections to a state, for example a group such as Hamas. TIA section 6(1) requires the Treasurer to consult with the Attorney-General before declaring a terrorist act. The TIA seems to envisage that the Attorney-General would decide what legal criteria to adopt in determining, on the basis of the available information including information from the security services, whether a particular incident amounted to an act of war, and would advise the Treasurer accordingly. This area involves some degree of uncertainty in Australia as it does in other common law jurisdictions. Even if a terrorist act was not an act of war for the purposes of TIA section 6(2) where a war exclusion was drafted broadly it might still apply to losses arising from that act. It would then be necessary to consider the language used in the particular exclusion clause to determine, taking a broad view, whether it could also be characterised as a terrorism exclusion for the purposes of TIA section 8(2) (see 2K below).

The boundaries between malicious damage and terrorism are equally difficult to pinpoint with accuracy. For example, it is not entirely clear when religiously or racially motivated violence and/or destruction of property might amount to a terrorist act. It could have been argued that the recent violence in southern Sydney fell within the definition of a terrorist act or series of such acts under TIA section 5 (though there was no declaration under section 6(1)). However, so far as malicious damage is concerned there is no equivalent to section 6(2). The Treasurer would not be prevented from declaring an act to be a terrorist act under section 6(1) simply because it could also be categorised as a riot or as malicious damage.

(d) Are there any market definitions of terrorism in use for insurance or reinsurance contracts? Please answer this question on a class/sector by class/sector basis. If these have been introduced in response to recent developments, how do these differ from previous provisions?

Market definitions based upon that adopted in the TIA are becoming more common (see section 1B above), for example form NMA 2930c defines an "act of terrorism", in similar terms to TIA section 5, as including:

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 government(s) de jure or de facto, and which:

- (i) involves violence against one or more persons; or*
- (ii) involves damage to property; or*
- (iii) endangers life other than that of the person committing the action; or*
- (iv) creates a risk to health or safety of the public or a section of the public; or*
- (v) is designed to interfere with or to disrupt an electronic system.*

Further, the TIA definition of a terrorist act is the basis for cover under all reinsurance provided by the ARPC (see 3C below).

(e) If there are policy restrictions on or exclusions of terrorism cover, when were these first introduced and have they been changed in light of recent events?

Terrorism exclusions such as NMA 2930c have become increasingly common since September 11. This process commenced during the December 2001 renewal season.

(f) More particularly do any market definitions of terrorism require actual physical damage to be sustained and if so of any particular kind?

The definition of terrorist act under TIA Section 5 can extend to acts which do not result in physical harm or damage to any person but the requirements of sections 5(2)(d), (e) or (f) and 5(3) (see 1A above) must still be met. Furthermore under TIA section 6(3), threats may constitute a terrorist act and be declared under section 6(1) (see 2J below). However under section 6(3) a threat could only be the basis for a declaration if the Treasurer determined that the threat resulted in economic loss to any person. Furthermore, given that under sections 7(1)(a) and (b)(i) an insurance contract is only an eligible insurance contract if it covers a loss involving eligible property (see 3A below), a threat would only be relevant where:

- there was business interruption and consequential loss arising from an inability to use eligible property; or
- less likely, a liability of the insured that arose because of the threat.

Further, one should keep in mind that the TIA does not alter normal policy terms and conditions providing cover. It simply operates to render terrorism exclusions inoperable in certain defined circumstances. Generally, business interruption policies available in the Australian market require some form of physical damage, either to property owned or used by the insured or property of a supplier, before they provide cover.

(g) Upon whom does the burden of proving any loss was caused by an act of terrorism fall?

The normal rules relating to proof apply subject to TIA section 6 (explained at section 2J below).

(h) Are rules of causation varied in relation to terrorism? In particular, does a terrorism exclusion operate when the loss is approximately caused by terrorism or is the exclusion narrower, eg, the loss has to be solely and directly caused by terrorism?

The normal rules relating to causation and in particular proximate cause apply subject to TIA section 6 (explained at section 2J below).

(i) Describe what, if any, significance is attributed to: the identity/identification of the perpetrators, their identification / association with recognised terrorist groups; the motive attributed to any act of terrorism (and whether this must be political, religious or ideological in nature); the modus operandi employed in perpetrating any act of terrorism and/or the target of the physical act, ie those directly suffering loss and/or those (eg government) intended to be influenced?

See the explanation of TIA section 5, at section 1A above.

(j) To satisfy any definition or test of terrorism is there any dependence upon any government, judicial or other form of certification or declaration of any kind?

The definition of a terrorist act is set out at TIA section 5 (see section 1A above). Whilst that definition is independent of a ministerial declaration, the scheme under the Act (in particular under section 8(1) – see 2K below) requires the Treasurer, after consultation with the Attorney-General to declare under section 6(1) that a terrorist act has happened in Australia (or that two or more related terrorist acts have happened in Australia) where he is satisfied that one has occurred. Under section 6(2) a terrorist act cannot be declared if the Treasurer is satisfied that it is an act of war, nor under section 6(3) can a threat of action be declared unless the Treasurer is satisfied that the threat resulted in economic loss to a person (see 2F above). Once a declaration is made it cannot be revoked. The power under section 6(1) to declare a terrorist incident is not discretionary. If the Treasurer is satisfied that a terrorist act as defined under section 5 has occurred, he must publish a declared terrorist incident in the Government Gazette.

(k) Is there any specific reference provision or known problem relating to acts involving biological, chemical, nuclear or other forms of contamination?

The key operative provision of the TIA so far as direct policy holders are concerned is section 8(1). (See further 3A below). This section provides that a "terrorism exclusion" in an "eligible insurance contract" has no effect in relation to a loss or liability to the extent to which the loss or liability is an "eligible terrorism loss". However, section 3 provides that an eligible terrorism loss means a loss or liability arising from a declared terrorist incident, but does not include a loss or liability arising from the hazardous properties (including radioactive, toxic or explosive properties) of nuclear fuel, nuclear material or nuclear waste. The result is that losses arising from terrorist incidents involving biological or chemical contamination would fall within the ambit of the Act. However, losses arising from terrorist incidents involving the detonation of a nuclear device or contamination with nuclear material would fall outside of the ambit of the Act. Less clear is the extent to which an exclusion clause relating to nuclear, biological or chemical contamination generally would be dealt with under the Act if relied upon to avoid liability for an eligible terrorism loss. Any particular exclusion clause would need to be analysed in order to determine whether or not it fell within the ambit of section 8(2) which defines a terrorism exclusion as follows:

... Terrorism Exclusion means an exclusion or exception (however described) for:

- (a) acts that are described using the word "terrorism" or "terrorist" or words of similar effect; or*
- (b) other acts (however described) that are substantially similar to terrorist acts as defined in section 5.*

(l) To the extent that terrorism risks are covered do policies use aggregation provisions to limit insurance, reinsurance exposure and oblige insured/reinsured's to bear retention of any kind?

We are not specifically aware of aggregation provisions being used in this way. However, for the purposes of TIA section 8(2), it is generally accepted that an "exception" would include a sub-limit in relation to terrorism losses such that section 8(1) would render the sub-limit inoperable. Whilst the Act does not specifically refer to aggregation provisions, it is conceivable that such a provision in an eligible insurance contract covering an eligible terrorism loss could fall within the ambit of a terrorism "exception" for the purposes of section 8(2) if it acted like a sub-limit. This is more likely to be the case in a situation in which terrorism losses were aggregated under the policy in a way that was

both different from other losses and disadvantageous to the insured. However, this would depend upon the drafting of the particular aggregation provision in question.

3. TERRORISM AND GOVERNMENT INTERVENTION

(a) Does national legislation impose any restrictions on terrorism exclusions in insurance policies? If so, describe them and their application.

TIA section 8(1) provides that a terrorism exclusion in an eligible insurance contract has no effect in relation to a loss or liability to the extent to which the loss or liability is an eligible terrorism loss. Section 3 provides that an eligible terrorism loss means a loss or liability arising from a declared terrorist incident but does not include losses arising from nuclear risks (see the discussion at K above). The definitions of "terrorism exclusion" and "eligible terrorism loss" are explained at section K above. "Eligible insurance contracts" are defined in sub-section 7(1) as contracts that provide insurance cover in relation to:

- loss of, or damage to "eligible property" that is owned by the insured;
- business interruption and consequential loss arising from loss of, or damage to or inability to use eligible property that is owned or occupied by the insured; and
- liability of the insured that arises out of the insured being the owner or occupier of eligible property.

Under section 3, "eligible property" means property that is located in Australia and is one of the following:

- (a) buildings (including fixtures) or other structures or works on, in or under land;
- (b) tangible property that is located in, on, or on, properties to which subparagraph (a) applies; or
- (c) any other property prescribed by the Regulations.

Clause 4 of the Regulations is the only relevant regulation relating to eligible property and prescribes tangible property that is on, in or under the seabed (which extends for a distance of 12 nautical miles from the coast).

TIA section 7(2) excludes from the definition of eligible insurance contracts:

- (a) contracts of reinsurance; and
- (b) insurance contracts prescribed by the Regulations.

The Regulations prescribe a large number of categories of insurance contracts which are thereby excluded from the definition of eligible insurance contracts (and thus the operation of the Act). They include a large number of contracts that do not appear to be subject to the application of the TIA in the first place. The prescribed categories of insurance contracts include the following:

- insurance of domestic or residential property;
- insurance contracts underwritten by or providing cover to the Commonwealth;
- State or Territory insurance (which is also excluded under TIA section 7(3));
- insurance of County Councils;
- professional indemnity insurance;
- mortgage insurance;
- life insurance and superannuation policies;
- motor vehicle insurance;
- marine insurance;
- insurance of goods in transit;
- workers' compensation;
- aviation insurance; and
- insurance covering nuclear risks.

Further, Discretionary Mutual Funds that provide "insurance like" products do not fall under the scheme provided by the TIA on the basis that the products they offer are not properly characterised as insurance.

(b) Does the government provide any scheme whereby terrorism cover is made available to direct policy holders by the government itself? If so, please outline the date of introduction of the scheme, the nature of the scheme including any limits, deductibles and so forth, its original purpose, its success and funding arrangements.

No. The scheme under the TIA operates to provide cover to certain direct policy holders indirectly by rendering terrorism exclusion clauses or exceptions in eligible contracts of insurance inoperable in the event of a declared terrorist incident but only to the extent they exclude the obligation to pay eligible terrorism losses. However, to protect direct insurers assuming risks under eligible contracts of insurance they are entitled to participate in the government backed reinsurance scheme provided by the Australian Reinsurance Pool Corporation (**ARPC**) established under the TIA, and introduced simultaneously with the TIA on 1 July 2003.

(c) Does the government provide any scheme whereby terrorism reinsurance is made available to insurers by the government itself? If so, please outline the date of introduction of the scheme, the nature of the scheme including any limits, deductibles and so forth, its original purpose, and its success and funding arrangements.

A Government backed scheme of reinsurance is provided for under TIA Part 3 which establishes the ARPC. That scheme has been in place since July 2003. A direct insurer can elect whether to participate in this scheme. In the event of a declared terrorist incident reinsurance provided by ARPC will reimburse the insurer its claims settlement costs and meet the costs of eligible terrorism losses less the insurer's retention and less what is known as a reduction percentage. ARPC is backed by a bank line of credit to the value of \$1 billion (underwritten by the Commonwealth) and a Commonwealth Government guarantee to the value of \$9 billion. ARPC is funded by reinsurance premiums paid by participating insurers underwriting eligible contracts of insurance. Between July 2003 and October 2003 coverage under the ARPC's scheme was free. Since October 2003 a reinsurance premium structure has been in place. This is based on three tiers and is calculated on the basis of underlying premium as follows:

Tier A – 12%
Tier B – 4%
Tier C – 2%.

Tiers A (property in most capital city CBDs) and B (property in other urban areas) are designated by postcodes. Property in all remaining areas falls within Tier C.

The two other key elements to the reinsurance scheme are the insurer's retention and the reduction percentage. The insurer's retention will be the amount which each insurer will need to contribute to eligible terrorism losses and which will therefore remain on its balance sheet. This consists of two elements:

- an annual retention covering all terrorism losses in any year which is the lesser of \$1 million or 4% of the insurer's fire/ISR premium (as would be reported to the Australian Prudential Regulation Authority (**APRA**) by Australian authorised insurers); and
- if in relation to a declared terrorist incident, the total retentions of all insurers exceed \$10 million, there is a pro rata reduction in each insurer's retention. (This assumes that each participating insurer would have exceeded its annual retention).

The reduction percentage is available only to insurers reinsured with ARPC and provides a mechanism by which the Commonwealth can manage its exposure. Under TIA section 6(6) when the Treasurer declares a terrorist incident he may also declare a reduction percentage. He is required to specify a reduction percentage if he considers that the total amounts that would be paid or payable by the Commonwealth under its guarantee in relation to the relevant declared terrorist incident would be more than \$10 billion (section 6(7)). If a reduction percentage is declared then the amount payable by a direct insurer in respect of a declared terrorist incident is reduced by the reduction percentage. In other words, the reduction percentage is borne by the insured. The Treasurer may subsequently reduce the reduction percentage but may not increase it.

4. INTERNATIONAL OR CROSS-BORDER ARRANGEMENTS

(a) Can you identify any international or cross-border schemes or initiatives whereby insurance or relief from financial consequences of acts of terrorism is guaranteed or supported for particular sectors, engineer, aviation, shipping?

We are not aware of any such initiatives.

(b) Are you aware of any international or cross-border initiatives or schemes which have been devised or developed since September 11 to protect insureds, insurers or reinsurers against exposure to terrorist activities?

We are not aware of any such initiatives.

(c) Have there been any court decisions or other rulings in your country in which the coverage of an insurance or reinsurance policy in respect of any act terrorism has been considered?

There have been no declarations under TIA section 6. There are certainly no decided cases under the Act.

BELGIUM

1. MEANING OF TERRORISM

(a) Is there any general definition of “terrorism”, “terrorist activity” or any related term in the general law within your jurisdiction?

The Act of 19 December 2003 has introduced the definition of terrorism in art. 137 of the Criminal Code (Code penal) as follows :

Art. 137 “Constitue une infraction terroriste, l'infraction prévue aux §§ 2 et 3 qui, de par sa nature ou son contexte, peut porter gravement atteinte à un pays ou à une organisation internationale et est commise intentionnellement dans le but d'intimider gravement une population ou de contraindre indûment des pouvoirs publics ou une organisation internationale à accomplir ou à s'abstenir d'accomplir un acte, ou de gravement déstabiliser ou détruire les structures fondamentales politiques, constitutionnelles, économiques ou sociales d'un pays ou d'une organisation internationale.

§ 2. Constitue, aux conditions prévues au § 1er, une infraction terroriste :

1° l'homicide volontaire ou les coups et blessures volontaires visés aux articles 393 à 404, 405bis, 405ter dans la mesure où il renvoie aux articles précités, 409, § 1er, alinéa 1er, et §§ 2 à 5, 410 dans la mesure où il renvoie aux articles précités, 417ter et 417quater;

2° la prise d'otage visée à l'article 347bis;

3° l'enlèvement visé aux articles 428 à 430, et 434 à 437;

4° la destruction ou la dégradation massives visées aux articles 521, alinéas 1er et 3, 522, 523, 525, 526, 550bis, § 3, 3°, a l'article 15 de la loi du 5 juin 1928 portant révision du Code disciplinaire et pénal pour la marine marchande et la pêche maritime, ainsi qu'à l'article 114, § 4, de la loi du 21 mars 1991 portant réforme de certaines entreprises publiques économiques, ayant pour effet de mettre en danger des vies humaines ou de produire des pertes économiques considérables;

5° la capture d'aéronef visée à l'article 30, § 1er, 2°, de la loi du 27 juin 1937 portant révision de la loi du 16 novembre 1919 relative à la réglementation de la navigation aérienne;

6° le fait de s'emparer par fraude, violence ou menaces envers le capitaine d'un navire, visé à l'article 33 de la loi du 5 juin 1928 portant révision du Code disciplinaire et pénal pour la marine marchande et la pêche maritime;

7° les infractions visées par l'arrêté royal du 23 septembre 1958 portant règlement général sur la fabrication, l'emmagasiner, la détention, le débit, le transport et l'emploi des produits explosifs, modifié par l'arrêté royal du 1er février 2000, et punies par les articles 5 à 7 de la loi du 28 mai 1956 relative aux substances et mélanges explosibles ou susceptibles de déflagrer et aux engins qui en sont chargés;

8° les infractions visées aux articles 510 à 513, 516 à 518, 520, 547 à 549, ainsi qu'à l'article 14 de la loi du 5 juin 1928 portant révision du Code disciplinaire et pénal pour la marine marchande et la pêche maritime, ayant pour effet de mettre en danger des vies humaines;

9° les infractions visées par la loi du 3 janvier 1933 relative à la fabrication, au commerce et au port des armes et au commerce des munitions;

10° les infractions visées à l'article 2, alinéa premier, 2°, de la loi du 10 juillet 1978 portant approbation de la Convention sur l'interdiction de la mise au point, de la fabrication et du stockage des armes bactériologiques (biologiques) ou à toxines et sur leur destruction, faite à Londres, Moscou et Washington le 10 avril 1972.

§ 3. Constitue également, aux conditions prévues au § 1er, une infraction terroriste :

1° la destruction ou la dégradation massives, ou la provocation d'une inondation d'une infrastructure, d'un système de transport, d'une propriété publique ou privée, ayant pour effet de mettre en danger des vies humaines ou de produire des pertes économiques considérables, autres que celles visées au § 2;

2° la capture d'autres moyens de transport que ceux visés aux 5° et 6° du § 2;

3° la fabrication, la possession, l'acquisition, le transport ou la fourniture d'armes nucléaires ou chimiques, l'utilisation d'armes nucléaires, biologiques ou chimiques, ainsi que la recherche et le développement d'armes chimiques;

4° la libération de substances dangereuses ayant pour effet de mettre en danger des vies humaines;

5° la perturbation ou l'interruption de l'approvisionnement en eau, en électricité ou en toute autre ressource naturelle fondamentale ayant pour effet de mettre en danger des vies humaines;

6° la menace de réaliser l'une des infractions énumérées au § 2 ou au présent paragraphe.

(b) If there is a definition, for what legal purposes is the definition relevant?

The purpose of this definition is criminal prosecution. However in most other acts the concept of terrorism is not defined. E.g. the Act of January 11th 1993 to prevent the use of the financial system for money laundering and financing of terrorism (Loi relative à la prévention de l'utilisation du système financier aux fins du blanchiment de capitaux et du financement du terrorisme) does not contain a definition of terrorism. Consequently by default (for lack of a specific definition in a particular field), the definition of the criminal code will apply.

Only the Act of November 30th 1998 instituting the intelligence and security services (Loi organique des services de renseignement et de sécurité) defines in its art. 8 the concept of terrorism as follows:

Art. 8. Pour l'application de l'article 7, on entend par :

1° " activité qui menace ou pourrait menacer " : toute activité, individuelle ou collective, déployée à l'intérieur du pays ou à partir de l'étranger, qui peut avoir un rapport avec l'espionnage, l'ingérence, le terrorisme, l'extrémisme, la prolifération, les organisations sectaires nuisibles, les organisations criminelles; en ce compris la diffusion de propagande, l'encouragement ou le soutien direct ou indirect, notamment par la fourniture de moyens financiers, techniques ou logistiques, la livraison d'informations sur des objectifs potentiels, le développement des structures et du potentiel d'action et la réalisation des buts poursuivis.

Pour l'application de l'alinéa précédent, on entend par :

a) espionnage : le recueil ou la livraison d'informations non accessibles au public, et le fait d'entretenir des intelligences de nature à les préparer ou à les faciliter;

b) terrorisme : le recours à la violence à l'encontre de personnes ou d'intérêts matériels, pour des motifs idéologiques ou politiques, dans le but d'atteindre ses objectifs par la terreur, l'intimidation ou les menaces;

c) extrémisme : les conceptions ou les visées racistes, xénophobes, anarchistes, nationalistes, autoritaires ou totalitaires, qu'elles soient à caractère politique, idéologique, confessionnel ou philosophique, contraires, en théorie ou en pratique, aux principes de la démocratie ou des droits de l'homme, au bon fonctionnement des institutions démocratiques ou aux autres fondements de l'Etat de droit;

d) prolifération : le trafic ou les transactions relatifs aux matériaux, produits, biens ou know-how pouvant contribuer à la production ou au développement de systèmes d'armement non conventionnels ou très avancés. Sont notamment visés dans ce cadre le développement de programmes d'armement nucléaire, chimique et biologique, les systèmes de transmission qui s'y rapportent, ainsi que les personnes, structures ou pays qui y sont impliqués;

e) organisation sectaire nuisible : tout groupement à vocation philosophique ou religieuse, ou se prétendant tel, qui, dans son organisation ou sa pratique, se livre à des activités illégales dommageables, nuit aux individus ou à la société ou porte atteinte à la dignité humaine;

f) organisation criminelle : toute association structurée de plus de deux personnes, établie dans le temps, en vue de commettre de façon concertée des crimes et délits, pour obtenir, directement ou indirectement, des avantages patrimoniaux, en utilisant l'intimidation, la menace, la violence, des manœuvres frauduleuses ou la corruption ou en recourant à des structures commerciales ou autres pour dissimuler ou faciliter la réalisation des infractions. Sont visées dans ce cadre les formes et structures des organisations criminelles qui se rapportent intrinsèquement aux activités visées à l'article 8, 1°, a) à e) et g), ou qui peuvent avoir des conséquences déstabilisantes sur le plan politique ou socio-économique;

g) ingérence : la tentative d'influencer des processus décisionnels par des moyens illicites, trompeurs ou clandestins;

2° " la sûreté intérieure de l'Etat et la pérennité de l'ordre démocratique et constitutionnel " :

a) la sécurité des institutions de l'Etat et la sauvegarde de la continuité du fonctionnement régulier de l'Etat de droit, des institutions démocratiques, des principes élémentaires propres à tout Etat de droit, ainsi que des droits de l'homme et des libertés fondamentales;

b) la sécurité et la sauvegarde physique et morale des personnes et la sécurité et la sauvegarde des biens;

3° " la sûreté extérieure de l'Etat et les relations internationales " : la sauvegarde de l'intégrité du territoire national, de la souveraineté et de l'indépendance de l'Etat, des intérêts des pays avec lesquels la Belgique poursuit des objectifs communs, ainsi que des relations internationales et autres que la Belgique entretient avec des Etats étrangers et des institutions internationales ou supranationales;

4° " le potentiel scientifique ou économique " : la sauvegarde des éléments essentiels du potentiel scientifique ou économique;

5° " protéger des personnes " : assurer la protection de la vie et de l'intégrité physique des personnes suivantes désignées par le Ministre de l'Intérieur :

a) les chefs d'Etat étrangers;

b) les chefs de Gouvernement étrangers;

c) les membres de la famille des chefs d'Etat et de Gouvernement étrangers;

- d) les membres des gouvernements belges et étrangers;*
- e) certaines personnalités qui font l'objet de menaces résultant d'activités définies à l'article 8, 1°.*

Also Belgium has signed and ratified the international conventions that aim to suppress terrorism and that directly or indirectly define the concept, such as :

1. U.N. Conventions

- Convention on the Prevention and Punishment of Crimes against internationally Protected Persons, including Diplomatic Agents, adopted by the General Assembly of the United Nations in New York on 14 December 1973 (Act of 27 April 2004).
- International Convention against the Taking of Hostages, adopted by the General Assembly of the United Nations in New York on 17 December 1979 (Act of 3 March 1999)
- International Convention for the Suppression of Terrorist Bombings, adopted by the General Assembly of the United Nations on 15 December 1997 (Act of 26 April 2005)
- International Convention for the Suppression of the Financing of Terrorism, adopted by the General Assembly of the United Nations on 9 December 1999 (Act of 30 March 2004)

2. Other Multilateral Conventions

- Convention on Offences and Certain Other Acts Committed on Board Aircraft, signed at Tokyo on 14 September 1963 (Act of 15 July 1970)
- Convention for the Suppression of Unlawful Seizure of Aircraft, signed at the Hague on 16 December 1970 (Act of 2 June 1973)
- Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, signed at Montreal on 23 September 1971 (Act of 20 July 1976).
- Convention on the Physical Protection of Nuclear Material, signed at Vienna on 3 March 1980 (Act of 24 July 1984)
- Protocol on the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, signed at Montreal on 24 February 1988 (Act of 25 March 1999)
- Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, done at Rome on 10 March 1988 (Act of 14 March 2005)
- Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms located on the Continental Shelf, done at Rome on 10 March 1988 (Act of 14 March 2005)
- Convention on the Marking of Plastic Explosives for the Purpose of Detection, signed at Montreal on 1 March 1991 (Adopted by Parliament on 12 January 2006, Act of ... ?)

3. Regional European Conventions

- European Convention on the Suppression of Terrorism, concluded at Strasbourg on 27 January 1977 and the Convention on the Application of the European Convention on the Suppression of Terrorism between the Member States of the European Communities, concluded at Dublin on 4 December 1979 (Act of 2 September 1985).

4. E.U. Legislation

For the purpose of Council Regulation (EC) No 2580/2001 of 27 December 2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism (Official Journal L 344, 28/12/2001 P. 0070 – 0075) the definition of "terrorist act" shall be the one contained in Article 1(3) of Common Position 2001/931/CFSP.

The Council Common Position of 27 December 2001 on the application of specific measures to combat terrorism (Official Journal L 344, 28/12/2001 P. 0093 – 0096) defines terrorism as follows :

Article 1

- 1. This Common Position applies in accordance with the provisions of the following Articles to persons, groups and entities involved in terrorist acts and listed in the Annex.*
- 2. For the purposes of this Common Position, "persons, groups and entities involved in terrorist acts" shall mean:*

- persons who commit, or attempt to commit, terrorist acts or who participate in, or facilitate, the commission of terrorist acts,
- groups and entities owned or controlled directly or indirectly by such persons; and persons, groups and entities acting on behalf of, or under the direction of, such persons, groups and entities, including funds derived or generated from property owned or controlled directly or indirectly by such persons and associated persons, groups and entities.

3. For the purposes of this Common Position, "terrorist act" shall mean one of the following intentional acts, which, given its nature or its context, may seriously damage a country or an international organisation, as defined as an offence under national law, where committed with the aim of:

- (i) seriously intimidating a population, or
- (ii) unduly compelling a Government or an international organisation to perform or abstain from performing any act, or
- (iii) seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or an international organisation:
 - (a) attacks upon a person's life which may cause death;
 - (b) attacks upon the physical integrity of a person;
 - (c) kidnapping or hostage taking;
 - (d) causing extensive destruction to a Government or public facility, a transport system, an infrastructure facility, including an information system, a fixed platform located on the continental shelf, a public place or private property, likely to endanger human life or result in major economic loss;
 - (e) seizure of aircraft, ships or other means of public or goods transport;
 - (f) manufacture, possession, acquisition, transport, supply or use of weapons, explosives or of nuclear, biological or chemical weapons, as well as research into, and development of, biological and chemical weapons;
 - (g) release of dangerous substances, or causing fires, explosions or floods the effect of which is to endanger human life;
 - (h) interfering with or disrupting the supply of water, power or any other fundamental natural resource, the effect of which is to endanger human life;
 - (i) threatening to commit any of the acts listed under (a) to (h);
 - (j) directing a terrorist group;
 - (k) participating in the activities of a terrorist group, including by supplying information or material resources, or by funding its activities in any way, with knowledge of the fact that such participation will contribute to the criminal activities of the group.

For the purposes of this paragraph, "terrorist group" shall mean a structured group of more than two persons, established over a period of time and acting in concert to commit terrorist acts.

"Structured group" means a group that is not randomly formed for the immediate commission of a terrorist act and that does not need to have formally defined roles for its members, continuity of its membership or a developed structure.

4. The list in the Annex shall be drawn up on the basis of precise information or material in the relevant file which indicates that a decision has been taken by a competent authority in respect of the persons, groups and entities concerned, irrespective of whether it concerns the instigation of investigations or prosecution for a terrorist act, an attempt to perpetrate, participate in or facilitate such an act based on serious and credible evidence or clues, or condemnation for such deeds. Persons, groups and entities identified by the Security Council of the United Nations as being related to terrorism and against whom it has ordered sanctions may be included in the list. For the purposes of this paragraph "competent authority" shall mean a judicial authority, or, where judicial authorities have no competence in the area covered by this paragraph, an equivalent competent authority in that area.

5. The Council shall work to ensure that names of natural or legal persons, groups or entities listed in the Annex have sufficient particulars appended to permit effective identification of specific human beings, legal persons, entities or bodies, thus facilitating the exculpation of those bearing the same or similar names.

6. The names of persons and entities on the list in the Annex shall be reviewed at regular intervals and at least once every six months to ensure that there are grounds for keeping them on the list.

The Royal Decrees governing the minimum conditions of the fire and other perils insurance cover of simple risks (Arrêté royal réglementant l'assurance contre l'incendie et d'autres périls, en ce qui concerne les risques simples),

February 1st 1988 as replaced by December 24th 1992), define terrorism in their Annex 1 as follows :

2. Par attentat, l'on entend toute forme d'émeutes, mouvements populaires, actes de terrorisme ou de sabotage, à savoir :

a) les émeutes : manifestation violente, même non concertée, d'un groupe de personnes qui révèle une agitation des esprits et se caractérise par du désordre ou des actes illégaux ainsi que par une lutte contre les organismes chargés du maintien de l'ordre public, sans qu'il soit cherché pour autant à renverser des pouvoirs publics établis;

b) le mouvement populaire : manifestation violente, même non concertée, d'un groupe de personnes qui, sans qu'il y ait révolte contre l'ordre établi, révèle cependant une agitation des esprits se caractérisant par du désordre ou des actes illégaux;

c) l'acte de terrorisme ou de sabotage : action organisée dans la clandestinité à des fins idéologiques, politiques ou sociales, exécutée individuellement ou en groupe et attentant à des personnes ou détruisant un bien :

- soit en vue d'impressionner le public et de créer un climat d'insécurité (terrorisme);
- soit en vue d'entraver la circulation ou le fonctionnement normal d'un service ou d'une entreprise (sabotage).

Following a wave of terrorist attacks in the beginning of the eighties by the CCC (Cellules Communistes Combattantes), the cover of terrorism was made compulsory in the fire and other perils insurance of simple risks (art. 4 Royal Decree 1 February 1988 and art. 3 Royal Decree 24 December 1992).

The notion "simple risks" refers to property, the insured value of which does not exceed EURO 743,680.00 indexed (equalling 1,181,956.00 on the basis of the ABEX (Association Belge des Experts) index of July 2005 (596)) or EURO 23,921,725.00 indexed (equalling EURO 38,019,595 on the basis of the ABEX index of July 2005 (596)) for some types of property such as office buildings, hotels, schools, churches, buildings for sports events, retirement homes, etc.,) as defined per art. 5 of the Royal Decree of December 24th 1992 executing the Act of June 25 on the Land Insurance Contract).

Special risks are all other properties.

In May 2006 a draft bill on the insurance cover of the terrorism peril was presented by the Minister of Economic Affairs to Parliament. In the definition of its scope of application, its art. 2 defines an act of terrorism as follows :

Article 2 – La présente loi est applicable à tous les risques belges tels que définis à l'article 2, § 6, 8° de la loi du 9 juillet 1975 relative au contrôle des entreprises d'assurances, dans la mesure où le contrat d'assurance couvre la réparation des dommages causés par un acte de terrorisme. Par acte de terrorisme, l'on entend « une action ou une menace d'action organisée dans la clandestinité à des fins idéologiques, politiques, ethniques ou religieuses, exécutée individuellement ou en groupe et attentant à des personnes ou détruisant partiellement ou totalement la valeur économique d'un bien matériel ou immatériel, soit en vue d'impressionner le public, de créer un climat d'insécurité ou de faire pression sur les autorités, soit en vue d'entraver la circulation et le fonctionnement normal d'un service ou d'une entreprise.

Par dérogation à l'alinéa précédent, la présente loi n'est pas applicable aux contrats d'assurance couvrant exclusivement les dommages causés par un acte de terrorisme, aux contrats d'assurance couvrant la responsabilité conformément à la loi du 22 juillet 1985 sur la responsabilité civile dans le domaine de l'énergie nucléaire, aux contrats d'assurance couvrant les dommages à une installation nucléaire telle que définie dans la loi du 22 juillet 1985 sur la responsabilité civile dans le domaine de l'énergie nucléaire, ni aux contrats d'assurance couvrant des corps de véhicules ferroviaires, des corps de véhicules aériens, des corps de véhicules maritimes, la responsabilité civile de véhicules aériens et ferroviaires et les risques liés à des véhicules maritimes.

Le Roi peut étendre ou limiter le champ d'application de la présente loi.

According to the explanatory note of the draft bill, this definition is inspired by :

- the Royal Decree of 24 December 1992 on the insurance of fire and other perils for simple risks
- a standard clause used by insurers on the Belgian market for industrial risks
- the OECD study on Terrorism Risk Insurance in OECD Countries (Policy Issues in Insurance n° 9, 2005)

- The conditions (clausuleblad) of the Dutch Reinsurance Company for Terrorism Losses (Nederlandse Herverzekeringsmaatschappij voor Terrorismeschaden)

Because of the broad terms of the definition and in order to safeguard the uniformity of the interpretation, a committee is instituted, that will determine whether a concrete event comes within the scope of the concept of terrorism (art. 6 draft bill). The committee's decision will be subject to appeal before the "Conseil d'Etat".

2. TERRORISM AND POLICY WORDINGS

(a) To what extent do insurance and reinsurance policies written in your country exclude the liability of insurers and reinsurers for war risks? If so, is any distinction drawn between commercial and consumer contracts. Please answer this question on a class/sector by class/sector basis.

Save an express contract clause to the contrary, the Land Insurance Contract Act 1992 (art. 9) excludes the risk of "war, similar events or civil war" from the cover as follows :

Sauf convention contraire, l'assureur ne répond pas des sinistres causés par la guerre ou par des faits de même nature et par la guerre civile . L'assureur doit faire preuve du fait qui l'exonère de sa garantie. Le Roi peut toutefois fixer des règles allégeant la charge de la preuve du fait qui exonère l'assureur de sa garantie.

The same provision is found in art. 19 of the the Insurance Act 1874 (applicable to transport insurance and reinsurance) for the "war and insurrection" risk :

L'assurance ne comprend ni les risques de guerre, ni les pertes ou dommages occasionnés par émeutes, sauf convention contraire

As opposed to the previous Royal Decree of 17 December 1992, the new Royal Decree of 14 November 2003 on Life Insurance no longer expressly refers to the (non) coverage of war risks. The "travaux préparatoires" (report to the King) refer to art. 9 of the Land Insurance Contract Act for this matter.

Also in marine insurance, by virtue of the law (i.e. save an express policy clause), the war risk is not covered (art. 201 and following of the Maritime Code). The Maritime Code stipulates In art. 201 2nd paragraph :

Dans le cas où les assureurs ont pris à leur charge les risques de guerre, ils répondent de tous les dommages et pertes qui arrivent aux choses assurées par hostilité, représailles, déclaration de guerre, blocus, arrêt par ordre de puissance, molestation de gouvernements quelconques reconnus ou non reconnus, et généralement de tous accidents et fortunes de guerre.

In art. 202 :

Dans le cas où l'assurance ne comprend pas les risques de guerre, le contrat est résilié lorsqu'un fait de guerre modifie les conditions du voyage. Toutefois si ce fait survient en mer, la résiliation du contrat n'a lieu que du moment où le navire sera ancré ou amarré au premier port qu'il atteindra.

In art. 203 :

Dans le cas de l'article précédent, les objets assurés sont présumés avoir péri par fortune de mer, jusqu'à preuve du contraire.

In art. 204 :

Les assureurs qui souscrivent les risques de guerre seuls sont, indépendamment de leurs obligations de ce chef, substitués, pour les risques ordinaires, aux assureurs francs de guerre, à partir du moment où le contrat, en ce qui concerne ces derniers, a été résilié conformément à l'article 202.

(b) To what extent do insurance and reinsurance policies written in your country exclude the liability of insurers and reinsurers for terrorism risks? If so, is any distinction drawn between commercial and consumer contracts? Please answer this question on a class/sector by class/sector basis.

Presently, the cover of terrorism risks is compulsory in workers' compensation for labour accidents (part of social security that is traditionally insured by the private sector in Belgium) (Act of 10 April 1971, Third party motor liability insurance (Act of 21 November 1989), Objective liability for fire and explosion in public premises (Act of 30 July 1979 and Royal Decrees of 2 February and 5 August 1991) and Fire and other perils for simple risks (Royal Decree 24 December 1992).

In other insurance classes, where party autonomy applies, the terrorism risk is generally excluded by an express provision.

The Assuralia (Belgian Professional Association of Insurance Enterprises) standard policies on Special (industrial) Risks) such as "fire" and "business interruption" and "all risks", exclude the loss or the increased loss that is directly or indirectly related to an act of terrorism or sabotage : e.g.

- All risks cover :

Are excluded the loss or damages or increased loss, that is directly or indirectly caused by or related with : 1. War or similar events, civil war, an act of terrorism or of sabotage

- Fire and business interruption :

Is excluded from the insurance cover and from the ensuing business interruption : [...] 4) loss or increased loss that is directly or indirectly related to one of the following cases : a) war or similar events, civil war, an act of terrorism or of sabotage

In transport insurance: On the Belgian market also English conditions are frequently used. We will only discuss the Belgian conditions.

In cargo insurance, the terrorism peril is usually covered.

In inland navigation the terrorism peril generally is not covered.

Marine hull in Belgium is normally insured according to foreign conditions. The terrorism peril is excluded by the general conditions (art. 11.2.5.2.) of the ABAM Cargo Insurance Policy of Antwerp (24 April 2004) (covering all transport modes). But the "strikes and riot risks" ABAM clause CE400 (27 May 2004) covers terrorism (art. 1.2). However the ABAM "Exclusion of Radioactive Contamination, Chemical, Biological, Bio-Chemical and Electromagnetic Weapons, and Exclusion of abandonment for radioactive goods" clause CE200 (27 May 2004) prevail over any clause covering the terrorism peril.

The ABAM "Exclusion of Cyber Attack" clause CE 001 (27 November 2003) on the other hand does not prevail over other policy clauses covering the terrorism peril.

In the CMR ABAM policy (28 February 1990) (covering contractual liability of the road carrier), art. 9.1.2.2. excludes the terrorism peril from the cover, allegedly because as a form of force majeure, terrorism amounts to a liability exoneration ground for the carrier under art. 17.2 CMR.

In reinsurance contracts, the "War and Civil War Exclusion Clause" NMA 464 (amended) applies as follows :

*Notwithstanding anything to the contrary contained herein this Agreement 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.
Notwithstanding the above it is agreed that the Strikes Riots Civil Commotion cover as per Belgian Law are not excluded from this Agreement.*

In the draft bill on the insurance cover of the terrorism peril, the terrorism peril is subject to compulsory insurance and reinsurance cover in the following classes of insurance (art. 10 § 2) (with per event/per annual limits) :

- i. Third party motor liability insurance
- ii. Property, simple Risks
- iii. Objective liability for fire and explosion in public premises (Act of 30 July 1979 and Royal Decrees of 2 February and 5 August 1991)
- iv. Workers' compensation for labour accidents
- v. Life insurance
- vi. Accident
- vii. Hospitalisation

(c) To what extent do war risks or exclusions and terrorism risks or exclusions or those for other acts of political or other violence such as malicious damage overlap?

The concept of war (and hence the exclusion from the cover) was interpreted extensively by the courts under art. 19 of the 1874 Insurance Act (cfr. infra). For lack of an express definition, it is accepted that the same broad meaning applies in art. 9 of the 1992 Land Insurance Contract Act.

However the “insurrection” from art. 19 Insurance Act 1874 is not to be found any more in art. 9 of the 1992 Land Insurance Contract Act. According to doctrine “insurrection” is not encompassed by the notion “similar events” in art. 9 Land Insurance Contract Act. Of course the parties to the insurance contract are free to exclude insurrection from the cover via an express clause.

Similarly for acts of terrorism the “travaux préparatoires” of the 1992 Land Insurance Contract Act argue that they do not come within the ambit of the notion “war and similar events” of art. 9. Hence acts of terrorism are in principle covered by virtue of the law. It was also argued that an act of terrorism in the context of a (civil) war is excluded from the cover. Indeed an act of terrorism may coincide with another exclusion ground (e.g. civil war, use of explosives, radio-active devices etc.).

However party autonomy allows the parties to the contract to exclude acts of terrorism from the cover via an express clause.

(See VAN SCHOU BROECK, C. , JOCQUE, G., DE GRAEVE, A., DE GRAEVE, M. en COUSY, H., “Overzicht van Rechtspraak, Wet op de Landverzekeringsovereenkomst (1992-2003), Tijdschrift voor Privaatrecht, 2003, pages 1850 and following, paragraphs 19.1 and following).

(d) Are there any market definitions of terrorism in use for insurance or reinsurance contracts? Please answer this question on class/sector by class/sector basis. If these have been introduced in response to recent developments how do these differ from previous provisions?

The Assuralia (Belgian Professional Association of Insurance Enterprises) standard policies on Special (industrial) Risks) such as “fire” and “business interruption” and “all risks” define an act of terrorism and sabotage as follows :

- A clandestinely organised action with ideological, political, economic or social goals, carried out individually or in group, that uses violence against persons or totally or partly destroys the economic value of goods :*
- *either in order to impress the public, to create a climate of unsafety or to exert pressure on the authorities (terrorism)*
 - *or in order to hinder the communication or the normal functioning of the services of an enterprise (sabotage).*

Definitions of terrorism were introduced in the reinsurance contracts during the renewal 2002 (after the 9/11 New York terrorist attacks). Before, there were no restrictions and hence no definitions with respect to terrorism in the reinsurance contracts. The definitions are to be found in the Swiss Re and Munich Re reinsurance contracts. They are used for all insurance classes.

E. g. a terrorism exclusion clause reads as follows :

Notwithstanding any provision to the contrary within this reinsurance or any endorsement thereto it is agreed that this reinsurance excludes loss, damage, cost or expense of whatsoever nature directly or indirectly caused by, resulting from 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.

For the purpose of this exclusion an act of terrorism means any act, including but not limited to the use of force or violence and/or the threat thereof, of any person or group(s) of persons, whether acting alone or on behalf of or in connection with any organisation(s) or government(s), that appears to have been committed for political, religious, ideological or similar purposes including the intention to influence any government and/or to put the public, or any section of the public, in fear.

This exclusion also excludes loss, damage, cost or expense of whatsoever nature directly or indirectly caused by, resulting from or in connection with any action taken in controlling, preventing, suppressing or in any way relating to any act of terrorism.

However, losses caused by or resulting from riot, riot attending a strike, civil commotion, and vandalism and malicious mischief are not excluded hereunder.

In the event any portion of this exclusion is found to be invalid or unenforceable, the remainder shall remain in full force and effect.

(e) If there are policy restrictions on or exclusions of terrorism cover, when were these first introduced and have they been changed in the light of recent events?

Generally an express terrorism cover is overridden by nuclear/radioactive exclusion clauses.

Nuclear installations and liability linked to it are generally excluded. A common exclusion relates to NBC, dirty bombs,... (see e.g. the ABAM “Exclusion of Radioactive Contamination, Chemical, Biological, Bio-Chemical and Electromagnetic Weapons, and Exclusion of abandonment for radioactive goods” clause CE200 (27 May 2004)).

The draft bill on the insurance cover of the terrorism peril does not apply to the loss of nuclear installations and the liability flowing from such installations, nor to rail, aircraft and marine hull and the liability flowing from such craft (art. 2).

Also losses caused by weapons or devices intended to explode by the atomic nuclear structure change can be excluded from the terrorism cover (art. 10 § 2).

(f) More particularly, do any market definitions of terrorism require actual physical damage to be sustained and if so of any particular kind?

Generally there is no such requirement. Also costs for preventing terrorism, decontamination,... are covered.

However e.g. art. 3 of the ABAM “strikes and riot risks” clause CE400 (27 May 2004) (covering the terrorism peril) contains a “Frustration Clause” to the effect that the insurers are only held to indemnify the insured in case of physical loss of and/or damage to the subject-matter insured.

(g) Upon whom falls the burden of proving any loss was caused by an act of terrorism?

As an exclusion from the cover, according to Belgian (controversial) supreme court ruling, the burden of proof that the loss was not caused by the excluded peril lies with the insured, unless the cover was of the all risks type (see FONTAINE, M., “Déchéances, exclusions, définition du risqué et charge de la preuve en droit des assurances”, Revue Critique de Jurisprudence Belge, 2003, p. 5.).

However under art. 9 Land Insurance Contract Act the insurer incurs the onus of proof that the loss was caused by war or similar peril. Also in marine insurance, there is a presumption that the average was caused by a peril of the sea (other than war risk) (art. 203 Maritime Law) and is hence covered. The onus of proof to rebut this presumption lies with the insurer.

(h) Are rules of causation varied in relation to terrorism? In particular, does a terrorism exclusion operate when the loss is proximately caused by terrorism or is the exclusion narrower, eg, the loss has to be “solely and directly” caused by terrorism?

For lack of express specific causation rules in the law or in the contract, in Belgian law it is accepted that also in insurance contract matters the “equivalence doctrine” will apply (see BOCKEN, H. en BOONE, I., “Causaliteit in het Belgische recht”, T.P.R., 2002, p. 1673, nr. 51 and VAEL, L. “Commentaar bij artikel 9 Wet Landverzekeringsovereenkomst”, *Comm. Verz.*, Kluwer, October 1999, 38-44). This means that any cause that was indispensable for the loss to occur (i.e. without which the loss would not have happened (in the same way) : “sine qua non” test”), will be considered as the relevant cause of the loss and give rise to the contractual obligation of the insurer. This causation rule is relevant when the loss is caused by the simultaneous effect of the excluded terrorism peril and another covered peril.

E.g. the CMR ABAM policy (28 February 1990) (covering contractual liability of the road carrier) art. 9.1.2.2. excludes from the cover the carrier liability “*caused by any terrorist or other person acting for political motives*”.

Express policy provisions may depart from this causation rule. E.g. the ABAM Cargo Insurance Policy of Antwerp (24 April 2004) (covering all transport modes) stipulates in art. 11.2.5.1. :

[...] the insurers will not indemnify : [...] damage, losses and/or expenses directly or indirectly, wholly or partly caused by – or arising from : [...] - terrorism or any action based on a political motive

The ABAM “strikes and riot risks” clause CE400 (27 May 2004) in art. 1.2.:

[...] covers [...] loss of or damage to the subject matter insured, directly caused by [...] any terrorist or any other person acting from a political motive

The ABAM “Exclusion of Radioactive Contamination, Chemical, Biological, Bio-Chemical and Electromagnetic Weapons, and Exclusion of abandonment for radioactive goods” clause CE200 (27 May 2004) excludes from the cover

loss damage liability or expense directly or indirectly caused by or contributed by or arising from[...] (radioactive, nuclear source etc.)

The ABAM “Exclusion of Cyber Attack” clause CE 001 (27 November 2003) excludes from the cover

[...] loss, damage, liability or expense directly or indirectly caused by or contributed by or arising from the use or operation [...]” (of computer, electronic software, process, programme etc.). Of course this extract is less relevant for it does not override a terrorism cover.

The reinsurance terrorism exclusion clause stipulates that it

excludes loss, damage, cost or expense of whatsoever nature directly or indirectly caused by, resulting from 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

and

This exclusion also excludes loss, damage, cost or expense of whatsoever nature directly or indirectly caused by, resulting from or in connection with any action taken in controlling, preventing, suppressing or in any way relating to any act of terrorism.

The Assuralia (Belgian Professional Association of Insurance Enterprises) standard policies on Special (industrial) Risks) such as “fire” and “business interruption” and “all risks” elaborate on the causation as follows :

- All risks cover :
Are excluded the loss or damages or increased loss, that is directly or indirectly caused by or related with : 1. War or similar events, civil war, an act of terrorism or of sabotage
- Fire and business interruption :

Is excluded from the insurance cover and from the ensuing business interruption :[...] 4) loss or increased loss that is directly or indirectly related to one of the following cases : a) war or similar events, civil war, an act of terrorism or of sabotage.

(i) Describe what, if any, significance is attributed to: the identity/identification of the perpetrator(s); their identification/association with recognised terrorist groups; the motive attributed to any act of terrorism (and whether this must be political, religious or ideological in nature); the modus operandi employed in perpetrating any act of terrorism; and/or the target of the physical act, ie those directly suffering loss and/or those (eg the Government) intended to be influenced?

Some of those elements are found in the definition of terrorist act in the draft bill (art. 2) :

- motives : ideological, political, ethnic or religious
- affiliation (or execution) : either individually or by a group
- target : persons or (im)material goods
- modus operandi : clandestine set up
- goal : impress the public, destabilise authorities, hinder normal functioning of service or enterprise

(j) To satisfy any definition or test of terrorism is there any dependence upon any Government, judicial or other form of certification or declaration of any kind?

In the draft bill on the insurance cover of the terrorism peril, because of the broad terms of the definition and in order to safeguard the uniformity of the interpretation, a committee is instituted, that will determine whether a concrete event comes within the scope of the concept of terrorism (art. 6 draft bill). The committee's decision will be subject to appeal before the State Council ("Conseil d'Etat").

The Committee will be composed of representatives of the public authorities and the (re)insurance sector.

(k) Is there any specific reference, provision or known problem relating to acts involving biological, chemical, nuclear or other forms of contamination?

Where there is party autonomy, the terrorism cover is generally overridden by NBC (Nuclear, Biological, Chemical) contamination exclusions.

NBC is excluded by the reinsurers.

For some insurance products, insurers are under a legal duty to provide NBC cover. The combined effect of the compulsory cover in direct insurance and the exclusion in reinsurance causes solvency problems.

(l) To the extent that terrorism risks are covered, do policies use aggregation provisions to limit insurance/reinsurance exposure and oblige insureds/reinsureds to bear retentions of any kind?

In direct insurance, where the terrorism cover is imposed by law, it is to cover the sum insured, or the legally defined minimum sum (sometimes unlimited e.g. for Motor Third Party Liability) per event.

In reinsurance, a limited number of reinstatements (typically 1 payable) and an annual aggregate limit apply.

3. TERRORISM AND GOVERNMENT INTERVENTION

(a) Does national legislation impose any restrictions on terrorism exclusions in insurance policies? If so, describe them and their application.

The terrorism cover is compulsory for the following classes of insurance :

- Workers' compensation for labour accidents (part of social security that is traditionally insured by the private sector in Belgium) (Act of 10 April 1971)
- Third party motor liability insurance (Act of 21 November 1989)

- Objective liability for fire and explosion in public premises (Act of 30 July 1979 and Royal Decrees of 2 February and 5 August 1991)
- Fire and other perils for simple risks (Royal Decree 24 December 1992).

(b) Does the Government provide any scheme whereby terrorism cover is made available to direct policy holders by the Government itself? If so, please outline the date of the introduction of the scheme, the nature of the scheme including any limits, deductibles and so forth, its original purpose, its success and funding arrangements.

Besides social security (guaranteeing medical treatment expenses and lump sum living expenses for incapacitated victims), also the special regime for the financial aid (maximum of € 62,000.00 per person) to victims of intentional acts of violence (Act of 1 August 1985 inspired by the European Convention on the compensation of victims of intentional acts of violence, Strasbourg 24 November 1983) do not exclude the victims of terrorism from their compensation.

In the field of private insurance the draft bill on the insurance cover of the terrorism peril provides for the compulsory cover of the terrorism peril in the classes mentioned above, viz. :

- Workers' compensation for labour accidents (part of social security that is traditionally insured by the private sector in Belgium) (Act of 10 April 1971)
- Third party motor liability insurance (Act of 21 November 1989)
- Objective liability for fire and explosion in public premises (Act of 30 July 1979 and Royal Decrees of 2 February and 5 August 1991)
- Fire and other perils for simple risks (Royal Decree 24 December 1992).

For the other insurance classes (save a few express exceptions for which coverage is deemed to be organised on the international level, such as :

- pure stand alone terrorism covers
- nuclear installations and liability
- rail, aviation, marine hull and liability),

the draft bill creates the framework, so as to allow the (optional) coverage of the terrorism peril.

The achievement of this goal, viz. to cover terrorism, is pursued by the creation of a pool (like the one that is operational in the Netherlands) with the participation of the State.

(c) Does the Government provide any scheme whereby terrorism reinsurance is made available to insurers by the Government itself? If so, please outline the date of the introduction of the scheme, the nature of the scheme including any limits, deductibles and so forth, its original purpose, its success and funding arrangements.

The draft bill on the insurance cover of the terrorism peril sets up a private/public partnership in order to create sufficient capacity to cover the terrorism peril for risks situated in Belgium.

A maximum will be set on the amount of cumulative (all events) and collective (all insurers, including the participation of the Belgian State) compensation per calendar year for losses due to terrorism : tentatively € 1 billion.

The scheme is based on a layered solidarity system, whereby the direct insurers will first intervene. If this layer does not suffice, the reinsurers will intervene.

Only if also this layer (up to a fraction of the maximum referred to above to be determined) does not suffice to indemnify the loss, then the Belgian State will bear the balance of the losses up to the ceiling mentioned.

The state will receive a certain consideration for its participation in the scheme.

A committee is instituted, that will determine whether a concrete event comes within the scope of the concept of terrorism (art. 6 draft bill). The committee's decision will be subject to appeal before the State Council ("Conseil d'Etat").

The Committee will be composed of representatives of the public authorities and the (re)insurance sector.

The scheme intends to compensate to the extent possible the individual bodily injuries. If the maximum does not cover all losses, priority will be given to compensation of bodily injury rather than of property and to financial losses rather than moral damages for pain and suffering. The individual victims' claims will have priority over the social insurers' right of subrogation.

A pool of insurers and reinsurers underwriting insurance in Belgium will be created in order to administer the terrorism loss compensation by the private sector (re)insurers.

4. INTERNATIONAL OR CROSS-BORDER ARRANGEMENTS

(a) Can you identify any international or cross-border schemes or initiatives whereby insurance or relief from financial consequences of acts of terrorism is guaranteed or supported for particular sectors, eg, aviation, shipping?

(b) Are you aware of any international or cross-border initiatives or schemes which have been devised or developed since September 11 to protect insureds, insurers or reinsurers against exposure to terrorist activities?

ICAO (International Civil Aviation Organisation) developed the “participation agreement for the global scheme regarding the provision of aviation war risk insurance”, that creates a system to provide war and related perils (such as sabotage, terrorism, hijack etc.) aviation insurance cover. The scheme is based on the creation of an insurance entity, established for the purpose of providing this aviation war risk cover. The obligations of the insurance entity are guaranteed by the states.

5. DECIDED CASES OR OTHER RULINGS

Have there been any court decisions or other rulings in your country in which the coverage of an insurance or reinsurance policy in respect of an act of terrorism has been considered?

Under the Insurance Act 1874, the supreme court interpreted the concept of war rather restrictively as a “battle between belligerent armies” (Cass., 25 November 1948, Pasicrisie, 1948, I, 688, 670 and 672 (three ruling of the same date).

More recent case-law (Labour Court Brussels, 17 January 1975, Journal des Tribunaux, 265 and Brussels labour court of appeals, 25 October 1976, Pasicrisie, 1977, II, 124) however has interpreted the concept of war more extensively to the effect that the notion “belligerent armies” does not exclude the case of armed groups of citizens conducting a guerrilla battle, if their participation, their structure and the hierarchy of their organisation and the militarily inspired goal correspond with the concept of “army”.

All together there is little case law on the question whether an act of terrorism is to be considered as “war” or “similar event” for the purpose of its exclusion in principle (save express stipulation to the contrary) from the insurance cover. During the drafting of the 1992 Land Insurance Contract Act, it was argued that an act of terrorism is not encompassed by the concepts of war or similar event and hence is not excluded from the cover by virtue of the law. However it is permissible to exclude the terrorism peril from the insurance cover by an express stipulation. For lack of such a provision in the policy conditions, terrorism is deemed to be covered.

If the act of terrorism occurs in the context of a (civil) war, it is excluded from the cover on the latter ground (see VAN SCHOUBROECK, C.; ... O.c., p. 1853, nr. 19.4).

APPENDIX: LITERATURE CONSULTED

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BRAZIL

1. DEFINITION OF TERRORISM

(a) Is there a general definition for ‘terrorism’, ‘terrorist activity’ or some term related in the legislation and/or jurisprudence of your jurisdiction?

Although there is not a clear legal definition, the subject is dealt with by the Brazilian Federal Constitution, in its Section 5, item XLIII, when it classifies terrorism acts *pari passu* with the other crimes included in the item, as well as the effects thereof, as follows:

*The law will typify the practice of torture, unlawful traffic of narcotics and related drugs, **terrorism** and crimes defined as hideous, as non worthy of bail, mercy or amnesty, with all the orderers and executors thereof as well as those who, being able to avoid them, abstain from doing so, being deemed responsible thereby.*

Within the case law realm, we may refer to a decision by the Federal Supreme Court that contains the basic definition of terrorism. The decision is appended to this report.

(b) If there is a definition (legal or jurisprudential), what would be its legal purpose?

The purpose of the definition, by case law, of the crime of terrorism in Brazil was intended to locate [sic] the field of application of criminal sanctions, although such understanding may be also extended, for effects of case law parameters, to the realm of civil/contractual law.

2. TERRORISM AND POLICY WORDINGS

(a) Do the written insurance policies and reinsurance in your country exclude coverage of insurance and reinsurance for war risks? If that is the case, is there some kind of distinction between the insurance arranged with consumers and with companies/professionals? Please answer the question in regards to the different branches and sectors.

Yes, insurance policies and reinsurance contracts exclude, in our country, coverage for **war and terrorism risks**. In respect of insurance contracts, such exclusion **was extended to all fields**, based on the Circular Letter de No. 168, of the Superintendence for Private Insurance – SUSEP, of October 31, 2001, whose section 1 provides as follows:

Section 1 – Insurance Companies are entitled to adopt, in insurance contracts still to be entered into or in renewals of contracts already in force, an Additional clause for Exclusion of Terrorism Acts, with the following wording:

Notwithstanding any provision to the contrary, under general, special and/or specific conditions of this insurance, it is hereby understood and agreed that, for the purpose of indemnification, any damages or losses caused, directly or indirectly, by a terrorism act, are not covered, it being incumbent upon the insurer to prove, by proper documentation, to be accompanied by detailed report describing the nature of the attack, irrespective of the purpose of the act, and provided that it has been duly acknowledged by the applicable public authority as an attempt on public policy.

As regards reinsurance contracts, IRB Brasil Resseguros S/A, the regulation agency for the Brazilian reinsurance market, issued, on account of the provisions of the Portfolio Protection Agreement (retro-assignment) entered into with the international market on January 8, 2003, Circular Letter PRESI-002/2003, by which it determines the exclusion from the automatic reinsurance coverage, **terrorism acts, political, credit and financial-guarantee risks** for all modalities of the branches: maritime hull, transport and petroleum risks. However, it left open the possibility of coverage for such risks on a voluntary basis, on a case-by-case basis.

Later on, on July 29, 2003, the same regulatory agency issued Circular Letter PRESI-010/2003, where it extended that exclusion to the branches of personal accidents, tourism, group life insurance, individual life insurance, however

maintaining the possibility of the contracting thereof on a voluntary basis, after detailed examination of each risk in practice.

(b) Do the insurance policies and reinsurance in your country exclude coverage of insurance and reinsurance for terrorism risks? If that is the case, is there some kind of distinction between the insurance arranged with consumers and with companies/professionals? Please answer the question in regards to the different branches and sectors

Already answered in the preceding question.

(c) Can the war risks or its exclusion and the terrorism risks or its exclusions or any other kind of risk of political activity or of violence be considered as fraudulent or *dolus* harm?

Law No. 10,744, of October 9, 2003 (it provides for the undertaking, by the Federal Government, of responsibility for acts performed against aircraft in the Brazilian territory), in its section 1, item 4, defines as terrorism act any act performed by one or more individuals, either agents of a sovereign power or not, for political or terrorism purposes, irrespective of the loss or damage derived therefrom being accidental or **intentional**. Thus, we may say that such war and terrorism risks are deemed to be acts deliberately performed by third parties.

(d) Do the insurance or reinsurance agreements have definitions of terrorism? Please answer the question in according to the different branches and sectors. If those definitions have been introduced as an answer to recent events, is there a difference between those and the previsions above?

In the answer to item 2 A above, we transcribed the parameters for the definition of terrorism and acts of war, as contained in Circular Letter SUSEP No. 168, of October 31, 2001 and reproduced in the Insurance Policy Schedule by the Brazilian market. Basically, we may say that the definition will be linked to the proof, by the insurance company, by proper documentation, as accompanied by detailed report characterizing the nature of the attack, which must be acknowledged, by the applicable authority, as an attempt on public policy.

(e) If there are coverage restrictions or exclusions for terrorism insurance, when were those restrictions introduced for the first time? And, have those restrictions been through any kind of change because of recent events?

The restrictions were introduced in year de 2003, as we can see above, and, so far, they have not undergone any kind of modification by the applicable authorities.

(f) Those definitions of terrorism used out in the Market require to have had a real physical damage? If the case, explain what kind of damage?

The definition given by the mentioned Circular Letter SUSEP No. 168/2001, establishes, as a principle, the proof of the damage (indemnification principle), thus, bodily injury is an essential assumption for the occurrence of terrorism acts.

(g) Who has the burden of proof that a damage was caused by a terrorist act?

It will be incumbent on the insurer, by documentary proof describing the nature of the attack.

(h) Can the rules of causality vary in regards to the terrorism? In particular, exclusion of terrorism is enforced when terrorism is the closest most probable cause of the damage? Or is it the most restricted exclusion?, for example: The damage has to be caused “only and directly” by terrorism?

There is no variance in causality rules. When the damage results, either directly or indirectly, from terrorism, there will be no coverage.

(i) Describe – if the case-, what is the importance given to: the identity/identification of he terrorism act authors; their identification/association to know terrorism groups; the motive for the terrorism act (if it could be of politic, religious or ideological nature); the *modus operandi* used to commit the terrorism act; and/or the target

or the physical act, in other words, those who suffer the damage directly and/or those who the terrorist act wants to influence (the government may be)?

In the Brazilian Law, the details referred to in that question do not affect the exclusion from the coverage of insurance policies and reinsurance contracts.

(j) To define or proof the sort of terrorism is there some dependency on some kind of certification or declaration from the government or any other kind?

In order to prove terrorism, Circular Letter SUSEP No. 168/2001 establishes as a requisite that the act be acknowledged by the applicable public authority as an attempt on public policy.

(k) Is there any specific reference, stipulation or problem known in relation to the terrorist acts that include biological, chemical or nuclear contamination or any other kind?

In the Brazilian legal system for insurance and reinsurance, there is no reference or precedent, either legal or infra-legal, on acts of biological, chemical, nuclear or any other type of contamination.

(l) As long as the terrorism risks are covered, do the policies use aggregated limits to restrict the insurance or reinsurance exposure and force the insured or reinsured to support retentions of some kind?

As Brazilian insurances and reinsurances do not cover terrorism, such risks are borne by insurers themselves.

3. TERRORISM AND GOVERNMENT INTERVENTION

(a) Does your national legislation have restrictions in the terrorism exclusions in the insurance coverages? If so, describe it and explain its application.

The only restriction existing relates to the proof of the occurrence of the terrorism act, as exclusively [*sic* proof] incumbent upon insurer, pursuant to the above mentioned Circular Letter SUSEP No. 168/2001.

(b) Can be foreseen a scheme by which the terrorism coverage can be provided directly to the insured by the government? If the case, please inform us the date of the introduction, its nature, including limits, its original objective, its achieved success and its financial agreements.

There is a legal provision under which coverage for events of terrorism is directly undertaken by the Federal Government. It relates to cases involving civil responsibility before third parties in the event of terrorist attacks, acts of war or related events, against aircraft with Brazilian prefix, operated by Brazilian companies engaged in public air transport, with exclusion of taxiplane companies. **Law No. 10,744, of October 9, 2003.**

Pursuant to that norm, as still in force, the Federal Government is authorized, according to the method and criteria established by the Executive Power, to undertake expenses for civil responsibility before third parties, in the event of occurrence of property damages and personal damages to passengers or non-passengers, as caused by terrorist attacks, acts of war or related events, occurred either in Brazil or abroad, against aircraft with Brazilian prefix, operated by Brazilian companies engaged in public air transport, with exclusion of taxiplane companies.

The total amount of expenses with civil responsibility is limited to the equivalent in *reais* of one billion United States dollars (US\$ 1,000,000,000.00) for all events against aircraft with Brazilian prefix, operated by Brazilian companies engaged in public air transport, with exclusion of taxiplane companies.

The expenses related to civil responsibility before third parties, in the event of occurrence of personal damages are exclusively limited to indemnity for bodily injury, illnesses, death or disability undergone as a result of the acts referred to above, with exclusion of pain and suffering, offense to honor, affection, freedom, profession, respect to the dead, psyche, health, name, credit and welfare, among others, without a need of occurrence of monetary losses.

Due to inexistence of registries of terrorism acts in Brazil after the enactment of that law, there are no expenses on that account, nor agreements or the like.

(c) Can be foreseen a scheme by which the terrorism coverage can be provided directly to the insurance companies by the government? If the case, please inform us the date of the introduction, its nature, including limits, franchises, its original objective, its achieved success and its financial agreements.

There is not anticipation of or scheme by which the Government undertakes responsibility for terrorism risks to cover insurances or reinsurances underwritten in Brazil.

4. INTERNATIONAL AGREEMENTS OR TRANS-BORDERS

(a) Can you identify any kind of international initiative or trans-borders initiative in which the insurance or aid for financial consequences of terrorism acts are being guaranteed and supported for specific sectors like for example, aviation or navigation?

There is no registration of international beyond-frontier acts involving the Brazilian Government on the subject of de terrorism and insurance/reinsurance.

(b) Do you know any international or trans-border initiative that has been created or developed since September 11 to protect the insurance and reinsurance companies against their exposure to terrorist acts?

We are not aware, at least as regards South America, of any agreement of the type referred to in the question above.

5. JUDICIAL DECISIONS AND OTHER RESOLUTIONS

Are in your country judicial decisions or other resolution in which it has been considered the coverage of an insurance or reinsurance policy in relation to a terrorist act?

In the Brazilian Judiciary Power, there is not any precedent on the subject.

APPENDIX

FEDERAL SUPREME COURT

TERRORISM – COMMON CRIME [as opposed to special crime, is the crime committed by any person individually and not as a member of a certain group/class/ideology]

Ext 855 / REPUBLIC OF CHILE

EXTRADITION

Reporting Minister: CELSO DE MELLO

Judgment: 08/26/2004 Judging Body: The Court in Full Session

Publication: DJ 01-07-2005 PP-00005 *EMENT VOL-02198-1* PP-00029

Docket

D O C K E T: EXTRADITION – OFFENSES OF A TERRORIST NATURE – DECHARACTERIZATION OF TERRORISM AS POLITICAL CRIME – CONVICTION OF THE TO-BE-SURRENDERED INDIVIDUAL TO TWO (2) PENALTIES OF IMPRISONMENT FOR LIFE – INADMISSIBILITY OF SUCH PUNISHMENT IN THE BRAZILIAN CONSTITUTIONAL SYSTEM (FEDERAL CONSTITUTION, SECTION 5, XLVII, "B") – EXTRADITION ACCOMPLISHMENT DEPENDS ON PRIOR DIPLOMATIC COMMITMENT CONSISTING IN THE CONVERSION OF IMPRISONMENT FOR LIFE INTO TEMPORARY IMPRISONMENT NON EXCEEDING 30 YEARS – INTENDED IMMEDIATE EXECUTION OF THE ORDER FOR EXTRADITION, BY DETERMINATION OF THE FEDERAL SUPREME COURT - IMPOSSIBILITY - PREROGATIVE EXCLUSIVELY ASCRIBED TO THE PRESIDENT OF BRAZIL AS CHIEF OF STATE – REQUEST GRANTED, WITH RESTRICTION. REPUDIATION OF TERRORISM: AN ETHIC-LEGAL COMMITMENT UNDERTAKEN BY BRAZIL, BOTH IN VIEW OF ITS OWN CONSTITUTION AND BEFORE THE INTERNATIONAL COMMUNITY. – **Terrorism crimes, as deemed parameters adopted by the Federal Constitution in force, are not associated to the notion of political criminality, as our Fundamental Law proclaimed the repudiation of**

terrorism as one of the essential principles to govern the Brazilian State in its international relations (Federal Constitution, section 4, VIII), in addition to having qualified terrorism, for effects of internal repression, as a crime equalized to hideous crimes, what subjects it, as such, to a legal treatment impregnated with the utmost severity, rendering it non worthy of bail and of the State sovereign clemency, and further, reducing it to the ordinary dimension of common crimes (Federal Constitution, section 5, XLIII). – Our Federal Constitution, as containing such interpretative vectors (CF, section. 4, VIII, and section 5, XLIII), does not allow to grant to terrorism crimes the same indulgent treatment granted to political or opinion criminals, thus barring the possibility of creating, all around the terrorist, an unacceptable protection circle, which renders him immune from the extradition power of the Brazilian State, in particular taking into account the very relevant circumstance that the National Constitutional Convention formulated a clear and indisputable unworthiness belief in respect of any offense of a terrorist nature, not acknowledging therein the dignity with which political criminality is often impregnated.

POSSIBILITY TO EXTRADITE THE TERRORIST: NEED TO PRESERVE THE DEMOCRATIC PRINCIPLE AND THE ESSENTIALITY OF INTERNATIONAL COOPERATION IN THE FIGHT AGAINST TERRORISM. – Political criminality laws do not apply nor are extendable, in their legal-constitutional projection, to crimes related to terrorism practices, either those committed by private individuals or those carried out with the authorized support of government devices themselves, as occurred in the South Cone, with the adoption by South-American military regimes of the despicable model of State terrorism. - Terrorism – which represents the expression of macro-delinquency, capable of affecting the safety, integrity and peace of citizens and organized societies – is a phenomenon of the utmost severity, in respect of which the international community cannot remain indifferent, as the terrorism act attempts on the bases themselves on which the democratic State of law relies, in addition to representing an unacceptable threaten to political institutions and public freedom, what authorizes its exclusion from the indulgent treatment granted by the Brazilian Constitution (section 5, LII) to acts that characterize political criminality. – The protection clause contained in section 5, LII of the Brazilian Constitution – which bars the extradition of foreigners for political or opinion crimes – is not extended, for that reason, to terrorist criminals, on account of the frontal repudiation ascribed by the Brazilian constitutional order to terrorism and the terrorist. - Extradition – while a legitimate means of international cooperation in the fight against common criminality practices – represents an instrument of significant importance in the fight against terrorism, which constitutes "a heavy threaten to democratic values and to international peace and safety (...)" (Inter-American Convention Against Terrorism, Article 11), the decharacterization thereof as a political offense, for extradition effects, being thus justified.

Jurists' Writings. EXTRADITION AND IMPRISONMENT FOR LIFE: NEED OF PRIOR CONVERSION FROM PUNISHMENT WITH IMPRISONMENT FOR LIFE INTO TEMPORARY IMPRISONMENT (MAXIMUM OF 30 YEARS), - REVIEW OF FEDERAL SUPREME COURT CASE LAW, IN COMPLIANCE WITH THE CONSTITUTIONAL DECLARATION OF RIGHTS (CF, SECTION 5, XLVII, "b"). – Extradition will only be granted by the Federal Supreme Court, in the event of offenses punishable with imprisonment for life, when the requesting State formally undertakes before the Brazilian Government, as regards the punishment, the commitment to convert it into a penalty not exceeding the maximum term admitted by the Brazilian criminal law (Criminal Code, section 75), as requests for extradition – according to the provisions of section 5, XLVII, "b" of the Federal Constitution – which prohibit criminal sanctions for life – are necessarily subject to the hierarchic-normative authority of the Brazilian Fundamental Law.

Jurists' Writings. New understanding derived from the review, by the Federal Supreme Court, of its case law on the issue of passive extradition. THE ISSUE OF IMMEDIATE ACCOMPLISHMENT OF SURRENDER BY EXTRADITION – UNDERSTANDING OF SECTION 89 OF FOREIGNERS LAW - PREROGATIVE EXCLUSIVE OF THE PRESIDENT OF BRAZIL, AS CHIEF OF STATE. – The surrender of the individual to be extradited – who is being sued under criminal law in Brazil, or who was criminally sentenced by the Brazilian Courts – is conditional, in principle, on the conclusion of the Brazilian criminal proceeding or the service of a term of prison, as decreed by the Brazilian Judiciary Power, unless the President of Brazil, based on his discretionary judgment, of an eminently political nature, grounded on opportunity, convenience and/or utility reasons, exercises, as Chief of State, the exceptional prerogative that entitles him to immediate enforcement of the extradition order (Foreigners Law, last part of main provision of section 89).

Jurists' Writings. Precedents.

CHILE³

1. DEFINITION OF TERRORISM

(a) Is there any general definition of “terrorism”, “terrorist activity” or any related term in the general law within your jurisdiction?

There is no general definition of a legal nature, but there are many references to “terrorist conduct” in both legislation and case law. There is a general definition of terrorism in a clause of general use which excludes terrorism cover in Chilean policies.

(b) If there is a definition, what legal aim does it have?

Not applicable.

2. TERRORISM AND POLICY WORDING

(a) Do insurance and reinsurance policies written in your country exclude the liability of insurers and reinsurers for war risks? If so, is there any distinction between insurance contracts entered into with consumers and insurance contracts entered into with companies/professionals? Please answer this question in relation to different branches or sectors.

War risks are excluded in all covers, but they can be covered by means of a special clause.

(b) Do insurance and reinsurance policies written in your country exclude the liability of insurers and reinsurers for terrorism risks? If so, is there any distinction between insurance contracts entered into with consumers and insurance contracts entered into with businesses/professionals? Please answer this question in relation to the different branches or sectors.

All of the policies exclude losses arising from acts of terrorism, but such losses can be covered by means of a special additional clause.

(c) Are war risks or their exclusions and terrorism risks or their exclusions or risks of other kind of political act or violence considered to be malicious damage?

In Chile, malice is equivalent to a positive intention to cause harm, and as a result such risks are by their nature malicious as there cannot, by their very nature, be acts of war or terrorism which are not caused deliberately.

(d) Do definitions of terrorism exist in insurance and reinsurance contracts? Please answer this question in relation to different branches or sectors. If these definitions have been introduced as a response to recent occurrences, are there differences between these and previous provisions?

The definition dates from the beginning of the 80s, and is included in a so-called “terrorism exclusion clause of general use” to which all other clauses relate. The definition is as follows:

For the purposes of this clause, a terrorist act is conduct classified as such by law, as well as the use of force or violence or the threat of force or violence, by any person or group, motivated by political, religious, ideological or similar causes, with the intention of exercising influence over any government or of terrorising the population or any section of the population.

(e) If restrictions or exclusions in terrorism insurance cover exist, when were these restrictions introduced for the first time, and have these restrictions undergone any kind of change due to recent occurrences?

³ Osvaldo Contreras Strauch. The original Spanish version is reproduced in Part 4 of this Report.

Please see previous response.

(f) Do any definitions of terrorism used in the market require there to have been actual physical damage? If so, please explain what particular type of damage is required.

The clause set out above excludes damage or losses directly or indirectly caused by an act of terrorism.

(g) Upon whom does the burden of proving that any loss was caused by an act of terrorism fall?

In Chilean law the burden of proving any exclusion falls on the insurer.

(h) Do the rules of causation in relation to terrorism vary? In particular, does a terrorism exclusion operate when the proximate cause of the damage is the terrorism or is the exclusion more strict, for example, does the loss have to be caused “solely and directly” by terrorism?

As has been stated in response to question (f), the exclusion operates in respect of all losses caused directly or indirectly by the terrorist act.

(i) Describe, if any, the importance attributed to: the identity/identification of the perpetrators of the acts of terrorism; their identification/association with known terrorist groups; the motive attributed to the act of terrorism (if it must be of a political, religious or ideological nature); the modus operandi used to carry out an act of terrorism; and/or the target of the physical act - that is to say those who suffer a loss directly and/or those intended to be influenced by the terrorist act (e.g. a government).

I believe that the text of the clause set out above very clearly responds to this question.

(j) To define or prove the type of terrorism, is there a need for any governmental, judicial or other certification or declaration?

No. But if there is a discrepancy between the insured and the insurer regarding whether or not there has been an act of terrorism which could influence indemnity under the insurance cover, the parties would need to resort to the appropriate legal mechanism for dispute resolution, which in the context of Chilean insurance is arbitration.

(k) Is there any specific reference, condition or known problem in relation to terrorist acts which include biological, chemical, nuclear or any other contamination?

No. But the clause set out above extends to any type of loss. On that basis, I consider that such circumstances would be included.

(l) To the extent that risks of terrorism are covered, do policies use aggregated limits to limit the insurance or reinsurance exposure and to oblige insureds and reinsureds to bear retentions of any kind?

Not applicable.

3. TERRORISM AND GOVERNMENT INTERVENTION

(a) Do terrorism restrictions and exclusions exist in insurance covers under your national legislation? If so, describe them and their application.

No. Any restrictions and exclusions are recorded in the policy clauses themselves. But the Superintendence of Values and Insurance (the Chilean insurance regulator) ensured, more than 20 years ago, that such clauses be brought into existence, prompting the first texts to be written about them.

(b) Does the Government provide any scheme whereby terrorism cover is made available to insureds by the Government itself? If so, please outline the date of introduction of the scheme, the nature of the scheme including any limits, deductibles and so forth, its original purpose, its success and funding arrangements.

No. Chile is not, and has not been for many years, a country in which terrorism is a priority problem.

(c) Does the Government provide any scheme whereby terrorism cover is made available to insurers by the Government itself? If so, please outline the date of the introduction of the scheme, the nature of the scheme including any limits, deductibles and so forth, its original purpose, its success and funding arrangements.

4. INTERNATIONAL OR CROSS-BORDER AGREEMENTS

(a) Can you identify any international or cross-border scheme or initiative whereby insurance or relief from the financial consequences of acts of terrorism are guaranteed or supported for specific sectors, e.g. aviation, shipping?

No.

(b) Are you aware of any international or cross-border initiative or scheme which has been devised or developed since September 11 to protect insureds, insurers or reinsurers against exposure to terrorist activities?

No. Nothing other than what has already been indicated in response to question 3(b).

JUDICIAL DECISIONS AND OTHER RESOLUTIONS

Are there any judicial decisions or other resolutions in your country in which the cover of an insurance/reinsurance policy in respect of an act of terrorism has been considered?

No. Litigation has been commenced in the past as a consequence of acts of terrorism, but in no action, as far as I know, was there anything discussed or decided in relation to insurance issues.

COLOMBIA⁴

1. MEANING OF TERRORISM

(a) Is there any general definition of “terrorism”, “terrorist activity” or any related term in the general law within your jurisdiction?

The criminal code of Colombia contains in its article 343, modified by the article 14 of the Law 890/04, the following definition of terrorism:

ARTICLE 343. TERRORISM. The person that provokes or maintains the population or a fragment of it in worry or terror, throughout acts that put in danger the life, integrity or liberty of persons or edifications or communication means, transport, processing or conduction of fluids or motor forces, using the means capable of causing damages, will incur in prison of 160 to 270 months, and fine of 1333.33 to 15000 minimum monthly wages in force, without excluding the penalty that corresponds to the other crimes committed with this conduct.

If the state of worry or terror is provoked through a telephone call, magneto phonic tape, video, cassette or anonymous writing, the penalty will be of 32 to 90 months and the fine will be of 133.33 to 750 minimum monthly wages in force.

(b) If there is a definition, for what legal purposes is the definition relevant?

The legal definition has been indicated under question 1(a). Its object is to facilitate its repression by means of criminal action.

2. TERRORISM AND POLICY WORDINGS

(a) Do insurance and reinsurance policies written in your country exclude the liability of insurers and reinsurers for war risks? If so, is there any distinction between insurance contracts entered into with consumers and insurance contracts entered into with companies/professionals? Please answer this question in relation to different branches or sectors.

In Colombia, insurance policies exclude War Risks, with the exception of cover for non-fixed assets (aircraft, vessels or goods) granted by the international insurance and reinsurance market. Although the distinction between consumer and commercial insurance contracts is well established in Europe, this is not yet the case in Colombia.

(b) Do insurance and reinsurance policies written in your country exclude the liability of insurers and reinsurers for terrorism risks? If so, is there any distinction between insurance contracts entered into with consumers and insurance contracts entered into with businesses/professionals? Please answer this question in relation to the different branches or sectors.

In Colombia it is possible to obtain covers known as HMCCoP (Strike, Riot, Civil Commotion or Piracy) and AMIT (Malicious Acts of Third Parties) including Sabotage and Terrorism, which are covers normally excluded from automatic reinsurance contracts. Such covers should, therefore, be granted by means of a specific annex with a separate premium and different deductibles. Terrorism cover should be limited, and can only be given as a first layer, as reinsurers do not give cover for excess layers. Foreign companies which operate in Colombia do not necessarily operate by these rules, insofar as their head offices provide them with their reinsurance requirements. As noted in response to the previous question, although the distinction between insurance contracts with consumers and businesses/professionals has been widely established in Europe, this is not yet the case in Colombia.

(c) Are war risks or their exclusions and terrorism risks or their exclusions or risks of other kind of political act or violence considered to be malicious damage?

⁴ The original Spanish version is reproduced in Part 4 of this Report.

Most certainly. The concept of the culpable act of terrorism does not exist in the Colombian legal or insurance world, although it is conceivable that a terrorist act could occur through the culpable act of someone who may have been in the situation to prevent it.

(d) Do definitions of terrorism exist in insurance and reinsurance contracts? Please answer this question in relation to different branches or sectors. If these definitions have been introduced as a response to recent occurrences, are there differences between these and previous provisions?

As far as damage insurance is concerned, yes. The definitions most generally used in Colombia are those contained in Clause LPO 437 (previously T 3-T3A) imposed by the London insurance market in the case of reinsurance contracts entered into with the London markets. Similar definitions exist in clauses imposed by other principal reinsurers, insofar as cover for HMCCoP and AMIT (including sabotage and terrorism) are concerned. The aviation and maritime sectors are governed by London market clauses. To the best of our knowledge, there is no special definition in life insurance.

(e) If restrictions or exclusions in terrorism insurance cover exist, when were these restrictions introduced for the first time, and have these restrictions undergone any kind of change due to recent occurrences?

Apart from a handful of exceptions, the restrictions and exclusions arose due to the lack of availability of reinsurance cover (and not as a result of legislation or governmental decision making) in the wake of the attacks on the Twin Towers in New York and on the Pentagon in Washington on 11 September 2001. However, exclusions in cover for terrorist attacks have existed for a long time for certain types of insureds, such as those in the energy and telecommunication sectors, for infrastructure projects and for some government-sector properties, in respect of which the exclusion usually operates in an absolute way in automatic reinsurance contracts. However, it has even been possible to obtain cover for such risks from the specialist Sabotage and Terrorism (S&T) reinsurance market.

(f) Do any definitions of terrorism used in the market require there to have been actual physical damage? If so, please explain what particular type of damage is required.

As has already been explained, there is no legal definition of “terrorism” for the purposes of insurance contracts. The definition of terrorism outlined in our response to question 1(a) of this questionnaire applies to the penal code. The definitions imposed by the international reinsurance market do require there to have been direct physical damage or physical loss as a consequence of an event covered under the policy. It is possible, through express agreement, to extend the cover to loss of profit arising from physical damage, and even by means of annex to cover loss of profit as a result of losses occurring as a result of terrorist acts on suppliers.

(g) Upon whom does the burden of proving that any loss was caused by an act of terrorism fall?

In accordance with Colombian legislation, it is the responsibility of the insured to prove that a terrorist act is covered under the policy. In the case of an event which is excluded under the policy, the burden of proof under Colombian legislation falls on the insurance company. However, in deciding whether or not a terrorist act is an event covered under the policy, the burden of proof in showing that the occurrence did not occur as a consequence of an act excluded under the cover due to the fact that it was an act of war, invasion, act of foreign enemy, hostilities or war operations, civil war, etc. operates in Colombia in the following way: the local texts of HMCCoP and AMIT (S&T) place the burden of proof on the insurer; and Clause LPO-437 of the London market or, in the case of reinsurance with the specialist Sabotage and Terrorism (S&T) market, the burden of proof falls on the insured.

(h) Do the rules of causation in relation to terrorism vary? In particular, does a terrorism exclusion operate when the proximate cause of the damage is the terrorism or is the exclusion more strict, for example, does the loss have to be caused “solely and directly” by terrorism?

The text of LPO 437, in common use in the Colombian insurance market, is specific in this respect and states as follows:

**RIOTS AND/OR STRIKES AND/OR CIVIL COMMOTIONS
AND/OR MALICIOUS DAMAGE INSURANCE
(TERRORIST WORDING)**

1. INSURING CLAUSE:

Subject to the terms, clauses and conditions contained herein the Underwriters agree to indemnify the Assured against direct physical loss of or damage to the interests insured caused by or arising from Riots and/or Strikes and/or Civil Commotions including fire damage and loss by looting following Riots and/or Strikes and/or Civil Commotions and/or Malicious Damage as described herein.

For the purpose of this Policy:

- (A) *Riot and Strike and Civil Commotion damage shall include but not be limited to loss directly caused by:*
 - (a) *Any act committed in the course of a disturbance of the public peace by any person taking part together with others in such disturbance; or*
 - (b) *Any wilful act of any striker or locked-out worker done in furtherance of a strike or in resistance to a lock-out whether or not such act is committed in the course of a disturbance of the public peace; or*
 - (c) *Any act of any lawfully constituted Authority for the purpose of suppressing or minimising the consequences of any existing disturbance of the public peace, or for the purpose of preventing any such act as is referred to in (b) above or minimising the consequences thereof;*
- (B) *Malicious Damage shall mean all Physical Loss or Damage resulting directly from a malicious act caused by anyone whether or not the aforesaid act is committed during a disturbance of the public peace, and shall include loss caused by sabotage and acts committed by any or all persons who are member(s) of an organisation whose aim is or includes the over-throwing of any legal or defacto Government by terrorism or violence.*

2. EXCLUSIONS:

This Policy does not cover:

- (A) *Loss or damage caused by or arising out of burglary, house-breaking, theft or larceny or caused by any person taking part therein.*
- (B) *Loss or damage caused by or resulting from confiscation, requisition, detention or legal or illegal occupation of property insured or of any premises, vehicle or thing containing the same.*
- (C) *Loss or damage caused by or resulting from an act or incident which occurs or is committed whether directly or indirectly by reason of or in connection with war, invasion, act of foreign enemy, hostilities or warlike operations (whether war be declared or not), civil war, or seizure of power arising from a military conspiracy.*
- (D) *Loss or damage directly or indirectly caused by or contributed to by or arising from ionising radiations or contamination by radioactivity from any nuclear fuel or from any nuclear waste from the combustion of nuclear fuel, or the radioactive, toxic, explosive or other hazardous properties of any explosive nuclear assembly or nuclear component thereof.*
- (E) *Loss resulting from total or partial cessation or interruption of work.*

3. CONDITIONS:

- (A) *In any claim, and in any action, suit or other proceeding to enforce a claim, for loss under this Policy the burden of proving that the loss does not fall within Exclusion (C) above set out shall be upon the Assured.*
- (B) *This Policy does not cover any loss which at the time of the happening of such loss is insured by or would, but for the existence of this Policy be insured by any other existing policy or policies except in respect of any excess beyond the amount which would have been payable under such other policy or policies had this Insurance not been effected.*
- (C) *The Assured shall, at the request and expense of the Underwriters, take all steps that may be necessary to protect the interests of Underwriters.*
- (D) *If the Assured shall make any claim knowing the same to be false or fraudulent as regards amount or otherwise, this Policy shall become void and all claims hereunder shall be forfeited.*
- (E) *If the total value of all property covered by this Insurance shall at the time of any loss be greater than the Declared Value set out in the Schedule the Assured shall be entitled to*

recover hereunder only such proportion of the Sum Insured set out in the Schedule as the said Declared Value bears to the said total value.

4. CANCELLATION:

This Policy may be cancelled by or on behalf of the Underwriters by 30 days notice given in writing to the Assured at his last known address, and the premium hereon shall be adjusted on the basis of the Underwriters receiving or retaining pro rata premium.

Notice shall be deemed to be duly received in the course of post if sent by pre-paid letter post properly addressed.

This Policy may not be cancelled by or on behalf of the Assured unless specially agreed by the Underwriters.

LPO437 (4/82)

In addition, property insurance policies in Colombia often include the text of NMA-2919, as follows:

WAR AND TERRORISM EXCLUSION ENDORSEMENT (Reinsurance)

Notwithstanding any provision to the contrary within this reinsurance or any endorsement thereto it is agreed that this reinsurance excludes loss, damage, cost or expense of whatsoever nature directly or indirectly 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 to the loss;

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

For the purpose of this endorsement an act of terrorism means an act, including but not limited to the use of force or violence and/or the threat thereof, of any person or group(s) of persons, whether acting alone or on behalf of or in connection with any organisation(s) or government(s), committed for political, religious, ideological or similar purposes including the intention to influence any government and/or to put the public, or any section of the public, in fear.

This endorsement also excludes loss, damage, cost or expense of whatsoever nature directly or indirectly caused by, resulting from or in connection with any action taken in controlling, preventing, suppressing or in any way relating to (1) and/or (2) above.

If the Reinsurers allege that by reason of this exclusion, any loss, damage, cost or expense is not covered by this reinsurance the burden of proving the contrary shall be upon the Reassured.

In the event any portion of this endorsement is found to be invalid or unenforceable, the remainder shall remain in full force and effect.

(i) Describe, if any, the importance attributed to: the identity/identification of the perpetrators of the acts of terrorism; their identification/association with known terrorist groups; the motive attributed to the act of terrorism (if it must be of a political, religious or ideological nature); the modus operandi used to carry out an act of terrorism; and/or the target of the physical act - that is to say those who suffer a loss directly and/or those intended to be influenced by the terrorist act (e.g. a government).

The definition of “Malicious Act” makes reference to acts carried out by any person who is a member of an organisation whose objective is or includes the “overthrow” of any Government through terrorism or violence, which involves a political motive. There are no further details on “modus operandi”.

Malicious Damage shall mean all Physical Loss or Damage resulting directly from a malicious act caused by anyone whether or not the aforesaid act is committed during a disturbance of the public peace, and shall include loss caused by sabotage and acts committed by any or all persons who are member(s) of an organisation whose aim is or includes the over-throwing of any legal or defacto Government by terrorism or violence.

(j) To define or prove the type of terrorism, is there a need for any governmental, judicial or other certification or declaration?

Perhaps the only requirement would be a report from the competent authorities but, in reality, no certification, whether by a governmental or other entity, is insisted upon (or has, to date, been insisted upon).

(k) Is there any specific reference, condition or known problem in relation to terrorist acts which include biological, chemical, nuclear or any other contamination?

The following is an absolute exclusion in policies deriving from specialist markets: Losses or damage directly or indirectly caused or contributed to by or derived from ionized radiation or contamination by radioactivity deriving from any nuclear combustible or any nuclear waste generated by the combustion of a nuclear combustible, or radioactive, toxic, explosive properties or other dangerous properties of any nuclear explosive appliance or any component of the same.

(l) To the extent that risks of terrorism are covered, do policies use aggregated limits to limit the insurance or reinsurance exposure and to oblige insureds and reinsureds to bear retentions of any kind?

Yes. In the wake of 11 September 2001, there is normally a per event and in the annual aggregate limit of cover for the term of the policy, which is less than the value of the assets covered.

3. TERRORISM AND GOVERNMENT INTERVENTION

(a) Do terrorism restrictions and exclusions exist in insurance covers under your national legislation? If so, describe them and their application.

There are none in Colombian legislation. In practice, there are the restrictions which we have already referred to.

(b) Does the Government provide any scheme whereby terrorism cover is made available to insureds by the Government itself? If so, please outline the date of introduction of the scheme, the nature of the scheme including any limits, deductibles and so forth, its original purpose, its success and funding arrangements.

Not to date. The issue has been and continues to be studied by the government and by the private insurance sector through the Federation of Colombian Insurers "FASECOLDA".

(c) Does the Government provide any scheme whereby terrorism cover is made available to insurers by the Government itself? If so, please outline the date of the introduction of the scheme, the nature of the scheme including any limits, deductibles and so forth, its original purpose, its success and funding arrangements.

Not to date.

4. INTERNATIONAL OR CROSS-BORDER ARRANGEMENTS

(a) Can you identify any international or cross-border scheme or initiative whereby insurance or relief from the financial consequences of acts of terrorism are guaranteed or supported for specific sectors, e.g. aviation, shipping?

Yes. One can clearly identify relief received from countries such as the United States and other European countries such as Germany in branches of insurance such as aviation. These countries assist their airlines backing, as a risk country, Public Liability for War AVN 52 and cover for Hull-War in some cases. Similarly, Venezuela opted to give support to its airlines but the risk-country rating of Venezuela, for many of the lessors, was not a sufficient guarantee and for that reason the operators had to go out and search for an alternative in the insurance/reinsurance market.

The particular scheme of assistance to the airlines was the following. In the wake of 11 September, the aviation reinsurance market applied a provisional Cancellation Clause of seven days for Hull-War and for the Extension of Public Liability for War AVN 52 (Third Party) and changed the rules of the game by increasing the premiums for Hull-War and limiting the cover of Extension of Public Liability for War AVN 52 to US\$50m. In addition, it proceeded to charge an additional premium of US\$1.25 per transported passenger for such cover. At the same time, an excess layer insurance market, to the required General Public Liability Limits, was created - reaching up to US\$1.500m. The majority of the airlines opted for cover only up to the limits required in their leasing contracts. The prices of these covers have dropped dramatically, and even the very same Hull and General Public Liability reinsurers have increased the limits of Public Liability War AVN 52 to limits of between S\$150m and US\$250m.

The United States government opted to grant support, in the guise of a 100% subsidy, through Terrorism Risk Insurance Act. In Colombia, authorisation was negotiated between the Airlines and Civil Aeronautics to increase the tariff charged for each passenger to include an additional security cost with a view to taking on, on the one hand, the extra costs in insurance and, on the other, the costs of the additional security infrastructure required for their daily operations.

(b) Are you aware of any international or cross-border initiative or scheme which has been devised or developed since September 11 to protect insureds, insurers or reinsurers against exposure to terrorist activities?

There are schemes of a national character in different countries such as TRIA in the United States, the Spanish Consortium of Catastrophic Risks, Pool Re in England, the Extermus Consortium and others in countries such as France and Australia, but none of an international nature that we know of. In addition, specifically with respect to aviation insurance, Germany opted to protect airlines through a government-funded system of insurance involving a pool of insurers which granted cover. However, this did not ensure total protection. A similar scheme was developed in France.

5. DECIDED CASES OR OTHER RULINGS

Are there any judicial decisions or other resolutions in your country in which the cover of an insurance/reinsurance policy in respect of an act of terrorism has been considered?

As is well known, Colombia has suffered with chronic guerrilla problems for many years, with the result that the issue of terrorism has been aired in court fairly frequently. We have selected, and attach for your information, two judgments relating to terrorist acts, handed down by the State Council, the first dated 2 May 2002 and the second dated 12 December 2002, which, although rather long, we hope will be of interest.

Decision of 12 December 2002

This decision concerns the insurance of state-owned property against damage caused by terrorist acts. The question is how can the State get round established terrorism exclusion clauses in insurance policies in order to ensure that public heritage property is fully insured? Such exclusion clauses commonly state that "In no circumstances will permanent material damage arising from the capture of villages, cities and towns carried out by illegal armed movements, or from the acts of the authorities to prevent such damage, be covered by this policy". The State's aim is to insure itself against any claims made against it as a result of damage caused to State property by means of a terrorist act. The reason for the exclusion clauses is said to be that, in the wake of 9/11, insurers are increasingly unable to obtain reinsurance for terrorist acts, especially where highly vulnerable State property is involved. The case explains that Article 1105 of the Colombian Commercial Code, which expressly excludes political risks from insurance contracts, makes it even more difficult for the State to obtain the full insurance cover for its property which it would like. The case concludes that insurance is strictly regulated in Colombia both constitutionally and legally, and that freedom to enter into insurance contracts, types of contract, liabilities and insurable risks are all subject to legal regulation. For that reason, insurers lack the full obligation to insure required by the State.

Decision of 2 May 2002

This case concerned whether or not insurers who paid out in respect of a guerrilla attack on 23 cars owned by the insured should be allowed to be indemnified by the State in a subrogated action for failing to protect the area through which the cars were being transported. It was held, both at first instance and on appeal, that the State was not liable to indemnify the insurers because (i) the State had no prior knowledge of a real and concrete situation in imminent need of defence; and (ii) the damage did not occur due to the fact that the State itself had created any risk.

DENMARK

1. MEANING OF TERRORISM

1(a) Is there any general definition of “terrorism”, “terrorist activity” or any related term in the general law within your jurisdiction?

The main clause on Terrorism in Danish Law is to be found in the Penal Code within the Criminal Law. Besides that, there are stipulations on terrorism in the Law on Money Laundering and Law on Foreigners. Terrorism is defined in the Penal Code § 114 as follows:

§114(1) Any person who, by acting with the intent to frighten a population to a serious degree or to unlawfully coerce Danish or foreign public authorities or an international organisation to carry out or omit to carry out an act or to destabilise or destroy a country's or an international organisation's fundamental political, constitutional, financial or social structures, commits one or more of the following acts, when the act due to its nature or the context, in which it is committed, can inflict a country or an international organisation serious damage, shall be guilty of terrorism and liable to imprisonment for any term extending to life imprisonment:

- 1) Homicide pursuant to Section 237 of this Act.*
 - 2) Gross violence pursuant to Section 245 or Section 246 of this Act.*
 - 3) Deprivation of liberty pursuant to Section 261 of this Act.*
 - 4) Impairment of the safety of traffic pursuant to Section 184(1) of this Act; unlawful disturbances in the operation of public means of communication etc. pursuant to Section 193(1) of this Act; or gross damage to property pursuant to Section 291(2) of this Act; if these violations are committed in a way, which can expose human lives to danger or cause considerable financial losses.*
 - 5) Seizure of transportation means pursuant to Section 183 a of this Act.*
 - 6) Gross weapons law violations pursuant to Section 192a of this Act or Law about Weapons and Explosives Section 10(2).*
 - 7) Arson pursuant to Section 180 of this Act; explosion, spreading of noxious gasses, flooding, shipwrecking, railway- or other traffic-accident pursuant to Section 183(1)-(2) of this Act; health-endangering contamination of the water supply pursuant to Section 186(1) of this Act; health-endangering contamination of products intended for general use etc. pursuant to Section 187(1) of this Act.*
- (2) Similar punishment shall apply to any person who, with the in Subsection (1) mentioned intent, transports weapons or explosives.*
- (3) Similar punishment shall further apply to any person who, with the in Subsection (1) mentioned intent, threatens to commit one of the acts mentioned in Subsections (1) and (2).*

1(b) If there is a definition, for what legal purposes is the definition relevant?

The code defines what is to be considered a terrorist act under Danish Law and thereby what conditions have to be fulfilled in order someone can be prosecuted and convicted of a terrorist crime.

2. TERRORISM AND POLICY WORDINGS

There is no firm practice on terrorism coverage in the direct market neither in the reinsurance market. The following comments are some general observations from which deviations can occur as agreed between the parties

(a) To what extent do insurance and reinsurance policies written in your country exclude the liability of insurers and reinsurers for war risks? If so, is any distinction drawn between commercial and consumer contracts. Please answer this question on a class/sector by class/sector basis.

All standard insurance and reinsurance policies will typically contain a general war exclusion clause. There is no distinction between commercial and consumer contracts. In the Marine market it is customary to buy a separate war policy covering hull and cargo risks.

2(b) To what extent do insurance and reinsurance policies written in your country exclude the liability of insurers and reinsurers for terrorism risks? If so, is any distinction drawn between commercial and consumer contracts? Please answer this question on a class/sector by class/sector basis.

Consumer policies (all classes) do typically not contain any exclusions for terrorism risk.

As for commercial risks there is a distinction between smaller and larger risks. Smaller commercial risks will not have any exclusions. The definition of 'smaller commercial' varies between insurance companies, but will typically be risks with sum insureds up to €50,000,000 or €67,000,000.

As to larger commercial risks, reinsurance wordings will normally exclude terrorism cover for such risks and, consequently, so will direct policies. However, there is an exception in regard of Building Fire Insurances. In order to protect lenders with mortgage in real estate the direct insurance companies are bound by certain law provisions concerning the provision of such insurance and cannot implement restrictions in coverage.

Specific buy back cover may be available for any excluded risks subject to price and reinsurance availability.

There are typically no exclusions in direct commercial casualty insurance policies.

Reinsurance wordings will normally contain a 'Target Risk' exclusion clause. Target risks may be certain security companies, 'large event' organisers (say for events involving more than 10,000 people), operators/owners of main train stations and airports. Furthermore, the reinsurance will typically exclude all terrorism losses arising from biological, chemical and nuclear contamination.

Direct Hull policies have for many years contained a standard terrorist exclusion clause as follows:

This insurance does not cover loss, damage, liability, or expense caused by any terrorist or any person acting from a political motive

There is no definition of 'terrorist' in the policy.

In the Cargo market a limited exclusion was introduced following 9/11. This exclusion applies only to specific 'stop-overs' in warehouses or places of storage which are outside the ordinary course of transit. The clause is a standard clause developed in the London market.

There are typically no exclusions in direct life policies.

Reinsurance on proportional basis will normally not have any exclusions whereas excess of loss reinsurance normally contain restrictions in cover from a full exclusion to a more limited exclusion (applying to nuclear, biological or chemical contamination only).

(c) To what extent do war risks or exclusions and terrorism risks or exclusions or those for other acts of political or other violence such as malicious damage overlap?

The general understanding is that 'war' and 'terrorism' do not overlap although it will all depend on the exact situation and the specific wording/exclusions used. On occasion, treaty wordings may exclude 'political risks' which then are further defined in a war and terrorism exclusion but there is no firm understanding of these words which will be subject to the specific definition in each agreement and the context in which they appear.

(d) Are there any market definitions of terrorism in use for insurance or reinsurance contracts? Please answer this question on class/sector by class/sector basis, If these have been introduced in response to recent developments how do these differ from previous provisions?

Following the 9/11 event the Danish Insurance Association (F&P) recommended the following clause:

An act of terrorism means an act, including but not limited to the use of force or violence and/or the threat hereof, of any person or group(s) of persons, whether acting alone or on behalf or in connection with any organization(s) or government (s), committed for political, religious, ideological, or ethnic purposes or

reasons including the intention to influence any government and/or to put the public, or any section of the public, in fear.

An act of terrorism has to be suitable for influencing any government and/or to put the public, or any section of the public, in fear.

The recommendation was reported to the Danish authorities at that time. In 2004 the Competition Authorities advised they were to review the situation and asked if F&P still recommended the clause. Consequently, F&P advised that while they still considered the situation as critical (in regard to reinsurance and the special rules on building insurance, as per above) they withdraw recommending the specific clause.

Where reinsurance exclusions are introduced in wordings they follow similar language. Reinsurance exclusions will typically only be applicable to larger commercial risks and on occasion to a list of 'Target Risks'. In Property these may be defined as high rise buildings, tunnels and bridges, power stations, offshore risks and airports. For Casualty, target risks are typically certain security companies, 'large event' organisers (say for events involving more than 10,000 people), operators/owners of main train stations and airports, as per above under 2 (b).

(e) If there are policy restrictions on or exclusions of terrorism cover, when were these first introduced and have they been changed in the light of recent events?

In the Marine Hull market a terrorist exclusion, as per above, has been standard since 1983. The limited exclusion for cargo risks was introduced following 9/11. In the Non-Marine market terrorism exclusions were introduced following 9/11.

(f) More particularly, do any market definitions of terrorism require actual physical damage to be sustained and if so of any particular kind?

There is no requirement of actual physical damage to be sustained for the exclusion to apply. Any loss/damage (as per the policy coverage) following a terrorism act, as defined, will be excluded.

(g) Upon whom falls the burden of proving any loss was caused by an act of terrorism?

Generally speaking, the burden of proving an act of terrorism will follow normal principles on construction of insurance policies. If the issue is whether a terrorist exclusion in a standard insurance policy applies for a given loss some general principles apply. The starting point is that the party who calls for a stipulation to apply has the burden of proving that the actual facts satisfy the exclusion clause. The wording will be given its plain, ordinary meaning, hereunder one will look into the purpose of the clause. If the clause is unclear, it is a general principle that it will be construed against the party who drafted it. This principle is codified in the general Law on Contracts, § 38, although only applying for consumer contracts.

In regard of commercial contracts Danish law will in general allow a broader proof of the intent between the parties and be less restricted by the '4 corners of contract' as per Common Law.

In reinsurance contracts it is common to see a 'reversed' burden of proof as per the following clause:

If the Reinsurer alleges that by reason of this exclusion, any loss, damage, cost or expense is not covered by this reinsurance the burden of proving the contrary shall be upon the Reassured.

(h) Are rules of causation varied in relation to terrorism? In particular, does a terrorism exclusion operate when the loss is proximately caused by terrorism or is the exclusion narrower, eg, the loss has to be "solely and directly" caused by terrorism?

Terrorism clauses will for the most part follow normal rules on causation and the proximate cause doctrine.

Reinsurance wordings may on occasion contain a clause as follows:

This reinsurance excludes loss, damage, cost or expense of whatsoever nature directly or indirectly caused by, resulting from or in connection with any act of terrorism regardless of any other cause or event contributing concurrently or in any other sequence to loss.

(i) Describe what, if any, significance is attributed to: the identity/identification of the perpetrator(s); their identification/association with recognised terrorist groups; the motive attributed to any act of terrorism (and whether this must be political, religious or ideological in nature); the modus operandi employed in perpetrating any act of terrorism; and/or the target of the physical act, ie those directly suffering loss and/or those (eg the Government) intended to be influenced?

The significance of these factors will all depend on the actual wording and clauses used. There is no requirement of proving a relation to any known terrorist group. A 'stand-alone' action can also qualify as a terrorist act.

(j) To satisfy any definition or test of terrorism is there any dependence upon any Government, judicial or other form of certification or declaration of any kind?

There is no dependence upon Government or similar institutions for declaring a specific event as a terrorist event.

(k) Is there any specific reference, provision or known problem relating to acts involving biological, chemical, nuclear or other forms of contamination?

There is no firm practice on these risks. In reinsurance wordings it is often stated that even if terrorism as such is covered this does not apply for biological, chemical or nuclear acts.

(l) To the extent that terrorism risks are covered, do policies use aggregation provisions to limit insurance/reinsurance exposure and oblige insureds/reinsureds to bear retentions of any kind?

Direct policies and reinsurance agreements may contain specific aggregation provisions to limit the exposure. Excess of loss reinsurance does by its nature provide an overall aggregate limit per event. On occasion a sub limit may apply for terrorism cover.

3. TERRORISM AND GOVERNMENT INTERVENTION

(a) Does national legislation impose any restrictions on terrorism exclusions in insurance policies? If so, describe them and their application.

As referred above it is not possible to make restrictions in the Fire Building Insurances. Similar restrictions would apply for Motor Liability (strict liability as per law) and for Workmen's Compensation coverage, however, for these type of policies there have so far not been any intentions to implement terrorism exclusions.

(b) Does the Government provide any scheme whereby terrorism cover is made available to direct policy holders by the Government itself? If so, please outline the date of the introduction of the scheme, the nature of the scheme including any limits, deductibles and so forth, its original purpose, its success and funding arrangements.

There are no Government schemes in place.

(c) Does the Government provide any scheme whereby terrorism reinsurance is made available to insurers by the Government itself? If so, please outline the date of the introduction of the scheme, the nature of the scheme including any limits, deductibles and so forth, its original purpose, its success and funding arrangements.

There are no Government reinsurance schemes in place.

4. INTERNATIONAL OR CROSS-BORDER ARRANGEMENTS

(a) Can you identify any international or cross-border schemes or initiatives whereby insurance or relief from financial consequences of acts of terrorism is guaranteed or supported for particular sectors, eg, aviation, shipping?

There are no such schemes in operation in Denmark

(b) Are you aware of any international or crossborder initiatives or schemes which have been devised or developed since September 11 to protect insureds, insurers or reinsurers against exposure to terrorist activities?

Although this was discussed in the market following 9/11 there are no such schemes or initiatives going on presently in Denmark.

5. DECIDED CASES OR OTHER RULINGS

Have there been any court decisions or other rulings in your country in which the coverage of an insurance or reinsurance policy in respect of an act of terrorism has been considered?

There have been no court decisions on terrorism cases.

ECUADOR

1. MEANING OF TERRORISM

(a) Is there any general definition of ‘terrorism’, ‘terrorist activity’ or any related term in the general law within your jurisdiction?

No.

(b) If there is a definition, for what legal purposes is the definition relevant?

Does not apply.

2. TERRORISM AND POLICY WORDING

(a) To what extent do insurance and reinsurance policies written in your country exclude the liability of insurers and reinsurers for war risks? If so, is there any distinction drawn between commercial and consumer contracts. Please answer this question on a class/sector by class/sector basis.

Even though war risks are excluded, the distinction between insurance with consumers and insurance with enterprises is not usual.

(b) To what extent do insurance and reinsurance policies written in your country exclude the liability of insurers and reinsurers for terrorism risks? If so, is there any distinction drawn between commercial and consumer contracts. Please answer this question on a class/sector by class/sector basis.

Even though risks of terrorism are excluded, the distinction between insurance with consumers and insurance with enterprises is not usual.

(c) To what extent do war risks or exclusions and terrorism risks or exclusions or those for other acts of political or other violence such as malicious damage overlap?

No.

(d) Are there any market definitions of terrorism in use for insurance or reinsurance contracts? Please answer this question on class/sector by class/sector basis. If these have been introduced in response to recent developments how do these differ from previous provisions?

The inclusion of those definitions is not usual.

(e) If there are policy restrictions on or exclusions of terrorism cover, when were these first introduced and have they been changed in light of recent events?

Those restrictions exist many decades ago, and have not suffered recent changes.

(f) More particularly, do any market definitions of terrorism require actual physical damage to be sustained and if so of any particular kind?

No.

(g) Upon whom does the burden of proving any loss was caused by an act of terrorism?

It is not regulated.

(h) Are rules of causation varied in relation to terrorism? In particular, does a terrorism exclusion operate when the loss is proximately caused by terrorism or is the exclusion narrower, eg, the loss has to be 'solely and directly' caused by terrorism?

The rules of causation do not change.

(i) Describe what, if any, significance is attributed to: the identity/identification of the perpetrator(s); their identification/association with recognised terrorist groups; the motive attributed to any act of terrorism (and whether this must be political, religious or ideological in nature); the modus operandi employed in perpetrating any act of terrorism; and/or the target of the physical act, ie those directly suffering loss and/or those (eg Government) intended to be influenced?

That attribution does not exist.

(j) To satisfy any definition or test of terrorism is there any dependence upon any Government, judicial or other form of certification or declaration of any kind?

No.

(k) Is there any specific reference, provision or known problem relating to acts involving biological, chemical, nuclear or other forms of contamination?

No.

(l) To the extent that terrorism risks are covered, do policies use aggregation provisions to limit insurance/reinsurance exposure and oblige insureds/reinsureds to bear retention of any kind?

It does not apply, as that risk is not usually covered.

3. TERRORISM AND GOVERNMENT INTERVENTION

(a) Does national legislation impose any restrictions on terrorism exclusions in insurance policies? If so, describe them and their application.

No.

(b) Does the Government provide any scheme whereby terrorism cover is made available to direct policy holders by the Government itself? If so, please outline the date of introduction of the scheme, the nature of the scheme including any limits, deductibles and so forth, its original purpose, its success and funding arrangements.

No.

(c) Does the Government provide any scheme whereby terrorism reinsurance is made available to insurers by the Government itself? If so, please outline the date of introduction of the scheme, the nature of the scheme including any limits, deductibles and so forth, its original purpose, its success and funding arrangements

No.

4. INTERNATIONAL OR CROSS-BORDER ARRANGEMENTS

(a) Can you identify any international or cross-border schemes or initiatives whereby insurance or relief from financial consequences of acts of terrorism is guaranteed or supported for particular sectors, eg, aviation, shipping?

No.

(b) Are you aware of any international or cross-border initiatives or schemes which have been devised or developed since September 11 to protect insureds, insurers or reinsurers against exposure to terrorist activities?

No.

5. DECIDED CASES OR OTHER RULINGS

Have there been any court decisions or other rulings in your country in which the coverage of an insurance or reinsurance policy in respect of an act of terrorism has been considered?

No.

FRANCE⁵

1. MEANING OF TERRORISM

(a) Is there any general definition of “terrorism” or “terrorist activity” in the general law within your jurisdiction?

Only the Penal Code contains a general definition of “terrorism”.

Offences

Article 421-1 (*laws of 9 September 1986, 22 July 1996 -17 June 1998 and 15 November 2001*):

The following offences constitute acts of terrorism where they are intentionally connected to an individual or collective enterprise, the aim of which is to cause serious disturbance to public order by means of intimidation or terror:

1. Wilful attacks on life, wilful attacks on the physical integrity of persons, kidnapping and false imprisonment as well as hijacking of aircraft, ships or other means of transport, as defined in Book II of this Code;
2. Theft, extortion, destruction, defacement and damage, as well as computer offences as defined in Book III of this Code;
3. Offences with respect to combat units and disbanded movements defined in articles 431-13 to 431-17 and the offences defined in articles 434-6 and 441-2 to 441-5;
4. The manufacture or possession of deadly or explosive machines or devices, as defined in articles L.2353-4 of the Defence Code;
 - the production, sale, import or export of explosive substances, as defined in articles L.2353-5 to L.2353-8 of the Defence Code;
 - the acquisition, possession, transport or unlawful carrying of explosive substances or of devices made with such substances, as defined in article L.2353-13 of the Defence Code;
 - the possession, carrying, and transport of arms and munitions of the first and fourth categories, as defined in articles L.2339-2, 2339-5, 2339-8 and 2339-9 of the Defence Code;
 - the offences defined in articles L.2341-1 and 2341-4 of the Defence Code;
 - the offences referred to in articles L.2342-57 to 2342-61 of the Defence Code;
5. Receiving the proceeds of any of the offences specified in subparagraphs 1 to 4 above;
6. The money-laundering offences specified in Chapter IV of Title II of Book III of this Code;
7. The insider-trading offences specified in article L.465-1 of the Monetary and Financial Code.

Introduction of a substance liable to endanger human or animal health

Article 421-2 (*laws of 22 July 1996 and 9 March 2004*):

The introduction into the atmosphere, on the ground, in the subsoil, into foodstuffs or foodstuff ingredients, or into waters, including territorial waters, of a substance liable to endanger the health of humans or animals or the natural environment is an act of terrorism where it is intentionally connected to an individual or collective enterprise, the aim of which is to cause serious disturbance to public order by means of intimidation or terror.

Participation in a terrorist organisation

Article 421-2-1 (*law of 22 July 1996*):

It also is an act of terrorism to participate in a group formed, or an association established, for the preparation, evidenced by one or more *actus reus* elements, of any of the acts of terrorism specified in the preceding articles.

Financing a terrorist organisation

Article 421-2-2 (*laws of 15 November 2001 and 18 March 2003*):

It also is an act of terrorism to finance a terrorist organisation by providing, collecting or managing funds, securities or property of any kind, or by giving advice for this purpose, intending that such funds, securities or

⁵ Professor Jerome Kullmann.

property be used, or knowing that they are intended to be used, in whole or in part, for the commission of any of the acts of terrorism listed in this chapter, irrespective of whether such an act takes place.

(b) If there is a definition, for what legal purposes is the definition relevant?

The purpose of this definition is criminal prosecution. Where a statute refers to "terrorism" without further specification, the term is to be understood as having the meaning ascribed to it in the Penal Code.

For instance, article L.126-2 of the Insurance Code provides:

Insurance contracts covering property situated in the national territory against fire damage as well as damage to the frame of land motor vehicles **shall entitle the policyholder to coverage** for direct material damage caused within the national territory to the insured property by an attack or an act of terrorism as defined in articles 421-1 and 421-2 of the Penal Code. (emphasis added)

2. TERRORISM AND POLICY WORDINGS

(a) To what extent do insurance and reinsurance policies written in your country exclude the liability of insurers and reinsurers for war risks? If so, is any distinction drawn between commercial and consumer contracts. Please answer this question on a class/sector by class/sector basis.

There is no statutory distinction based on the different classes of insureds (major risks/mass risks; professionals/consumers).

Insurance contracts:

Property insurance: Article L.121-8 of the Insurance Code excludes the liability of insurers for losses and damage caused by war (whether foreign or civil), riots and civil commotion (concepts that do not encompass acts of terrorism). But the statutory exclusion is not mandatory. The parties may therefore depart from it and agree to cover damage due to foreign and/or civil war and/or riots and civil commotion. They may also specify that such-and-such a type of damage and property shall be covered.

An identical rule applies to maritime insurance: Article L.172-16 of the Insurance Code provides that **unless otherwise provided**, insurers shall not cover risks of civil or foreign war, mines or engines of war, and riots and civil commotion.

Life assurance: Since 1989, the law no longer contains any provision relating to life assurance during wartime. Consequently, the parties to a life assurance contract may elect to cover or exclude death resulting from civil or foreign war.

Reinsurance: contractual freedom.

(b) To what extent do insurance and reinsurance policies written in your country exclude the liability of insurers and reinsurers for terrorist risks? If so, is any distinction drawn between commercial and consumer contracts? Please answer this question on a class/sector by class/sector basis.

Insurance contracts: see 3(a).

Reinsurance: contractual freedom, but industry agreement (insurance companies belonging to the FFSA (*Fédération Française des Sociétés d'Assurances* / association of French insurers) and mutual insurance companies belonging to the GEMA (*Groupe des Entreprises Mutuelles d'Assurances* / association of French mutuals) in the context of the GAREAT co-reinsurance pool. See 3(c).

(c) To what extent do war risks or exclusions and terrorism risks or exclusions or those for other acts of political or other violence such as malicious damage overlap?

Damage to property or individuals (collapse of a building, bodily injuries) may arise from an event (fire, explosion) caused by one or more persons acting in the context either of a foreign or civil war, or of a terrorist activity.

Consequently, the legal regime of the loss occurrence depends on the originating cause of the act of violence: foreign or civil war, or terrorism.

Foreign war presupposes hostilities between clearly identified nations, even though there may have been no official declaration of war.

Civil war presupposes hostilities between citizens of the same country (during the 1954-1962 Algerian War, the French courts held that damage caused in Algeria came within the scope of the civil war and that attacks committed in Paris and elsewhere in mainland France were events arising from the civil war).

Terrorism presupposes:

- an intent to intimidate or create fear — this may be the state of mind of someone acting in the context of a foreign or civil war —
- by engaging in conduct made an offence by the Penal Code — conduct that may also be encountered in the context of a foreign or civil war.

In the event of litigation concerning the cause of the harmful event, the court must settle the dispute on the basis of the circumstantial evidence adduced during the trial (see 2(h)). It should be pointed out that damage may also be caused by someone acting outside the context of a war or a terrorist enterprise, eg by blowing up a neighbour's car out of revenge (see: Cass. Civ. 1, 11 October 1983, No 82-14118, Bull. civ. I, No. 222: whenever an attack involving an explosive device is not part of a series of concerted actions of the same kind, the attack is not an act of terrorism within the meaning of insurance law since the victim may have been the object of personal revenge or the target of a mentally unbalanced person).

(d) Are there any market definitions of terrorism in use for insurance or reinsurance contracts? Please answer this question on class/sector by class/sector basis. If these have been introduced in response to recent developments how do these differ from previous provisions?

No.

(e) If there are policy restrictions on or exclusions of terrorism cover, when were these first introduced and have they been changed in the light of recent events?

Before 1983: contractual freedom: generally, insurers would exclude the consequences of acts of terrorism.

1983: procedure introduced in the wake of the development of regional terrorism in France (Corsica, Basque country and Brittany, in particular): no legislation, but an agreement between the French Government and the Fédération Française des Sociétés d'Assurances under which insurers would send their policyholders an offer to extend coverage to **property damage** due to a terrorist attack, provided the attack caused an explosion or a fire. The policyholders were free to decline the offer.

1983 to 1986: wave of terrorist attacks (particularly in September 1986: 9 dead and 140 injured).

1986: law of 9 September 1986: two statutory mechanisms were put in place.

- For **personal injury** but not for property damage: creation of a compensation fund for victims of acts of terrorism (*Fonds de garantie contre les actes de terrorisme*), funded by taxes collected on property insurance policies. Compensation is granted to all victims, whether or not they carry insurance. Compensation is payable to any French or foreign national who is injured in France; and to any French national injured in France or abroad (and, since the law of 23 January 2006, even the beneficiaries — e.g. the spouses — of victims of acts of terrorism can obtain compensation under the same conditions. The compensation is meant to provide *full* redress (ie without any ceiling) for all manner of personal injury (bodily harm, pain and suffering, emotional distress, economic loss).

The *Fonds de garantie* is not an insurance undertaking, but a body created by law. Its funding comes exclusively from property insurance policyholders via a tax on their policies. The amount of the tax is set by Minister of Economy and Finance (the current rate is €3.30 per property insurance policy; in 2005, the total amount of such tax was 240 million euros — which corresponds to about 70 million property insurance policies). Since 1990, about

13,000 claims have been lodged with the *Fonds de garantie* in respect of acts of terrorism (in France, Israel, Egypt, etc.), aircraft attacks, the 9/11 attacks in New York, etc.).

- For **property damage**: A new article was introduced into the Insurance Code (article L.126-2) making terrorism coverage compulsory for property insurance contracts by prohibiting clauses excluding coverage of damage caused by terrorist action:

Property insurance contracts may not exclude the insurer's cover for damage arising from acts of terrorism or attacks perpetrated in the national territory. Any clause to the contrary shall be deemed severed from the contract.

It should be stressed that terrorism coverage applies to all manner of damage and loss: direct damage to property and also consequential losses (business interruption, loss of enjoyment, etc.), but it only applies to insured property. In other words, a person whose property is damaged by an act of terrorism will not receive compensation unless he or she carries insurance for the property. The rule is therefore very different from the one for personal injury: victims of personal injury caused by an act of terrorism are entitled to compensation from the *Fonds de garantie* even if they carry no insurance.

The applicable limits and deductibles for damage caused by terrorism are mandatorily identical to those specified in the insurance contract for damage caused by other perils.

This statutory regime was substantially amended by a law of 23 January 2006 (see *infra*).

2001 – Insurance contracts: following the September 11 attacks in the United States, French insurers considered that the amount of damage liable to be caused by ‘hyperterrorism’ could be so high that the identical-limit-and-deductible rule laid down by the law 9 September 1986 would be impossible to bear for corporate risks. As a result, the operation of the rule was excluded for **“large risks”** by a decree of 28 December 2001 (see 3(a)).

2001 - Reinsurance: GAREAT pool set up as early as December 2001.

*2006: Law of 23 January 2006 amending the rules governing **property insurance*** : The law of 23 January 2006 transformed article L. 126-2 of the Insurance Code, which now reads as follows:

Insurance contracts covering property situated in the national territory against fire damage as well as damage to the frame of land motor vehicles **shall entitle the policyholder to coverage** for direct material damage caused within the national territory to the insured property by an attack or an act of terrorism as defined in articles 421-1 et 421-2 of the Penal Code. (emphasis added)

The law no longer prohibits exclusions for acts of terrorism; rather, it positively provides for coverage of damage resulting from such acts.

The law no longer requires insurance contracts to cover *all* damage caused by acts of terrorism but only *direct property damage* and **consequential losses** arising therefrom. Hence, consequential losses that do not arise from direct damage to property will no longer be mandatorily covered. However, any business-interruption coverage afforded by a policy will extend to damage caused by attacks and acts of terrorism under the conditions specified in the policy.

(f) More particularly, do any market definitions of terrorism require actual physical damage to be sustained and if so of any particular kind?

No - See 3(a)

(g) Upon whom falls the burden of proving any loss was caused by an act of terrorism? Must loss be solely and directly caused?

During periods of foreign war: When an insurance contract does not cover damage caused by a foreign war, the insured bears the burden of proving that the loss was caused by an event other than foreign war (article L.121-8 of the Insurance Code).

During periods of civil war: When an insurance contract does not cover damage caused by a civil war, the insurer bears the burden of proving that the loss was caused by civil war (article L.121-8 of the Insurance Code).

Where there is neither a foreign war nor a civil war, and terrorism is involved:

Before the 1986 law, insurance contracts excluded coverage for damage caused by acts of terrorism (unless such coverage was included as a result of the 1983 agreement referred to in 2(e)). As a general rule, for all exclusions, the insurer bears the burden of proving that the loss corresponds to a risk excluded from the contract. Consequently, to deny cover, the insurer had to prove that the damage was caused by an act of terrorism.

After 1986, damage caused by acts of terrorism is covered. Any insured making a claim for damage caused by an act of terrorism must prove the alleged act of terrorism. Proof may be adduced by any means: the insured may therefore satisfy the court by producing circumstantial evidence (see 2(h)).

(h) Describe what, if any, significance is attributed to: the identity/identification of the perpetrator(s); their identification/association with recognised terrorist groups; the motive attributed to any act of terrorism (and whether this must be political, religious or ideological in nature); the modus operandi employed in perpetrating any act of terrorism; and/or the target of the physical act, ie those directly suffering loss and/or those (eg the Government) intended to be influenced?

It is for the court to determine any dispute between an insurer and an insured regarding the originating cause of a harmful event. The court will take several indicia into account in considering terrorism: an organization claiming responsibility for the act; several attacks committed within a certain period or time or a certain area; the modus operandi (sophisticated or unsophisticated bomb); the specificity of the target (public building, prominent politician, religious leader, etc.). Although France's highest court, the Cour de cassation, has ruled on this point, it should be emphasized that the courts below (in practice, the courts of appeal) are free to form their assessment of the significance of the circumstantial evidence produced before them.

- Cass. Civ. 1, 15 April 1982, No 81-10490: The court of appeal held there had been an act of terrorism, based on the findings that: the building in Corsica owned by the insured had been destroyed at night by an explosive device; other attacks of the same type had been perpetrated during the same period of time (eg an attack on the tax office in Bastia); and a newspaper article published in the March 28, 1978 edition of *Le Provençal* indicated that journalists had attended a secret press conference held by known members of the FLNC terrorist movement, at which one of the participants had stated that the FLNC claimed responsibility for the attack in issue.

- Cass. Civ. 1, 4 November 1987, No 86-16266: In Calvi, Corsica, the insured's premises were destroyed by an explosion. The FNLC, claimed responsibility for the attack, and tracts bearing the FNLC logo were found at the scene. However, the court of appeal noted that the tracts had not been authenticated and that the claim of responsibility for the attack, made in the press, could not, because of its anonymous nature, constitute sufficient evidence that the explosion was caused by an act of terrorism;

- Cass. Civ. 1, 7 June 1988, No 86-18711: A villa in Corsica was blown up. The court held it was an act of terrorism, based on the findings that: there was no ill feeling towards the insured in the area; a criminal organization had claimed responsibility for the attack; and 42 other properties had been destroyed during the same period and the same criminal organization had claimed responsibility for their destruction;

- Cass. Civ. 1, 7 February 1989, No 87-11811, Bull. civ. I, No 59 p.38: On 11 August 1982, a booby-trapped vehicle exploded, seriously damaging the Iraqi embassy building in Paris. A Shiite terrorist group calling itself "The Islamic Amal Movement of Iraq" immediately claimed responsibility for the attack. The investigation was unable to identify the perpetrators, and no charges were brought. The Cour de cassation upheld the court of appeal's finding that the attack was an act of terrorism.

- Cass. Civ. 1, 17 October 1995, No 93-14837 (see G. Durry, *Aspects juridiques de l'indemnisation, en France, des victimes d'actes de terrorisme*, Revue Risques No 48, December 2001, p.117): The court of appeal – which having rightly held that such an act implies a minimum of organization and found that the act (setting off an explosive charge in a secondary school in Bastia, Corsica, injuring the school's janitors), for which no-one had claimed responsibility, was an isolated action against the school and the manner in which it was carried did not show that the perpetrators, who are not known, were professionals – correctly deduced from this that the act was not an act of terrorism.

Basically, terrorism presupposes a certain *organisation* by the perpetrators and that the aim of their action extends beyond the victim.

(i) To satisfy any such definition or test is there any dependence upon any Government, judicial or other form of certification or declaration of any kind?

There is a fundamental difference among the various catastrophe risks. For *natural disasters* (law of 1982) and *technological disasters* (law of 2003), the Government may intervene and declare such and such an occurrence (or combination of occurrences) a natural or technological disaster. The triggering of insurance coverage for such risks is conditional on the Government making such a declaration.

For *terrorism risks*, there is no similar procedure. A discussion may therefore arise between the insurer and the insured and, if an accommodation cannot be reached, the court will settle the dispute on the basis of the evidence produced by the insured (see 2(g)). Obviously, any official declarations by the Government or arrests of [suspected] terrorists would constitute circumstantial evidence likely to influence the personal conviction of the court. In this respect, the Ministry of Foreign Affairs usually publishes a communiqué whenever there is an act of terrorism, and the compensation fund for victims of acts of terrorism accepts the communiqué as evidence of the reality of the act of terrorism.

(j) Is there any specific reference, provision or known problem relating to acts involving biological, chemical, nuclear or other forms of contamination?

Insurance contracts ordinarily contain clauses excluding coverage for:

- damage caused by attacks, acts of terrorism or sabotage, subject to the provisions of law that make coverage of such damage compulsory;
- damage caused by weapons or devices designed to explode by modification of atom core structures, or by any nuclear fuel, radioactive product or waste or any other source of ionising radiation, including, but not limited to, any radioisotope), etc.

But such acts may constitute acts of terrorism under article 421-2 of the Penal Code :

The introduction into the atmosphere, on the ground, in the subsoil, into foodstuffs or foodstuff ingredients, or into waters, including territorial waters, of a substance liable to endanger the health of humans or animals or the natural environment is an act of terrorism too, where it is intentionally connected to an individual or collective enterprise, the aim of which is to cause serious disturbance to public order by means of intimidation or terror.

Given that article L.126-2 of the Insurance Code makes coverage compulsory for property damage arising from acts of terrorism, and given that acts of terrorism are defined in, eg, article 421-2 of the Penal Code, damage corresponding to biological, chemical, nuclear or other forms of contamination is insured.

In addition, article L.126-2 of the Insurance Code provides:

[C]ompensation for material damage, *including decontamination expenses*, and compensation for consequential losses arising from such damage shall be covered, subject to the deductible and the limit specified in the contract in respect of coverage against fire.

Where it is necessary to *decontaminate* real estate, the compensation for damage, *including decontamination expenses*, shall not exceed the market value of the real estate or the amount of the insured sum.

The *decontamination* of spoil as well as the isolation thereof shall not come within the scope of this coverage. (emphasis added)

(k) To the extent that terrorism risks are covered, do policies use aggregation provisions to limit insurance/reinsurance exposure and oblige insureds/reinsureds to bear retentions of any kind?

See 3(c).

3. TERRORISM AND GOVERNMENT INTERVENTION

(a) Does national legislation impose any restrictions on terrorism exclusions in insurance policies? If so, describe them and their application.

1. Property damage

Insured property mandatorily covered against damage due to terrorism:

- between 1986 and 2006, via the statutory prohibition on excluding terrorism coverage;
- since the law of 23 January 2006, by compulsory coverage of damage caused by an act of terrorism (article L.126-2 of the Insurance Code); article L.126-3 specifies: "Insurance undertakings must include in the contracts referred to in article L. 126-2 a clause extending their coverage to the damage specified in the said article").

Large risks and mass risks are subject to the above-mentioned compulsory coverage. However, special rules affect the amount of coverage under insurance contracts covering insureds classed in the category of large risks.

It should be noted that the law of 23 January 2006 provided that a decree would determine "the derogations or exclusions, if any, applicable to contracts concerning the large risks defined in article L. 111-6 in the light of the insurability of such risks." The decree (which reportedly will exempt transport-industry risks from terrorism coverage) has not been published to date.

Property

Terrorism coverage applies to all property, including land motor vehicles, provided the property is:

- already insured against fire, and
- situated in French territory.

Damage

Terrorism coverage applies to: material damage to the aforesaid property and consequential losses arising from such material damage; business interruption, if covered by the insurance contract; and the cost of decontaminating real estate but not of decontaminating or isolating spoil.

The amount of terrorism coverage is limited by the deductible and the limit of coverage specified in the insurance contract in respect of fire risks.

- For mass risks, the insurance benefits cannot be less than such deductible and limit.
- For large risks, the decree of 28 December 2001 (article R.126-1 of the Insurance Code) provides that the amount of terrorism coverage may be reduced. But the reduction is limited, too. (For goods carried, 20% of the limit of coverage, net of deductible, specified in the contract for damage of the same kind not caused by an act of terrorism or an attack. For other risks, 20% of the limit of coverage, net of deductible, specified in the contract for damage of the same kind not caused by an act of terrorism or an attack, and, in any event, 20 million euros.)
- And for decontamination of real estate, the amount of coverage is limited to the market value of the real estate or to the amount of the sum insured.

2. Personal injury

Insurance contracts are not regulated as regards personal injury caused by acts of terrorism. Such injury is covered by a compensation fund financed by taxes collected on property insurance policies (see 2(e)).

(b) Does the Government provide any scheme whereby terrorism cover is made available to direct policyholders by the Government itself? If so, please outline the nature of the scheme including any limits, deductibles and so forth, its original purpose, its success and funding arrangements.

No, but a curious and perverse phenomenon should be noted. There are more than 120 types of mandatory insurance or cover in France. This means that a person cannot legally engage in certain business activities (eg practise as a lawyer, auditor or insurance broker) or leisure activities (eg sports) unless he or she carries insurance. Yet, the law that requires a person to carry certain insurance does not require insurers to provide that insurance. The lawmakers therefore set up a public body, the Bureau Central de Tarification (BCT), or central rating bureau, to which people unable to find an insurer willing to provide them with mandatory insurance may apply. After examining the risk, the BCT sets a premium that is binding on the insurer. But the BCT is competent only for a few types of mandatory insurance (eg builders' public liability insurance, natural disaster cover and medical malpractice insurance).

Apart from those few cases, the BCT is not competent. Consequently, nothing requires an insurer to issue an insurance contract solely covering terrorism risks.

Since property covered against fire is automatically and mandatorily covered against terrorism, a person particularly exposed to a risk of property damage through terrorist acts will seek to take out an insurance contract covering fire risks. But nothing obliges an insurer to issue a fire insurance contract, and the BCT cannot intervene.

Consequently, some French insurers have adopted the following strategy: A person exposed to terrorism risks has a typical contract, which covers fire risks; the policyholder is therefore covered for terrorism risks too. The insurer cancels the insurance contract with effect from the anniversary date. There is no longer any insurance contract and, hence, there is no longer any coverage against fire and, hence, no longer any coverage against terrorism. The person is therefore totally deprived of insurance for the property. An example of this is a public body, the Department of South Corsica, the buildings of which are frequently the target of Corsican terrorists. It no longer has any insurance for its property (Conseil d'Etat, 15 June 2005, RGDA 2006 p.189, note J. Kullmann).

(c) Does the Government provide any scheme whereby terrorism reinsurance is made available to insurers by the Government itself? If so, please outline the nature of the scheme including any limits, deductibles and so forth, its original purpose, its success and funding arrangements.

The French Government has not directly provided any such scheme. There is, however, a French state-controlled public body dedicated to reinsurance, the Caisse Centrale de Réassurance (CCR), the legal status of which is established in articles L.431-1 *et seq.* of the Insurance Code.

After the introduction in 1986 of compulsory terrorism coverage for all property situated in France or a French overseas department or territory and in the wake of the attacks of 11 September 2001, a pool was set up on 1 January 2002 by insurers, reinsurers and the CCR to cover terrorist acts: GAREAT (*Gestion de l'Assurance et de la REassurance contre les Attentats* – management of insurance and reinsurance against [terrorist] attacks).

And in December 2001, the Minister of Economy and Finance authorised the CCR to provide unlimited coverage with the guarantee of the French state, under a layered risk-sharing system structured as follows:

1. Large risks (or, more precisely, 'heavy' risks: sum insured exceeding 6 million euros)

Layers

- | | | |
|-----------------|---|-----------------------------|
| - First layer: | Insurers Retention: | €0 – €400 million |
| - Second layer: | Reinsurers Reinsurance: | €400 million – €1.2 billion |
| - Third layer: | Reinsurers Reinsurance: | €1.2 billion – €1.6 billion |
| - Fourth layer: | Reinsurers Reinsurance: | €1.6 billion – €2 billion |
| - Fifth layer: | Unlimited state coverage through the CCR. | |

Risks covered

Three main criteria:

- Types of business covered
 - Property damage
 - Construction/Engineering and Financial Institution lines
- The sums insured for direct damage and business interruption must exceed €6 million.
- Territorial coverage: The risks must be located in France or French overseas departments or territories.

Main exclusions

- Personal injury, life assurance
- Third-party liability insurance
- Non-material damage not linked to material damage
- All transport insurance
- War, civil war, riot, strike, civil commotion, vandalism
- Indirect and secondary causes (computer viruses or computer hacking, for instance)

It should be pointed out that **nuclear risks** have been covered since 2006.

2. Mass risks (since 2006) :

For mass risks, the reinsurance system is not necessarily established through GAREAT.

- Limit = 20% DAB premiums + 2% motor insurance premiums
- First layer: Insurers Retention: 0 -15% limit
- Second layer: Reinsurers Reinsurance: 15% - 52.5% limit
- Third layer: Reinsurers Reinsurance: 52.5% - 100% limit
- Fourth layer: Unlimited CCR cover.

4. INTERNATIONAL OR CROSS-BORDER ARRANGEMENTS

(a) Can you identify any international or cross-border schemes or initiatives whereby insurance or relief from financial consequences of terrorist acts is guaranteed or supported for particular sectors, eg, aviation, shipping?

After the attacks of 11 September 2001, the Government introduced public-aid measures in favour of airlines. By decision of the European Commission, the aid was eliminated throughout the European Union on 1 November 2002.

(b) Are you aware of any initiatives or schemes which have been devised or developed since September 11 to protect insureds, insurers or reinsurers against exposure to terrorist activities?

No

5. DECIDED CASES OR OTHER RULINGS

Have there been any court decisions or other rulings in your country in which the coverage of an insurance or reinsurance policy in respect of a terrorist act has been considered ?

No, not recently (but see 2(h)). Many court decisions were published forty or fifty years ago, during and after the Algerian civil war, but at the time there was no specific terrorism legislation as we now know it.

GREAT BRITAIN⁶

As insurance and reinsurance policies written in Great Britain - and most particularly in the London international insurance market - commonly concern (re)insurable interests situated in locations all over the world where possible we have attempted to distinguish in the answers provided between policies involving interests situated in Great Britain - and in the context of terrorism still further between mainland Britain and Northern Ireland - and those situated elsewhere.

1. MEANING OF TERRORISM

(a) Is there any general definition of “terrorism” or “terrorist activity” or any related term in the general law within your jurisdiction?

Strictly speaking no. There are however a number of statutory definitions of “terrorism” or “acts of terrorism” in different pieces of legislation, many concerned in recent times with the prevention of terrorism.

Prompted by concerns expressed about the different interpretations which might be given to such different statutory definitions, the British Government published guidelines in late 2004 upon the meaning of “acts of terrorism” for the purpose of the reinsurance underwritten by the Government by means of Pool Re : (below 3(c)).

For the purposes of the Prevention of Terrorism (Temporary Provisions) Act 1984, s.14(1) “terrorism” was defined as “the use of violence for political ends”, including “any use of violence for the purpose of putting the public or any section of the public in fear”.

However the latest (and most elaborate) statutory definition is that of the Terrorism Act 2000, s. 1:

- (1) In this Act “terrorism” means the use or threat of action where –
 - (a) the action falls within subsection (2),
 - (b) the use or threat is designed to influence the government or to intimidate the public or a section of the public, and
 - (c) the use or threat is made for the purpose of advancing a political, religious or ideological cause.
- (2) Action falls within this subsection if it-
 - (a) involves serious violence against a person,
 - (b) involves serious damage to property,
 - (c) endangers a person's life, other than that of the person committing the action,
 - (d) creates a serious risk to the health or safety of the public or a section of the public, or
 - (e) is designed seriously to interfere with or seriously to disrupt an electronic system.
- (3) The use or threat of action falling within subsection (2) which involves the use of firearms or explosives is terrorism whether or not subsection (1)(b) is satisfied.
- (4) In this section-
 - (a) “action” includes action outside the United Kingdom,
 - (b) a reference to any person or to property is a reference to any person, or to property, wherever situated,
 - (c) reference to the public includes a reference to the public of a country other than the United Kingdom, and
 - (d) “the government” means the government of the United Kingdom, of a Part of the United Kingdom or of a country other than the United Kingdom.
- (5) In this Act a reference to action taken for the purposes of terrorism includes a reference to action taken for the benefit of a proscribed organisation.

(b) If there is a definition, for what legal purposes is the definition relevant?

N/A

⁶ Profesor Malcolm Clarke and Tim Hardy.

2. TERRORISM AND POLICY WORDINGS

(a) To what extent do insurance and reinsurance policies written in your country exclude the liability of insurers and reinsurers for war risks? If so, is any distinction drawn between commercial and consumer contracts. Please answer this question on a class/sector by class/sector basis.

Broadly the practice continues along traditional lines whereby policies in most classes/sectors exclude liability for “war risks”, leaving an insured with the need to secure specific additional cover for such excluded “war risks”. For the purposes of this answer, these may broadly be categorised into “war on land” and transport risks, the latter again subdividing between marine war and aviation war risks.

Meaning of “war risks”

Such “war risks” are not customarily confined to the risk of war between States alone. There are variations both between and within classes, but in general terms “war risks” may more accurately be considered as “war and allied perils”.

A typical example of a widely-used “war exclusion” clause in the context of a commercial property all risks insurance (and thus in turn the basis of cover for many specialised “war on land” risks) illustrates the nature of what regularly are considered to be “war (or warlike) risks” in this context :

... damage occasioned by war, invasion, act of foreign enemy, hostilities or warlike operations (whether war be declared or not), civil war, rebellion, revolution, insurrection, civil commotion assuming the proportions of or amounting to an uprising, military or usurped power...

In addition one may find that some “war exclusions” embrace a slightly wider number of “allied perils”. These may broadly be described as acts of political interference and/or violence short of being “warlike”.

In the former category are specified perils of “*nationalisation, confiscation, requisition, seizure or destruction by government or any public authority*”, more commonly considered as “political risks”, often separately insured by a specialist policy/market. Acts of violence falling short of being “warlike” may be identified as specific perils which include riots, strikes, acts of civil commotion or malicious damage.

These specified perils may commonly be separately excluded or insured, distinct from any “war” or “warlike” perils, but are mentioned here (and 5 below) because of the difficulties of interpretation, proof and overlap of perils to which they may give rise.

Customarily, the risk of “*terrorism*” is regarded as a discrete risk and is separately provided for, but again boundaries are not always easily established. Some exclusion clauses which are described as being “war exclusions” exclude all the perils identified above, from war and warlike risks through political risks and acts of violence to acts of terrorism.

Some clauses in common use are variously described as, “war and terrorism” or “war, political risk and terrorism” clauses, but the perils actually listed will determine what is or is not excluded.

The difficulties of distinguishing and proving what specific peril has caused any loss has led to some insurance policies being marketed in recent years which cover a broader range of peril, which may be described as “political violence” or standalone “terrorism” cover (2(c) below).

War on land :

“War risks” are usually excluded as a general exclusion from all forms of land-based covers, whether of a private lines/consumer or commercial nature.

“War” exclusions are therefore to be found in household (buildings & contents) insurance, motor and travel insurance, as well as commercial property/all risks insurance, public liability/employers’ liability insurance and professional indemnity insurance.

Transport risks :

Aviation Insurance

Aviation insurance has traditionally excluded War (and warlike) risks from standard all risks hull and liability covers, which covers are usually combined in one policy for aircraft operators. The same principle of exclusion applies to the aviation risks of non-aircraft operators such as airports and service providers.

The form of exclusion, as described more fully below, was introduced following a spate of hijackings and other losses principally sustained in and around Beirut. The London Market developed a new form of exclusion in the late 1960s for aviation underwriters ("AVN 48"). This wording replaced the old war exclusion with a wider exclusion, which after some subsequent revisions to AVN48B, encompasses claims arising from war, hostile detonation of nuclear weapons, civil commotion, terrorist acts, sabotage, political seizure, hijacking and the like.

For hull covers the specialist (Aviation) War risk market has provided specific cover for what, save nuclear risks, has been so excluded. This has meant traditionally that a seamless cover has been provided respectively by either Aviation hull all risks insurers or (Aviation) War risk underwriters. Moreover, it is common practice for the two hull covers to incorporate a 50:50 clause whereby the all risk and war risks insurers each advance to the insured 50% of a commonly agreed insured value in the event of a loss leaving any dispute as to the proximate cause of loss as between the two policies to that of the insurers concerned. Recent developments in the war risk market, however, mean that some insurers restrict the cover in ways that may no longer make the cover seamless, so that certain risks remain excluded.

For liability covers, subject to review and cancellation provisions, the AVN48B perils are written back into policies through the extended coverage clause ("AVN52C"). Nuclear detonation and associated radioactive contamination cannot since the potential magnitude, spread and persistence of damage is such that the insurance market remains unwilling to cover it.

This has continued in effect to the present day, but subsequent to the 9/11 attacks, aviation insurers introduced a sub-limitation on their liability under AVN52C and spawned a market for cover excess of that sub-limit. Subsequently the sub-limit has increased. For a time, and continuing to date in a few countries only, the cover excess of the sub-limit had to be covered by government schemes of indemnity. In the UK, when in September 2001 the threatened (7 day) cancellation of AVN52C cover by aviation insurers threatened to ground all commercial flights, this was averted by the setting up of a Government captive - Troika Insurance Company. By the end of 2002 the assistance so afforded was no longer needed as the insurance of aviation war and terrorism risks returned to the independent market.

What at time of writing remains unsettled, but is expected before the end of July 2006, is the publication by the Aviation Insurance Clauses Group (AICG – a pan-European group of aviation insurers established in June 2005 and charged with the development of standard form aviation insurance clauses under terms of reference and subject to procedures that include public consultation on new draft clauses that are set out at www.aicg.co.uk.) of new form aviation war risk exclusion clauses and new form endorsements writing back cover otherwise excluded in amended form. It is likely that hitherto standard form clauses will be added to by alternative form clauses which aviation buyers and insurers may use more selectively in the negotiation of the covers.

The origin was a call by some aviation insurers for the more specific exclusion within the framework of an AVN48B-type clause for losses caused by terrorists using chemical, biological, radioactive or nuclear weapons ("dirty bombs" and/or "weapons of mass destruction - WMDs" in pursuit of their aims with the possibility of such risks not being written back under AVN52C type clauses. In Europe aviation insurance, to include against war risks, has become, by EC Regulation, compulsory for aircraft operators and so the deliberations of the market take account of the need for regulatory compliance by aircraft operators.

Marine Insurance

Marine risks and war risks have traditionally been underwritten separately. Widespread criticism in the 1970s of the clarity of some of the clauses and practices then in use saw an overhaul of marine clauses in the early 1980s, which form the basis of underwriting practice in the London Market today.

The standard Institute of London Underwriters (ILU) (now the International Underwriters Association (IUA)) marine hull, freight and cargo clauses typically in use exclude specified so-called "war and strikes" (discord) risks from their cover of "marine" risks. The risks excluded are separately and expressly covered by what are known as Institute War and Strikes clauses. Neither the exclusions, nor the covering clauses are however confined strictly to "war" and "strikes"

The "war" exclusion (or element thereof) typically excludes loss, damage, liability or expense caused by :

war civil war revolution rebellion insurrection, or civil strife arising therefrom, or any hostile act by or against a belligerent power ... (all essentially involving some form of public danger)

capture seizure arrest restraint or detainment (barratry and piracy excepted)... or any attempt thereat ... (detention of various kinds)

derelict mines torpedoes bombs or other derelict weapons of war...

The “strikes” exclusion excludes cover essentially for losses etc caused by strikes, labour disturbances, riots or civil commotions (*essentially all disturbances of different kinds*).

Further exclusions commonly extend to other terrorist, politically- motivated and malicious acts (2(b) below), which, together with the above exclusions fall to be separately and expressly covered by ILU War and Strikes clauses, which mirror the above four clauses and those of terrorism and confiscation, described more fully below.

The coverage afforded by the War and Strikes Clauses is not, however, wholly unqualified in scope. Such policies themselves regularly contain general exclusions of various kinds, one being an exclusion of losses arising from nuclear weapons of war. The precise ambit of such an exclusion may vary, but one in common use involves the automatic termination or cessation of effect of the policy in the event of the use of any nuclear weapon of war.

Reinsurance

War and Civil War exclusions have been a traditional feature of reinsurance wordings, generally following the form and content of other War exclusions described above.

Immediately following the 9/11 attacks there was considerable activity among direct insurers and reinsurers alike to establish whether the attacks (or any response described as a “war on terror”) were to be excluded from cover by the war exclusions, which themselves came to be re-examined along with all forms of terrorism exclusions, as described more fully below.

The War and Civil War elements of these exclusions themselves have not been radically altered, although, as discussed, that is not true of some elements of “war and terrorism” exclusions.

(b) To what extent do insurance and reinsurance policies written in your country exclude the liability of insurers and reinsurers for terrorist risks? If so, is any distinction drawn between commercial and consumer contracts? Please answer this question on a class/sector by class/sector basis.

Background (pre-2001)

While War and Civil War exclusions have been commonplace in policies covering most classes of business for a very considerable time, before September 2001 the private market in London (and elsewhere) would routinely cover, rather than exclude, terrorism risks related to property losses sustained in most countries under policies which would provide compensation for fire and explosion damage of any other cause than war.

In countries which were particularly prone to terrorism or other forms of political unrest, however, these perils have been, and continue to be, additionally excluded by means of an extended form of “War and Civil War” exclusion clause. Specialist political risk underwriters would then meet demand for any insurance cover required. Those covers would not necessarily distinguish the specific peril of “terrorism” from broader categories or descriptions of “political violence” in various forms.

As described further below, no terrorism exclusions in respect of UK-based risks were usual until IRA terrorist activity, first in the province of Northern Ireland, then on mainland Britain, prompted specific provisions to be implemented. From 1993 standard UK terrorism exclusions were introduced to cater for the government-backed scheme put in place (Pool Re) to provide cover for the terrorism risk posed to mainland commercial property risks.

Present position

After the events of 9/11 had made the risk of potential future major terrorist strikes a very real threat to the solvency of many reinsurers, the imposition by reinsurers of very wide terrorism exclusion clauses, led in turn to insurers seeking drastically to reduce their own exposure to terrorism risks both in the UK and around the world.

Since then a variety of measures, described below, have allowed the private market in a variety of ways once again to provide cover for terrorist risks. With some notable exceptions, (especially in the cases of some personal lines and/or

compulsory insurance covers), terrorism risks will now usually be excluded from cover in insurance and reinsurance policies written in Great Britain across most classes and sectors.

A practice has developed of voluntary “write back” or reinstatement of cover, depending largely upon a combination of what competitors /competing insurers provide or exclude and/or the availability of Government-backed or commercially available reinsurance. Alternatively, where available, use may be made of supplementary “standalone” terrorism cover.

Introduction/forms of exclusion - Northern Ireland

Following the implementation in Northern Ireland of the Government compensation scheme, designed to address extensive property damage caused in the province by IRA activity - per the Criminal Damage (Compensation) (Northern Ireland) Order 1977 - damage by terrorism was excluded by property insurers (save for private dwellings) in a manner intended to match the cover provided by the Government scheme.

This remains the position. In 2001 the possible return by the insurance industry to writing this business in the province was jeopardised by the 9/11 attacks, since when insurers have still not chosen to re-enter this market.

Mainland Great Britain

When IRA activity was targeted on mainland Britain in the 1980s, no compensation scheme equivalent to that in Northern Ireland was implemented. The risk continued to be written by the insurance market, supported by reinsurers. This changed in the wake of the £450m property damage caused by the St Mary Axe bomb in April 1992, which led to the creation of the Government-backed mutual reinsurer, Pool Re (3(c) below and elsewhere).

The exclusions which continue to operate in 2006 in respect of mainland Britain exposures reflect the availability and terms of the Pool Re protection.

In short, the Pool Re scheme first implemented was confined to cover loss or damage (in excess of £100,000) to commercial property, together with consequential loss, caused by fire or explosion in Great Britain (other than Northern Ireland).

With effect from mid-2002 this was extended to cover “all risks” and from January 2003, to include loss by nuclear or biological attack (“dirty bombs”), but still excluding war and related perils, computer hacking or virus and denial of service. In the classes where Pool Re cover applies, primary insurers offer cover for terrorism, subject to its being reinsured by Pool Re.

Commercial Property/ All Risks Insurance

Where Pool Re reinsurance is being made available, the form of exclusion (and write-back) of the terrorism risk provided in the direct policy follows strictly the terms of the Pool Re cover and the statutory definition of “acts of terrorism” adopted in the Reinsurance (Acts of Terrorism) Act 1993 which remains unaltered (3(c) below).

Household (Buildings & Contents) Insurance

Buildings insurance for blocks of apartments is usually covered by Commercial Property Insurance.

Where Pool Re cover does not apply, the extent and form of any “terrorism” exclusion depends entirely upon the willingness of the insurance market to assume or exclude elements of this risk.

Since before 2001 to the present day, most household insurers have remained willing to provide cover for terrorism risk, even where they may have no matching reinsurance protection. This has resulted from a sense that any possible aggregation of claims is likely to be relatively small. There have also doubtless been public relations benefits taken into consideration. These have also prompted some insurers to waive any reliance upon exclusions in place in the wake of incidents and with the benefit of knowing the extent of any losses actually sustained.

At present most household insurers do not exclude terrorism, save for losses caused by or resulting from chemical, biological, radioactive or nuclear contamination (“CBRN” risks), which are thought to represent the most unpredictable form of terrorist risk to measure.

These risks are usually excluded by means of some variation of a widely adopted London Market exclusion clause, incorporating a definition of “Terrorism” specifically confined to:

...the use of biological, chemical and/or nuclear force or contamination and/or threat thereof by any person or group of persons whether acting alone or on behalf of or in connection with any organisation(s) or government(s) committed for political, religious, ideological or similar purposes including the intention to influence any government and/or to put the public or any section of the public in fear.

By way of example, Ecclesiastical Ins. Office, 'Cantab' Home Secure Policy 2006 excludes cover for contamination 'due to any act of terrorism'.

Commonly this will also be followed by a provision expressly confirming that, "losses caused by or resulting from riot, strike, civil commotion and malicious damage are not excluded". (More is said of the potential overlap between these specified perils: 2(c) below.)

Travel Insurance

This class of business represents a relatively small one to the insurance industry in terms of premium income and in most circumstances, claims, but as with all personal lines business, the industry's adopted position involves considerable media attention.

In consequence, the response of direct insurers since 2001 has been mixed. Terrorism exclusions remain commonplace, but even where reinsurance protection may not be available, some travel insurers have been willing to assume cover for baggage losses and medical expenses, and to some extent for Personal Accident cover. Generally, cover for delay or cancellation, which September 11 showed could involve a catastrophic exposure, has proved much more difficult to obtain.

Personal Accident / Group Health and Life Insurance

Exclusions of terrorism, or caps on liability where losses result from one catastrophic event involving terrorist attacks, will largely be determined by the availability of reinsurance cover available to insurers in this class. It has been common, particularly since 2001, to find that group covers especially contain a cap on liability. In respect of UK risks this will often be for a much smaller sum where the incident or losses in question involve a very high-risk location, such as that of the high-rise business area of Canary Wharf in London, which will involve a much greater than usual concentration, and thus accumulation, of risk.

Motor Insurance

Most motor policies, either personal or fleet (commercial), usually cover damage resulting from acts of terrorism. In the case of fleet insurance the policy limit for claims arising from acts of terrorism, however, will commonly be much lower than for other third party liabilities.

Terrorism exclusions or restrictions frequently result from restrictions having again been imposed upon motor insurers by their own reinsurers, concerned by accumulations of major third party loss.

As most reinsurers recognise that insurers of a compulsory class, as motor insurance in Great Britain is, need to be able to issue policies which comply with the law, the policy limit may simply be for the minimum amount required by the compulsory motor third party insurance legislation in the country in which the insured event occurs.

There are unresolved questions surrounding whether the use of a car by a terrorist, whether a suicide driver or car bomber or otherwise, would or would not create a liability under compulsorily insured risks of a motor policy. Concerns however exist on the part of reinsurers that there at least exists the possibility of such catastrophic liability should, for example, a petrol tanker be hijacked and detonated in a city centre.

Definitions of "terrorism" used in such restrictions or exclusions will usually take the form of one or more of the market exclusions which were drafted in the immediate aftermath of the 9/11 attacks, but there is no complete uniformity of definitions or terms used.

Public Liability Insurance

Unlike motor or employers' liability insurance, there is no obligation in English law for entities to purchase public liability insurance, nor for insurers to provide it. In consequence, terrorism remains largely excluded from cover.

Those commercial entities with particularly high exposures for any third party liability claims are consequently required to assume this risk themselves or to consider bespoke standalone terrorism cover which is available and which extends to provide cover for liability risks beyond the scope of any government-backed scheme or support.

Employers' Liability Insurance

Although insurers are not obliged under English law to issue policies providing cover for terrorism, employers are required to insure against their liabilities to employees. Should these involve terrorist acts (such as providing inadequate premises security, staff vetting procedures etc) any lack of cover may put them in breach of the law.

Reinsurers have recognised that in this respect employers' liability represents a compulsory class. With a relatively limited prospect of several employers all being held liable even in a multi-occupancy premises for the same terrorist event, reinsurers have tended to continue to provide terrorism cover for EL risks, which EL insurers in turn provide, albeit commonly limited to a £5m or £10m limit per occurrence, with employers having to bear a retention.

Professional Indemnity Insurance

Again professional indemnity policies customarily exclude losses arising from acts of terrorism, adopting similar definitions and terms as are used in other classes.

Aviation Insurance

Yes, these are excluded, but are covered separately (refer 2(a) above).

Marine Insurance

Yes - as already described in our answer to the previous section, by way of various standard marine market clauses, excluded from marine hull, freight and cargo covers, but then covered in turn by Institute War and Strikes clauses will be the risks of loss, damage and expense etc caused by

any terrorist or any person acting maliciously or from a political motive

and

confiscation or expropriation: essentially the traditional political risk perils.

Reinsurance

Prior to the events of 11 September 2001, there were a series of standard terrorism exclusion clauses in use, many along the lines of those issued by the London Market associations, either excluding terrorism in addition to war, civil war and allied perils or excluding terrorism alone, particularly in respect of UK terrorism risk (also 2(d) below).

As described above with regard to the underlying classes of business in question, the inclusion or exclusion of terrorism cover by reinsurers will largely depend upon the questions of what if any compulsory underlying cover is being provided and the anticipated accumulations of catastrophic loss in prospect.

(c) To what extent do war risks or exclusions and terrorism risks or exclusions or those for other acts of political or other violence such as malicious damage overlap?

That these events do overlap is clear. As described immediately above, in some instances some specified perils are also deliberately conjoined in some express coverage terms or exclusions. When the words civil war, revolution, rebellion, civil commotion and riot appear in conjunction in the same insurance contract, one view is that each connotes a disturbance less extensive than the one before, as a distinct stage. In *Republic of Bolivia v Indemnity Mutual Marine Assurance Co Ltd* [1909] 1 KB 785 (CA) the policy contained the following clause: "Warranted free of capture, seizure, and detention, and the consequences thereof, or any attempt thereat, piracy excepted, and also from all consequences of riots, civil commotions, hostilities, or warlike operations, whether before or after declaration of war." Farwell LJ said (p 801):

Before the point is reached at which a state of civil war can be said to exist, there are, as the author points out, various stages. First there is, possibly, a riot, and this may be followed by what may be described as "civil commotion."

However, the more general opinion is that to some degree the stages overlap and, for example, the same events may amount to both riot and civil commotion (*Motor Union Ins Co v Boggan* (1924) 130 LT 588, 591 per Lord Birkenhead LC (HL)). The perils do not "lie in a straight line" (Mustill J in *Spinney's (1948) Ltd v Royal Ins Co Ltd* [1980] 1 Lloyd's Rep 406, 428. *Arnould on Marine Insurance*, (vol 2) para 905 and (vol 3) para 319.) That point arose in 1924. Terrorism as an itemised event is a more recent feature of insurance policies. It seems likely, however, that courts

would see it in the same way as regards other events. The ‘extent’ of overlap is not a question which has received much judicial attention.

Just as the boundaries between each identified peril are not always easily drawn, nor is there complete consistency in the manner in which these perils are drawn together for the purposes of individual exclusions or for standalone covers.

This is the result in part of opportunistic market responses by different parts of the insurance and reinsurance markets, which may restrict or extend cover at any time depending upon prevailing trading conditions.

The capacity shortage created after 9/11 by the loss or withdrawal of reinsurance market support for property insurers or for other direct insurers still willing to underwrite some element of terrorism exposures, saw some brokers then look to other sections of the market to fill the void. The political risk market, for example, was encouraged once again to extend the perils that they had more traditionally written, but had already begun to extend - those of sovereign risk (confiscation, nationalisation etc) or of contract frustration risk - to encompass terrorism or related risks in their so-called ‘political violence’ covers.

Some policy wordings, whether those already available, such as the Lloyd’s Market Political Violence Policy (LPO 437) wording or standalone terrorism wordings thereafter issued, such as the T3 Terrorism Wording, cover a carefully extended spectrum of perils, designed in part to help overcome evidential difficulties for policyholders when trying to satisfy Underwriters that insured losses have actually occurred.

(d) Are there any market definitions of terrorism in use for insurance or reinsurance contracts? Please answer this question on class/sector by class/sector basis. If these have been introduced in response to recent developments how do these differ from previous provisions?

The position in respect of aviation and marine risks has been described quite fully above.

In respect of other classes, prior to the establishment of Pool Re in 1993, policies incorporating any reference to “terrorism” would customarily not incorporate any definition of “terrorism”. Prior to 9/11 and since there has been widespread concern and activity about how the market should define “terrorism”.

Pre-9/11 position :

In 1993 the standard LIRMA/IUA G55 and NMA 2751 clauses, being those most widely used for excluding terrorism, were adopted to operate - in respect of mainland Britain risks - in line with the Pool Re provisions and the Reinsurance (Acts of Terrorism) Act 1993. Accordingly, the clauses defined an “act of terrorism” to be:

...an act of any person acting on behalf of or in connection with any organisation with activities directed towards the overthrowing or influencing of any government de jure or de facto by force or violence.

Prior to 2001 two features of these exclusion clauses were addressed. Following discussions between representative bodies, it was broadly recognised that by agreeing to be bound by any certification by the Secretary of State of what constituted an “act of terrorism” pursuant to the provisions of Pool Re, no private market reinsurer was at liberty to refer this question to any arbitration panel, provided by the contract terms to determine all other disputes which might arise in respect of the reinsurance contract.

The second, involved a minor extension of the exclusion clause, to meet the concerns of insurers, who wanted express confirmation that if the Secretary of State had refused to certify an event as an “act of terrorism”, and this was upheld by the designated tribunal set up to review such decisions, then insurers would not be precluded from recovering from their private market reinsurers on account of the UK terrorism exclusion.

Concerns among reinsurers (who were bearing the risk of “terrorism” save for that expressly borne by Pool Re) about the adequacy of the definition itself then began to grow even before the 9/11 attacks. It had been noted that the definition of ‘terrorism’ used in the counter-terrorism legislation, the Terrorism Act 2000 (refer 1(a) above) was much wider.

Post-9/11 position:

In the months immediately following the 9/11 attacks, a series of revised clauses were circulated by the London Market associations for intended use in both direct and reinsurance covers. As already described, the position adopted by reinsurers in many cases dictated the terms upon which direct insurers felt able to underwrite or exclude any element of terrorist risk.

The NMA circulated four revised terrorism exclusion clauses, which still currently form the basis of exclusions most widely used in direct and reinsurance wordings (NMA 2918-2921), whereby the definition of an “act of terrorism” was revised so as to extend to include any act :

...including but not limited to the use of force or violence and/or the threat thereof, of any person or group(s) of persons, whether acting alone or on behalf of or in connection with any organisation(s) or government(s), committed for political, religious, ideological or similar purposes including the intention to influence any government and/or to put the public, or any section of the public, in fear.

Further market-generated exclusions circulated in November and December 2001 by the IUA and the NMA respectively introduced alternative and still more widely-drawn definitions of ‘terrorism’. These are considered below, but it should be noted that the market has nonetheless largely continued to adopt the definition outlined in full (above).

When issuing IUA Clauses G51A and G57 in November 2001 to replace the existing G51 and G55 (G51 and 51A for use where war and related perils and terrorism were being excluded; G55 and 57 for terrorism only), the IUA stressed their concern to take account of the need to consider the widest possible set of circumstances in which an act of terrorism might manifest itself. This was with reference to the perpetrator of the terrorism, the motive for the terrorism, the modus operandi and any reaction to an act of terrorism. Accordingly, the definition of ‘terrorism’ was extremely wide:

...an act or acts (whether threatened or actual) of any person or persons involving the causing or occasioning or threatening of harm of whatever nature and by whatever means made or claimed to be made in whole or in part for political, religious, ideological or similar purposes.

At that time the IUA announced that the definition of “terrorism” in existing clauses might also be subject to amendment depending upon the outcome of discussions between the IUA and Pool Re and other representative bodies such as the Association of British Insurers (ABI) and the Association of Insurance and Risk Managers (AIRMIC). As no revision of the Pool Re definition resulted (refer 3(c) above), no withdrawal, nor amendment of G55 (nor G51) occurred.

In December 2001, in the light of the market’s evolving response to the aftermath of 9/11, the NMA issued further Terrorism Exclusion Clauses, (such as NMA 2930a for use in Property Treaty Reinsurance) in which yet another definition of ‘terrorism’ was employed, this time drawing upon much of the wording of the Terrorism Act 2000. This read (in full):

An 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, 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 government(s) de jure or de facto, and which :

- (i) involves violence against one or more persons; or*
- (ii) involves damage to property ; or*
- (iii) endangers life other than that of the person committing the action; or*
- (iv) creates a risk to health or safety of the public or a section of the public; or*
- (v) is designed to interfere with or disrupt an electronic system.*

This lengthy definition demonstrates the preoccupation at that time (but rather less so since, as greater faith has been placed in modelling and the selection of risks) to ensure that a very wide set of circumstances might be captured by the exclusion, including ‘cyber-terrorism’, where actual or threatened interference with property may in fact involve no physical damage to property, nor harm or personal injury to anybody of any kind (also 3(f) below).

(e) If there are policy restrictions on or exclusions of terrorism cover, when were these first introduced and have they been changed in the light of recent events?

The impact of terrorist activity in Northern Ireland in the 1960s and 1970s and its transfer to mainland Britain in the late 1970s has been outlined above. Many policy restrictions on, or exclusions of, terrorism cover were revised, if not first introduced, in the immediate aftermath of the 9/11 attacks.

From this time many terrorism standalone products were also created. Extensions to the terms of the Pool Re cover took effect in July 2002 and January 2003 respectively.

(f) More particularly, do any market definitions of terrorism require actual physical damage to be sustained and if so of any particular kind?

As noted above, a number of exclusions in use make express reference to “loss of or damage to” property or other insured interests, together with consequential losses or expenses; see, for example, the house contents exclusion (above 3(b)) and the Pool Re definition (above 3(c)).

Particular consideration has been given to this question in the context of cyber-terrorism and/or the rendering inaccessible of commercial premises by threatened or actual acts of terrorism, which themselves may not directly involve physical damage to people or property.

A dictionary definition of ‘damage’ includes “*Injury, harm; esp. physical injury to a thing, such as impairs its value or usefulness*”. In English law, what amounts to “damage” in the context of damage to property is ultimately a question of fact, tending to involve a two-limb test comprising a physical element and an effect upon the value or utility of the property in question. The physical element, however, would not apply to any requirement in the alternative simply of ‘loss’.

(g) Upon whom falls the burden of proving any loss was caused by an act of terrorism? Must loss be solely and directly caused?

Under general principles of English law, acts of terrorism are covered by the policy, loss must be proved by the claimant policyholder.

If acts of terrorism are excluded by the policy, that loss claimed was caused by such acts must be proved by the underwriter.

(h) Are rules of causation varied in relation to terrorism? In particular, does a terrorism exclusion operate when the loss is proximately caused by terrorism or is the exclusion narrower, eg, the loss has to be “solely and directly” caused by terrorism?

In each case, unless a sole or direct link is specifically required by the policy, the act must be the (less stringent) proximate cause.

In most instances, however, certainly those involving commercial lines insurance, the practice has developed of insurers imposing what is known as a “reverse burden of proof” provision. This may typically read: “*In any action, suit or other proceeding, where the [insurer] alleges that by reason of the [excepted causes] 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.*”

Clearly, the intention of the draftsman is to require the insured claimant to disprove relevant exceptions on demand of the insurer, thus reversing the normal onus of proof.

When such a clause came before the English court, in *Spinney’s (1948) Ltd v Royal Ins Co Ltd* [1980] 1 Lloyd’s Rep 406 (fire) the judge observed that, although in principle the validity of such a clause is not in doubt, ‘*it should not be construed in such a sense as to make the policy unworkable. In my judgment, the insurers cannot bring the clause into play simply by asserting that the loss was excluded by a particular exception, and challenging the insured to prove the contrary. They must prove evidence from which it can reasonably be argued that (a) a state of affairs existed or an event occurred falling within an exception, and (b) the excepted peril directly or indirectly caused the loss. It is only when an arguable case of this nature is made out that the insured is required to disprove it*’ (p 426, Mustill J). In *Levy v Assicurazioni Generali* [1940] AC 791 the Judicial Committee of the Privy Council, composed of members of the House of Lords, accepted that, in principle the onus of proof might be entirely reversed by the words of the policy.

(i) Describe what, if any, significance is attributed to: the identity/identification of the perpetrator(s); their identification/association with recognised terrorist groups; the motive attributed to any act of terrorism (and whether this must be political, religious or ideological in nature); the modus operandi employed in perpetrating any act of terrorism; and/or the target of the physical act, i.e. those directly suffering loss and/or those (e.g. the Government) intended to be influenced?

None unless or to the extent specified by the policy, although, as described above, these issues were expressly addressed by some London market bodies when re-issuing exclusions in the wake of the 9/11 attacks. They have also more recently been considered by the Organisation for Economic Co-operation and Development (OECD) (see below).

Marine war risks perils described above are said to have been deliberately drafted in 1982 in such a way that evidence of any damage which has been done and the surrounding circumstances ought to enable it to be established on a balance of probabilities whether that peril has occurred, if it has involved sufficient indiscriminate loss of life or damage and to have been in pursuit of a public cause without the identification of the exact perpetrators themselves.

A review (*Marine War Risks* by Michael D Miller, LLP, Third Edition (2005) at pp197-8) of some notable decisions taken by the London insurance market and the Mutual War Risks Associations has identified the following instances where liability has been accepted, absent any proven positive identification of the actual perpetrators themselves :

1. In 1987 an Air India Boeing 747 was destroyed over the North Atlantic by a bomb, as established from the wreckage. The perpetrators were thought to have been Sikh extremists living in Canada, bringing public attention to their cause for an independent state.
2. In 1988 a Pan American Boeing 747 was destroyed over Lockerbie in Scotland by a bomb in the passengers' luggage. Prior to the handing over by Libya of two alleged perpetrators for trial by a Scottish Court sitting in the Netherlands, one of whom was subsequently convicted, there was no established evidence of the identity of any perpetrators. What was considered sufficient for the satisfaction of the insured peril was the damage being attributed to an indiscriminate terrorist attack almost certainly for a public cause, although which cause had not at the time been established.
3. Also in 1988, a group among passengers aboard a Greek holiday ship, the *City of Poros*, threw hand grenades and used machine guns killing many passengers and causing extensive damage to the vessel, with the perpetrators executing a pre-planned escape by motor boats. Although suspicions were aired that this was the work of a splinter group of the PLO harbouring hostility against the State of Israel, no evidence was established, but the market concluded that the peril of terrorism was nonetheless sufficiently self-evident from what had undoubtedly transpired.

(j) To satisfy any such definition or test is there any dependence upon any Government, judicial or other form of certification or declaration of any kind?

No, although, as already described, in the case of commercial property / all risks insurance, cover of excluded risks of terrorism is dependent upon support from and reinsurance by the government-backed Pool Re (see 3(c) below) and liability may expressly depend upon the certification by the relevant H M Government department and /or any Tribunal confirming or overturning the Secretary of State's decision by way of non-certification.

(k) Is there any specific reference, provision or known problem relating to acts involving biological, chemical, nuclear or other forms of contamination?

Yes, see the reference to exclusion of "CBRN" risks (2(b) above).

(l) To the extent that terrorism risks are covered, do policies use aggregation provisions to limit insurance/reinsurance exposure and oblige insureds/reinsureds to bear retentions of any kind?

Yes, as more fully described elsewhere.

3. TERRORISM AND GOVERNMENT INTERVENTION

(a) Does national legislation impose any restrictions on terrorism exclusions in insurance policies? If so, describe them and their application.

No.

(b) Does the Government provide any scheme whereby terrorism cover is made available to direct policy holders by the Government itself? If so, please outline the nature of the scheme including any limits, deductibles and so forth, its original purpose, its success and funding arrangements.

No.

(c) Does the Government provide any scheme whereby terrorism reinsurance is made available to insurers by the Government itself? If so, please outline the nature of the scheme including any limits, deductibles and so forth, its original purpose, its success and funding arrangements.

Pool Re:

The Government and insurance industry work in partnership through the Pool Re scheme to ensure that terrorism cover remains available for commercial property and business interruption in Great Britain. Pool Re is a mutual reinsurer, the members of which are insurers, and it covers risks which the market will not cover under the Retrocession Agreement between HM Treasury and Pool Re. The Agreement was made in accordance with the Reinsurance (Acts of Terrorism) Act 1993. For the text, see the Appendix to this questionnaire. Pool Re was set up in 1993 after bomb attacks in London by the IRA. After 11 September 2001, when insurance and reinsurance cover for risks of terrorism was withdrawn across significant areas of the insurance industry, the scheme was revised.

Prior to 11 September 2001 Pool Re covered acts of terrorism causing fire and explosion. Cover has since been extended to 'all risks', thus including nuclear risks and damage having causes other than fire and explosion, such as flood and contamination.

Still excluded are hacking and virus damage to electronic components because it is likely to be hard to prove source and motive. War risks are also excluded.

As to the amount of cover, the first tranche is borne by insurers. Initially insurers were generally required to retain £100, 000 per head of cover (policy section). However, a more flexible formula for retention by insurers was introduced on 1 January 2003. In the event that Pool Re exhausts its financial resources following claim payments, HM Treasury is the 'reinsurer of last resort' for Pool Re. To fund this, the British Government collects a surcharge on premiums, which are then 'pooled' to pay for losses covered by the Treasury.

Defining "acts of terrorism":

In December 2004, after consultation with the insurance and commercial property industries, the Treasury published a set of general *principles of interpretation that it would expect to be guided by* in its application of the definition of an 'act of terrorism'. At the same time the Treasury stressed that, as the definition has not been the subject of a judicial decision, the principles should not be taken as a definitive legal interpretation. Central to the definition is the relationship between the act in question and an "organisation".

The scope of the term "organisation" is not expressly limited, either as to its purpose or the number of persons involved. Diffuse, loose or decentralised structures would not be excluded. However, the organisation must be one that carries out activities directed towards overthrowing or influencing a Government, anywhere in the world, by force or violence. At the same time the particular activities relied on to characterise the organisation need not themselves be forceful or violent, provided they are thus directed. The Treasury gave the example of an organisation whose activities were limited to funding or otherwise supporting the forceful or violent acts of others. Moreover, "multi-purpose" organisations, those with a diverse range of activities, are not excluded either, provided that at least some of their activities are directed towards the overthrow or influencing of a Government by force or violence.

Acts of terrorism must be "on behalf of" or "in connection with" the organisation. However, the act would not have to be carried out by a member of, or person authorised by, the organisation. The fact that it was carried out by a sympathiser, or "cell" acting independently of the organisation would not exclude it from the definition. In the case of a sympathiser acting alone, the mere fact of sharing an organisation's objectives is unlikely to be sufficient. In any event, it not necessary that the act should be successful in its aims.

4. INTERNATIONAL OR CROSS-BORDER ARRANGEMENTS

Can you identify any international or cross-border schemes or initiatives whereby insurance or relief from financial consequences of terrorist acts is guaranteed or supported for particular sectors, e.g., aviation, shipping?

In response to the 9/11 attacks on the United States the Air Transportation and Safety and System Stabilisation Act was very quickly signed into law in the USA. Subsequently and to improve aviation security, President George W. Bush signed into the law the Aviation and Transportation Security Act (the “Security Act”) on November 19, 2001. This introduced amendments to the Stabilisation Act that retrospectively limited the liability of air carriers, aircraft manufacturers and airport owners and operators (but, significantly, not the airport security companies) for claims arising out of the WTC events (as detailed below) to the limits of their insurance coverage.

The amended section 408(a) provides that liability for all claims, whether for compensatory or punitive damages or for contribution or indemnity, against an air carrier, aircraft manufacturer, airport owner or operator or person with a property interest in the World Trade Centre on September 11, 2001, or their directors, officers, employees or agents, and arising from the September 11, 2001 events shall not be in an amount greater than the limits of liability insurance coverage maintained by the carrier, manufacturer, sponsor or person. The liability limitation does not apply to any person with a property interest in the World Trade Centre, if the Attorney General determines after notice and an opportunity for a hearing that the person wilfully defaulted on a contractual obligation to rebuild or assist rebuilding the World Trade Centre: Aviation and Transportation Security Act S201(a)(2). The liability of New York City for all claims arising out of the September 11, 2001 crashes shall not exceed the greater of the city’s insurance coverage or \$350 million.

To the best of our knowledge no similar scheme applies to shipping or marine risks more generally.

Are you aware of any initiatives or schemes which have been devised or developed since September 11 to protect insureds, insurers or reinsurers against exposure to terrorist activities?

Background

In 2005 the Organisation for Economic Co-operation and Development (OECD) published, in *Terrorism Risk Insurance in OECD Countries* (OECD Publishing 2005) non-binding conclusions and policy options in response to a call from OECD Ministers in 2002 (following the 9/11 attacks) to assist them in preparing for the financial consequences of possible further large-scale attacks and to provide compensation for such unforeseeable events. The stance of the OECD received criticism from the Lloyd’s Terrorism Panel among others, who argued that the OECD favoured nationalising terrorism risk, having underestimated the glut of terrorism capacity which had become available in major insurance markets since the immediate aftermath of 9/11 (Lloyd’s List, 2 Dec 2004)

Despite improvements in private market conditions following the immediate aftermath of the 9/11 attacks, aided by advanced terrorism risk modelling, they recognised that government intervention and support of some kind was likely to be essential. This would be by way of regulatory action to reduce the cost to insurers of building up reserves, as well as direct involvement in compensation mechanisms or the entering of public-private risk-bearing schemes (such as that of Pool Re). It was observed that defining the nature of terrorism acts remained a difficult task and that no agreed definition had emerged at international level.

A book published in 2006 argues that traditional approaches to determining State responsibility fail to ensure adequate State responsibility for protecting civilians from such violence and that a new approach is needed. The author then advances what he considers to be a new and better approach (Becker, *Rethinking State Responsibility for Terrorism*, Hart, 2006)

Initiatives and Schemes in Great Britain

The extensions to the original 1993 Pool Re scheme, which were implemented in July 2002 and January 2003 respectively, have been described above, including protection against the consequences of CBRN attacks.

While not directly concerning insurance, some amendments have also been made to public sector compensation schemes operating in Great Britain for victims, which have permitted increased levels of payment being made to victims of the London attacks of 7 July 2005 (quadruple suicide bombings causing 52 deaths, but only limited property damage).

The insurance and reinsurance markets themselves have invested considerable resources in developing improved terrorism risk modelling techniques to enable them to continue to provide cover. Over and above more standard risk

management and business continuity initiatives being implemented among the business and insurance communities, the government has worked in conjunction with the Bank of England, the Financial Services Authority and all areas of the London business community, including risk managers and insurers, upon a series of initiatives designed to help improve London's resilience against any major disruption to its financial system being caused by terrorist attacks. These have included the enactment of major loss scenarios such as might result from the detonation of a 'dirty bomb' in the heart of the City of London.

Further anti-terrorist legislation continues to be passed as a result of the 7 July 2005 attack and a failed attack on 21 July 2005, with three terrorist attacks on the British mainland since then being claimed to have been thwarted by the police and security services.

Inter-governmental discussions, supported by the UK Government, are taking place at ICAO on the drafting of a text for one or more international conventions on liability for damage on the surface of the earth arising out of aviation activities. One convention would address such liability arising out of terrorist acts.

One idea under discussion is the proposition of an unbreakable cap on the liability of the aircraft operator to victims with the amount of liability limited according to the weight of the aircraft involved (a concept reflected in an existing convention) and capped at amounts up to circa US\$1 billion for the largest aircraft and circa US\$1.1 million for aircraft with a weight of less than 500 kilos. As to funding, under discussion is a three-tier approach, involving a carriers' fund, one from industry and a government fund.

5. DECIDED CASES OR OTHER RULINGS

Have there been any court decisions or other rulings in your country in which the coverage of an insurance or reinsurance policy in respect of a terrorist act has been considered?

(i) *National Oil Co of Zimbabwe (Pte) v Sturge* [1991] 2 Lloyd's Rep 281 concerned supporters of the Mozambique National Resistance (Renamo) blew up a pipeline causing losses of gas oil, which were the subject of a subsequent insurance claim. It was accepted that the losses came within the cover offered by the Institute Strike Clauses, which was loss caused by "any terrorist or any person acting from a political motive". The issue for the court was whether the case also came within the exception of loss caused by "war, civil war, revolution, rebellion, insurrection, or civil strife". Saville J. held that it did, being a case of both "rebellion" and "insurrection", stressing at p 286 that the fundamental aim of Renamo was to overthrow the Government. The inference seems to be that that is not an essential feature of acts of terrorism.

(ii) In *If P&C Insurance Limited (Publ.) v. Silversea Cruises Limited* [2004] Lloyd's Rep IR 217 Tomlinson J, observed that in the light of his conclusions on a different issue, it was "unnecessary that I should consider the question whether the events of 11 September are properly to be characterised as acts of war or armed conflict. I will merely note that English law would approach this question as one of construction of the policy. In the light of the cover afforded in the relevant section in respect of the consequences of actions by terrorists, and the express reference in section Aii to terrorist activities in a list of perils which includes acts of war and armed conflict, I would be surprised if it were concluded that, for the purposes of deciding whether cover is available under this policy, the events of 11 September fall to be characterised as acts of war or armed conflict when action by terrorists or terrorist activities seems more appropriately to encapsulate what occurred". On appeal, [2004] Lloyd's Rep IR 217 (CA) Rix LJ, with whom the other members of the Court agreed, noted "the fact that everyone could agree that 9/11 was an example of a terrorist attack".

APPENDIX

The Definition of "acts of terrorism" in the Reinsurance (Acts of Terrorism) Act 1993.

In applying the definition of "acts of terrorism" in section 2(2) of the 1993 Act in the context of the Pool Re scheme, HM Treasury would expect to be guided by the following general principles of interpretation. In view of the fact that the definition has not been the subject of a judicial decision, these principles cannot be taken as a definitive legal interpretation. Nor are they offered as legal advice to parties who might be affected by the scheme, or as any legally binding undertaking by HM Treasury to any person.

The essence of the definition is the relationship between the act in question and an "organisation".

“Organisation”

The scope of the term “*organisation*” is not expressly limited, and includes “*any association or combination of persons*” (section 2(3)). Diffuse, decentralised structures would not be excluded.

There is no defined upper or lower limit on the numbers of persons required to constitute an “*organisation*”, and no express minimum duration for its existence as such. However, it is clear that there would need to be a significant element of continuity before an “*organisation*” could be said to exist: persons acting spontaneously in concert (without more) would be unlikely to constitute an “*organisation*”, although their actions might still be carried out “*on behalf of*”, or “*in connection with*” an organisation (see further below).

“Overthrowing or influencing a government by force or violence”

The activities relied on to characterise the organisation need not of themselves be forceful or violent, provided they are directed towards overthrowing or influencing a Government by such means (e.g. an organisation whose activities were limited to funding or otherwise supporting the forceful or violent acts of others would not be excluded). The Government in question may be anywhere in the world and may or may not be recognised.

“Multi-purpose” organisations are not excluded. An organisation is not excluded merely because it carries on a diverse range of activities, provided that at least some of them are directed towards the overthrow or influencing of a Government by force or violence.

The precise motive, or subject on which influence is sought to be brought to bear makes no difference: it could be political, ethnic, religious, cultural, or anything else.

The “*force or violence*” envisaged does not have to be carried out by the organisation itself, nor does it need to be successful in its aims. The fact that the organisation’s activities are directed towards the end of exerting influence over a Government by force or violence would be sufficient.

The fact that an organisation’s activities are not aimed at specific government targets would not be decisive: the organisation might seek to influence a Government by attacking private property, and would not fall outside the definition for this reason.

Acts “on behalf of” or “in connection with” an organisation

The act in question needs to be related to the organisation. However, the act would not need to be carried out by a member of, or person authorised by, the organisation. The fact that it was carried out by a sympathiser, or “cell” acting independently of the organisation’s hierarchy would not exclude it from the definition.

In the case of a sympathiser acting alone, the mere fact of sharing an organisation’s objectives is unlikely to be sufficient. There would probably have to be something additional to connect the act to a specific organisation. However, there would be a variety of circumstances that could potentially establish a connection of the required kind.

GREECE

1. MEANING OF TERRORISM

(a) Is there any general definition of ‘terrorism’, ‘terrorist activity’ or any related term in the general law within your jurisdiction?

According to the Greek Penal Code the term “terrorism” refers to the commission of any act in such a manner or to such extent or under such circumstances that is likely to severely harm a country or an international organization and with the ultimate purpose to severely intimidate the population or to illegally compel to a public Authority or international organization to undertake any act or to omit any act, or to severely harm or to destroy the fundamental constitutional, political, financial structures of one country or an international organization. As a result, not any crime constitutes a terrorist act, if it is committed as an attempt to establish, protect or restore democratic rule or as an act towards liberation, as defined in the Constitution of Greece (article 5 paragraph 2), or aims to exercise a fundamental civil, political or labour freedom or other right protected by the Constitution of Greece or the European Convention for the Protection of Human Rights and Fundamental Freedoms.

(b) If there is a definition, for what legal purposes is the definition relevant?

Insurance companies use this definition as guideline for the conduction clauses in insurance policy agreements regarding the coverage of terrorism risk.

If the insurance policy does not define the meaning of “terrorism” or if it refers to the definition given by the Law, the courts will also use the criteria laid down by the definition under (a) above in order to decide whether an act may be characterised as terroristic or not.

2. TERRORISM AND POLICY WORDING

(a) To what extent do insurance and reinsurance policies written in your country exclude the liability of insurers and reinsurers for war risks? If so, is there any distinction drawn between commercial and consumer contracts. Please answer this question on a class/sector by class/sector basis.

According to Act no 2496/1997 (Insurance Contract Act, ICA) no insurance cover is to be provided if the occurrence of the insured risk results from war, civil war, rebellion, or civil commotion. However insurers provide coverage for war risks in marine insurance against a higher premium.

(b) To what extent do insurance and reinsurance policies written in your country exclude the liability of insurers and reinsurers for terrorism risks? If so, is there any distinction drawn between commercial and consumer contracts. Please answer this question on a class/sector by class/sector basis.

(c) To what extent do war risks or exclusions and terrorism risks or exclusions or those for other acts of political or other violence such as malicious damage overlap?

N/A.

(d) Are there any market definitions of terrorism in use for insurance or reinsurance contracts? Please answer this question on class/sector by class/sector basis. If these have been introduced in response to recent developments how do these differ from previous provisions?

A market definition of terrorism is as follows:

Terrorism (or act of terrorism) means use (or threat of use) of force or violence (including the biological or chemical contamination or pollution or use of missiles) for political or social reasons, which includes the public intimidation of a certain group of people or the affect of a legal or de facto Authority, from persons

that act individually or within or in connection to any organization or government irrespective if these acts took place or not during political agitations, rebellions, strikes or during any breach of the peace.

A market definition of “malicious acts” is as follows:

Malicious acts are violent acts of any person, which are committed aiming at the vandalism and the sabotage, without including any act of Terrorism.

A market definition of rebellion, strike, mass demonstrations, political agitations is as follows:

Rebellion, strike, mass demonstrations, political agitations are a) acts of a person who participated with others in a breach of peace or b) acts of a legally situated Authority for suppression or prevention of disruption or decrease of its consequences or c) premeditated act of a striker or a striking employer for support or for resistance against a striking employer, without including any act of Terrorism.

(e) If there are policy restrictions on or exclusions of terrorism cover, when were these first introduced and have they been changed in light of recent events?

N/A

(f) More particularly, do any market definitions of terrorism require actual physical damage to be sustained and if so of any particular kind?

See above under (d).

(g) Upon whom does the burden of proving any loss was caused by an act of terrorism?

Upon the insured.

(h) Are rules of causation varied in relation to terrorism? In particular, does a terrorism exclusion operate when the loss is proximately caused by terrorism or is the exclusion narrower, eg, the loss has to be ‘solely and directly’ caused by terrorism?

N/A.

(i) Describe what, if any, significance is attributed to: the identity/identification of the perpetrator(s); their identification/association with recognised terrorist groups; the motive attributed to any act of terrorism (and whether this must be political, religious or ideological in nature); the modus operandi employed in perpetrating any act of terrorism; and/or the target of the physical act, ie those directly suffering loss and/or those (eg Government) intended to be influenced?

(j) To satisfy any definition or test of terrorism is there any dependence upon any Government, judicial or other form of certification or declaration of any kind?

(k) Is there any specific reference, provision or known problem relating to acts involving biological, chemical, nuclear or other forms of contamination?

(l) To the extent that terrorism risks are covered, do policies use aggregation provisions to limit insurance/reinsurance exposure and oblige insureds/reinsureds to bear retention of any kind?

This is mainly determined on an ad hoc basis.

3. TERRORISM AND GOVERNMENT INTERVENTION

(a) Does national legislation impose any restrictions on terrorism exclusions in insurance policies? If so, describe them and their application.

No

(b) Does the Government provide any scheme whereby terrorism cover is made available to direct policy holders by the Government itself? If so, please outline the date of introduction of the scheme, the nature of the scheme including any limits, deductibles and so forth, its original purpose, its success and funding arrangements.

According to L. 2093/1992 art. 18 § 3 natural and legal persons are entitled to be reimbursed by the Government for any damage caused to their movable or immovable property due to a terror act. If the property that has been destructed was insured the owner may only claim the difference between the insurance coverage and the actual damage. The above mentioned right for indemnification may not be subrogated to private insurance companies. The indemnification by the Government is tax free.

(c) Does the Government provide any scheme whereby terrorism reinsurance is made available to insurers by the Government itself? If so, please outline the date of introduction of the scheme, the nature of the scheme including any limits, deductibles and so forth, its original purpose, its success and funding arrangements

No.

4. INTERNATIONAL OR CROSS-BORDER ARRANGEMENTS

(a) Can you identify any international or cross-border schemes or initiatives whereby insurance or relief from financial consequences of acts of terrorism is guaranteed or supported for particular sectors, eg, aviation, shipping?

N/A.

(b) Are you aware of any international or cross-border initiatives or schemes which have been devised or developed since September 11 to protect insureds, insurers or reinsurers against exposure to terrorist activities?

N/A.

5. DECIDED CASES OR OTHER RULINGS

Have there been any court decisions or other rulings in your country in which the coverage of an insurance or reinsurance policy in respect of an act of terrorism has been considered?

There exist some court decisions regarding the indemnification of owners of movable or immovable property by the Government, due to their property having been damaged by way of a terroristic act (s. above under 3b).

Decision 24/1997 of the Athens Court of Appeal is at this point interesting. In this case a person shot with a gun to a parked car. The court decided that this consisted a terroristic act, since it was proven that the act aimed to cause terror to the neighborhood, which had been in fact terrorised, and because the insurance company had failed to prove that the perpetrators' target was solely the insured due to personal differencies.

HUNGARY

1. MEANING OF TERRORISM

(a) Is there any general definition of ‘terrorism’, ‘terrorist activity’ or any related term in the general law within your jurisdiction?

Yes. In section 261 of the Penal Code and in many international conventions ratified by Hungary

(1) Any person who commits a violent crime against one of the persons referred to in subsection (9) or commits a crime that endangers the public or involved the use of a firearm in order to

(A) coerce a government agency, another state or an international body into doing, not doing or countenancing something;

(B) intimidate the general public;

(C) conspire to change or disrupt the constitutional, economic or social order of another state, or to disrupt the operation of an international organisation;

is guilty of a felony punishable by imprisonment between ten to fifteen years, or life imprisonment

(2) Any person who seizes considerable assets or property for the purposes defined in paragraph (A) and makes demands to government agencies or non-governmental organisations in exchange for refraining from harming or injuring said assets and property or for returning them shall be punishable according to subsection (1).

(3) The punishment of any person who:

(A) abandons commission of the criminal act defined under subsections (1) and (2) before any grave consequences are able to materialise, and

(B) confesses his conduct to the authorities

in such a manner as to co-operate with the authorities to prevent or mitigate the consequences of such criminal act, apprehend other co-actors and prevent other criminal acts may be reduced without limitation.

(4) Any person engaged in plotting or making preparations for any of the criminal acts defined under subsections (1) and (2) is guilty of a felony punishable by imprisonment between five to ten years.

(5) Any person who instigates, suggests, offers, joins or collaborates in the commission of any of the criminal acts defined under subsections (1) and (2) in a terrorist group or any person who is involved in aiding and abetting such criminal conduct by providing any of the means intended for use in such activities or by providing or raising funds to finance the activities or support the terrorist group in any other form is guilty of a felony punishable by imprisonment between five to fifteen years.

(6) If the perpetrator of a criminal act defined in subsection (5) shall not be liable for prosecution if he confesses the act to the authorities before they become aware of it and reveals the circumstances of the criminal act.

(7) Any person threatening to commit the crimes specified in subsections (1) and (2) is guilty of a felony punishable by imprisonment between two to eight years.

(8) Any person who has positive knowledge concerning plans for a terrorist act and fails to promptly report that to the authorities is guilty of a felony punishable by imprisonment for up to three years.

(9) For the purposes of this section:

(A) “violent crime against a person and crime of public endangerment that involves the use of firearms” shall mean homicide, batter, wilful malpractice, violation of personal freedom, kidnapping, crimes against transportation safety, endangering railway, air or water traffic, violence against public officials, violence against persons performing public duties, violence against a person aiding a public official, violence against a person under international protection, public endangerment, interference with public works, seizure of an aircraft, any means of railway, water or road transport or any means of freight transport, criminal misuse of explosives or explosive devices, criminal misuse of firearms or ammunition, arms trafficking, criminal use of radioactive materials, criminal misuse of weapons prohibited by international convention, crimes against computer systems and computer data, vandalism and robbery.

(B) “terrorist group” shall mean a group consisting of three or more persons operating in accord for an extended period of time whose aim is to commit the crimes defined in Subsections (1)-(2).

(b) If there is a definition, for what legal purposes is the definition relevant?

2. TERRORISM AND POLICY WORDING

(a) To what extent do insurance and reinsurance policies written in your country exclude the liability of insurers and reinsurers for war risks? If so, is there any distinction drawn between commercial and consumer contracts. Please answer this question on a class/sector by class/sector basis.

Treated more or less in the same way, excluded.

(b) To what extent do insurance and reinsurance policies written in your country exclude the liability of insurers and reinsurers for terrorism risks? If so, is there any distinction drawn between commercial and consumer contracts. Please answer this question on a class/sector by class/sector basis.

Treated more or less in the same way, excluded.

(c) To what extent do war risks or exclusions and terrorism risks or exclusions or those for other acts of political or other violence such as malicious damage overlap?

The definitions offer the difference

(d) Are there any market definitions of terrorism in use for insurance or reinsurance contracts? Please answer this question on class/sector by class/sector basis. If these have been introduced in response to recent developments how do these differ from previous provisions?

Yes, different definitions in insurance contracts, in reinsurance contracts the international used and in motor TPL given in the law.

(e) If there are policy restrictions on or exclusions of terrorism cover, when were these first introduced and have they been changed in light of recent events?

No, but the change itself is the widespread exclusions of terrorism risks in most policies, where this exclusion was not provided before.

(f) More particularly, do any market definitions of terrorism require actual physical damage to be sustained and if so of any particular kind?

No difference according to heads of damage.

(g) Upon whom does the burden of proving any loss was caused by an act of terrorism?

Insurer

(h) Are rules of causation varied in relation to terrorism? In particular, does a terrorism exclusion operate when the loss is proximately caused by terrorism or is the exclusion narrower, eg, the loss has to be 'solely and directly' caused by terrorism?

Fortunately, no praxis related, theoretically no difference in comparisons to other exclusions

(i) Describe what, if any, significance is attributed to: the identity/identification of the perpetrator(s); their identification/association with recognised terrorist groups; the motive attributed to any act of terrorism (and whether this must be political, religious or ideological in nature); the modus operandi employed in perpetrating any act of terrorism; and/or the target of the physical act, ie those directly suffering loss and/or those (eg Government) intended to be influenced?

Identification of no importance. The motives are political, religious, ideological or similar nature. Modus operandi is also defined (use of force, threat etc.)

(j) To satisfy any definition or test of terrorism is there any dependence upon any Government, judicial or other form of certification or declaration of any kind?

No.

(k) Is there any specific reference, provision or known problem relating to acts involving biological, chemical, nuclear or other forms of contamination?

No in connection of terrorism

(l) To the extent that terrorism risks are covered, do policies use aggregation provisions to limit insurance/reinsurance exposure and oblige insureds/reinsureds to bear retention of any kind?

No in connection of terrorism.

3. TERRORISM AND GOVERNMENT INTERVENTION

(a) Does national legislation impose any restrictions on terrorism exclusions in insurance policies? If so, describe them and their application.

Only the motor third party liability law.

(b) Does the Government provide any scheme whereby terrorism cover is made available to direct policy holders by the Government itself? If so, please outline the date of introduction of the scheme, the nature of the scheme including any limits, deductibles and so forth, its original purpose, its success and funding arrangements.

No.

(c) Does the Government provide any scheme whereby terrorism reinsurance is made available to insurers by the Government itself? If so, please outline the date of introduction of the scheme, the nature of the scheme including any limits, deductibles and so forth, its original purpose, its success and funding arrangements

No

4. INTERNATIONAL OR CROSS-BORDER ARRANGEMENTS

(a) Can you identify any international or cross-border schemes or initiatives whereby insurance or relief from financial consequences of acts of terrorism is guaranteed or supported for particular sectors, eg, aviation, shipping?

No

(b) Are you aware of any international or cross-border initiatives or schemes which have been devised or developed since September 11 to protect insureds, insurers or reinsurers against exposure to terrorist activities?

No

5. DECIDED CASES OR OTHER RULINGS

Have there been any court decisions or other rulings in your country in which the coverage of an insurance or reinsurance policy in respect of an act of terrorism has been considered?

No practice

ISRAEL

1. MEANING OF TERRORISM

(a) Is there any general definition of ‘terrorism’, ‘terrorist activity’ or any related term in the general law within your jurisdiction?

No. There is only a definition to the phrase: “hostile acts” in special Acts.

(b) If there is a definition, for what legal purposes is the definition relevant?

The Acts determine who is entitled to be compensated by the State due to damages caused to him (material damages, BI, and physical injuries).

2. TERRORISM AND POLICY WORDING

(a) To what extent do insurance and reinsurance policies written in your country exclude the liability of insurers and reinsurers for war risks? If so, is there any distinction drawn between commercial and consumer contracts. Please answer this question on a class/sector by class/sector basis.

Most of the policies exclude liability for war risks.

No. However, commercial contracts usually enable the insured to extend the policy also to terrorism damages.

(b) To what extent do insurance and reinsurance policies written in your country exclude the liability of insurers and reinsurers for terrorism risks? If so, is there any distinction drawn between commercial and consumer contracts. Please answer this question on a class/sector by class/sector basis.

The same as (a).

(c) To what extent do war risks or exclusions and terrorism risks or exclusions or those for other acts of political or other violence such as malicious damage overlap?

There have different definitions.

(d) Are there any market definitions of terrorism in use for insurance or reinsurance contracts? Please answer this question on class/sector by class/sector basis. If these have been introduced in response to recent developments how do these differ from previous provisions?

In Israel, Lloyd’s’ definitions for “terrorism” definitions are usually accepted.

(e) If there are policy restrictions on or exclusions of terrorism cover, when were these first introduced and have they been changed in light of recent events?

In the policy itself. They have not been changed.

(f) More particularly, do any market definitions of terrorism require actual physical damage to be sustained and if so of any particular kind?

Not necessarily. Indirect damages are also compensable.

(g) Upon whom does the burden of proving any loss was caused by an act of terrorism?

It depends on the policy wording. Usually, in regular business and private insurance policies, the burden is of the insurer that has to issue special documents from governmental officers that define the damages as such. In terrorism extensions, the burden is usually of the insured.

(h) Are rules of causation varied in relation to terrorism? In particular, does a terrorism exclusion operate when the loss is proximately caused by terrorism or is the exclusion narrower, eg, the loss has to be 'solely and directly' caused by terrorism?

According to special Act that deals with bodily damages alleged to be caused by terror acts, there is a presumption that the damages were caused by terror acts. Israeli Courts also gave lesser causation demands to prove such acts.

(i) Describe what, if any, significance is attributed to: the identity/identification of the perpetrator(s); their identification/association with recognised terrorist groups; the motive attributed to any act of terrorism (and whether this must be political, religious or ideological in nature); the modus operandi employed in perpetrating any act of terrorism; and/or the target of the physical act, ie those directly suffering loss and/or those (eg Government) intended to be influenced?

Israeli Courts require 2 cumulative elements: objective and subjective. As to prove the subjective element is usually difficult to be proved (as not all terrorists are arrested or even known), objective elements are much more simple to be proved.

(j) To satisfy any definition or test of terrorism is there any dependence upon any Government, judicial or other form of certification or declaration of any kind?

Not necessarily.

(k) Is there any specific reference, provision or known problem relating to acts involving biological, chemical, nuclear or other forms of contamination?

No. Such damages are usually excluded, regardless of the circumstances.

(l) To the extent that terrorism risks are covered, do policies use aggregation provisions to limit insurance/reinsurance exposure and oblige insureds/reinsureds to bear retention of any kind?

Some policies aggregate to compensation paid by the State..

3. TERRORISM AND GOVERNMENT INTERVENTION

(a) Does national legislation impose any restrictions on terrorism exclusions in insurance policies? If so, describe them and their application.

No.

(b) Does the Government provide any scheme whereby terrorism cover is made available to direct policy holders by the Government itself? If so, please outline the date of introduction of the scheme, the nature of the scheme including any limits, deductibles and so forth, its original purpose, its success and funding arrangements.

According to a special regulation, the State's compensation is on top of insurance benefits.

(c) Does the Government provide any scheme whereby terrorism reinsurance is made available to insurers by the Government itself? If so, please outline the date of introduction of the scheme, the nature of the scheme including any limits, deductibles and so forth, its original purpose, its success and funding arrangements

No.

4. INTERNATIONAL OR CROSS-BORDER ARRANGEMENTS

(a) Can you identify any international or cross-border schemes or initiatives whereby insurance or relief from financial consequences of acts of terrorism is guaranteed or supported for particular sectors, eg, aviation, shipping?

Not relevant.

(b) Are you aware of any international or cross-border initiatives or schemes which have been devised or developed since September 11 to protect insureds, insurers or reinsurers against exposure to terrorist activities?

Not relevant.

5. DECIDED CASES OR OTHER RULINGS

Have there been any court decisions or other rulings in your country in which the coverage of an insurance or reinsurance policy in respect of an act of terrorism has been considered?

Yes, for example: Can an insurer be considered as “damaged person” after paying the insured terrorism damages, in order to be subrogated by the State.

ITALY

1. MEANING OF TERRORISM

(a) Is there any general definition of “terrorism”, “terrorist activity” or any related term in the general law within your jurisdiction?

The only definition of “terrorism” legally binding in the Italian jurisdiction is provided in articles 270 bis and 280 of the Italian Criminal Code that consider terrorism all “acts of violence having the purpose of overthrowing the democratic order”. EU Council decision 2002/475/GAI and the definition of terrorism therein provided have not yet been enacted in Italy.

(b) If there is a definition, for what legal purposes is the definition relevant?

The Criminal code definition may have civil law effects in legal actions for damages deriving from such acts. Decision 2002/475/GAI is detailed enough to have binding effects in intra Union relations and very likely will be used by Union, Italian or member countries courts in interpreting Italian law and/or policy undertakings.

2. TERRORISM AND POLICY WORDINGS

(a) To what extent do insurance and reinsurance policies written in your country exclude the liability of insurers and reinsurers for war risks? If so, is any distinction drawn between commercial and consumer contracts. Please answer this question on a class/sector by class/sector basis.

Art. 1912 of the Italian Civil Code expressly states: “Except as otherwise agreed in the contract, the insurer is not liable for damages that may be caused by earthquakes, war, insurrection or population uprising”.

In domestic policies insureds very seldom have requested and request such separate agreement to cover war risks because of the premium surcharge. The reinsurance market for war risks is ample.

In export policies guaranteed by the State the cover of such risk is mandatory for exports in non industrialized countries.

In both cases there is no distinction between commercial and consumers contracts or on class/sector basis.

(b) To what extent do insurance and reinsurance policies written in your country exclude the liability of insurers and reinsurers for terrorism risks? If so, is any distinction drawn between commercial and consumer contracts? Please answer this question on a class/sector by class/sector basis.

Terrorism risks as such are not mentioned in art. 1912. They would be excluded by law from insurance (unless expressly covered) therefore only if they were directly or indirectly related to an act of war, insurrection or people uprising. Failing an agreement between insured and insurer, it would be up to judicial interpretation to determine whether a specific terror or any other malicious act is related to war, insurrection or people’s uprising and therefore excluded.

After September 11 policies and reinsurance treaties normally exclude terror risk, unless specific cover is contracted with the insurer and reinsurer.

Policies normally exclude malicious (i.e. vandalic) acts per se, unless specifically covered.

(c) To what extent do war risks or exclusions and terrorism risks or exclusions or those for other acts of political or other violence such as malicious damage overlap?

Any overlapping entirely depends on the motivation of the act. In general terms we would consider applicable the Roman law principle “*causa causae est causa causati*” (the cause of the cause is also the cause of the effect). In credit

risk, for instance, if somebody becomes bankrupt because of a war risk excluded by law, or of a terror risk excluded by contract, damages deriving from his default would not be covered, even if the event of default covered is insolvency.

(d) Are there any market definitions of terrorism in use for insurance or reinsurance contracts? Please answer this question on class/sector by class/sector basis. If these have been introduced in response to recent developments how do these differ from previous provisions?

Italian insurance and reinsurance contracts provide the following definition: “act of terrorism is any act (including use or threat of force or violence) that any person or group of persons acting alone or on behalf of or in connection with any organization will commit for political, religious, ideological or similar purposes, including the intention of influencing any government or generating fear in the population or any part thereof”. Policies issued before Sept.11 had no definition.

(e) If there are policy restrictions on or exclusions of terrorism cover, when were these first introduced and have they been changed in the light of recent events?

Before Sept.11, terror acts falling within the scope of art. 1912 (war, insurrection or population uprising) were excluded by law, unless specifically insured with a premium surcharge; terror acts outside that scope were included without a premium surcharge. After Sep.11, also terror acts are specifically excluded from cover unless expressly insured with a premium surcharge.

(f) More particularly, do any market definitions of terrorism require actual physical damage to be sustained and if so of any particular kind?

Policies do not make distinctions on the type of damage incurred.

(g) Upon whom falls the burden of proving any loss was caused by an act of terrorism?

General rules on evidence apply.

(h) Are rules of causation varied in relation to terrorism? In particular, does a terrorism exclusion operate when the loss is proximately caused by terrorism or is the exclusion narrower, eg, the loss has to be “solely and directly” caused by terrorism?

Current policies expressly state “the company shall indemnify damages directly or indirectly caused by, derived from, or occurred on the occasion of acts of terrorism, in derogation of the restrictions set forth in points (a) and (b) of the provision on ‘malicious acts’ ” [excluded from cover].

Contracts and Law do not specify. No Italian court decisions have been published on the subject. A foreign court decision interpreting Italian law is referred to in following section 3(c). According to the principle “*causa causae est causa causati*” quoted in preceding paragraph (c) the terror act should be at least the proximate cause. In fact, very seldom (if ever) an action in itself is the “sole and direct cause” of the damage: normally a combination of factors cause the damage. However from a legal point of view “the cause” cannot be but the key factor that triggered the chain events generating the damage.

(i) Describe what, if any, significance is attributed to: the identity/identification of the perpetrator(s); their identification/association with recognised terrorist groups; the motive attributed to any act of terrorism (and whether this must be political, religious or ideological in nature); the modus operandi employed in perpetrating any act of terrorism; and/or the target of the physical act, ie those directly suffering loss and/or those (eg the Government) intended to be influenced?

No particular significance is attached to such facts, except as set forth in the provision quoted in (d) above.

(j) To satisfy any definition or test of terrorism is there any dependence upon any Government, judicial or other form of certification or declaration of any kind?

Formal certifications are not expressly required. However in the case of legal dispute any of such certifications would make much easier the proof of the nature of the event.

(k) Is there any specific reference, provision or known problem relating to acts involving biological, chemical, nuclear or other forms of contamination?

A distinguishing is necessary between biological and chemical contamination and nuclear one. Policies covering terrorism do not exclude insurance against biological and chemical contamination; therefore there are no potential conflicts between the two covers. To the contrary most policies covering terrorism risks explicitly exclude damages due to any kind of nuclear explosions or contamination; a literal interpretation of the contract therefore would exclude damages that a terrorist nuclear explosion or contamination may cause. There are no known precedents on the matter. Fortunately.

(l) To the extent that terrorism risks are covered, do policies use aggregation provisions to limit insurance/reinsurance exposure and oblige insureds/reinsureds to bear retentions of any kind?

Italian insurance policies provide as follows:

so far as this guarantee [i.e. terrorism] is concerned: (a) a retention of 20% on the amount of the indemnity, with a minimum of € 5.200, shall be deducted from the payment due to the insured; in no case to Company shall indemnify, for one or more events that may take place within the same insurance year, an amount exceeding 20% of the amount insured for each location, with a maximum of € 5.000.000. The Company is entitled to withdraw from the cover provided under this section [i.e. against terror risks] at any moment, with a 15 days notice from the date of receipt of the withdrawal notification sent via registered mail with advise of delivery; in such case the Company shall reimburse the pro rata premium paid for the period out of risk, excluding taxes.

3. TERRORISM AND GOVERNMENT INTERVENTION

(a) Does national legislation impose any restrictions on terrorism exclusions in insurance policies? If so, describe them and their application.

No

(b) Does the Government provide any scheme whereby terrorism cover is made available to direct policy holders by the Government itself? If so, please outline the date of the introduction of the scheme, the nature of the scheme including any limits, deductibles and so forth, its original purpose, its success and funding arrangements.

No,

(c) Does the Government provide any scheme whereby terrorism reinsurance is made available to insurers by the Government itself? If so, please outline the date of the introduction of the scheme, the nature of the scheme including any limits, deductibles and so forth, its original purpose, its success and funding arrangements.

Since the late 1950s, the Italian government provides a back stop guarantee, of a nature similar to reinsurance, for export related risks insurance including risks related to terror acts. No indemnities have been claimed so far under such risk. However a foreign lender brought a law suit in a Swiss court (under the Lugano Convention) against his Italian credit insurer that refused to pay damages deriving from the default of the debtor under the insured loan. Refusal had been based on the principle of causation: a terrorist attack had destroyed the debtor income earning facilities causing of the default. In fact the creditor had insured the credit under a commercial risks insurance scheme, while cover against terror acts, a political risk, was available under the political risks insurance scheme, which the insured felt unnecessary; moreover under the specific circumstances the attack fell within the scope of art. 1912 and had to be expressly insured. The insured argued in court that damages deriving from default had been insured per se, regardless of the cause of insolvency. The judgement, in large measure favourable to the insurance company, is under appeal.

4. INTERNATIONAL OR CROSS-BORDER ARRANGEMENTS

(a) Can you identify any international or cross-border schemes or initiatives whereby insurance or relief from financial consequences of acts of terrorism is guaranteed or supported for particular sectors, eg, aviation, shipping?

Aviation risks were directly covered by the state after Sept. 11 up to December 31, 2002.

(b) Are you aware of any international or cross-border initiatives or schemes which have been devised or developed since September 11 to protect insureds, insurers or reinsurers against exposure to terrorist activities?

5. DECIDED CASES OR OTHER RULINGS

Have there been any court decisions or other rulings in your country in which the coverage of an insurance or reinsurance policy in respect of an act of terrorism has been considered?

None so far regarding insurance or reinsurance cases, except as described in paragraph 3 (c) above. However a 1985 decision of the Criminal Court of Cassation has ruled that “an act of violence against a public officer or utility may be considered terrorism only if the clear intention of such act is to support the political intent” [that the terrorist group is purposing]. This decision sets between terrorist acts, malicious acts and accidents a distinguishing that may be used in civil court actions.

JAPAN

1. MEANING OF TERRORISM

(a) Is there any general definition of ‘terrorism’, ‘terrorist activity’ or any related term in the general law within your jurisdiction?

No, there isn't any specific definition in the general law.

(b) If there is a definition, for what legal purposes is the definition relevant?

2. TERRORISM AND POLICY WORDING

(a) To what extent do insurance and reinsurance policies written in your country exclude the liability of insurers and reinsurers for war risks? If so, is there any distinction drawn between commercial and consumer contracts. Please answer this question on a class/sector by class/sector basis.

There are war risks exclusions in commercial law and insurance/reinsurance policies. Basically, there is no distinction drawn between commercial and consumer contracts.

(b) To what extent do insurance and reinsurance policies written in your country exclude the liability of insurers and reinsurers for terrorism risks? If so, is there any distinction drawn between commercial and consumer contracts. Please answer this question on a class/sector by class/sector basis.

There are terrorist risks exclusions in commercial law and insurance reinsurance policies. There is some distinction drawn between commercial and consumer contracts, which depends on policies in commercial contracts.

(c) To what extent do war risks or exclusions and terrorism risks or exclusions or those for other acts of political or other violence such as malicious damage overlap?

Partly overlapping.

(d) Are there any market definitions of terrorism in use for insurance or reinsurance contracts? Please answer this question on class/sector by class/sector basis. If these have been introduced in response to recent developments how do these differ from previous provisions?

There is no definition in the market.

(e) If there are policy restrictions on or exclusions of terrorism cover, when were these first introduced and have they been changed in light of recent events?

There are no policy restrictions on nor exclusions of terrorism cover before September 11.

(f) More particularly, do any market definitions of terrorism require actual physical damage to be sustained and if so of any particular kind?

Ambiguous.

(g) Upon whom does the burden of proving any loss was caused by an act of terrorism?

Insurer has the burden of proof of loss by terrorism.

(h) Are rules of causation varied in relation to terrorism? In particular, does a terrorism exclusion operate when the loss is proximately caused by terrorism or is the exclusion narrower, eg, the loss has to be 'solely and directly' caused by terrorism?

There are no rules on the causation on terrorism.

(i) Describe what, if any, significance is attributed to: the identity/identification of the perpetrator(s); their identification/association with recognised terrorist groups; the motive attributed to any act of terrorism (and whether this must be political, religious or ideological in nature); the modus operandi employed in perpetrating any act of terrorism; and/or the target of the physical act, ie those directly suffering loss and/or those (eg Government) intended to be influenced?

Not clear.

(j) To satisfy any definition or test of terrorism is there any dependence upon any Government, judicial or other form of certification or declaration of any kind?

There is no form of certification nor declaration.

(k) Is there any specific reference, provision or known problem relating to acts involving biological, chemical, nuclear or other forms of contamination?

Sarin ejection in the subway train and anthrax spraying act in Tokyo metropolitan area in 1995.

(l) To the extent that terrorism risks are covered, do policies use aggregation provisions to limit insurance/reinsurance exposure and oblige insureds/reinsureds to bear retention of any kind?

There is no cover in consumer contracts, while there are limits in consumer contracts. There is no obligation of retention in insureds/reinsureds.

3. TERRORISM AND GOVERNMENT INTERVENTION

(a) Does national legislation impose any restrictions on terrorism exclusions in insurance policies? If so, describe them and their application.

No legislations.

(b) Does the Government provide any scheme whereby terrorism cover is made available to direct policy holders by the Government itself? If so, please outline the date of introduction of the scheme, the nature of the scheme including any limits, deductibles and so forth, its original purpose, its success and funding arrangements.

No scheme available for terrorism cover by the Government.

(c) Does the Government provide any scheme whereby terrorism reinsurance is made available to insurers by the Government itself? If so, please outline the date of introduction of the scheme, the nature of the scheme including any limits, deductibles and so forth, its original purpose, its success and funding arrangements

No scheme available for terrorism reinsurance by the Government.

4. INTERNATIONAL OR CROSS-BORDER ARRANGEMENTS

(a) Can you identify any international or cross-border schemes or initiatives whereby insurance or relief from financial consequences of acts of terrorism is guaranteed or supported for particular sectors, eg, aviation, shipping?

No, I can't.

(b) Are you aware of any international or cross-border initiatives or schemes which have been devised or developed since September 11 to protect insureds, insurers or reinsurers against exposure to terrorist activities?

No, I am not. Not clear.

5. DECIDED CASES OR OTHER RULINGS

Have there been any court decisions or other rulings in your country in which the coverage of an insurance or reinsurance policy in respect of an act of terrorism has been considered?

No, there haven't any court decisions on terrorism coverage.

MEXICO

1 DEFINITION OF TERRORISM

(a) Is there any general definition of “terrorism”, “terrorist activity” or any related term in the general law within your jurisdiction?

Article 139 of the Federal Penal Code, in the Second Book, First Section on “Crimes against the Security of the Nation”, Chapter VI on “Terrorism”, establishes the following:

“A prison penalty of between two and forty years and a fine of up to \$50,000 will be imposed, without prejudice to any other penalties which may be also be imposed for any other crimes which may result, on anyone who, using explosives, toxic substances, firearms or fire, flood or any other violent means carries out acts against people, things or public services which produce alarm, fear, terror in the population or in a group or sector of the population, in order to disturb the public peace or try to undermine the autonomy of the State or to force the State to take a decision.

A prison sentence of between one and nine years and a fine of up to \$10,000 will be imposed on any person who has knowledge of the activities of a terrorist and of the terrorist’s identity and does not make this known to the authorities.”

(b) If there is a definition, what legal aim does it have?

The Federal Penal Code defines terrorism in order to establish the penalties for terrorist activities

2 TERRORISM AND POLICY WORDING

(a) Do insurance and reinsurance policies written in your country exclude the liability of insurers and reinsurers for war risks? If so, is there any distinction between insurance contracts entered into with consumers and insurance contracts entered into with companies/professionals? Please answer this question in relation to different branches or sectors.

Yes, in insurance for property damage there are exclusions for war risks. There is no difference between insurance contracts entered into with consumers and those entered into with businesses/professionals.

(b) Do insurance and reinsurance policies written in your country exclude the liability of insurers and reinsurers for terrorism risks? If so, is there any distinction between insurance contracts entered into with consumers and insurance contracts entered into with businesses/professionals? Please answer this question in relation to the different branches or sectors.

Yes, terrorism exclusion clauses exist. There is no difference between insurance contracts entered into with consumers and those entered into with businesses/professionals.

(c) Are war risks or their exclusions and terrorism risks or their exclusions or risks of other kind of political act or violence considered to be malicious damage?

No, this is a specific exclusion; there is another exclusion for malicious damage in general.

(d) Do definitions of terrorism exist in insurance and reinsurance contracts? Please answer this question in relation to different branches or sectors. If these definitions have been introduced as a response to recent occurrences, are there differences between these and previous provisions?

In some contracts terrorism is defined - in property insurance, for example. There is no difference between these and previous provisions.

(e) If restrictions or exclusions in terrorism insurance cover exist, when were these restrictions introduced for the first time, and have these restrictions undergone any kind of change due to recent occurrences?

They were introduced following the events of 11 September in the United States. There have been no changes.

(f) Do any definitions of terrorism used in the market require there to have been actual physical damage? If so, please explain what particular type of damage is required.

Any consequential loss following an act of terrorism is covered. Definition: the acts of a person or persons who either acting alone, or representing somebody or in connection with any organisation carry out activities by force, violence or through the use of any other means for political, religious, ideological, ethnic or any other reason, with the aim of influencing or pressurising the government to take a decision or to undermine the authority of the State. The direct or indirect losses or natural damage, whether or not they occur immediately, which result from the use of explosives, toxic substances, firearms or any other violent means against people, things or public services and which, under the threat or possibility of their reoccurring, produce alarm, fear, terror or disturbance in the population or a group or a sector of the population by disturbing the public peace.

(g) Upon whom does the burden of proving that any loss was caused by an act of terrorism fall?

On the insurer, because it is an exclusion.

(h) Do the rules of causation in relation to terrorism vary? In particular, does a terrorism exclusion operate when the proximate cause of the damage is the terrorism or is the exclusion more strict, for example, does the loss have to be caused “solely and directly” by terrorism?

No, they do not vary. The exclusion is wide.

(i) Describe, if any, the importance attributed to: the identity/identification of the perpetrators of the acts of terrorism; their identification/association with known terrorist groups; the motive attributed to the act of terrorism (if it must be of a political, religious or ideological nature); the modus operandi used to carry out an act of terrorism; and/or the target of the physical act - that is to say those who suffer a loss directly and/or those intended to be influenced by the terrorist act (e.g. a government).

For insurance purposes there is little importance if the perpetrators are identified.

(j) To define or prove the type of terrorism, is there a need for any governmental, judicial or other certification or declaration?

It is considered a crime, and therefore the Attorney General of the Republic should intervene.

(k) Is there any specific reference, condition or known problem in relation to terrorist acts which include biological, chemical, nuclear or any other contamination?

No.

(l) To the extent that risks of terrorism are covered, do policies use aggregated limits to limit the insurance or reinsurance exposure and to oblige insureds and reinsureds to bear retentions of any kind?

In the specific case of credit insurance, yes.

3 TERRORISM AND GOVERNMENT INTERVENTION

(a) Do terrorism restrictions and exclusions exist in insurance covers under your national legislation? If so, describe them and their application.

No.

(b) Does the Government provide any scheme whereby terrorism cover is made available to insureds by the Government itself? If so, please outline the date of introduction of the scheme, the nature of the scheme including any limits, deductibles and so forth, its original purpose, its success and funding arrangements.

No.

(c) Does the Government provide any scheme whereby terrorism cover is made available to insurers by the Government itself? If so, please outline the date of the introduction of the scheme, the nature of the scheme including any limits, deductibles and so forth, its original purpose, its success and funding arrangements.

No.

4 INTERNATIONAL OR CROSS-BORDER ARRANGEMENTS

(a) Can you identify any international or cross-border scheme or initiative whereby insurance or relief from the financial consequences of acts of terrorism are guaranteed or supported for specific sectors, e.g. aviation, shipping?

We do not know of any international or cross-border schemes or initiatives to guarantee or support insurance, or relieve the financial consequences of acts of terrorism.

(b) Are you aware of any international or cross-border initiative or scheme which has been devised or developed since September 11 to protect insureds, insurers or reinsurers against exposure to terrorist activities?

We do not know of any international or cross-border schemes or initiatives which may have been created or developed since 11 September to protect insureds, insurers or reinsurers against exposure to acts of terrorism.

5 JUDICIAL DECISIONS AND OTHER RESOLUTIONS

Are there any judicial decisions or other resolutions in your country in which the cover of an insurance/reinsurance policy in respect of an act of terrorism has been considered?

We do not know of any Mexican judicial decisions or other resolutions in which insurance or reinsurance policy cover has been considered with regard to an act of terrorism.

SOUTH AFRICA⁷

1. MEANING OF TERRORISM

(a) Is there any general definition of “terrorism”, “terrorist activity” or any related term in the general law within your jurisdiction?

Section 1(1) of the Protection of Constitutional Democracy against Terrorism and Related Activities Act 33 of 2004 defines “terrorist activity” in extremely broad and seemingly exhaustive terms. The definition includes any act which (a) displays certain specified features (eg, involves violence, or endangers life, or causes the destruction of property), (b) is intended to achieve specified consequences (eg, to intimidate the public, or to force the government to do something), and (c) is committed for a specified purpose (eg, to advance a political or ideological motive or cause).

More specifically, “terrorist activity” includes any act, committed in or outside South Africa,

(a) which –

- (i) involves the systematic, repeated or arbitrary use of violence by any means or method;
- (ii) involves the systematic, repeated or arbitrary release into the environment or any part of it or distributing or exposing the public or any part of it to –
 - (aa) any dangerous, hazardous, radioactive or harmful substance or organism;
 - (bb) any toxic chemical; or
 - (cc) any microbiological or other biological agent or toxin;
- (iii) endangers the life, or violates the physical integrity or physical freedom of, or causes serious bodily injury to or the death of, any person, or any number of persons;
- (iv) causes serious risk to the health or safety of the public or any segment of the public;
- (v) causes the destruction of or substantial damage to any property, natural resource, or the environmental or cultural heritage, whether public or private;
- (vi) is designed or calculated to cause serious interference with or serious disruption of an essential service, facility or system, or the delivery of any such service, facility or system, whether public or private, including, but not limited to –
 - (aa) a system used for, or by, an electronic system, including an information system;
 - (bb) a telecommunication service or system;
 - (cc) a banking or financial service or financial system;
 - (dd) a system used for the delivery of essential government services;
 - (ee) a system used for, or by, an essential public utility or transport provider;
 - (ff) an essential infrastructure facility; or
 - (gg) any essential emergency services, such as police, medical or civil defence services;
- (vii) causes any major economic loss or extensive destabilisation of an economic system or substantial devastation of the national economy of a country; or
- (viii) creates a serious public emergency situation or a general insurrection in the Republic,

whether the harm contemplated in paragraphs (a)(i) to (vii) is or may be suffered in or outside the Republic, and whether the activity referred to in subparagraphs (ii) to (viii) was committed by way of any means or method; and

(b) which is intended, or by its nature and context can reasonably be regarded as being intended, in whole or in part, directly or indirectly, to –

- (i) threaten the unity and territorial integrity of the Republic;
- (ii) intimidate, or to induce or cause feelings of insecurity within, the public, or a segment of the public, with regard to its security, including its economic security, or to induce, cause or spread feelings of terror, fear or panic in a civilian population; or
- (iii) unduly compel, intimidate, force, coerce, induce or cause a person, a government, the general public or a segment of the public, or a domestic or an international organisation or body or intergovernmental organisation or body, to do or to abstain or refrain from doing any act, or to adopt or abandon a particular standpoint, or to act in accordance with certain principles,

whether the public or the person, government, body, or organisation or institution referred to in subparagraphs (ii) or (iii), as the case may be, is inside or outside the Republic; and

⁷ Professor JP Van Niekerk.

(c) which is committed, directly or indirectly, in whole or in part, for the purpose of the advancement of an individual or collective political, religious, ideological or philosophical motive, objective, cause or undertaking.

Further, there is also in s 1(1) a definition of “engages [or engage, or engaging, or engagement] in a terrorist activity”, which brings within the scope of the Act the commission, performance or carrying out of a terrorist activity; the facilitation of, participation or assistance in, or contribution to the commission, performance or carrying out of such activity; the performance of an act in preparation for or planning of a terrorist activity, or the issuing of any instructions in this regard.

From the broad definition in s 1(1) – and no doubt in accordance with the trite notions that the definition of terrorism lies more commonly in the eyes of the victim and that (just as one person’s gain is another person’s loss, so, too) one person’s terrorist is another’s freedom fighter – certain activities are specifically excluded and are accordingly not regarded as terrorist activities. These are:

- any act which is committed in pursuance of any advocacy, protest, dissent or industrial action and which does not intend the harm contemplated in par (a)(i)-(v) of the definition (s 1(3)), and
- any act committed during a struggle waged by peoples, including any action during an armed struggle, in the exercise or furtherance of their legitimate right to national liberation, self-determination and independence against colonialism, or occupation or aggression or domination by alien or foreign forces, in accordance with the principles of international law (s 1(4); this exclusion of struggles, it was suggested in the *Memorandum* on the objects of the Bill which preceded the Act, was derived from the *Convention on the Prevention and Combating of Terrorism* adopted by the Organisation of African Unity in July 1999).

However, a political, philosophical, ideological, racial, ethnic, religious or any similar motive will not for any reason be considered a justifiable defence in respect of an offence for which the definition of terrorist activity forms an integral part (s 1(5)).

(b) If there is a definition, for what legal purposes is the definition relevant?

The Protection of Constitutional Democracy against Terrorism and Related Activities Act 33 of 2004 was passed to provide for measures to prevent and combat terrorist and related activities, or the financing of such activities; to provide for an offence of terrorism and other offences related or connected to terrorist activities; to give effect in South African law to international instruments dealing with terrorist and related activities (thirteen such instruments are listed in s 1(1) sv “instruments dealing with terrorist and related activities”); and to provide for a mechanism to enable South Africa to comply with its international obligations relating to such activities.

More specifically, the Act creates the offence of terrorism, which is committed when a person engages in a “terrorist activity” (s 2), as well as a range of other offences associated or connected with terrorist activities (s 3). It further creates so-called Convention offences (ss 4-10), which includes offences associated or connected with the financing of specified offences, or offences relating to explosive or other lethal devices, to hijacking, destroying or endangering the safety of a fixed platform, to the taking of a hostage, to causing harm to internationally protected persons, to the hijacking of an aircraft, and to the hijacking of a ship or endangering the safety of maritime navigation. The Act also creates a number of other offences relating to the harbouring or concealment of persons committing certain offences or the failure to report the presence of such persons, to hoaxes, and to any threat, attempt, conspiracy and inducing of another person to commit those specified offences (ss 11-14).

All these offences are criminalised and brought within the (extended extraterritorial) jurisdiction of South African courts, and the property of convicted offenders used in connection with the offence is subject to forfeiture (ss 15-21).

2. TERRORISM AND POLICY WORDING

(a) To what extent do insurance and reinsurance policies written in your country exclude the liability of insurers and reinsurers for war risks? If so, is any distinction drawn between commercial and consumer contracts. Please answer this question on a class/sector by class/sector basis.

The General Exceptions in the standard-form indemnity insurance contract in general use on the South African market (the so-called MultiMark III (1997) policy, drafted under the auspices of the South African Insurance Association (“SAIA”)), exclude the insurer’s liability for three broad types of loss, namely (a) loss related to war, riot and terrorism; (b) loss caused by nuclear and related risks, and (c) loss caused by computer failure.

As far as war and related risks are concerned, the standard SAIA Exclusion reads:

- (A) This policy does not cover loss of or damage to property related to or caused by:*
- (i) civil commotion, labour disturbances, riot, strike, lockout or public disorder or any act or activity which is calculated or directed to bring about any of the foregoing;*
 - (ii) war, invasion, act of foreign enemy, hostilities or warlike operations (whether war be declared or not) or civil war;*
 - (iii) (a) mutiny, military rising, military or usurped power, martial law or state of siege, or any other event or cause which determines the proclamation or maintenance of martial law or state of siege;*
 - (b) insurrection, rebellion or revolution;*
- ...
- (vii) the act of any lawfully established authority in controlling, preventing, suppressing or in any other way dealing with any occurrence referred to in clause A (i), (ii), (iii) ... above.*
- (B) This policy does not cover loss or damage caused directly or indirectly by or through or in consequence of any occurrence for which a fund has been established in terms of the War Damage Insurance and Compensation Act, 1976 (No. 85 of 1976) or any similar Act operative in any of the territories to which this policy applies.*

As far as the exclusion of war risks is concerned, no general distinction is drawn in the local market between commercial and consumer insurance contracts.

In reinsurance contracts, there are two standard exclusions frequently used in reinsurance agreements which have a bearing on war risks. The one is the War and Terrorism Exclusion Endorsement (NMA2919) which excludes reinsurer liability for loss, damage, cost or expense caused by

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

The other is the War and Civil War Endorsement (drafted by the South African Reinsurance Offices Association) which excludes from protection by the reinsurance contract any loss or damage occasioned by any of a number of occurrences involving war or warlike activities, including

war, invasion, act of foreign enemy, hostilities or war-like operations (whether war be declared or not), civil war, civil commotion, mutiny, military or popular rising, insurrection, rebellion, revolution, military or usurped power.

(b) To what extent do insurance and reinsurance policies written in your country exclude the liability of insurers and reinsurers for terrorism risks? If so, is any distinction drawn between commercial and consumer contracts? Please answer this question on a class/sector by class/sector basis.

The General Exceptions in the standard-form and SAIA-endorsed indemnity insurance contract in general use on the South African market (so-called MultiMark III (1997)), exclude the insurer’s liability for losses caused by what may broadly be termed terrorism risks. This is achieved by (at least) two potentially overlapping exclusions, the one referring to acts calculated to overthrow or influence a government by means of, amongst others, “terrorism”, and the other referring, more specifically, to an “act of terrorism”.

The relevant standard SAIA terrorism risks exclusions read as follows:

- (A) This policy does not cover loss of or damage to property related to or caused by:*
- ...
- (iv) any act (whether on behalf of any organisation, body or person or group of persons) calculated or directed to overthrow or influence any State or Government or any provincial, local or tribal authority with force or by means of fear, terrorism or violence;*

(v) any act 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 provincial, local or tribal authority, or for the purpose of inspiring fear in the public or any section thereof;
(vi) any attempt to perform any act referred to in clause (iv) or (v) above;
(vii) the act of any lawfully established authority in controlling, preventing, suppressing or in any other way dealing with any occurrence referred to in clause A ... (iv), (v) or (vi) above.

...

(C) Notwithstanding any provision of this policy including any exclusion, exception or extension or other provision not included herein which would otherwise override a general exception, this policy does not cover loss of or damage to property or expense of whatsoever nature directly or indirectly caused by, arising out of or in connection with any act of terrorism

As far as the exclusion of terrorism risks is concerned, no general distinction is drawn in the local market between commercial and consumer insurance contracts.

In reinsurance contracts, there are two standard exclusions most frequently used in reinsurance agreements which have a bearing on terrorism risks. The one is the War and Terrorism Exclusion Endorsement (NMA2919) which excludes reinsurer liability for loss, damage, cost or expense caused by “any act of terrorism”. The other is the War and Civil War Endorsement (drafted and suggested for use by the South African Reinsurance Offices Association) which excludes from protection by the reinsurance contract any loss or damage occasioned by any of a number of occurrences, including

any act of any person acting on behalf of or in connection with any organisation with activities directed towards the overthrow by force of any Government de jure or de facto or to the influencing of it by terrorism or violence.

(c) To what extent do war risks or exclusions and terrorism risks or exclusions or those for other acts of political or other violence such as malicious damage overlap?

As is apparent from the exclusions quoted above, both war risks exclusions and terrorism risks exclusions, strictly taken, overlap to some extent and are not clearly separated or required to be separated. Both, in turn, overlap to some extent, and are accordingly excluded alongside risks involving other and notionally distinguishable acts of political or other violence. These include strikes, lockouts and labour disturbances; acts of civil commotion, riot or public disorder; and acts involving mutiny, military uprising or martial law.

However, a distinction is drawn between the losses caused by “purely” malicious or intentional conduct by third parties and malicious conduct by third parties in some way or other attributable or linked to political or terrorist motives: the former is, as a rule covered; the latter, as a rule, not.

(d) Are there any market definitions of terrorism in use for insurance or reinsurance contracts? Please answer this question on class/sector by class/sector basis. If these have been introduced in response to recent developments how do these differ from previous provisions?

The terrorism exclusion referred to in 2(b) above, contains a description of “an act of terrorism” which, given the widespread use of the standard-form of policy containing the exclusion, may be taken representing a, or at least part of a, “market definition”.

The description (which is part of clause (C)) reads:

For the purpose of this General Exception 1(C) an act of terrorism includes, without limitation, the use of violence or force or the threat thereof whether as an act harmful to human life or not, by any person or group of persons, whether acting alone or on behalf of or in connection with any organisation or government or any other person or body of persons, committed for political, religious, personal or ideological reasons or purposes including any act committed with the intention to influence any government or for the purpose of inspiring fear in the public or any section thereof.

A similar description of “an act of terrorism” is found in the War and Terrorism Exclusion Endorsement (Reinsurance). However, it refers to “the use of force or violence, by any means whatsoever, including chemical and/or biological means”, an insertion added some three years ago.

(e) If there are policy restrictions on or exclusions of terrorism cover, when were these first introduced and have they been changed in the light of recent events?

Terrorism risks exclusions have been incorporated in South African insurance contracts for many years. Under the previous regime, risks then perceived as falling within the description of “terrorism” were excluded from cover as being too onerous for the capacity of local insurers. The exclusions have not been changed in any material respect “in the light of recent events” (by which it is taken reference is intended to “terrorism” attacks in the United States of America, Spain, Britain, and elsewhere) as those events have not had, or have not locally been regarded to have had, any direct bearing on the extent of risks underwritten on the South African insurance market.

(f) More particularly, do any market definitions of terrorism require actual physical damage to be sustained and if so of any particular kind?

The terrorism risks exclusion referred to earlier excludes the insurer’s liability for “loss of or damage to property” caused by any act calculated to overthrow any state by means of terrorism, and also its liability for “loss of or damage to property or expense of whatever nature” caused by any act of terrorism. The insured is therefore not required to sustain any “actual physical damage” before the insurer may rely on the exclusion. Liability will be excluded also for any expense incurred by the insured in averting loss or damage from terrorism.

Further, actual physical damage is not required before an act will qualify as one of terrorism. As appears from the broad nature of market definition referred to in 2(d) above, a threat of such damage alone is for example sufficient to qualify as an “act of terrorism”.

(g) Upon whom falls the burden of proving any loss was caused by an act of terrorism?

In accordance with general principles, the burden of proving, on a balance of probabilities, the occurrence of an exception to the risk as described in the policy lies on the insurer (by contrast, in the case of a limitation on that risk, the insured bears the burden of proof: see further MFB Reinecke, SWJ van der Merwe, JP van Niekerk & Peter Havenga *General Principles of Insurance Law* (2002) in pars 272 and 289).

However, the parties to an insurance contract are permitted to agree, and in fact often agree, otherwise. That is true also of the terrorism risks exclusions referred to earlier. The standard wording in general use on the South African market provides:

If the [insurer] alleges that by reason of [clause A (i) - (vi) or 1(C)] of this exception, loss or damage is not covered by this policy, the burden of proving the contrary shall rest on the insured.

A similar provision is included in the terrorism risks exclusions employed in reinsurance contracts and imposes a burden of proof on the reinsured.

Such reverse burden of proof clauses are not contrary to public policy. Nevertheless, South African courts have not interpreted such clauses as absolving the insurer totally but have still required the insurer to adduce some evidence to support the allegation referred to in the clause (ie, some evidence pointing to the applicability of the exception in question) before the clause would be regarded as having become operational in its favour (see Reinecke et al op cit in par 289).

(h) Are rules of causation varied in relation to terrorism? In particular, does a terrorism exclusion operate when the loss is proximately caused by terrorism or is the exclusion narrower, eg, the loss has to be “solely and directly” caused by terrorism?

According to the standard terrorism risks exclusion referred to earlier, insurer liability is excluded for loss or damage “related to or caused by” any act calculated to overthrow any state by means of terrorism, and also for loss or damage “directly or indirectly caused by, arising out of or in connection with” any act of terrorism. The same may be observed of the exclusions encountered in reinsurance contracts: they exclude liability for loss or damage “occasioned by or

through or in consequence directly or indirectly of' any act calculated to overthrow by force any government by means of terrorism, or for loss "directly or indirectly caused by, resulting from or in connection with" any act of terrorism.

Thus, the causal link required is less restricted (and the exclusion thus wider) than it would have been had a proximate cause (or a more restricted link such as "solely and directly caused") been required. However, this relaxation of the causal link (ie, the exclusion or adaptation of the proximate cause rule) is not unique (see Reinecke et al op cit in par 279) and occurs also in connection with other types of exclusions of insurer liability.

Further, the second of the exclusions quoted directly above (as also the War and Terrorism Exclusion Endorsement employed in reinsurance contracts), contains an additional contractual agreement further impacting on the rules regarding causation which might otherwise have applied. It provides for instances where terrorism is accompanied by other, or multiple or intervening causes of loss (see Reinecke et al op cit in par 280). Insurer liability is excluded for loss or damage directly or indirectly caused by, 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, damage or expense".

(i) Describe what, if any, significance is attributed to: the identity/identification of the perpetrator(s); their identification/association with recognised terrorist groups; the motive attributed to any act of terrorism (and whether this must be political, religious or ideological in nature); the modus operandi employed in perpetrating any act of terrorism; and/or the target of the physical act, ie those directly suffering loss and/or those (eg the Government) intended to be influenced?

Generally no significance is attributed in the exclusion of terrorism risks to the identity of the perpetrators of acts of terrorism or their association with recognised terrorist groups.

As far as the motive is concerned, the SAIA General Exceptions in the standard-form policies requires any act calculated to cause loss "in order to further any political aim, objective or cause, or to bring about any social or economic change". In the description of "act of terrorism", reference is made to the use of violence or force by a person or group of persons "committed for political, religious, personal or ideological reasons or purposes" (the description in the terrorism exclusion endorsement used in reinsurance contracts refers to "committed for political, religious, ideological or similar purposes").

As far as modus operandi is concerned, the terrorism risks exclusions require that the acts of terrorism involve "the use of violence or force or the threat thereof".

And as far as the target of the physical act of terrorism is concerned, the exclusions refer to any act calculated "to overthrow or influence any State or Government or any provincial, local or tribal authority". Further, the description of "act of terrorism" makes it clear that an act will qualify as such "whether as an act harmful to human life or not"; also included are acts "committed with the intention to influence any government or for the purpose of inspiring fear in the public or any section thereof".

(j) To satisfy any definition or test of terrorism is there any dependence upon any Government, judicial or other form of certification or declaration of any kind?

None of the definitions or descriptions of "terrorism" or "act of terrorism" encountered in South African insurance policies refers to, or depends on, any governmental, judicial or other form of certification. The various meaning of these terms are strictly matters for judicial interpretation.

(k) Is there any specific reference, provision or known problem relating to acts involving biological, chemical, nuclear or other forms of contamination?

The only specific reference to acts involving biological, chemical, nuclear or other forms of contamination in any of the terrorism risks exclusions referred to earlier, occurs in the description of "act of terrorism" encountered in the War and Terrorism Exclusion Endorsement (Reinsurance) referred to in 2(c) above.

However, as noted earlier, the standard-form General Exceptions employed in the South African market contains, in addition to exclusions related to war, riot and terrorism, also specific exclusions related to nuclear loss. More specifically, insurer liability is excluded for loss of or damage to property or for legal liability caused by "ionising radiations or contamination by radio-activity from any nuclear fuel or from any nuclear waste from the combustion of nuclear fuel", "combustion" being stated to include "any self-sustaining process of nuclear fission".

(l) To the extent that terrorism risks are covered, do policies use aggregation provisions to limit insurance/reinsurance exposure and oblige insureds/reinsureds to bear retentions of any kind?

Terrorism risks are, as a rule, not covered by ordinary insurance carriers operational in the South African market.

3. TERRORISM AND GOVERNMENT INTERVENTION

(a) Does national legislation impose any restrictions on terrorism exclusions in insurance policies? If so, describe them and their application.

There is no provision in South African national legislation imposing any restrictions on terrorism exclusions in insurance policies.

(b) Can you identify any international or cross-border schemes or initiatives whereby insurance or relief from financial consequences of acts of terrorism is guaranteed or supported for particular sectors, eg, aviation, shipping?

(c) Are you aware of any international or cross-border initiatives or schemes which have been devised or developed since September 11 to protect insureds, insurers or reinsurers against exposure to terrorist activities?

In view of the fact that the short-term insurance industry in South Africa was neither prepared to insure nor capable of insuring the risks arising after the widespread political unrest which occurred in South Africa in 1976, the South African Special Risks Association ("SASRIA") was incorporated as an association not for gain (a so-called section 21 company) in 1979. It was established to provide insurance cover against damage to property caused by political acts. SASRIA enjoyed monopoly status and it was permitted to act as the sole supplier of indemnity insurance cover for these special risks in South Africa. It provided such cover on a non-refusable and non-cancellable basis to all prospective insured. Its premiums were derived as a small percentage of the premiums paid to conventional insurers covering the property in question against loss or damage from non-political risks.

As reinsurance protection for an insurer providing cover against the consequences of political acts on that basis was unavailable, the South African Government agreed with SASRIA to act as its reinsurer of last resort.

In 1989 SASRIA's main business was extended by the Reinsurance of Damage and Losses Act 56 of 1989. It then covered not only loss of or damage to property by political acts but also by non-political acts (such as riots, strikes or public disorder, including civil commotion, labour disturbances or lock-outs), as well as losses suffered by moneylenders in respect of mortgage loans.

The political acts in question were defined (in s 1 sv "loss of or damage to property" of that Act) as

- (a) any act (whether on behalf of any organization, body, person or group of persons) calculated or directed to overthrow or influence any state or government, or any provincial, local or tribal authority, with force or by means of fear, terrorism or violence;*
- (b) any act 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 provincial, local or tribal authority, or for the purpose of inspiring fear in the public or any section thereof;*
- ...*
- (d) any attempt to perform any act referred to in paragraph (a), (b), ...;*
- (e) the act of any lawfully established authority in controlling, preventing, suppressing or in any other way dealing with any occurrence referred to in paragraph (a), (b) ... or (d).*

With reinsurance being provided by the Government and with SASRIA being exempt from tax, SASRIA in the course of time accumulated substantial reserves which, as a section 21 company, it was not allowed to distribute. In 1998, therefore, SASRIA was converted into a public company with a share capital and with the State as its sole shareholder (the possibility being provided for of the disposal, at a future date, of the State's shareholding). Provision was made for the major part of its assets to be declared as a special restructuring benefit to be used to offset State debt. This was

accomplished by the Conversion of SASRIA Act 134 of 1998 which also repealed the Reinsurance of Damage and Losses Act 56 of 1989.

While the company's main business of carrying on short-term insurance for special risks remained unchanged (s 6(3) of the Conversion of SASRIA Act), provision was made for the reduction of the State's risk exposure as regards the special risks covered by SASRIA Ltd by way of the termination of the Government's existing agreement with it (s 8). This has now occurred and as a result SASRIA now has to obtain reinsurance cover on the open market as is the case with any private short-term insurer.

Like its predecessor, SASRIA Ltd provides insurance cover, subject to an annual calendar limit of R300 000 000 for any one insured, against direct (as opposed to indirect or consequential) loss or damage to property directly related to or caused by various political as well as non-political acts. More specifically it covers

- (i) any act (whether on behalf of any organization, body, person or group of persons) calculated or directed to overthrow or influence any state or government, or any provincial, local or tribal authority, with force or by means of fear, terrorism or violence;*
- (ii) any act 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 provincial, local or tribal authority, or for the purpose of inspiring fear in the public or any section thereof;*
- (iii) any riot, strike or public disorder [including civil commotion, labour disturbances or lockouts], or any act or activity which is calculated or directed to bring about riot, strike or public disorder;*
- (iv) any attempt to perform any act referred to in clause (i), (ii), (iii) above;*
- (v) the act of any lawfully established authority in controlling, preventing, suppressing or in any other way dealing with any occurrence referred to in clause (i), (ii), (iii) or (iv) above.*

It specifically does not cover war risks.

SASRIA cover is provided to individual insured (both consumers and commercial insured) and to groups (by way of group schemes) by way of so-called coupons (comprising a certificate and policy wording) that are issued to the insured. There are five main types of cover: material damage; contract works and / or construction and plant risks; consequential or business interruption loss; motor policy; and marine and inland transit risks.

Except in the case of motor-vehicle insurance, SASRIA cover is adjunct and supplementary to underlying cover against ordinary (as opposed to special) risks provided by direct insurers. Those direct insurers (and not SASRIA itself) issue the SASRIA coupons to insured together with their own underlying policies (or individual sections of those policies: eg, a SASRIA consequential loss coupon may be issued for the business interruption section of a comprehensive underlying policy). They do so as agents for SASRIA on a commission basis, in consequence of authority received from SASRIA under agency agreements.

Direct insurers also collect and pay over SASRIA premiums in their capacity as its agents. Until 1999, SASRIA's premiums were annually reduced; from 1999 to 2003, they remained fixed, and following the terrorist attacks in 2003, and also as a result of increased reinsurance premiums, its premiums were increased for the first time by 20 per cent across the board. Premium rates generally vary between 0.0030 and 0.0120 per cent (some transit risks go up to 1 per cent) depending on the risk involved.

The insurers of underlying policies also handle SASRIA claims on its behalf and have limited authority to settle some such claims, all other claims having to be submitted to SASRIA.

In short, an underlying policy (eg, a fire policy, or a comprehensive all-risks policy), issued by an insurer which is a registered SASRIA agent, must be in force and cover the insured in question in respect of the object of risk in question for a SASRIA coupon to be issued and to provide the insured cover against the consequences of special risks operating on that object of risk. Apart from its scope of cover (perils and exclusions clauses), the SASRIA coupon follows all the terms and conditions of the underlying policy, unless those have specifically been replaced by terms and conditions printed on the SASRIA coupon itself.

In the case of motor vehicle insurance, the SASRIA cover (provided by a SASRIA motor policy) is stand-alone and not accompanied by or dependent on an underlying policy.

SASRIA may not refuse any request for special risks cover, provided the necessary formalities, including that relating to, and having to be complied with by, its agents, have been met.

SASRIA cover is intended to dovetail with the cover excluded from the ordinary, underlying policy. In fact, the standard SAIA Exceptions (see 2(b) above) must be included in all underlying policies. However, the dovetailing is not absolute and some perceived gaps have been specifically identified if not (yet) addressed (see the SASRIA *Circular no 386* of 25 Feb 2002):

- SASRIA covers only “direct” loss or damage, that is, loss or damage “directly” related to or caused by, eg, terrorism and therefore excludes cover for consequential loss or malicious damage; the SAIA exclusion, again, absolves the underlying insurer from liability for “loss of or damage to property related to or caused by”, eg, terrorism.
- SASRIA covers looting where the proximate cause of the loss or damage is, eg, terrorism or one of the other acts of terror covered.
- SASRIA says it covers acts of terrorism caused through religious or ideological (rather than political) reasons under the clause that refers to “inspiring fear in the public or any section thereof”; also, it covers “any act ... calculated or directed to influence any state or government ... by means of fear terrorism or violence”, with out specifying that the motivation must be political, so that such acts are covered also when they are of a religious or ideological nature.
- SASRIA does not cover loss or damage arising from purely malicious acts.

Additionally, SASRIA cover (like the standard SAIA cover: see 2(k) above) contains a “Nuclear/Chemical/Biological Terrorism Exclusion” (see SASRIA *Circular no 392* of 12 Nov 2002). In terms of this SASRIA does not, as from 1 January 2003, cover

regardless of any contributory cause(s), ... any loss(es) in any way caused or contributed to by an act of terrorism involving the use or release or the threat thereof of any nuclear weapon or device or chemical or biological agent.

This exclusion is also accompanied by a reverse burden of proof provision (see 2(g) above).

SASRIA cover is also synchronised temporally with that provided by the underlying policy. It is stated to be from the inception or renewal date of the underlying policy, and for a period of no longer than 12 calendar months. An extension of the expiry date is possible if necessary to coincide it with that of the underlying policy to which it attaches.

(For further details on SASRIA, including copies of its coupon and policy wordings and its various regulations and circulars, see <http://www.sasria.co.za>). For background on the provision of political risks coverage by SASRIA, see *Joosub Investments v Maritime & General Insurance Co Ltd* 1990 (3) SA 373 (C) at 379H-380I; Reinecke et al op cit in par 274).

4. INTERNATIONAL OR CROSS-BORDER ARRANGEMENTS

(a) Does the Government provide any scheme whereby terrorism cover is made available to direct policy holders by the Government itself? If so, please outline the date of the introduction of the scheme, the nature of the scheme including any limits, deductibles and so forth, its original purpose, its success and funding arrangements.

(b) Does the Government provide any scheme whereby terrorism reinsurance is made available to insurers by the Government itself? If so, please outline the date of the introduction of the scheme, the nature of the scheme including any limits, deductibles and so forth, its original purpose, its success and funding arrangements.

SASRIA provides cover only for risks affecting property situated or located within South Africa and not, eg, for property situated in neighbouring territories nor for property en route to or from (but not at the relevant time located in) South Africa.

In Namibia, an equivalent institution, the Namibian Special Risks Insurance Association (“NASRIA”), provides cover against special risks on a comparable basis.

In consequence of special reciprocal arrangement between SASRIA and NASRIA, cover is automatically provided by SASRIA for vehicles registered in South Africa while being driven in Namibia (and by NASRIA for Namibian vehicles while being driven in South Africa), and for South African property in transit to (or from) Namibia from (or to) South Africa. Cover may also be specifically issued for South African goods imported or exported through Namibia.

In other southern African countries, insured are reliant on the willingness and capability of ordinary, direct insurer for cover against special, including terrorism, risks and SASRIA cover also does not operate there for either South African or other insured.

5. DECIDED CASES OR OTHER RULINGS

Have there been any court decisions or other rulings in your country in which the coverage of an insurance or reinsurance policy in respect of an act of terrorism has been considered?

Although there have been a few South African decisions interpreting words or phrases (still) occurring in the war risks exclusion clause (see, eg, *Lindsay & Pirie v The General Accident Fire & Life Assurance Corp Ltd* 1914 AD 574 (“civil commotion”); *Orenstein Arthur Koppel Ltd v Salamander Fire Insurance Co Ltd* 1915 TPD 497 (“riot”); and *Oos-Randse Bantoesake Administrasieraad v Santam Versekeringsmaatskappy Bpk & Andere* (2) 1978 (1) SA 164 (W) (the Afrikaans equivalents of “riot”, “civil commotion”, “insurrection” and “popular rising”)), the terms “terrorism” or “act of terrorism” or related phrases have yet to be judicially considered in the context of an insurance claim.

There have been a few cases involving SASRIA.

From *Van Zyl & Maritz NNO & Others v South African Special Risks Insurance Association & Others* 1995 (2) SA 331 (SEC) it is clear that general principles (here: the duty of disclosure) applies equally to SASRIA coupon policies. The Court held that threats of attack on the insureds’ property because of their liberal and anti-apartheid political views had to be disclosed to SASRIA as they were material to the risk of property damage if such threats were serious and sufficiently proximate in time to the taking out of the policy.

In *K & S Dry Cleaning Equipment (Pty) Ltd & Another v South African Eagle Insurance Co Ltd & Another* 1998 (4) SA 456 (W) (discussed in (1998) 1 *Juta’s Insurance Law Bulletin* 52-55), the insured claimed in the alternative against two insurers. Malicious loss or damage (that is, loss or damage directly occasioned by the deliberate act of any person committed with the intention of causing such loss or damage) was covered by the underlying insurer (SA Eagle), while various special risks, including riot, strike and public disorder (which included civil commotion, labour disturbance or lock-out) were covered by SASRIA. On the application by both insurers for absolution from the instance, the Court held that the insured was unable to prove that the looting damage caused to its property came within the special risks (eg, that the damage was caused by persons in the course of politically motivated violence) or that the damage had arisen out of civil commotion. In consequence SASRIA was absolved from the proceedings. The Court held further that there was sufficient evidence against SA Eagle so that case against it could continue. (SA Eagle later successfully defeated the insured claim by relying on non-compliance with a time-bar, as well as on the fact the loss was not caused by malicious damage but by theft, a peril excluded in its policy: see *K & S Dry Cleaning & Another v South African Eagle Insurance Co Ltd & Another* unreported (W) (discussed in (1999) 2 *Juta’s Insurance Law Bulletin* 3-5) and 2001 (3) SA 652 (W) (discussed in (2000) 3 *Juta’s Insurance Law Bulletin* 113-116).

In *SASRIA Ltd v Certain Underwriters at Lloyds* 2002 (4) SA 474 (SCA), a dispute arose as to which of two insurers was liable for fire damage to certain timber plantations: SASRIA Ltd, which covered certain special risks not covered by the underlying underwriters, including risks connected to labour disturbances, or Lloyd’s underwriters as the underlying insurer. The issue was resolved by an agreement between the insurers that each would make an equal interim payment to the insured and that the dispute between them as to their liability would then be submitted to arbitration, the liable insurer to refund half of the interim payments to other insurer. The arbitrator found in favour of SASRIA Ltd, that is, that the fire had not been caused by labour disturbances for which it, and not underlying insurer, was liable to the insured (as to the arbitral decision, see also Derek Wanblad “Labour Disturbances and Insurance Cover”, available at <http://www.deneysreitz.co.za/news/> (accessed on 21 Nov 2005)).

SPAIN

1. MEANING OF TERRORISM

(a) Is there any general definition of ‘terrorism’, ‘terrorist activity’ or any related term in the general law within your jurisdiction?

Yes, there are several legal definitions of "terrorism". The 1995 Código Penal (Criminal Act) typifies the crimes of terrorism as a specific aggravation the crimes against the persons, fire and devastations that are characterized for being committed by persons belonging to "armed gangs, organizations or groups which purpose is subvertir the constitutional order or to alter seriously the public peace".

The framework for Extraordinary Risks Cover (Real Decreto 300/2004) includes a definition of "terrorism" to effects of coverage of the risk: "any violent action carried out with the purpose to destabilize the political established system, or to cause dread and insecurity in the social way in which it is produced".

(b) If there is a definition, for what legal purposes is the definition relevant?

The Criminal Act definition is relevant to delimitate a type of crime and to separate it from other criminal acts, as well as the possibility of the victim to be included in the indemnifications foreseen in the Law 32/1999, of Solidarity with the Victims of the terrorism, obligation that assumes vicariously by the State.

The definition contained in the Regulation about Extraordinary Risks Cover serves to distinguish in what cases it must work the coverage of terrorism granted by the Consorcio de Compensación de Seguros (CCS).

2. TERRORISM AND POLICY WORDING

(a) To what extent do insurance and reinsurance policies written in your country exclude the liability of insurers and reinsurers for war risks? If so, is there any distinction drawn between commercial and consumer contracts. Please answer this question on a class/sector by class/sector basis.

The Insurance Contract Law (Ley 50/1980, de Contrato de Seguro) excludes the damages springs form war risks. The Insurances Contract Law is compulsory for consumer contractos. In the case of commercial contracts, usually the policies exclude the coverage of the risk of war. The only exception would be in regards Export Credit Insurance.

(b) To what extent do insurance and reinsurance policies written in your country exclude the liability of insurers and reinsurers for terrorism risks? If so, is there any distinction drawn between commercial and consumer contracts. Please answer this question on a class/sector by class/sector basis.

Alos, Insurance Contract Law excludes the damages springs form extraordinary risks on persons and goods. If there isn't any particular agreement in the policy, these risks are cover for the Consorcio de Compensación de Seguros (www.conorseguros.es, for more information).

The Legal Statute of the Consorcio de Compensación de Seguros (Real Decreto Legislativo 7/2004) says that they are subject of this coverage the damages for losses produced by extraordinary events occurred in Spain, causing damages on people or goods located in the country. In case of extraordinary event occurred abroad, the Consorcio will compensate for personal injuries if the policyholder is resident in Spain (it depends of the insurance branches).

Above-mentioned branches are: fire and natural events, land vehicles (vehicle damages, not civil liability), railways vehicles, other damages produced to goods (robbery, plate glass, machinery breakdown, electronic equipments and computers), business interruption. Accident insurance is also included, even if contracted additionally to another type of insurance, as life or motor vehicles, or in the framework of a pension plan.

Since 2006 (Law of 16 May 2006) the Extrardinary Risks Cover (including terrorism) has been extended to life insurance for death or invalidity, when the insured is resident in Spain.

The insurers can include in the policies the terrorism cover, but no insurer assumes this risk in Spain.

(c) To what extent do war risks or exclusions and terrorism risks or exclusions or those for other acts of political or other violence such as malicious damage overlap?

No in relation with the risk cover

(d) Are there any market definitions of terrorism in use for insurance or reinsurance contracts? Please answer this question on class/sector by class/sector basis. If these have been introduced in response to recent developments how do these differ from previous provisions?

In the legal regulation of Extraordinary Risks Cover, all the events capable of guarantee are defined legally all the risks cover (natural risks and social risks) included the terrorism. In the reinsurance contracts is not usually to include a definition of terrorism.

(e) If there are policy restrictions on or exclusions of terrorism cover, when were these first introduced and have they been changed in light of recent events?

Five years ago, the Spanish Extraordinary Risks Cover system only covers the damages derivated of events happened in Spain in property, motor insurance (compulsory) and personal accidents. Immediately after the events of 11-S, the system began to assume this risks in loss of benefits and, in the last month in life insurance, even when the bodily injuries are happened abroad.

(f) More particularly, do any market definitions of terrorism require actual physical damage to be sustained and if so of any particular kind?

No, any physical damage can be compensated, in the Spanish cover system. The damage must be direct consequence of the terrorism act.

(g) Upon whom does the burden of proving any loss was caused by an act of terrorism?

The policyholder, the insured or the beneficiary must proof the occurrence of the damage and the direct relation with a terrorism act. After, the damages will be valued by the experts. To proof the terrorism act is enough the press cronicle which gather the facts or the declaration of the official authorities.

(h) Are rules of causation varied in relation to terrorism? In particular, does a terrorism exclusion operate when the loss is proximately caused by terrorism or is the exclusion narrower, eg, the loss has to be 'solely and directly' caused by terrorism?

The CCS cover operates only regards the damages directly caused by terrorism. Except in the case of the bussiness interruption cover, all the consequential or no directly damages are out of this cover.

(i) Describe what, if any, significance is attributed to: the identity/identification of the perpetrator(s); their identification/association with recognised terrorist groups; the motive attributed to any act of terrorism (and whether this must be political, religious or ideological in nature); the modus operandi employed in perpetrating any act of terrorism; and/or the target of the physical act, ie those directly suffering loss and/or those (eg Government) intended to be influenced?

This items haven't any significance regards the CCS system cover.

(j) To satisfy any definition or test of terrorism is there any dependence upon any Government, judicial or other form of certification or declaration of any kind?

No, there isn't needed any official previous declaration in orden to obtain the compensation. It is enough that the event were include in the legal definition.

(k) Is there any specific reference, provision or known problem relating to acts involving biological, chemical, nuclear or other forms of contamination?

No

(l) To the extent that terrorism risks are covered, do policies use aggregation provisions to limit insurance/reinsurance exposure and oblige insureds/reinsureds to bear retention of any kind?

Not. Only there is applied a deductible in property damages and bussiness interruption covers. This deductible will not be applied to vehicles insured through motor car insurance policy, to buildings or to communities of dwelling owners.

3. TERRORISM AND GOVERNMENT INTERVENTION

(a) Does national legislation impose any restrictions on terrorism exclusions in insurance policies? If so, describe them and their application.

No.

(b) Does the Government provide any scheme whereby terrorism cover is made available to direct policy holders by the Government itself? If so, please outline the date of introduction of the scheme, the nature of the scheme including any limits, deductibles and so forth, its original purpose, its success and funding arrangements.

We have described this system across the precedent answers of this questionnaire.

The Consorcio de Compensación de Seguros (CCS), which cover the extraordinary risks, among them the terrorism risk, is a public business institution, attached to the Ministry of Economy and Finance through the Directorate-General for Insurance and Pension Funds. It has legal personality on its own and full capacity to act. The activity of the entity is subject to laws ruling private companies. The CCS have its own assets, independent from State's.

The CCS coverage takes as a requeriment the previously existence of a insurance contract (property, motor insurance, bussiness interruption, personal accidents or life insurance) signed among a policyholder and a autorized insurance company. A compulsory surcharge is applied on this contract in favour of the CCS for the coverage of extraordinary risks. The amount of this surcharge depends of the type of insurance and the risk itself.

(For more information about the Consorcio system: www.consorseguros.es. Also avalaible in English)

Nevertheless, in order to complement this system, for the cases of not insured goods or personal damages as well as to cover the difference between the really suffering damages and the received indemnifications proceeding from the insurance (thorough the CCS), there exists a system of helps and compensation for the victims of the terrorism, regulated in the Law of helps and indemnities to the victims of crimes of terrorism (RD 288/2003), that establishes the direct indemnity for the State, with vicariously character in relation to possible compensations to the CCS, of the bodily injuries and property caused as consequence of acts of terrorism.

(c) Does the Government provide any scheme whereby terrorism reinsurance is made available to insurers by the Government itself? If so, please outline the date of introduction of the scheme, the nature of the scheme including any limits, deductibles and so forth, its original purpose, its success and funding arrangements

In this foreseen moment there isn't any scheme of special coverage, different from the realized one for the CCS. In 2001, as consequence of the terrorist attempts of 11.09.2001, a system of reinsurance was established at the expense of the State of the risks of war and terrorism for the air insurance, in effect until October, 2002, which administration was at the expense of the CCS.

4. INTERNATIONAL OR CROSS-BORDER ARRANGEMENTS

(a) Can you identify any international or cross-border schemes or initiatives whereby insurance or relief from financial consequences of acts of terrorism is guaranteed or supported for particular sectors, eg, aviation, shipping?

All the initiatives in this concern have been studied by the OCDE and other international organizations.

(b) Are you aware of any international or cross-border initiatives or schemes which have been devised or developed since September 11 to protect insureds, insurers or reinsurers against exposure to terrorist activities?

The same answer than the precedent question.

5. DECIDED CASES OR OTHER RULINGS

Have there been any court decisions or other rulings in your country in which the coverage of an insurance or reinsurance policy in respect of an act of terrorism has been considered?

The Spanish system is clear enough. In the types of insurance which terrorism cover the CCS assumes, litigations don't exist practically. Solely litigation exists, in some cases, to distinguish the terrorism acts of others social risks, as popular riot.

UNITED STATES⁸

1. MEANING OF TERRORISM

(a) Is there any general definition of ‘terrorism’, ‘terrorist activity’ or any related term in the general law within your jurisdiction?

There are several in use. Federal law -- the Terrorism Risk Insurance Act (TRIA) -- governs the Terrorism Risk Insurance Program sponsored by the federal government. The presence of that law results in broad use of its definition, or definitions that closely resemble it.

(b) If there is a definition, for what legal purposes is the definition relevant?

The definition under TRIA sets forth the authority for the Secretary of the Treasury to declare an act as a "certified act of terrorism" thereby triggering the provision of TRIA. That duty to declare such acts as terrorism reduces the pressure on the words that define terrorism in the policy form, because ultimately the Secretary will declare whether a given act is or is not foreign terrorism -- that decision, not interpretation of the policy language, will likely control the coverage question. Other terrorism definitions have more need to "stand on their own" if there will be no specific ultimate arbiter (other than perhaps a court) on whom to rely.

2. TERRORISM AND POLICY WORDING

(a) To what extent do insurance and reinsurance policies written in your country exclude the liability of insurers and reinsurers for war risks? If so, is there any distinction drawn between commercial and consumer contracts. Please answer this question on a class/sector by class/sector basis.

Property policies have historically provided an exclusion for losses caused by acts of war for both personal and commercial lines of business. Commercial General Liability policies added such an exclusion in recent years.

(b) To what extent do insurance and reinsurance policies written in your country exclude the liability of insurers and reinsurers for terrorism risks? If so, is there any distinction drawn between commercial and consumer contracts. Please answer this question on a class/sector by class/sector basis.

Base policies have historically not addressed the terrorism exposure by name. However, there are certain provisions that could be invoked in the event of a terrorist act such as the nuclear exclusion, the pollution exclusion and possibly others.

Personal property policies do not fall under TRIA, and terrorism-specific exclusions are generally not used in the personal property market.

Most commercial contracts fall under the provisions of TRIA. Insurers are required to make available coverage for terrorism losses for "certified" acts of terrorism subject to terms and limitations that do not differ materially from the terms and limitations to which other events are subject. If a policyholder rejects the offer, a terrorism exclusion for certified acts may be added.

For acts of terrorism that do not fit the TRIA definition, insurers are generally free to attach exclusions to commercial policies. However, that has not been the case in New York, Florida and Georgia, where only the TRIA exclusions have been approved.

(c) To what extent do war risks or exclusions and terrorism risks or exclusions or those for other acts of political or other violence such as malicious damage overlap?

⁸ This report was prepared by the Insurance Services Office.

The answer to this question would depend entirely on the fact set in effect as a result of a specific act. Use of a threshold can avoid some of the overlap. For example, the federal law does not apply if the event causes less than \$5 million on damage. Other forms (non-TRIA-based forms) include other threshold levels.

(d) Are there any market definitions of terrorism in use for insurance or reinsurance contracts? Please answer this question on class/sector by class/sector basis. If these have been introduced in response to recent developments how do these differ from previous provisions?

Regulators have not approved the use of terrorism-specific exclusions for personal lines contracts.

For commercial lines insurance contracts, there are various types of exclusions/limitations available, including:

- "certified" acts
- "certified" and "other" acts
- "other" acts
- Nuclear, biological and chemical, and
- sublimits

(e) If there are policy restrictions on or exclusions of terrorism cover, when were these first introduced and have they been changed in light of recent events?

Terrorism exclusions were first introduced at the end of 2001, primarily in response to the events of 9/11 and the hardening of the reinsurance market for terrorism risks. These first exclusions did not differentiate between acts of foreign or domestic terrorism.

Following the enactment of TRIA (which applies only to certain foreign-based terrorism), the definitions were revised to track the concept of a "certified" act of terrorism as spelled out in federal statute. This necessitated the creation of a definition for "other" acts of terrorism (acts NOT certified by the Secretary of the Treasury).

In addition, since TRIA currently has an expiration date (end of 12/31/07) forms exist that recognize the potential for mid-term changes in the definition of terrorism. These "conditional" endorsements can be used to modify policy provisions mid-term should TRIA actually expire.

(f) More particularly, do any market definitions of terrorism require actual physical damage to be sustained and if so of any particular kind?

In ISO forms, the "other acts" (non-TRIA) exclusion requires insured property damage for ALL damaged property (not just the subject of the insurance policy at hand) to meet a threshold of \$25,000,000 US to trigger the exclusion for property and/or liability coverage. For liability coverages, in addition to the \$25,000,000 trigger, there is an alternate threshold of 50 serious injuries or deaths.

The federal definition of a "certified" act sets a threshold of \$5,000,000 in damages as the minimum amount for federal certification. In addition to this floor, there is a \$100,000,000,000 threshold that serves as a ceiling. Losses above this amount are neither insured nor backstopped – they would be addressed by possible later action of Congress.

There are also various thresholds, varying depending on a particular insurer's net written premium, and incurred losses, that apply in setting the federal government's reimbursement to any particular insurer under the terms of TRIA.

(g) Upon whom does the burden of proving any loss was caused by an act of terrorism?

Typically, the burden is on the policyholder to prove a loss is caused by a covered peril. If terrorism is excluded, the burden would generally be on the insurer (as it is with other exclusions) to prove that the loss was subject to that exclusion.

(h) Are rules of causation varied in relation to terrorism? In particular, does a terrorism exclusion operate when the loss is proximately caused by terrorism or is the exclusion narrower, e.g., the loss has to be 'solely and directly' caused by terrorism?

Various rules of causation can apply -- much depends on the fact patterns applicable in a specific situation and the wording of the insurance policy. For example, does the policy cover certain specified risks or generally cover risks of loss unless they are excluded; does it contain concurrent cause wording to characterize the exclusion? The actual means of terrorism (conventional attack; use of radiation; cyber terrorism) may affect the difficulty of proving causation. The infrequency of such events in the past means that such a discussion is not one based on a broad amount of experience with such cases.

(i) Describe what, if any, significance is attributed to: the identity/identification of the perpetrator(s); their identification/association with recognised terrorist groups; the motive attributed to any act of terrorism (and whether this must be political, religious or ideological in nature); the modus operandi employed in perpetrating any act of terrorism; and/or the target of the physical act, i.e. those directly suffering loss and/or those (e.g. Government) intended to be influenced?

The federal definition of a "certified" act refers to a violent act that is dangerous to human life, property or infrastructure and is committed by individuals acting on behalf of foreign persons or foreign interests, as part of an effort to coerce the civilian population or influence the policy or affect the conduct of the United States Government by coercion. The definition of "other act" (non-TRIA) contains some similar language but applies to acts that are not "certified" and does not include the foreign persons or interest requirement.

(j) To satisfy any definition or test of terrorism is there any dependence upon any Government, judicial or other form of certification or declaration of any kind?

The Secretary of the Treasury, in concurrence with the Secretary of State and Attorney General of the United States, may declare an act of terrorism as a "certified" act.

(k) Is there any specific reference, provision or known problem relating to acts involving biological, chemical, nuclear or other forms of contamination?

Base (unendorsed) policies typically contain exclusions that may apply to loss caused by these perils, even absent any terrorism exclusion.

(l) To the extent that terrorism risks are covered, do policies use aggregation provisions to limit insurance/reinsurance exposure and oblige insureds/reinsureds to bear retention of any kind?

TRIA contains several provisions that limit an insurer's exposure to a certain percentage based on net written premium and incurred loss amounts.

3. TERRORISM AND GOVERNMENT INTERVENTION

(a) Does national legislation impose any restrictions on terrorism exclusions in insurance policies? If so, describe them and their application.

TRIA requires that coverage for certified acts be made available, subject to the same plans, terms and conditions, as coverage for other events. This requirement applies only to those lines eligible for backstop under the program.

(b) Does the Government provide any scheme whereby terrorism cover is made available to direct policy holders by the Government itself? If so, please outline the date of introduction of the scheme, the nature of the scheme including any limits, deductibles and so forth, its original purpose, its success and funding arrangements.

We have no such information

(c) Does the Government provide any scheme whereby terrorism reinsurance is made available to insurers by the Government itself? If so, please outline the date of introduction of the scheme, the nature of the scheme including any limits, deductibles and so forth, its original purpose, its success and funding arrangements

TRIA essentially serves as a reinsurance program funded by the government. TRIA was originally introduced in November 2002, and extended in December 2005. It is currently set to expire at the end of December 31, 2007.

4. INTERNATIONAL OR CROSS-BORDER ARRANGEMENTS

(a) Can you identify any international or cross-border schemes or initiatives whereby insurance or relief from financial consequences of acts of terrorism is guaranteed or supported for particular sectors, e.g., aviation, shipping?

No information.

(b) Are you aware of any international or cross-border initiatives or schemes which have been devised or developed since September 11 to protect insureds, insurers or reinsurers against exposure to terrorist activities?

No.

5. DECIDED CASES OR OTHER RULINGS

Have there been any court decisions or other rulings in your country in which the coverage of an insurance or reinsurance policy in respect of an act of terrorism has been considered?

We are aware of cases related to war exclusions and the question of how/whether they apply to an act of terrorism. The most frequently cited such case is known as the "Pan Am" case. It held that war exclusions, and related exclusions, did not apply to an airplane hijacking (and its ultimate destruction) by the Popular Front for the Liberation of Palestine. The court noted that the insurers were aware of the existence of prior hijackings and had not changed the policy language to deal with it (*Pan American World Airways Inc v Aetna Casualty & Surety Co* 505 F.2d 989 (2nd Cir, 1974)). More recently, there have been several cases disputing the extent of coverage of the World Trade Center in the aftermath of the 9/11 attacks. They dealt mainly with issues of limits and not terrorism exclusions.

URUGUAY⁹

1. DEFINITION OF TERRORISM

(a) Is there any general definition of “terrorism”, “terrorist activity” or any related term in the general law within your jurisdiction?

No.

(b) If there is a definition, what legal aim does it have?

Not applicable.

2 TERRORISM AND POLICY WORDING

(a) Do insurance and reinsurance policies written in your country exclude the liability of insurers and reinsurers for war risks? If so, is there any distinction between insurance contracts entered into with consumers and insurance contracts entered into with companies/professionals? Please answer this question in relation to different branches or sectors.

Although war risks are excluded, there is not usually any distinction drawn between insurance contracts entered into with consumers and insurance contracts entered into with companies.

(b) Do insurance and reinsurance policies written in your country exclude the liability of insurers and reinsurers for terrorism risks? If so, is there any distinction between insurance contracts entered into with consumers and insurance contracts entered into with businesses/professionals? Please answer this question in relation to the different branches or sectors.

Although terrorism risks are excluded, there is not usually any distinction drawn between insurance contracts entered into with consumers and insurance contracts entered into with companies.

(c) Are war risks or their exclusions and terrorism risks or their exclusions or risks of other kind of political act or violence considered to be malicious damage?

No.

(d) Do definitions of terrorism exist in insurance and reinsurance contracts? Please answer this question in relation to different branches or sectors. If these definitions have been introduced as a response to recent occurrences, are there differences between these and previous provisions?

The inclusion of such definitions is not the norm.

(e) If restrictions or exclusions in terrorism insurance cover exist, when were these restrictions introduced for the first time, and have these restrictions undergone any kind of change due to recent occurrences?

Such restrictions have existed for various decades and have not undergone any recent changes.

(f) Do any definitions of terrorism used in the market require there to have been actual physical damage? If so, please explain what particular type of damage is required.

No.

⁹ The original Spanish version is reproduced in Part 4 of this Report.

(g) Upon whom does the burden of proving that any loss was caused by an act of terrorism fall?

There is no law on this.

(h) Do the rules of causation in relation to terrorism vary? In particular, does a terrorism exclusion operate when the proximate cause of the damage is the terrorism or is the exclusion more strict, for example, does the loss have to be caused “solely and directly” by terrorism?

The rules of causation do not vary.

(i) Describe, if any, the importance attributed to: the identity/identification of the perpetrators of the acts of terrorism; their identification/association with known terrorist groups; the motive attributed to the act of terrorism (if it must be of a political, religious or ideological nature); the modus operandi used to carry out an act of terrorism; and/or the target of the physical act - that is to say those who suffer a loss directly and/or those intended to be influenced by the terrorist act (e.g. a government).

No such attribution exists.

(j) To define or prove the type of terrorism, is there a need for any governmental, judicial or other certification or declaration?

No.

(k) Is there any specific reference, condition or known problem in relation to terrorist acts which include biological, chemical, nuclear or any other contamination?

No.

(l) To the extent that risks of terrorism are covered, do policies use aggregated limits to limit the insurance or reinsurance exposure and to oblige insureds and reinsureds to bear retentions of any kind?

Not applicable insofar as terrorism risks are not usually covered.

2. TERRORISM AND GOVERNMENT INTERVENTION

(a) Do terrorism restrictions and exclusions exist in insurance covers under your national legislation? If so, describe them and their application.

No.

(b) Does the Government provide any scheme whereby terrorism cover is made available to insureds by the Government itself? If so, please outline the date of introduction of the scheme, the nature of the scheme including any limits, deductibles and so forth, its original purpose, its success and funding arrangements.

No.

(c) Does the Government provide any scheme whereby terrorism cover is made available to insurers by the Government itself? If so, please outline the date of the introduction of the scheme, the nature of the scheme including any limits, deductibles and so forth, its original purpose, its success and funding arrangements.

No.

3. INTERNATIONAL OR CROSS-BORDER AGREEMENTS

(a) Can you identify any international or cross-border scheme or initiative whereby insurance or relief from the financial consequences of acts of terrorism are guaranteed or supported for specific sectors, e.g. aviation, shipping?

No.

(b) Are you aware of any international or cross-border initiative or scheme which has been devised or developed since September 11 to protect insureds, insurers or reinsurers against exposure to terrorist activities?

No.

4. JUDICIAL DECISIONS AND OTHER RESOLUTIONS

Are there any judicial decisions or other resolutions in your country in which the cover of an insurance/reinsurance policy in respect of an act of terrorism has been considered?

No.

4. ACUERDOS INTERNACIONALES O TRANSFRONTERIZOS

(a) ¿Puede identificar algún esquema o iniciativa internacional o transfronteriza según la cual los seguros o ayudas para las consecuencias financieras de los actos de terrorismo sean garantizados o apoyados para sectores concretos por ejemplo, aviación, marítimo?

No

(b) ¿ Conoce de algún esquema o iniciativa internacional o transfronteriza que haya ideada o desarrollada desde el 11 de septiembre para proteger a los asegurados, aseguradores o reaseguradores contra la exposición a las actividades terroristas?

No

5. DECISIONES JUDICIALES U OTRAS RESOLUCIONES

¿Existen decisiones judiciales u otras resoluciones en su país en las que se haya considerado la cobertura de una póliza de seguros/reaseguros respecto a un acto de terrorismo?

No

SPANISH TEXTS

ARGENTINA

1.- DEFINICIÓN DE TERRORISMO

(a) ¿Existe una definición general para “terrorismo”, “actividad terrorista” o algún término relacionado en la legislación y/o jurisprudencia de su jurisdicción?

§ 1 De los antecedentes colectados en jurisdicción nacional de la Argentina se puede colegir que no existe una definición general para “terrorismo”, “actividad terrorista” o término relacionado.

§ 2 Ciertamente, se ha visto que, en general, nuestra legislación y la jurisprudencia del Máximo Tribunal asocia en estrecha vinculación el concepto de “terrorismo” con el accionar de grupos armados que generan atentados individuales o colectivos, con la finalidad de conmover a la sociedad y aumentar las tensiones sociales preexistentes y con el objetivo último de quebrar el orden constitucional.

§ 3 Los elementos definitorios de terrorismo serían:

- a) Sujeto activo: Grupos organizados y armados
- b) Acción: Atentados individuales o colectivos
- c) Finalidad inmediata: Conmover a la sociedad y aumentar las tensiones sociales preexistentes
- d) Finalidad final: Quebrar el orden constitucional

§ 4 Por otra parte, y vinculado a la actual realidad internacional, se hace una genérica referencia a los movimientos de fondos por parte de las organizaciones terroristas transfronterizas.

(b) ¿Si existe una definición (legal o jurisprudencial)?, ¿Qué finalidad legal tiene esa?

§ 1 El concepto de “terrorismo” ha sido utilizado con los siguientes propósitos:

- a) Para organizar los sistemas de represión de los grupos terroristas
- b) Para establecer un sistema de compensaciones y subsidios para las víctimas de la actividad terrorista.-
- c) Para establecer sistemas procesales de los Tribunales que juzgaron a quienes llevaron adelante operaciones con el motivo alegado de reprimir el terrorismo.
- d) Para incorporar a la legislación nacional aquellas disposiciones de Derecho Internacional Público referentes a la represión del lavado de dinero de origen delictivo.

ANTECEDENTES

- **Decreto N° 261/75 del Poder Ejecutivo Nacional / 05/02/75**

Visto: Las actividades que elementos subversivos desarrollan en la provincia de Tucumán y la necesidad de adoptar medidas adecuadas para su erradicación

- **DECRETO 664/1992 del Poder Ejecutivo Nacional en relación con el atentado terrorista contra la Embajada de Israel. Subsidios graciabiles. Régimen** del 23/4/1992; publicado el 24/4/1992

Que dado el carácter graciable del subsidio, su otorgamiento y percepción no genera ni implica reconocimiento alguno de responsabilidad del Estado por los daños causados con motivo del hecho **terrorista**, por lo que el monto del subsidio será uniforme para cada categoría de daños y será abonado por única vez

- **LEY 23049 FUERZAS ARMADAS DELITOS Código de Justicia Militar. Modificaciones** sancionado. 9/2/1984; promulgado . 13/2/1984; publicado. 15/2/1984

Art. 10.– El Consejo Supremo de las Fuerzas Armadas conocerá mediante el procedimiento sumario en tiempo de paz establecido por los arts. 502 al 504 y concordantes del Código de Justicia Militar, de los delitos cometidos con anterioridad a la vigencia de esta ley siempre que:

1) Resulten imputables al personal militar de las Fuerzas Armadas, y al personal de las fuerzas de seguridad, policial y penitenciario bajo control operacional de las Fuerzas Armadas y que actuó desde el 24 de marzo de 1976 hasta el 26 de setiembre de 1983 en las operaciones emprendidas con el motivo alegado de reprimir el terrorismo; y...

- **COMUNICACIÓN A-4273 - Banco Central de la República Argentina ENTIDADES FINANCIERAS Prevención del Financiamiento del Terrorismo. Normas. Texto Ordenado** del 3/1/2005; publicado. 14/1/2005
.1.8. Cuenta abierta por una persona jurídica que está involucrada en las actividades de una asociación o fundación cuyos objetivos se relacionan a las demandas o reclamos de una organización terrorista.
5.1.9. Cuenta abierta por una persona jurídica, fundación o asociación que podría estar vinculada a una organización terrorista y por la cual se efectúan movimientos de fondos sobre el nivel esperado de ingresos.
- **DECRETO 327/1989 del Poder Ejecutivo Nacional SEGURIDAD INTERIOR Medidas tendientes a prevenir y conjurar la formación o actividad de grupos armados. Preparación, ejecución y control. Bases orgánicas y funcionales** del 10/3/1989; publicado. 16/3/1989
Que dadas las particularidades de la acción terrorista subversiva, llevando a cabo atentados individuales o colectivos, con la finalidad de conmover a la sociedad y aumentar las tensiones existentes y con el objetivo último de quebrar el orden constitucional, resultando así la Nación en su conjunto agredida, se deben instrumentar medidas de defensa que se irán graduando según la magnitud de la agresión, para lo cual se recurrirá a las Fuerzas Policiales o de Seguridad, dentro de sus respectivas jurisdicciones, pudiendo finalmente llegarse al empleo de las Fuerzas Armadas.
- **Corte Sup., 15/05/1981- Moya, Benito Alberto.). Fallos 303:696.JA 1981-III-57**
8) A fs. 40, comodidad necesaria, esta Cámara requirió al Juzgado Federal de Tucumán la causa penal indicada precedentemente y que corre agregada. De su lectura surge que con fecha 31/7/1979 se elevaron al Juez Federal por parte de las autoridades del Ejército Argentino los antecedentes atribuidos a Moya a partir de 1973 hasta el momento de su detención, y donde se referencia su trayectoria dentro de una organización terrorista y se lo sindicaba realizando tareas políticas de propaganda, captación de militantes, etc., atribuyéndose asimismo haber colocado una bomba lanza panfletos en la vereda de un supermercado
9) En lo que concierne a la libertad irrestricta en el país, tiene para sí esta Cámara que es de aplicación al caso la doctrina sentada en forma reiterada por la Corte Suprema, en cuanto decide que no corresponde hacer lugar al habeas corpus promovido por persona detenida durante el estado de sitio a la orden del Poder Ejecutivo Nacional si es categórica la afirmación suministrada por dicho Poder en el sentido de que la medida se funda en la vinculación del arrestado con la actividad y organizaciones subversivas, lo que obliga al tribunal a respetar la esfera de reserva que es propia del Poder Ejecutivo (ED 20/4/1979 31804, 31806, 31807 y LL 1978-A-473, "Tizio, Hebem", y esta Cámara expedientes del registro de sus fallos 47085, 46672, 47502 entre otros).
- **(Corte Sup., 24/10/1962- Rodríguez, Juan Carlos y otros.). Fallos 254:116.JA 1962-VI-321.**
DEL OPINIÓN DEL PROCURADOR GENERAL.-Las hipótesis aludidas se referían, todas ellas, a la comisión por civiles de delitos contra la seguridad y la tranquilidad públicas y el orden constitucional. Además, conviene señalarlo, la extensión de la potestad jurisdiccional de los tribunales castrenses sólo comprendía las infracciones que se cometieran a partir del 16/3/1960, día de publicación del decreto respectivo (ver B.O. del 16/3/1960).
Aparte de la expresada modificación del orden de competencias para el conocimiento de los hechos referidos, el mencionado decreto 2639/1960 prescribió que éstos serían juzgados por Consejos de Guerra especiales, cuya Constitución deberían ordenar los comandantes de zonas de defensa y de áreas.
Dichos consejos tramitarían las causas cuyo conocimiento se les encomendaba siguiendo las normas del procedimiento sumario establecido por el Código de Justicia Militar para situaciones excepcionales en tiempo de paz (art. 502).
El conjunto de disposiciones citadas es lo que se ha conocido usualmente con el nombre de "Plan Conintes". Todas ellas se fundamentan, según los considerandos de los decretos que las contienen, en la comprobación de un estado de extraordinaria emergencia, en la cual corría grave riesgo la estabilidad de las instituciones del país...."
.....Ya en los considerandos de éste se afirmó que "la sucesión de tales hechos (actos de terrorismo) pone en evidencia el desarrollo de un vasto plan de perturbación que intenta destruir el

orden constitucional y afectar el funcionamiento de las instituciones republicanas. Que el Poder Ejecutivo Nacional posee los elementos de juicio que le permiten concluir que esa acción terrorista se intentará continuar desarrollando cada vez en más vasta escala, con el propósito, entre otros, de impedir el acto eleccionario del 27 de marzo próximo, y alterar la Constitución y funcionamiento normal de los poderes públicos"......Luego, el comandante en jefe del Ejército, al dirigirse a la población después de dictarse el decreto referido, indica que la finalidad de éste es "garantizar el respeto de la vida de los habitantes, la propiedad pública y privada y, en suma, asegurar la paz interior amenazada por actos de terrorismo, sabotaje y de acción de bandas armadas irregulares" ("Diario de Sesiones de la Cámara de Senadores", año 1961, p. 316)......El ministro del Interior informó en el Congreso de la Nación el 17/5/1960, que desde el 1/5/1958 hasta esa fecha se habían producido 1726 actos de intimidación o terrorismo, trayendo al recuerdo algunos de los más graves ocurridos antes de dictarse el decreto 2639/1960 ("Diario de Sesiones de la Cámara de Senadores", año 1961, p. 310)......Luego de puesto en vigencia dicho decreto, se registraron aun muchos otros actos de terrorismo e intimidación ("Diario de Sesiones de la Cámara de Diputados", año 1960, p. 503), se produjeron levantamientos armados, y se descubrieron depósitos ingentes de armas y explosivos ("Diario de Sesiones de la Cámara de Diputados", año 1960, p. 957). Todo este cúmulo de actos de violencia se hallaba organizado, obedeciendo a un plan sistemático ("Diario de Sesiones de la Cámara de Senadores", año 1961, p. 502)...... 5. Como es sabido, el empleo de modos de violencia organizada, cual los descriptos, constituye una táctica moderna de insurrección, tanto o más temible para el orden constitucional que los alzamientos armados de carácter, por así decirlo, clásico. En este orden de ideas, creo oportuno recordar que los tribunales británicos han declarado que existe insurrección aun en casos en los que la lucha asume formas muy distintas que las de combate abierto ("Rex v. Allen", King's Bench Division, Ireland, transcripto en "Cases in Constitutional Law", de Keir y Lawson, 1954, Oxford, p. 450 y ss., espec. p. 454)......No parece razonable, pues, negar que existiera en el país un verdadero movimiento insurreccional, manifestado sobre todo a través de actividades terroristas, cuando se dictó el decreto 2639/1960. Así lo reconoció, por otra parte, V.E. en Fallos 246:237 al referirse a las "actividades subversivas o insurreccionales de la naturaleza de las que actualmente conmueven la paz pública".

- **LONGOBARDI MARIANO Delitos de omisión impropia y normativización en el Derecho Penal moderno SJA 26/10/2005**

Sin embargo, la dosis de cada uno de los elementos que lo componen variará según la clase de dolo de que se trate. El dolo directo, de primer grado o inmediato, se caracteriza por elemento volitivo predominante e inequívoco, en tanto el resultado delictivo ha sido adoptado claramente como meta de la voluntad, identificándose con la resolución o determinación delictiva. El dolo indirecto, o de consecuencia necesarias, es aquel que se presenta cuando el sujeto adopta un medio comisivo que traerá consecuencias delictivas conexas a las buscadas directamente aunque no las desee. Es el mentado caso del terrorista que con dolo directo de provocar la muerte de un mandatario coloca una bomba en el avión en el que éste vuela sabiendo que ésta provocará la muerte del resto del pasaje.

2. TERRORISMO Y REDACCION DE LA PÓLIZA

(a) ¿Excluyen las pólizas de seguros y reaseguros escritos en su país la cobertura de los aseguradores y reaseguradores para riesgos de guerra? En caso afirmativo, ¿existe algún tipo de distinción entre seguros concertados con consumidores y con empresas/ profesionales?. Por favor conteste esa pregunta en relación con los distintos ramos o sectores.

(b) ¿Hasta que punto se excluye la responsabilidad de aseguradores y reaseguros por el riesgo de terrorismo en pólizas de seguros y reaseguros suscriptas en su país?. De existir esta exclusión, ¿hay alguna distinción entre contratos comerciales y con consumidores

Respuesta a las preguntas (a) y (b)

- Respecto de los contratos de seguros

§ 1.- Ciertamente, las pólizas de las diversas ramas de seguros, excluyen la cobertura para riesgos de guerra.

El art. 71 de la ley argentina 17418, de Contrato de Seguros, establece que: “...el asegurador no cubre los daños causados por hechos de guerra civil o internacional, o por motín o tumulto popular, salvo convención en contrario”.

§ 2.- No existe una disposición legal específica que distinga entre seguros masivos o seguros contratados por consumidores, de aquellos otros concertados con empresas/profesionales.

No obstante ello, y la existencia de una tendencia doctrinaria y jurisprudencia favorable a considerar aplicable la ley de defensa del consumidor a los contratos de seguros, la exclusión de cobertura por hechos de guerra, no se encuentra controvertida.

§ 3.- Exclusiones por el riesgo de guerra en las diversas ramas de seguros.

- El 3 de octubre del 1969 la Superintendencia de Seguros de la Nación dictó la resolución 9786 por la que se define cada uno de los supuestos de exclusión de garantía.
- Un párrafo de dicha resolución, que fuera discutido doctrinariamente, establece que: “Cuando el daño o la pérdida ocurran en el lugar y en ocasión de producirse los hechos, se presumirá que es consecuencia de los mismos, sin perjuicio de prueba en contrario del asegurado, si están excluidos, y del asegurador, cuando se pacte incluirlos”.
- Para incluir en las condiciones generales de pólizas aquellas cláusulas que los aseguradores entiendan conveniente, deben obtener, previamente, la autorización por parte de la Superintendencia de Seguros de la Nación. Esta entidad de control, conforme la resolución antes señalada, viene aprobando la inclusión de las exclusiones de cobertura con un texto similar al siguiente:

A los efectos de la presente póliza, déjense expresamente convenidas las siguientes reglas de interpretación, asignándose a los vocablos utilizados los significados y equivalencias que se consignan:

- 1) **Hechos de guerra Internacional:** Se entienden por tales los hechos dañosos originados en un estado de guerra (declarada o no) con otro u otros países, con la intervención de fuerzas organizadas militarmente (regulares o irregulares y participen o no civiles)
- 2) **Hechos de guerra civil:** Se entienden por tales los hechos dañosos originados en un estado de lucha armada entre habitantes del país o entre ellos y fuerzas regulares, caracterizado por la organización militar de los contendientes (participen o no civiles), cualquiera fuese su extensión geográfica, intensidad o duración y que tienda a derribar los poderes constituidos u obtener la secesión de una parte del territorio de la Nación.
- 3) **Hechos de rebelión:** Se entienden por tales los hechos dañosos originados en un alzamiento armado o de fuerzas organizadas militarmente (regulares o irregulares y participen o no civiles) contra el Gobierno Nacional constituido, que conlleven resistencia y desconocimiento de las ordenes impartidas por la jerarquía superior de la que dependen y que pretendan imponer sus propias normas. Se entienden equivalentes a los de rebelión, otros hechos que encuadren en los caracteres descriptos, como ser revolución, sublevación, usurpación del poder, insurrección, insubordinación, conspiración.
- 4) **Hechos de sedición o motín:** Se entienden por tales los hechos dañosos originados en el accionar de grupos (armados o no) que se alzan contra las autoridades constituidas del lugar, sin rebelarse contra el Gobierno Nacional o que se atribuyen los derechos del pueblo, tratando de arrancar alguna concesión favorable a su pretensión. Se entienden equivalentes a los de sedición otros hechos que encuadren en los caracteres descriptos como ser: asonada, conjuración.
- 5) **Hechos de tumulto popular:** Se entienden por tales los hechos dañosos originados a raíz de una reunión multitudinaria (organizada o no) de personas, en la que uno o más de sus participantes intervienen en desmanes o tropelías, en general sin armas pese a que algunos las emplearen. Se entienden por equivalentes a los hechos de tumulto popular otros hechos que se encuadren en los caracteres descriptos, como ser: alboroto, alteración del orden público, desórdenes, disturbios, revuelta, conmoción.
- 6) **Hechos de vandalismo:** Se entienden como tales los hechos dañosos originados por el accionar destructivo de turbas que actúan irracional y desordenadamente.

- 7) **Hechos de guerrilla:** Se entienden por tales los hechos dañosos originados a raíz de las acciones de hostigamiento o agresión de grupos armados irregulares (civiles o militarizados), contra cualquier autoridad o fuerza pública o sectores de la población. Se entienden equivalentes a los hechos de guerrilla a los hechos de subversión.
 - 8) **Hechos de terrorismo:** Se entienden por tales los hechos dañosos originados en el accionar de una organización siquiera rudimentaria que, mediante la violencia en las personas o en las cosas, provoca alarma, atemoriza o intimida a las autoridades constituidas o a la población o a sectores de ésta o a determinadas actividades. No se consideran hechos de terrorismo aquellos aislados y esporádicos de simple malevolencia que no denotan algún rudimento de organización.
 - 9) **Hechos de huelga:** Se entienden por tales los hechos dañosos originados a raíz de la abstención concertada de concurrir al lugar de trabajo o de trabajar, dispuesta por entidades gremiales de trabajadores (reconocidas o no oficialmente) o por núcleos de trabajadores al margen de aquellas. No se tomará en cuenta la finalidad gremial o extragremial que motivó la huelga, así como tampoco su calificación de legal o ilegal.
 - 10) **Hechos de lock out:** Se entienden por tales los hechos dañosos organizados por: a) El cierre de establecimientos de trabajo dispuesto por uno o más empleadores o por entidad gremial que los agrupa (reconocida o no oficialmente), o b) El despido simultáneo de una multiplicidad de trabajadores que paralice total o parcialmente la explotación de un establecimiento. No se tomará en cuenta la finalidad gremial o extragremial que motivó el lock out, así como tampoco su calificación de legal o ilegal.
 - 11) **Atentado, depredación, devastación, intimidación, sabotaje, saqueo u otros hechos similares,** en tanto encuadren en los respectivos caracteres descriptos en el apartados anteriores. Se consideran hechos de guerra civil o internacional, de rebelión, de sedición o motín, de tumulto popular, de vandalismo, de guerrilla, de terrorismo, de huelga o de lock out.
 - 12) Los hechos dañosos originados en la prevención o represión por la autoridad o fuerza pública de los hechos descriptos, seguirán su tratamiento en cuanto a su cobertura o exclusión del seguro.
- Transcribimos a continuación, las cláusulas específicas de exclusión de cobertura, correspondientes a diversas ramas de seguro:
 - a) **Rama automotores**
 El Asegurador no indemnizará los siguientes siniestros producidos y/o sufridos por el vehículo y/o su carga:
5) Por hechos de guerra civil, terrorismo o malevolencia.6) Por hechos de huelga o lock-out, tumulto popular, cuando el Asegurado sea partícipe deliberado en ellos.
 - b) **Rama Incendio**
 El Asegurador no indemnizará los daños o pérdidas producidos por:.....
 Hechos de guerra civil o internacional, rebelión, sedición o motín, guerrilla o terrorismo salvo cuando ello provenga de hechos de tumulto popular, huelga y lock-out, incluidos los hechos de terrorismo originados en los referidos acontecimientos. Otros hechos de vandalismo, terrorismo, y malevolencia, aunque no se originen en las circunstancias del Inciso y siempre que no formen parte de hechos de guerra civil o internacional, rebelión, sedición o motín, o guerrilla. Los siniestros acaecidos en el lugar y ocasión de producirse los acontecimientos enumerados en esta cláusula, se presume que son consecuencias de los mismos, salvo prueba en contrario del Asegurado
 - c) **Rama robo y riesgo similares**
 El Asegurador no indemnizará la pérdida de daños cuando el siniestro se produzca como consecuencia de:
 Hechos de guerra civil o internacional, de guerrilla, rebelión, sedición, motín o terrorismo cuando éste no forme parte de los hechos cubiertos por la presente póliza
 - d) **Rama responsabilidad civil**
 El Asegurador no cubre, salvo pacto en contrario, la responsabilidad del Asegurado en cuanto sea causada por o provenga de: Hechos de tumulto popular, huelga o lock-out. No podrán cubrirse en

ningún supuesto, las responsabilidades del Asegurado emergentes de transmutaciones nucleares, de hechos de guerra civil o internacional, rebelión, sedición o motín, guerrilla o terrorismo.

e) Rama vidrios, cristales y espejos

El Asegurador no indemnizará los daños producidos por: Hechos de guerra civil o internacional o por motín o tumulto popular Hechos de guerrilla, terrorismo, rebelión, huelga o lock-out.

f) Rama Seguros de Vida y Accidentes Personales

- **Accidentes Personales**

Quedan excluidos de este seguro

Los accidentes causados por hechos de guerra civil o internacional. Los accidentes causados por hechos de guerrilla, rebelión, terrorismo, motín o tumulto popular, huelga o lock out, cuando el Asegurado participe como elemento activo. Los siniestros acaecidos en el lugar y ocasión de producirse los acontecimientos enumerados en esta cláusula, se presume que son consecuencias de los mismos, salvo prueba en contrario del Asegurado.

- **Seguros de Vida Comercial Individual**

Esta póliza está exenta de toda clase de restricciones respecto a viajes, residencia y ocupación del Asegurado, salvo las excepciones especificadas a continuación, en cuyas circunstancias la obligación del Asegurador en caso de fallecimiento del asegurado quedará reducida a la reserva matemática de la póliza.....participación en cualquier acto de guerra, declarada o no, que comprenda a la Nación Argentina, siempre que la muerte fuera causada por un hecho de guerra. En caso de guerra que comprenda a la Nación Argentina, las obligaciones tanto de parte del Asegurador, como del Asegurado se regirán por las normas que para el emergencia dicte la autoridad competente Argentina.

El art. 137 de la ley 17418 establece la siguiente exclusión de cobertura: “El asegurador se libera si la persona cuya vida se asegura, la pierde en empresa criminal o por aplicación legítima de la pena de muerte”.

- **Seguros de Vida Comercial Colectivo**

En este tipo de seguro existe una cláusula referida al mantenimiento de la cobertura durante el tiempo que el asegurado estuviera prestando el servicios militar en tiempo de paz. Si bien en nuestro país el servicios militar ha dejado de ser obligatorio para los ciudadanos masculinos, cabe señalar que la redacción de muchas pólizas no hacen referencia a la prestación de servicio militar obligatorio, sino simplemente “servicio militar”, pudiendo dar lugar a la cobertura de fallecimiento en caso en que ocurriera el mismo durante el tiempo de paz pero con motivo de cualquier otro acto de violencia colectiva.

En general entre las exclusiones de cobertura de los seguros colectivos de vida existe una que establece: *El Asegurador no pagará la indemnización cuando el fallecimiento del asegurado se produjera por alguna de las siguientes causas:..... Empresa o acto criminal o aplicación legítima de la pena de muerte.....Acto de guerra civil o internacional, guerrilla, rebelión, sedición, motín, terrorismo, huelga o tumulto popular, cuando el Asegurado hubiera participado como elemento activo..”*

Alguna de estas exclusiones se encuentra actualmente disputadas doctrinariamente en especial las referidas a la huelga que en nuestro país tiene amparo constitucional en el art. 14 bis. el cual establece que: “El trabajo en sus diversas formas gozará de la protección de las leyes, las que asegurarán al trabajador.....Queda garantizado a los gremios: concertar convenios colectivos de trabajo; recurrir a la conciliación y al arbitraje; el derecho de huelga. Los representantes gremiales gozarán de las garantías necesarias para el cumplimiento de su gestión sindical y las relacionadas con la estabilidad de su empleo..”

- **Seguros de Vida Social (Seguro Colectivo de Vida Obligatorio).**

Este seguro se encuentra reglamentado por el decreto 1567/1974

Este seguro carece de exclusiones de todo tipo

- **Respecto de los contratos de reaseguros**

§ 1.- En la plaza Argentina existen reaseguradoras privadas locales y agencia o representaciones de reaseguradoras extranjeras. Respecto de los contratos celebrados con intervención de agencias o representantes de reaseguradoras extranjeras, éstos incluyen cláusulas y condiciones aprobados y de estilo en los países de las casas matrices, por lo tanto los textos de las mismas habrán de obrar en los informes nacionales de los distintos miembros de A.I.D.A e informantes del presente cuestionario.

§ 2.- En cuanto a las cláusulas contractuales que utilizan las reaseguradoras locales, cabe destacar las más usuales:

- **Operaciones excluidas:** “...Quedan excluidas del contrato las siguientes operaciones:....Los hechos de guerra civil o internacional, declarada o no, rebelión, sedición, motín o guerrilla y/o el terrorismo que forma parte de tales hechos”.
- **Operaciones excluidas:** “...Quedan excluidas del contrato las siguientes operaciones:....la pérdida o daños sobre cosas o personas y sus consecuencias directas o indirectas, provocadas por: I.- Lucha armada que constituya un estado de guerra....II.- Alzamiento de fuerzas organizadas militarmente...III.- Actos de fuerza, violencia, agresión biológica, química o nuclear, sobre cosas o personas, efectuados en forma encubierta o sorpresiva formando parte de una organización siquiera rudimentaria que promueva actos de tal naturaleza, por motivos políticos, religiosos, raciales o de intencionalidad semejante y los daños causados directa o indirectamente para prevenir, suprimir o neutralizar tales actividades...”.
- **Riesgos de la naturaleza, políticos y sociales:** “....Si en las Condiciones Particulares del contrato, se incluye la cobertura de daños materiales, incendio o interrupción de explotación (pérdida de beneficios) como consecuencia de.....hechos de tumulto popular, incluyendo saqueo, huelga, lock out, hechos de terrorismo, malevolencia o vandalismo, la responsabilidad máxima conjunta de todo los participantes del contrato por todos los siniestros acumulado ocurridos en el año de su vigencia, provocados por cualquiera de estos riesgos, quedará limitada al importe indicado en las condiciones particulares como límite agregado anual igual a tres veces el límite del contrato...”.
- **Cláusula de exclusión de terrorismo:** “...Contrariamente a lo establecido en cualquier disposición contenida en las condiciones generales o particulares originales de este reaseguro o en cualquier cláusula adicional o endoso posteriormente emitido, queda especialmente convenido que el presente reaseguro no cubre pérdidas, daños a bienes o a personas, costos, costas y gastos de cualquier naturaleza, directa o indirectamente causados por, resultantes de o en relación con cualquier acto de terrorismo o cualquier otro hecho o circunstancia que hubiera contribuido en forma concurrente o no en la producción del daño. Con relación a la exclusión establecida en la presente cláusula queda especialmente convenido que se enviden por “acto de terrorismo” - implique o no el uso de fuerza o violencia-, toda acción concreta, amenaza o preparación de actos, por parte de cualquier persona o grupo(s) de personas, actuando por propia cuenta o en conexión con cualquier organización o gobierno, que tenga o pueda tener por objeto: a) intimidar o influenciar a gobiernos de jure o de facto, o a la población en general a parte de ella o, b) alterar el funcionamiento de algún sector de la economía y que por su naturaleza o por las circunstancias en las cuales se realiza, sea motivada por causas o fines políticos, sociales, religiosos, ideológicos o similares, c) Igualmente se excluyen los daños, perjuicios, costas y gastos de toda índole directa o indirectamente causados por, resultantes de o en relación con cualquier acción realizada para controlar, prevenir, suprimir o de alguna manera neutralizar cualquier actividad terrorista.
Si el Reasegurador considera que, en razón de la presente exclusión de cobertura, cualquier pérdida, daño, costo y gasto sufrido no se encuentra amparado por el presente reaseguro, la carga de la prueba en contrario queda a cargo del respectivo Asegurador reasegurado. En caso de que alguna parte de la presente cláusula fuera declarada nula, imprevisible, el resto de la misma se mantendrá en vigor y pleno efecto.

(c) ¿Hasta que punto existe superposición entre riesgo de guerra o exclusiones, riesgo de terrorismo o exclusiones, o aquellos por actos de violencia política o de otro tipo de violencia tal como daño malicioso

Conforme se explicó anteriormente en todos los casos se excluyen por igual los riesgos de guerra, de terrorismo y los demás que la doctrina llama de violencia colectiva. La malevolencia o el daño malicioso esta excluido en los casos de vandalismo (*los hechos dañosos originados por el accionar destructivo de turbas que actúan irracional y desordenadamente*) y tumulto popular (*los hechos dañosos originados a raíz de una reunión multitudinaria (organizada o no) de personas, en la que uno o más de sus participantes intervienen en desmanes o tropelías, en general sin armas pese a que algunos las emplearen. Se entienden por equivalentes a los hechos de tumulto popular otros hechos que se encuadren en los caracteres descriptos, como ser: alboroto, alteración del orden público, desórdenes, disturbios, revuelta, conmoción.*)

(d) ¿Existen en el mercado definiciones terrorismo insertas en contratos de seguro o reaseguro) Por favor, conteste esta pregunta basándose en clase sector por clase sector. ¿En caso de que éstas hayan sido introducidas como respuesta a acontecimientos recientes, en que se diferencian de las definiciones anteriores?

Ciertamente y tal como se informase existen definiciones de terrorismo insertas en contratos de seguro, pero ellas fueron incorporadas hace años, no son la respuesta a acontecimientos recientes.

(e) En caso de existir condiciones restrictivas respecto a terrorismo u otras que lo excluyan ¿Cuándo fueron éstas insertas por primera vez? ¿ Han sido modificadas a la luz de eventos recientes?

Las condiciones restrictivas respecto a terrorismo fueron insertas en 1969 y no se han visto modificadas a la luz de eventos recientes.

(f) Particularmente, ¿se requiere daño físico real en alguna definición de terrorismo del mercado y en caso positivo de que tipo en particular?

No se requiere daño físico real en las definiciones de terrorismo del mercado, pues en general la exclusión se refiere a todo tipo de daño.

(g) ¿Sobre quien pesa la carga de probar que un daño fue causado por un acto terrorista? ¿Debe el daño ser causado exclusiva y directamente?

En general se ha estipulado en las pólizas que . *Los siniestros acaecidos en el lugar y ocasión de producirse los acontecimientos enumerados en esta cláusula, se presume que son consecuencias de los mismos, salvo prueba en contrario del Asegurado*

No obstante cabe señalar que cierto sector de la doctrina nacional, como alguna de la más reciente jurisprudencia han venido elaborando una tendencia y refiriéndose a la nulidad de las llamadas “cláusulas abusivas en los contratos de seguros” (*en doctrina ver Cláusulas abusivas en el contrato de seguro por Stiglitz, Ruben S Ed. Abeledo Perrot, Buenos Aires, 1994*), entre las cuales podría considerarse esta presunción establecida en contra del asegurado.

(h) ¿Varían las reglas de causalidad en relación al terrorismo? En particular, ¿opera la exclusión de terrorismo cuando la causa próxima a los daños es el terrorismo o es la exclusión más estricta, por ejemplo: la pérdida tiene que ser causada única y directamente por el terrorismo?

Tal como se indicó anteriormente, las cláusulas contractuales habituales es plaza establecen que los siniestros caecidos en el lugar y ocasión de producirse los acontecimientos enumerados en las mismas, se presume que son consecuencias de éstos, salvo prueba en contrario del Asegurado.

De lo cual cabe colegir que “el lugar” y “la ocasión” son determinantes para presumir la relación causal existente entre el acto terrorista y siniestro. En consecuencia la entidad aseguradora no tiene la carga de probar esta relación presumida de causalidad

(i) Describa - en caso de existir- qué importancia se atribuye a la identidad/identificación de los autores de actos de terrorismo; su identificación/asociación con grupos terroristas conocidos; el motivo atribuido al acto de terrorismo (si debe ser de naturaleza político, religioso o ideológico); el modus operandi usado para cometer un acto terrorista, y/o el blanco de del acto físico, es decir los que sufren una pérdida directamente y/o aquellos a los que se pretende influir con el acto terrorista (por ejemplo un gobierno)

En la redacción habitual en plaza de las pólizas no se atribuye importancia alguna a la identidad/ identificación de los autores, pero sí, que al menos dichos actos hayan sido ejecutados por quienes denotan algún rudimento de organización.

Nuestra jurisprudencia ha tenido oportunidad de manifestar:

la prueba del siniestro por la asegurada lleva implícita la de que aquel tiene por causa un riesgo cubierto contractualmente y si bien es cierto que el asegurador debe demostrar que el acto de violencia que ocasiona los daños configura una acción de terrorismo, en el caso, el tema no es totalmente ajeno al interés de quien invoca la cobertura del riesgo cuando existe una cláusula de exclusión -de "no seguro"- para hechos de terrorismo o de guerrilla. Resulta de interés para ambas partes -asegurado y asegurador- la determinación de si el hecho ilícito de terceros, en su autoría y motivación, responde a un obrar malevolente respecto del damnificado o a un atentado terrorista y si bien la prueba de la exclusión de la responsabilidad debe ser aportada por el asegurador, no favorece al asegurado, a los efectos del juicio, su actitud pasiva en materia probatoria que ha contribuido a dar eficacia a la suma de indicios resultantes de la causa penal. Entre el hecho individual amparado por el seguro y el acto de terrorismo excluido, la diferencia fundamental es dada por la finalidad, puesto que no existe diferencia entre los hechos que concretan la violencia. Si la sentencia apelada y el pronunciamiento recaído en la causa penal, sobre la base del medio de destrucción empleado - artefacto explosivo- y la conducta de sus autores -que por medio de un comunicado o proclama de contenido intimidatorio y político se atribuyen a autoría en la producción del hecho-, dan una respuesta coincidente en orden a la motivación y características del operativo -largo período en el que nuestra comunidad estuvo sometida a actos de perjuicio colectivo, intimidación general o de sectores sociales, de alarma y terror-, debe concluirse, como lo hace el a quo, que los perjuicios ocasionados en el inmueble y bienes existentes en el mismo, de propiedad del asegurado fueron consecuencia de un obrar terrorista y no de un acto de malevolencia individual cubierto por el seguro. (doctrina de segunda instancia).

(Corte Suprema de Justicia Nacional ,22/05/1979- ASOCIACIÓN ARGENTINA DE CRIADORES DE HEREFORD v. FEBO CÍA. DE SEGUROS.).

La sentencia de primera instancia rechaza la demanda por cobro de daños ocurridos en el automotor asegurado por considerar aplicables las cláusulas sobre exclusión de riesgos: "... Los siniestros producidos y/o sufridos por el vehículo por hechos de guerrilla, terrorismo, rebelión, huelga o lock out, con aclaración de que se presume que los siniestros acaecidos en el lugar y en ocasión de tales eventos son consecuencia de los mismos, salvo prueba en contrario del asegurado, configuran supuestos no indemnizables". En el caso, el vehículo asegurado fue objeto de un robo por un grupo armado que luego lo abandono en la vía pública previa colocación de explosivos, uno de los cuales detonó al ser abierta la puerta y otro al tomar intervención las fuerzas de seguridad, que lo hizo estallar por encontrarse oculto bajo el capot resultando riesgoso desactivarlo. Sobre la base de que la mayoría de los autores de delitos de violencia colectiva no son individualizados ni hallados, el Dr. Halperín propuso pautas para configurar el ilícito, que concreta en el análisis del fin del hecho, la organización del mismo y las características de su ejecución dentro del cuadro general o estado en que ese hecho aislado se inserta. De haber querido sólo la destrucción del automotor tuvieron oportunidad de hacerlo por explosivos u otros modos, sin poner en peligro la vida de terceros que como respuesta al minado de la camioneta asegurada, asignar a la destrucción querida la calidad de medio adecuado para herir o dar muerte, no en orden a la individualidad de los afectados sino potencialmente a cualquiera de los vecinos constituyendo además una forma idónea para alarmar, aterrorizar o intimidar a sectores de la población. El segundo aspecto a considerar de acuerdo al esquema antes adoptado es el relativo a la organización del hecho y las características de su ejecución. Quienes intervinieron como grupo de asalto exhiben armas, entre ellas una itaka, roban la camioneta con el apoyo de otro vehículo. Las espoletas y granadas así como los medios técnicos de armado, responden a fabricación y métodos de empleo subversivos, de acuerdo a la clara tipificación dada por los peritos. El propósito final de quienes actuando en banda en el robo dejan el automotor minado en una zona densamente poblada se evidencia como el logro de una destrucción

indiscriminada, acto de perjuicio colectivo, fuente de intimidación, alarma y terror. En cuanto a si el estallido de explosivos, afectando a terceros con lesiones corporales y perjuicio en un bien inserta en un cuadro de conjunto o plan entiende que bastaría afirmar el concepto de hecho notorio y recordar que el minado del vehículo se produjo cuando todavía en la comunidad perduraba un clima de inquietud que se reconoce en la declaración del testigo con la advertencia de su acompañante "no la toques -a la puerta- que puede contener una bomba". Por lo que se confirma la sentencia de primera instancia.

(C. Nac. Com., sala C, 30/11/1978- CORSALTER, WALTER v. CARDINAL CÍA. DE SEGUROS SA.).

Magistrados: ANAYA, PATUEL, QUINTANA TERÁN

Conforme con la cláusula de interpretación de las exclusiones de la cobertura emanada de la superintendencia de seguros se entiende por terrorismo los hechos de violencia en personas o cosas, susceptibles de alarmar, atemorizar o intimidar a las autoridades, a la población, a sectores de ésta o a determinadas actividades. 2. Configura acto de terrorismo la explosión de una bomba en el tocador de caballeros de un club de golf, si el día del siniestro coincidía con el aniversario del fallecimiento de una figura política de la vida nacional -26 de julio- habiendo estallado en tal oportunidad más o menos a la misma hora otros artefactos en distintos sitios públicos. 3. Las presunciones como medio probatorio consisten en recoger o interpretar todos los hechos y circunstancias que puedan llevar al descubrimiento de la verdad concluyendo que si bien esta prueba tiene la desventaja de ser indirecta, más o menos compleja y generalmente fragmentaria, tiene en cambio la ventaja de ser objetiva, basada en hechos. Ahora bien, se dice que si los testigos pueden mentir, los hechos no mienten.

(C. Nac. Com., sala D, 30/09/1977- CÓRDOBA GOLF CLUB v. LA UNIVERSAL CÍA. ARGENTINA DE SEGUROS SA.).

(j) Para definir o probar el acto de terrorismo, ¿existe dependencia de alguna certificación o delegación gubernamental judicial o de cualquier otro tipo?

Las cláusulas contractuales aprobadas por el Organismo de Control (Superintendencia de Seguros de la Nación) no establecen la necesidad de una manifestación emanada de algún organismo gubernamental o judicial en el sentido de que el siniestro constituye un acto de terrorismo.

La jurisprudencia y doctrina no han arribado a un concepto uniforme sobre que debe entenderse por "terrorismo". **(ver Padilla, Miguel M., "Un positivo pero insuficiente intento: la ley de protección del orden constitucional y de la vigencia democrática", ADLA 1984-C-3677; Piotti, Alberto D. y Fernández, Alberto A., "Atentados al orden constitucional y a la vida democrática (Reformas introducidas por la ley 23077)", LL 1985-A-Sec. doctrina, p. 917 y ss.).**

Por otra parte y conforme nuestro sistema de gobierno, cualquier determinación de un organismo administrativo el Estado, calificando a un hecho de "terrorista", puede ser revisado judicialmente, si se aportan pruebas y elementos de convicción suficientes al respecto.

(k) ¿Existe alguna referencia específica, estipulación o problema conocido en relación a los actos terroristas que incluyen contaminación biológica, química, nuclear o de cualquier otro tipo?

En las cláusulas habituales utilizadas en la plaza Argentina, no existe referencia específica, estipulación o problema que vincule o relacione los actos terroristas con los métodos o instrumentos que se utilicen para llevarlos a cabo, ya sean estos explosivos, medios biológicos, químicos, o nucleares.

(l) En la medida en que los riesgos de terrorismo estén cubiertos ¿utilizan las pólizas límites agregados para limitar la exposición del seguro o reaseguros y obligar a los asegurados o reasegurados a soportar retenciones de algún tipo?

No existe cobertura específica de riesgos de terrorismo en la plaza Argentina. No obstante, es dable estimar que en la rama donde este tipo de cobertura podría llegar a funcionar, como sería responsabilidad civil, existe actualmente una cobertura cuantitativa baja y selectiva, como así también se incluyen significativas franquicias y descubiertos obligatorios.

3. TERRORISMO E INTERVENCIÓN DEL GOBIERNO

(a) ¿Existe en su legislación nacional, restricciones en las exclusiones de terrorismo en las coberturas de seguros?. En caso afirmativo, describirla y exponga su aplicación.

Nuestra legislación no impone restricciones a las exclusiones de terrorismo en las coberturas de seguros, pero, como la ley se asegura solamente se refiere a los daños causados por hechos de guerra civil o internacional, o por motín o tumulto popular, la única exigencia establecida por la doctrina y la jurisprudencia ha sido “la razonabilidad” de la exclusión y procurando que la misma no desnaturalice la finalidad del seguro y la cobertura del riesgo principal contemplado en el contrato.

(b) ¿Se prevé algún esquema por el cual la cobertura de terrorismo se ponga a disposición de los asegurados por el propio gobierno?. En caso afirmativo, por favor indique la fecha de introducción del esquema, su naturaleza, incluyendo límites, franquicias, su objetivo original, su éxito obtenido y los acuerdos financieros

En la Argentina no existe un seguro o cobertura de terrorismo ofrecido por el gobierno. No obstante el gobierno ha establecido por ley, o decreto ejecutivo, distintos subsidios y compensaciones en algunos supuestos de terrorismo (por ejemplo en relación al llamado “terrorismo de estado”, o las víctimas del atentado a la AMIA, entre otros supuestos).

(c) ¿Se prevé algún esquema por el cual la cobertura de reaseguro de terrorismo se ponga a la disposición de los aseguradores por el propio gobierno?. En caso afirmativo, por favor indique la fecha de introducción del esquema, su naturaleza, incluyendo límites, franquicias, su objetivo original, su éxito obtenido y los acuerdos financieros.

No existe ningún ente u organismo gubernamental que brinde coberturas de reaseguro a los aseguradores y, por ende, tampoco para la cobertura de terrorismo.

4. CUERDOS INTERNACIONALES O TRANSFRONTERIZOS

(a) ¿Puede identificar algún esquema o iniciativa internacional o transfronteriza según la cual los seguros o ayudas para las consecuencias financieras de los actos de terrorismo sean garantizados o apoyados para sectores concretos por ejemplo, aviación marítima?

b) ¿Conoce de alguna esquema o iniciativa internacional o transfronteriza que se haya ideado o desarrollado desde el 11 de setiembre para proteger a los asegurados, aseguradores o reaseguradores contra la exposición a las actividades terroristas?

No se conocen acuerdos internacionales o transfronterizos celebrados por el Estado Argentino, con excepción de los compromisos asumidos en su carácter de miembro de la ONU y de la OEA

5. DECISIONES JUDICIALES U OTRAS RESOLUCIONES

¿Existen decisiones judiciales u otras resoluciones en su país en las que se haya considerado la cobertura de una póliza de seguros/reaseguros respecto a un acto de terrorismo?

En nuestro sistema de gobierno y en la actual evolución jurisprudencial y doctrinaria, los Jueces no tienen atribuciones para imponer al Poder Ejecutivo o Legislativo, la implementación de una cobertura de daños y perjuicios por actos de terrorismo.

En cuanto a la existencia de resoluciones administrativas, tampoco existen antecedentes de que se haya considerado específicamente el establecimiento de un seguro especial respecto de actos de terrorismo.

1. DEFINICIÓN DE TERRORISMO

(a) Existe una definición general para ‘terrorismo’, ‘actividad terrorista’ o algún término relacionado en la legislación y/o jurisprudencia de su jurisdicción?

No existe ninguna definición general de carácter legal. Pero si muchas referencias a “conductas terroristas” tanto en la legislación como en la jurisprudencia. Existe una definición general de terrorismo en una cláusula de uso general que excluye la cobertura de terrorismo en las pólizas chilenas.

(b) Si existe una definición (legal o jurisprudencial), ¿qué finalidad legal tiene esa?

No aplicable.

2. TERRORISMO Y REDACCIÓN DE LA PÓLIZA

(a) ¿Excluyen las pólizas de seguros y reaseguros escritos en su país la cobertura de los aseguradores y reaseguradores para riesgos de guerra? En caso afirmativo, ¿existe algún tipo de distinción entre seguros concertados con consumidores y con empresas/profesionales? Por favor conteste esa pregunta en relación con los distintos ramos o sectores.

Los riesgos de guerra están excluidos en todas las coberturas. Pero pueden ser cubiertos mediante una cláusula especial.

(b) ¿Excluyen las pólizas de seguros y reaseguros en su país la cobertura de los aseguradores y reaseguradores para riesgos de terrorismo? En caso afirmativo, ¿existe algún tipo de distinción entre seguros concertados con consumidores y con empresas/profesionales? Por favor conteste esa pregunta en relación con los distintos ramos o sectores.

Todas las pólizas excluyen las pérdidas ocasionadas por actos de terrorismo, pero ellos pueden ser cubiertas mediante una cláusula adicional especial.

(c) ¿Se consideran los riesgos de guerra o sus exclusiones y los riesgos de terrorismo o sus exclusiones o los riesgos de otro tipo de acto políticos o de violencia como daños dolosos?

En Chile el dolo es equivalente a intención positiva de causar daño y por lo tanto dichos riesgos tienen ese carácter porque no puede haber actos de guerra o de terrorismo que no sean susceptibles de causarlos, por su propia naturaleza.

(d) ¿Existen definiciones del terrorismo en los contratos de seguros o reaseguros? Por favor conteste esa pregunta en relación con los distintos ramos o sectores. Si estas definiciones han sido introducidas como respuesta a acontecimientos recientes, ¿hay diferencia entre éstas y las previsiones anteriores?

La definición data de principios de la década de los años 80 y está incluida en la denominada “cláusula de uso general de exclusión de terrorismo”, a la que se remiten todas las otras.

La definición es la siguiente: “Para los efectos de la presente cláusula, un acto terrorista consiste en una conducta calificada como tal por la ley, así como el uso de fuerza o violencia o la amenaza de ésta, por parte de cualquier persona o grupo, motivado por causas políticas, religiosas, ideológicas o similares, con la intención de ejercer influencia sobre cualquier gobierno o de atemorizar a la población o a cualquier segmento de la misma”.

(e) Si existen restricciones o exclusiones de coberturas en seguros para el terrorismo, ¿cuándo se introdujeron

¹⁰ Osvaldo Contreras Strauch

por primera vez estas restricciones y ¿han sufrido estas restricciones algún tipo de cambios debido a acontecimientos recientes?

Me remito a mi anterior respuesta.

(f) ¿Requieren las definiciones del terrorismo usadas en el Mercado que se haya sufrido realmente un daño físico? En caso afirmativo explicar qué tipo de daño.

De acuerdo a la cláusula que analizo, lo que quedan excluidos son los daños o pérdidas directa o indirectamente causados por el acto de terrorismo.

(g) ¿Sobre quién recae la carga de la prueba de que un daño ha sido causado por un acto terrorista?

En el derecho chileno la prueba de cualquier exclusión y de que se dan los supuestos mencionados en ella recae sobre el asegurador.

(h) ¿Varían las reglas de causalidad en relación al terrorismo? En particular, ¿opera la exclusión del terrorismo cuando la causa próxima del daño es el terrorismo o es la exclusión más estricta, por ejemplo: la pérdida tiene que ser causada 'únicamente y directamente' por el terrorismo?

Como se ha dicho en la respuesta f) la exclusión opera por toda pérdida causada directa o indirectamente por el acto terrorista.

(i) Describa - en caso de existir- qué importancia se atribuye a: la identidad/identificación de los autores de actos de terrorismo; su identificación/asociación con grupos terroristas conocidos; el motivo atribuido al acto del terrorismo (si debe ser de naturaleza político, religioso o ideológico); el modus operandi usado para cometer un acto terrorista; y/o el blanco del acto físico, es decir, los que sufren una pérdida directamente y/o aquellos a los se pretende influenciar con l acto terrorista (p.e. un gobierno)?

Me parece que el texto de la cláusula, mas arriba copiado, es muy clara para responder a esta pregunta.

(j) Para definir o probar el tipo de terrorismo, ¿existe dependencia de alguna certificación o declaración gubernamental, judicial o de cualquier otro tipo?

No. Pero si se presenta discrepancia entre el asegurado y el asegurador respecto a si ha habido o no un acto de terrorismo, con influencia en la indemnización del seguro, deberá recurrirse al mecanismo legal de solución de conflictos, que en el seguro chileno es el arbitraje.

(k) ¿Existe alguna referencia específica, estipulación o problema conocido en relación a los actos terroristas que incluyen contaminación biológica, química, nuclear o de cualquier otro tipo?

No. Pero la cláusula que analizamos se extiende a cualquier tipo de pérdida, por lo que estimo que tales circunstancias se encontrarían comprendidas.

(l) En la medida en que los riesgos de terrorismo estén cubiertos, ¿utilizan las pólizas límites agregados para limitar la exposición del seguro o reaseguros y obligar a los asegurados o reaseguros a soportar retenciones de algún tipo?

No aplicable.

3. TERRORISMO E INTERVENCIÓN DEL GOBIERNO

(a) ¿Existen en su legislación nacional, restricciones en las exclusiones de terrorismo en las coberturas de seguros? En caso afirmativo, describela y exponga su aplicación.

No. La registran las cláusulas de las pólizas. Pero la Superintendencia de Valores y Seguros (que es el organismo regulador del seguro en Chile), se preocupó, en su oportunidad, hace mas de 20 años atrás, de que dichas cláusulas existieran, al punto que los primeros textos fueron redactados por ella.

(b) ¿Se prevé algún esquema por lo cual la cobertura del terrorismo se ponga a la disposición de los asegurados directamente por el propio gobierno? En caso afirmativo, por favor indique la fecha de introducción del esquema, su naturaleza, incluyendo límites, franquicias, su objetivo original, su éxito obtenido y los acuerdos financieros.

No. En la actualidad, desde hace muchos años, Chile no es un país en que el terrorismo sea un problema prioritario.

(c) ¿Se prevé algún esquema por el cual la cobertura del terrorismo se ponga a la disposición a los aseguradores directamente por el propio gobierno? En caso afirmativo, por favor indique la fecha de introducción del esquema, su naturaleza, incluyendo límites, franquicias, su objetivo original, su éxito obtenido y los acuerdos financieros.

Esta es la misma pregunta anterior. Sugiero borrarla.

4. ACUERDOS INTERNACIONALES O TRANSFRONTERIZOS

(a) ¿Puede identificar algún esquema o iniciativa internacional o transfronteriza según la cual los seguros o ayudas para las consecuencias financieras de los actos de terrorismo sean garantizados o apoyados para sectores concretos por ejemplo, aviación, marítimo?

No.

(b) ¿ Conoce de algún esquema o iniciativa internacional o transfronteriza que haya sido ideada o desarrollada desde el 11 de septiembre para proteger a los asegurados, aseguradores o reaseguradores contra la exposición a las actividades terroristas?

No. Nada nuevo, atendido lo indicado en la respuesta a la pregunta 3. b)

5. DECISIONES JUDICIALES U OTRAS RESOLUCIONES

¿Existen decisiones judiciales u otras resoluciones en su país en las que se haya considerado la cobertura de una póliza de seguros/reaseguros respecto a un acto de terrorismo?

No. Hubo procesos judiciales iniciados en el pasado a consecuencia de actos de terrorismo, pero en ninguno, que yo sepa, se discutió ni falló, nada en relación a problemas de seguros.

COLOMBIA

1. DEFINICIÓN DE TERRORISMO

(a) Existe una definición general para ‘terrorismo’, ‘actividad terrorista’ o algún término relacionado en la legislación y/o jurisprudencia de su jurisdicción?

El código penal colombiano contiene en su artículo 343, modificado por el artículo 14 de la Ley 890 de 2.004, la siguiente definición de terrorismo:

ARTICULO 343. TERRORISMO. El que provoque o mantenga en estado de zozobra o terror a la población o a un sector de ella, mediante actos que pongan en peligro la vida, la integridad física o la libertad de las personas o las edificaciones o medios de comunicación, transporte, procesamiento o conducción de fluidos o fuerzas motrices, valiéndose de medios capaces de causar estragos, incurrirá en prisión de ciento sesenta (160) a doscientos setenta (270) meses y multa de mil trescientos treinta y tres punto treinta y tres (1.333.33) a quince mil (15.000) salarios mínimos legales mensuales vigentes, sin perjuicio de la pena que le corresponda por los demás delitos que se ocasionen con esta conducta.

Si el estado de zozobra o terror es provocado mediante llamada telefónica, cinta magnetofónica, video, casete o escrito anónimo, la pena será de treinta y dos (32) a noventa (90) meses y la multa de ciento treinta y tres punto treinta y tres (133.33) a setecientos cincuenta (750) salarios mínimos legales mensuales vigentes.

(b) Si existe una definición (legal o jurisprudencial), ¿qué finalidad legal tiene esa?

La definición legal transcrita tipifica el delito de terrorismo, con el objeto de facilitar su represión por la vía de la acción penal.

2. TERRORISMO Y REDACCIÓN DE LA PÓLIZA

(a) ¿Excluyen las pólizas de seguros y reaseguros escritos en su país la cobertura de los aseguradores y reaseguradores para riesgos de guerra? En caso afirmativo, ¿existe algún tipo de distinción entre seguros concertados con consumidores y con empresas/profesionales? Por favor conteste esa pregunta en relación con los distintos ramos o sectores.

En Colombia las pólizas de seguro excluyen los Riesgos de Guerra, excepción hecha de la cobertura que para activos no fijos (aeronaves, embarcaciones o mercancías) se otorgan por el mercado internacional de seguros y reaseguro. En nuestro medio no ha tenido aún acogida legal la distinción ampliamente consolidada en Europa, entre seguros concertados con consumidores y seguros para empresas/profesionales.

(b) ¿Excluyen las pólizas de seguros y reaseguros en su país la cobertura de los aseguradores y reaseguradores para riesgos de terrorismo? En caso afirmativo, ¿existe algún tipo de distinción entre seguros concertados con consumidores y con empresas/profesionales? Por favor conteste esa pregunta en relación con los distintos ramos o sectores.

En Colombia se otorgan las denominadas coberturas de HMCCoP (Huelga, Motín, Conmoción Civil o Piratería) y AMIT (Actos Mal Intencionados de Terceros) incluyendo Sabotaje y Terrorismo, coberturas normalmente excluidas de los contratos automáticos de reaseguro, las cuales deben, por lo tanto, otorgarse mediante anexo específico con prima cobrada por separado y deducibles diferenciales. La cobertura para terrorismo debe estar sublimitada y solo puede ser otorgada como capa primaria, ya que los reaseguradores no otorgan cobertura para capas en exceso. Las compañías extranjeras que operan en Colombia no se rigen necesariamente por esta normatividad, en la medida en que sus requerimientos de reaseguro los proveen las casas matrices, las cuales fijan en cada caso las políticas a seguir. Como se comentó en respuesta a la pregunta anterior, en nuestro medio no ha tenido aún acogida legal la distinción ampliamente consolidada en Europa, entre seguros concertados con consumidores y seguros concertados con empresas/profesionales.

(c) ¿Se consideran los riesgos de guerra o sus exclusiones y los riesgos de terrorismo o sus exclusiones o los riesgos de otro tipo de acto políticos o de violencia como daños dolosos?

Definitivamente si. No existe en nuestro entorno jurídico o asegurador la figura el acto culposos de terrorismo, si bien es concebible que un acto terrorista pueda llegar a ocurrir con la concurrencia de la actuación culposa de quien, eventualmente hubiere estado en posibilidad de evitarlo.

(d) ¿Existen definiciones del terrorismo en los contratos de seguros o reaseguros? Por favor conteste esa pregunta en relación con los distintos ramos o sectores. Si estas definiciones han sido introducidas como respuesta a acontecimientos recientes, ¿hay diferencia entre éstas y las previsiones anteriores?

Para los ramos de seguros de daños si. Las definiciones más generalmente utilizadas en Colombia son las contenidas en el clausulado LPO 437 (Anteriormente T3-T3A) impuesta por el mercado de seguros de Londres, para colocaciones de reaseguro que se realizan con dicho mercado. Similares definiciones se consignan en los clausulados impuestos por los principales reaseguradores de contratos, en lo que respecta a las coberturas de HMCCoP y AMIT, incluidos sabotaje y terrorismo. Los ramos de Aviación y Marítimo se rigen al respecto por las cláusulas del mercado de Londres.

Hasta donde va nuestro conocimiento no existe una definición especial para los seguros de personas.

(e) Si existen restricciones o exclusiones de coberturas en seguros para el terrorismo, ¿cuándo se introdujeron por primera vez estas restricciones y ¿han sufrido estas restricciones algún tipo de cambios debido a acontecimientos recientes?

Las restricciones o exclusiones surgieron con carácter general, salvo contadas excepciones, por razón de falta de disponibilidad de cobertura de reaseguro, no por razón de legislación o decisión gubernamental de carácter local, a raíz de los atentados ocurridos 11 de septiembre de 2001 en las torres gemelas de Nueva York y en el Pentágono de Washington. Sin embargo, la exclusión de cobertura para actos terroristas ha existido por largo tiempo para cierto tipo de asegurados, tales como los pertenecientes a los sectores energético y de telecomunicaciones, para proyectos de infraestructura y para algunos predios del sector gobierno, respecto de los cuales la exclusión suele operar de manera absoluta en los contratos automáticos de reaseguro. Ha sido, sin embargo, factible obtener cobertura, aún para tales riesgos, en el mercado especializado de reaseguro para Sabotaje y Terrorismo (S&T).

(f) ¿Requieren las definiciones del terrorismo usadas en el Mercado que se haya sufrido realmente un daño físico? En caso afirmativo explicar qué tipo de daño?

No existe, como ya se explicó, una definición legal de “terrorismo” para efectos del contrato de seguro. Existe si la definición para los efectos del código penal, transcrita en el numeral 1 (a) del presente cuestionario. Las definiciones impuestas por el mercado internacional de reaseguros sí requieren que se presente un daño físico o pérdida física **directa** como consecuencia de un evento amparado bajo la Póliza. Se puede mediante acuerdo expreso, extender la cobertura para amparar el lucro cesante derivado de un daño físico, e inclusive mediante anexo, cubrir el lucro cesante contingente para pérdidas resultantes de actos terroristas a proveedores.

(g) ¿Sobre quién recae la carga de la prueba de que un daño ha sido causado por un acto terrorista?

En tratándose de la prueba del acto terrorista como un evento cubierto bajo la póliza la carga de la prueba, de conformidad con la legislación colombiana, corresponde al asegurado. En tratándose de un evento excluido de cobertura bajo la póliza, a la luz de la legislación colombiana la carga de la prueba recae sobre la compañía de seguros. Ahora bien, en tratándose del acto terrorista como un evento amparado bajo la póliza, la carga de la prueba de que el siniestro no se produjo como consecuencia de un acto excluido de cobertura por tratarse de acto de guerra, invasión, acto de enemigo extranjero, hostilidades u operaciones de guerra, guerra civil etc. opera en nuestro país así:

- Los textos locales de HMCCoP y AMIT (S&T) hacen recaer la carga de la prueba sobre el asegurador y
- El clausulado LPO-437 del mercado de Londres o cuando se trata de colocaciones de reaseguro con el mercado especializado de Sabotaje y Terrorismo (S&T), se exige que la carga de la prueba recaiga sobre el asegurado.

(h) ¿Varían las reglas de causalidad en relación al terrorismo? En particular, ¿opera la exclusión del terrorismo cuando la causa próxima el daño es el terrorismo o es la exclusión más estricta, por ejemplo: la pérdida tiene que ser causada ‘únicamente y directamente’ por el terrorismo?

El texto LPO437, de uso común en el mercado asegurador colombiano, es específico al respecto y reza así:

**RIOTS AND/OR STRIKES AND/OR CIVIL COMMOTIONS
AND/OR MALICIOUS DAMAGE INSURANCE
(TERRORIST WORDING)**

1. INSURING CLAUSE:

Subject to the terms, clauses and conditions contained herein the Underwriters agree to indemnify the Assured against direct physical loss of or damage to the interests insured caused by or arising from Riots and/or Strikes and/or Civil Commotions including fire damage and loss by looting following Riots and/or Strikes and/or Civil Commotions and/or Malicious Damage as described herein.

For the purpose of this Policy:

- (A) *Riot and Strike and Civil Commotion damage shall include but not be limited to loss directly caused by:*
 - (a) *Any act committed in the course of a disturbance of the public peace by any person taking part together with others in such disturbance; or*
 - (b) *Any wilful act of any striker or locked-out worker done in furtherance of a strike or in resistance to a lock-out whether or not such act is committed in the course of a disturbance of the public peace; or*
 - (c) *Any act of any lawfully constituted Authority for the purpose of suppressing or minimising the consequences of any existing disturbance of the public peace, or for the purpose of preventing any such act as is referred to in (b) above or minimising the consequences thereof;*
- (B) *Malicious Damage shall mean all Physical Loss or Damage resulting directly from a malicious act caused by anyone whether or not the aforesaid act is committed during a disturbance of the public peace, and shall include loss caused by sabotage and acts committed by any or all persons who are member(s) of an organisation whose aim is or includes the over-throwing of any legal or defacto Government by terrorism or violence.*

2. EXCLUSIONS:

This Policy does not cover:

- (A) *Loss or damage caused by or arising out of burglary, house-breaking, theft or larceny or caused by any person taking part therein.*
- (B) *Loss or damage caused by or resulting from confiscation, requisition, detention or legal or illegal occupation of property insured or of any premises, vehicle or thing containing the same.*
- (C) *Loss or damage caused by or resulting from an act or incident which occurs or is committed whether directly or indirectly by reason of or in connection with war, invasion, act of foreign enemy, hostilities or warlike operations (whether war be declared or not), civil war, or seizure of power arising from a military conspiracy.*
- (D) *Loss or damage directly or indirectly caused by or contributed to by or arising from ionising radiations or contamination by radioactivity from any nuclear fuel or from any nuclear waste from the combustion of nuclear fuel, or the radioactive, toxic, explosive or other hazardous properties of any explosive nuclear assembly or nuclear component thereof.*
- (E) *Loss resulting from total or partial cessation or interruption of work.*

3. CONDITIONS:

- (A) *In any claim, and in any action, suit or other proceeding to enforce a claim, for loss under this Policy the burden of proving that the loss does not fall within Exclusion (C) above set out shall be upon the Assured.*
- (B) *This Policy does not cover any loss which at the time of the happening of such loss is insured by or would, but for the existence of this Policy be insured by any other existing policy or policies except in respect of any excess beyond the amount which would have been payable under such other policy or policies had this Insurance not been effected.*
- (C) *The Assured shall, at the request and expense of the Underwriters, take all steps that may be necessary to protect the interests of Underwriters.*

- (D) *If the Assured shall make any claim knowing the same to be false or fraudulent as regards amount or otherwise, this Policy shall become void and all claims hereunder shall be forfeited.*
- (E) *If the total value of all property covered by this Insurance shall at the time of any loss be greater than the Declared Value set out in the Schedule the Assured shall be entitled to recover hereunder only such proportion of the Sum Insured set out in the Schedule as the said Declared Value bears to the said total value.*

4. CANCELLATION:

This Policy may be cancelled by or on behalf of the Underwriters by 30 days notice given in writing to the Assured at his last known address, and the premium hereon shall be adjusted on the basis of the Underwriters receiving or retaining pro rata premium.

Notice shall be deemed to be duly received in the course of post if sent by pre-paid letter post properly addressed.

This Policy may not be cancelled by or on behalf of the Assured unless specially agreed by the Underwriters.

LPO437 (4/82)

Por otro lado, en Colombia, las pólizas de seguro de propiedad suelen incluir el texto NMA-2919, el cual que reza:

WAR AND TERRORISM EXCLUSION ENDORSEMENT (Reinsurance)

Notwithstanding any provision to the contrary within this reinsurance or any endorsement thereto it is agreed that this reinsurance excludes loss, damage, cost or expense of whatsoever nature directly or indirectly 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 to the loss;

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

For the purpose of this endorsement an act of terrorism means an act, including but not limited to the use of force or violence and/or the threat thereof, of any person or group(s) of persons, whether acting alone or on behalf of or in connection with any organisation(s) or government(s), committed for political, religious, ideological or similar purposes including the intention to influence any government and/or to put the public, or any section of the public, in fear.

This endorsement also excludes loss, damage, cost or expense of whatsoever nature directly or indirectly caused by, resulting from or in connection with any action taken in controlling, preventing, suppressing or in any way relating to (1) and/or (2) above.

If the Reinsurers allege that by reason of this exclusion, any loss, damage, cost or expense is not covered by this reinsurance the burden of proving the contrary shall be upon the Reassured.

In the event any portion of this endorsement is found to be invalid or unenforceable, the remainder shall remain in full force and effect.

(i) Describe - en caso de existir-, qué importancia se atribuye a: la identidad/identificación de los autores de actos de terrorismo; su identificación/asociación con grupos terroristas conocidos; el motivo atribuido al acto del terrorismo (si debe ser de naturaleza político, religioso o ideológico); el modus operandi usado para cometer un acto terrorista; y/o el blanco del acto físico, es decir, los que sufren una pérdida directamente y/o aquellos a los que se pretende influenciar con acto terrorista (p.e. un gobierno)?

La definición de “Acto Malicioso” hace referencia a actos cometidos por cualquier persona que sea miembro de una organización cuyo objetivo sea o incluya el “derrocamiento” de cualquier Gobierno de hecho por terrorismo o violencia, lo cual conlleva la presencia de una motivación de carácter político. No se especifican mayores detalles sobre “modus operandi”. Veamos:

Malicious Damage shall mean all Physical Loss or Damage resulting directly from a malicious act caused by anyone whether or not the aforesaid act is committed during a disturbance of the public peace, and shall include loss caused by sabotage and acts committed by any or all persons who are member(s) of an organisation whose aim is or includes the over-throwing of any legal or defacto Government by terrorism or violence.

(j) Para definir o probar el tipo de terrorismo, ¿existe dependencia de alguna certificación o declaración gubernamental, judicial o de cualquier otro tipo?

Quizá, lo único que se requiera es un reporte de las autoridades competentes pero, de hecho, no es exigida (o no ha sido exigida hasta el momento) certificación alguna por parte de un ente gubernamental o de otro tipo.

(k) ¿Existe alguna referencia específica, estipulación o problema conocido en relación a los actos terroristas que incluyen contaminación biológica, química, nuclear o de cualquier otro tipo?

La misma es una Exclusión absoluta en las Pólizas que provienen de mercados especializados. Veamos:

Pérdidas o daños directa o indirectamente causados o a los que contribuyan o derivados de radiaciones ionizantes o contaminación por radioactividades proveniente de cualquier combustible nuclear o de cualquier desecho nuclear generado por la combustión de un combustible nuclear, o las propiedades radioactivas, tóxicas, explosivas u otras propiedades peligrosas de cualquier artefacto explosivo nuclear o cualquier componente del mismo.

(l) En la medida en que los riesgos de terrorismo estén cubiertos, ¿utilizan las pólizas límites agregados para limitar la exposición del seguro o reaseguros y obligar a los asegurados o reasegurados a soportar retenciones de algún tipo?

Si. Normalmente después del 11 de septiembre de 2001, se otorga un límite de cobertura por evento y en el agregado anual para la vigencia de la Póliza, inferior al valor de los bienes amparados.

3. TERRORISMO E INTERVENCIÓN DEL GOBIERNO

(a) ¿Existen en su legislación nacional, restricciones en las exclusiones de terrorismo en las coberturas de seguros? En caso afirmativo, descríbala y exponga su aplicación.

En la legislación ninguna. En la práctica se presentan las restricciones a que hemos hecho referencia con anterioridad.

(b) ¿Se prevé algún esquema por lo cual la cobertura del terrorismo se ponga a la disposición a los asegurados directamente por el propio gobierno? En caso afirmativo, por favor indique la fecha de introducción del esquema, su naturaleza, incluyendo límites, franquicias, su objetivo original, su éxito obtenido y los acuerdos financieros.

No hasta ahora. El tema ha sido y continúa siendo objeto de estudio por el gobierno y por la industria privada de seguros a nivel de la Federación de aseguradores Colombianos “FASECOLDA”

(c) ¿Se prevé algún esquema por lo cual la cobertura del terrorismo se ponga a la disposición a los aseguradores directamente por el propio gobierno? En caso afirmativo, por favor indique la fecha de introducción del esquema, su naturaleza, incluyendo límites, franquicias, su objetivo original, su éxito obtenido y los acuerdos financieros.

No hasta ahora.

4. ACUERDOS INTERNACIONALES O TRANSFRONTERIZOS

(a) ¿Puede identificar algún esquema o iniciativa internacional o transfronteriza según la cual los seguros o ayudas para las consecuencias financieras de los actos de terrorismo sean garantizados o apoyados para sectores concretos por ejemplo, aviación, marítimo?

Sí se puede identificar claramente la ayuda recibida por países como Estados Unidos y algunos países de Europa como Alemania en seguros como el de Aviación. Ellos ayudan a sus Aerolíneas respaldando como riesgo país la cobertura de Responsabilidad Civil por Guerra AVN52 y la cobertura de Casco-Guerra en algunos casos. Igualmente Venezuela

optó por darle respaldo a sus aerolíneas pero el riesgo país de Venezuela, para muchos de los arrendadores no fue garantía suficiente y por ello debieron los operadores salir a buscar una alternativa en el mercado de seguros/reaseguros.

El esquema particular de ayuda a las aerolíneas fue el siguiente:

Una vez sucedidos los hechos del 11 de Septiembre, el mercado reasegurador de aviación aplicó la cláusula de Cancelación provisional de 7 días tanto para Casco-Guerra como para la Extensión de Responsabilidad Civil por Guerra AVN 52 (Third Party) y cambió las reglas del juego subiendo las primas de Casco-Guerra y sublimitando la cobertura de Extensión de Responsabilidad Civil por Guerra AVN52 a US\$50 millones. Además, procedió a cobrar por dicha cobertura una prima extra de US\$1.25 por pasajero transportado. A su vez, se creó un mercado de seguros de excesos en capas hasta por los límites de Responsabilidad Civil General requeridos, llegando incluso hasta US\$1.500 millones. Las aerolíneas, en su gran mayoría, optaron por tomar la cobertura únicamente hasta los límites exigidos en sus contratos de leasing.

Los precios de estas coberturas han caído dramáticamente, e incluso los mismos reaseguradores de Casco y Responsabilidad Civil General han aumentado los sub-límites de Responsabilidad Civil por Guerra AVN52 a límites entre US\$150 y US\$250 millones.

Estados Unidos optó por respaldar a través del TRIA con un subsidio, por tal efecto, del 100% por parte del gobierno. En Colombia se logró negociar entre las Aerolíneas y la Aeronáutica Civil la autorización para recargar en la tarifa cobrada a cada pasajero un sobre-costos de seguridad con miras a asumir, de una parte, los extra-costos en los seguros y de otra, los costos de la infraestructura adicional de seguridad requerida para sus operaciones diarias.

(b) ¿ Conoce de algún esquema o iniciativa internacional o transfronteriza que haya sido ideada o desarrollada desde el 11 de septiembre para proteger a los asegurados, aseguradores o reaseguradores contra la exposición a las actividades terroristas?

Existen esquemas de carácter nacional en diversos países como el TRIA en Estados Unidos, el Consorcio español de Riesgos catastróficos, el Pool Re en Inglaterra, el consorcio Extermus, en fin, otros en países como Francia y Australia, pero ninguno que sepamos de carácter internacional.

Por otra parte, concretamente respecto del seguro de aviación, en Alemania se optó por proteger a las aerolíneas a través del sistema de seguros, mediante un pool de aseguradoras que otorgaron la cobertura siendo el costo asumido por el Gobierno, mas no en su totalidad. De igual forma se procedió en Francia.

5. DECISIONES JUDICIALES U OTRAS RESOLUCIONES

¿Existen decisiones judiciales u otras resoluciones en su país en las que se haya considerado la cobertura de una póliza de seguros/reaseguros respecto a un acto de terrorismo?

Como es bien sabido, Colombia adolece desde hace ya muchos años de un problema crónico de guerrilla, lo cual la hace propensa a que el tema de terrorismo sea ventilado en los estrados judiciales con relativa frecuencia. Hemos seleccionado y anexo para su información, dos sentencias relativas a actuaciones terroristas, emitidas por el Consejo de Estado, la primera el 2 de mayo de 2.002 y la segunda el 12 de septiembre del mismo año, las cuales, aun cuando un poco extensas, confío sean de su interés.

CONSEJO DE ESTADO SALA DE CONSULTA Y SERVICIO CIVIL

Consejero Ponente: Flavio Augusto Rodríguez Arce

Bogotá D. C., doce (12) de diciembre de dos mil dos (2002)

Radicación No. 1.452 Referencia: BIENES INMUEBLES DE PROPIEDAD ESTATAL. Aseguramiento ante eventuales daños ocasionados por actos terroristas.

El Departamento Administrativo de la Presidencia de la República, a solicitud del señor Procurador General de la Nación, consulta a la Sala:

"Teniendo en cuenta las exclusiones establecidas en las condiciones generales de las pólizas de seguros frente a eventuales daños ocasionados en ataques terroristas, ¿Cuáles son los mecanismos a utilizar por parte de las entidades del Estado para asegurar integralmente los bienes que hacen parte del patrimonio público?

¿Cuál es el mecanismo idóneo para proteger a las entidades Estatales contra posibles demandas de responsabilidad por daños causados en ataques terroristas perpetrados contra inmuebles tomados en arrendamiento, en los cuales funcionan sedes oficiales?

Aduce el solicitante que con posterioridad a los insucesos acaecidos en la ciudad de Nueva York el año anterior y a la situación anómala de orden público del país, las compañías aseguradoras nacionales y extranjeras "han venido incluyendo dentro de sus pólizas una serie de exclusiones que dejan al descubierto los bienes públicos en ciertas eventualidades. En el caso de los seguros de corriente débil, las compañías están dejando la siguiente anotación: 'En ningún caso quedan cubiertos por este anexo los daños permanentes materiales provenientes de tomas a poblaciones, ciudades y municipios realizadas por movimientos armados al margen de la ley ni los actos de autoridad para repelerlos'".

Solicitado concepto a la compañía aseguradora acerca del alcance de tal reserva adujo que "'se encuentran amparadas todas aquellas acciones terroristas aisladas, que no impliquen una acción armada masiva por parte de grupos al margen de la ley, con la cual causen graves destrozos en las poblaciones tal como sucede en las llamadas tomas a poblaciones' (...) 'La exclusión que nos ocupa se refiere a las definidas a nivel nacional como toma a poblaciones y es en este contexto en el cual se debe entender esta cláusula', de lo cual se deduce que 'en ciertas e imprecisas situaciones los bienes públicos no se encuentran [sic] cobijados por el amparo de corriente débil'".

Así, resulta totalmente imposible obtener en el mercado de seguros una póliza cuya protección garantice la protección integral de los bienes estatales frente a la acción de grupos armados, por lo que se indaga acerca de las "medidas alternativas que pueden adoptar las entidades públicas para garantizar la protección cierta, adecuada y efectiva de los bienes de dominio público que se encuentran a su cargo", en consideración a que la omisión en el aseguramiento de tales bienes puede generar responsabilidades de distinto orden para los servidores públicos encargados de velar por su adecuada conservación y protección y que la jurisprudencia de la Sección Tercera de ésta Corporación es reiterativa en deducir responsabilidad patrimonial por los daños antijurídicos derivados de actos terroristas perpetrados contra instalaciones oficiales o funcionarios públicos, casos en los cuales "el hecho del tercero" no exonera de responsabilidad.

Consideraciones de la Sala

Dada la situación actual de orden público en el país, resulta evidente el riesgo a que están expuestos los bienes de las entidades públicas por el potencial acaecimiento de atentados Terroristas.¹ Por tanto, existen grandes posibilidades de que acciones de este tipo recaigan sobre elementos representativos del Estado.

Como se expresa en la consulta, a raíz del atentado acontecido el 11 de Septiembre de 2001 en Nueva York, las aseguradoras están excluyendo de sus pólizas los riesgos por actividades terroristas, debido a la dificultad de obtener de las compañías reaseguradoras respaldo para su cubrimiento, la cual se acrecienta cuando de bienes del Estado se trata, en consideración a su alta vulnerabilidad.

El artículo 1105 del Código de Comercio, respecto de la exclusión de riesgos catastróficos, dispone:

"Se entenderán igualmente excluidas del contrato de seguro las pérdidas o daños que sufran los objetos asegurados, o los demás perjuicios causados por:

1. Guerra civil o internacional, motines, huelgas, movimientos subversivos o, en general, conmociones populares de cualquier clase, y 2. Erupciones volcánicas, temblores de tierra o cualesquiera otras convulsiones de la naturaleza."

Sobre el alcance del artículo anterior, la Superintendencia Bancaria ha expresado lo siguiente:

"De manera expresa, el código consagra como circunstancias no comprendidas dentro del amparo del contrato de seguro, los comúnmente llamados riesgos políticos.

Así las cosas, las conmociones populares se consideran exclusiones de carácter legal, y son reservas lógicas, en cuanto tales situaciones pueden causar daños en proporción y magnitud incontrolables en número y extensión debido a que se

desbordan los canales de legalidad y el orden público reinante. Aún más, sus consecuencias no pueden preverse en toda su extensión y destruirían fácilmente todas las previsiones del asegurador y las reglas técnicas en que funda sus cálculos, toda vez que en cualquiera de dichos acontecimientos el siniestro afectará varios riesgos, por lo que el asegurador excedería considerablemente el pleno de responsabilidad determinada para sus operaciones.

Es por ello que los actos ocasionados por los grupos subversivos que puedan operar en el país, se consideran encajados dentro de las excepciones señaladas en el artículo 1105 del Código de Comercio.

No obstante lo anterior, vale la pena señalar que no se puede equiparar jurídicamente y para efectos del contrato de seguro, los actos lesivos generados por la acción de delincuentes comunes y los causados por razón de movimientos subversivos; por cuanto mientras las consecuencias o daños que producen los primeros, pueden estar amparados por el contrato de seguro, las de los segundos están excluidos. No sobra agregar, que en cada caso corresponderá a las autoridades competentes determinar si se trata de delito político o común, y que es necesario analizar la póliza que haya sido suscrita, por cuanto, aunque normalmente en una póliza de todo riesgo se excluye la subversión, sin embargo, en casos especiales, puede ser susceptible de otorgarse dicho amparo si se pacta un anexo específico que lo cubra, mediante el pago de una prima adicional".²

Sin embargo, al momento de contratarse el seguro o de efectuarse reclamaciones por acaecimiento del siniestro, deberá tomarse en consideración que la Superintendencia en el Concepto No. 8203 del día 2 de diciembre de 2002, en relación con la aplicación del artículo 1105 por una aseguradora para invocar la exclusión de guerra civil, respecto de situaciones amparadas por el anexo de actos mal intencionados de terceros AMIT, "en particular las relacionadas con actos terroristas ejecutados por movimientos subversivos", hizo las siguientes importantes precisiones, que se resumen:

a) El numeral 1º del artículo 1105 enlista eventos que se entienden incorporados al contrato de seguro sin necesidad de convenio expreso de las partes - art. 38 Ley 153/87 - pero que en consideración al carácter de la norma pueden ser objeto de aseguramiento previa estipulación de los contratantes.

b) "Un eventual conflicto de exclusiones..." que pudiera presentarse cuando no obstante haberse otorgado la cobertura de AMIT en el clausulado general de la póliza se consagra la exclusión de guerra civil, se resuelve con el examen de las condiciones bajo las cuales el mercado asegurador expide dicho anexo y la definición del alcance de la exclusión en comento".

c) La doctrina en seguros, en relación con el alcance de la exclusión mencionada, "se inclina por desestimar la noción de guerra civil o internacional." Se cita a Esteban Jaramillo, quien al tratar el tema de los actos terroristas en el seguro privado, sostiene: "...categóricamente se puede afirmar que por 'guerra' se entiende no necesariamente una guerra formalmente declarada por un Estado, representado por su gobierno legítimo, a otro Estado o a la cabeza orgánica de un movimiento insurreccional armado de parte de la población contra ese gobierno (caso de la 'guerra civil o interna'), sino una simple situación bélica de hecho..."³, ya J. Efrén Ossa y Carlos Ignacio Jaramillo, para quienes "... En el derecho de seguros la ratio legis de la exclusión de guerra no finca en consideraciones distintas a las de orden técnico y, que como se recordará, tienen que ver, principalmente, con las devastadoras consecuencias dimanantes de la materialización de un conflicto bélico de envergadura (riesgo catastrófico), con el subsiguiente menoscabo de los principios angulares de la dispersión del riesgo y de su frecuencia, además del relevo del principio de la necesaria compensación de los riesgos, principios medulares del seguro y de todo lo que él conlleva. (...) , "Es más, si de rigor se trata, hay que puntualizar que en materia de seguros, el estado de guerra o la guerra propiamente dicha que, en el terreno fáctico se torna en evento catastrófico, es un estado o situación de hecho, de facto, no un estado o si desea una situación de derecho, de jure, no susceptible, por tanto de enmarcarse en rígidos patrones ultra-jurídicos, sin que con ello le restemos importancia a la debida integración del vínculo o relación causal: 'Ea res facti non juris est' (es una cuestión de hecho, no de derecho)"⁴.

La doctrina comparada, citada por estos autores, coincide con los argumentos citados, "... en el sentido de que el concepto de guerra comporta antes que todo una situación bélica de hecho, en la medida en que '...importan como causas de exclusión (...) los actos de guerra en cuanto origen del daño, aunque la guerra como tal no haya sido declarada".

d) Las condiciones bajo las cuales se expide el amparo de AMIT en el mercado asegurador mediante anexo, extiende las siguientes coberturas: asonada, motín, conmoción civil o popular, huelga y los actos mal intencionados de tercero, así como los actos de autoridad tendientes a disminuir los efectos de éstos.

"En este orden mediante la cobertura de actos malintencionados de terceros el asegurador se obliga a cubrir la destrucción o daño material de los bienes asegurados causados por dicha clase de actos, incluidos los terroristas cometidos por individuos pertenecientes a movimientos subversivos.

Tal como lo señala el tratadista J. Efrén Ossa, los actos de los movimientos subversivos se encuentran '... encaminados a subvertir el orden institucional o legal establecido, se identifican con la asonada, la rebelión, la sedición como entidades delictivas contra la seguridad del Estado'. En el mismo sentido, dichos actos pueden tipificar las figuras de actos de terrorismo, barbarie y terrorismo, previstas en nuestro ordenamiento penal, como delitos contra las personas y bienes protegidos por el derecho internacional humanitario y contra la seguridad pública".

e) "En este orden de ideas un análisis de la cobertura de actos de movimientos subversivos incluida en el anexo AMIT, no puede desconocer que en su mayor parte los actos ejecutados por tales movimientos pueden derivar en actos de guerra.⁵

"En este orden de ideas, el otorgamiento de un amparo como el mencionado, supone el reconocimiento de que el riesgo de guerra como tal se encuentra implícito en los actos que ejecuten los movimientos subversivos con el propósito de atentar contra el orden institucional o legal establecido, con los consabidos perjuicios de índole catastrófica que puedan irrogar, de ahí la necesidad de su aseguramiento a través del anexo en comentario.

"Desde esta perspectiva, debe entenderse que el efecto de la estipulación de las partes, en virtud de la cual el asegurador otorga la cobertura de AMIT a través del anexo respectivo, se equipara a la renuncia del asegurador a su derecho de invocar la exclusión de guerra consignada en las condiciones generales frente a las pérdidas o daños causadas por los actos de movimientos subversivos. ⁶

"Una interpretación en sentido contrario, vale decir aquella que permita invocar como válida la exclusión del riesgo de guerra previsto en las condiciones generales del seguro o en el artículo 1105 del Código de Comercio, no obstante el otorgamiento de la cobertura de AMIT, resultaría improcedente y atentaría contra la buena fe que informa este contrato, pues su efecto haría inoperante el amparo frente a la ocurrencia de actos de guerra perpetrados por movimientos subversivos."

De ésta manera el alcance de la exclusión manifestada por la aseguradora, según la cual "se encuentran amparadas todas aquellas acciones terroristas aisladas" que no impliquen una acción armada masiva por parte de grupos al margen de la ley, con la cual causen graves destrozos en las poblaciones tal como sucede en las llamadas tomas a poblaciones", se enmarca dentro de las previsiones del artículo 1105 del Código de Comercio, así como del 1056 ibídem que al regular la delimitación contractual de los riesgos dispone: "Con las restricciones legales, el asegurador podrá, a su arbitrio, asumir todos o algunos de los riesgos a que están expuestos el interés o la cosa asegurados, el patrimonio o la persona del asegurado", de lo cual se sigue que los bienes del Estado no tendrán protección integral.

De lo hasta aquí expuesto, surge que ante la negativa de las aseguradoras de asumir la totalidad de los riesgos provenientes de actividades terroristas - la cual no ofrece reparo conforme al ordenamiento jurídico -, corresponde al legislador y al gobierno adoptar las medidas que considere pertinentes a fin de garantizar el cubrimiento total.

Sin embargo, es preciso recordar que conforme al parágrafo del artículo 1047 del Código de Comercio, modificado por el artículo 2° de la ley 389 de 1997, "en los casos en que no aparezcan expresamente acordadas, se entenderán como condiciones del contrato aquellas de la póliza o anexo que el asegurador haya depositado en la Superintendencia Bancaria para el mismo ramo, amparo, modalidad del contrato y tipo de riesgo".

Ahora bien, de lo hasta aquí expuesto surgen varias consideraciones:

1.- Sin perjuicio del ejercicio libre de la actividad económica y de la iniciativa privada, conforme al inciso final del artículo 333 de la Carta "la ley delimitará el alcance de la libertad económica cuando así lo exijan el interés social..." y al 334, al Estado corresponde intervenir, por mandato de la ley, en los servicios públicos y privados para racionalizar la economía ⁷. A su vez, el Congreso debe dictar las leyes marco a las cuales debe sujetarse el gobierno para regular la actividad aseguradora (art. 150.19, literal d).

Es así como el artículo 335 estatuye que la actividad aseguradora es de interés público y sólo puede ser ejercida previa autorización del Estado, conforme a la ley, "la cual regulará la forma de intervención del gobierno" en la materia.

Por su parte el Presidente de la República, en su calidad de suprema autoridad administrativa, está facultado para ejercer, de acuerdo con la ley 8, la inspección, vigilancia y control sobre las personas que realicen la actividad

aseguradora y para ejercer la intervención en esta, (art. 189.24 9 y 25). A su vez, la Superintendencia Bancaria tiene a su cargo funciones precisas y ejerce la fiscalización gubernamental sobre la materia 10.

Al respecto la Corte en Sentencia C- 176 de 1996 manifiesta:

"El reparto de las competencias entre la ley y el reglamento en materia de intervención del Estado no es el mismo en todas las actividades económicas. Así, en general, para proteger la libertad económica, la dirección estatal se efectúa por el Gobierno con base en leyes de intervención que deben precisar sus fines, sus alcances y los límites de la libertad económica pero, en otros casos, la intervención se efectúa con base en leyes marco, que son normas más generales, pues en ellas el Congreso fija únicamente los objetivos y criterios de la acción gubernamental.

En términos generales, la Constitución de 1991 devuelve protagonismo al Congreso en materia económica, por lo cual corresponde al Legislador definir en lo esencial el ámbito y los fines de la intervención estatal en los procesos económicos. Ya había señalado al respecto esta Corporación que "puede decirse que la facultad de intervenir en la economía dentro del sistema constitucional colombiano, en lo esencial, descansa primordialmente en el Congreso".

2. - La onerosidad que para las aseguradoras se derivaría de afianzar la totalidad del riesgo sin reaseguro - como al parecer acontece -, implicaría la afectación del patrimonio de las empresas, al tener que pagar siniestros cuyos costos podría rebasar los seguros adicionales o amparos especiales contratados. 11. Ha dicho la Corte:

"De esta forma, la actividad aseguradora, por su origen y finalidad económica, se desenvuelve a través de un permanente proceso de consolidación económica y financiera, con perfeccionamiento de los resultados operativos y de los servicios ofrecidos, ampliando coberturas y disminuyendo costos, a fin de dar seguridad en la protección de los riesgos y en el pago cumplido de los siniestros, proceso que necesariamente debe reflejar una sujeción estricta a principios que rigen cualquier clase de contratación, como ocurre con el principio de la buena fe, la igualdad de las partes contratantes, la diligencia y equilibrio contractual, entre otros." (Sentencia C- 269/ 99)

3.- Pero también habrá de considerarse el carácter de interés público que la Carta reconoce a la actividad aseguradora. "De allí se debe partir: del interés público que reviste la actividad aseguradora, cimentado en los fines que como operación económica persigue y en la protección de la parte más débil - asegurado y beneficiario - de la relación contractual 12 (sentencia C- 269 de 1999).

La misma Corporación en sentencia C- 233 de 1997, señaló:

"Al Estado corresponde desplegar una actividad orientada a favorecer el cabal cumplimiento de las prerrogativas inherentes a la libre iniciativa y la libertad económica y, a la vez, procurar la protección del interés público comprometido, en guarda de su prevalencia sobre los intereses particulares que pueden encontrar satisfacción, pero dentro del marco de las responsabilidades y obligaciones sociales a las que alude la Constitución. Las tareas que, por virtud de los mandatos constitucionales, el Estado debe acometer, implican la previa fijación de políticas institucionales y la selección e implementación de los instrumentos adecuados para llevar a la práctica las orientaciones generales que guían la actuación de la organización política que, para tal efecto, cuenta con el concurso de órganos superiores encargados de adoptar esas definiciones, con la posibilidad de expedir las leyes y los decretos indispensables que vayan perfilando los específicos contornos de la actividad estatal en esas materias y, en fin, con la actuación del gobierno en concreto que, por intermedio de sus agentes, está llamado a procurar el cumplimiento de las garantías previstas en la Carta y, además, a velar para que, sin desmedro de la iniciativa privada, en cada caso, el interés general halle realización conforme a la legalidad propia del Estado Social de Derecho."

Además, cabe recordar que la "empresa como base del desarrollo, tiene una función social que implica obligaciones" (art. 333 de la C. P.)

4.- La ausencia de cubrimiento de los riesgos catastróficos compromete las actividades productivas y, además, el deterioro del estado de confianza en la recuperación de los daños potenciales que puedan presentarse, desestiman la inversión en general. Tal la importancia de la actividad aseguradora, asociada al desarrollo nacional.

5.- La política del Estado en materia de seguros ha sufrido variaciones en el tiempo. Mediante decreto 2222 de 1962 se dispuso que los seguros de los bienes de la Nación y los de las entidades públicas del orden nacional, debían contratarse con la Previsora S. A. Compañía de Seguros - las utilidades se destinaban a fines sociales concretos -.

El decreto anterior fue modificado por el 406 de 1970, en el sentido de facultar a las entidades mencionadas para contratar los seguros con las compañías legalmente autorizadas para funcionar en el país - los cuales continuaban

contratándose conforme al decreto 2222 -, siempre que la cuantía del seguro o interés asegurable no excediera de veinte millones de pesos por cada riesgo; la licitación pública era la forma de contratación de los seguros, salvo para éstos últimos.

El artículo 244 del decreto 222 de 1983 mantuvo el régimen anterior, salvo cuando la cuantía o interés asegurable no excedía de ciento veinte millones de pesos por riesgo asegurable, caso en el cual debía contratarse en forma directa y obligatoria con la Previsora.

La ley 45 de 1990, que sustituyó los artículos 244 y 245 del decreto ley 222 de 1983, dispuso en el artículo 63: "Licitación pública para el aseguramiento de bienes oficiales (...). La contratación de los seguros a que se refiere el artículo anterior se hará mediante licitación pública en los casos que establece el título V de este estatuto, conforme a las reglas generales sobre la materia.

Las entidades aseguradoras en las cuales participe el capital estatal, en un porcentaje igual o superior al cincuenta por ciento (50%), celebrarán los contratos de seguros en igualdad de condiciones con las demás aseguradoras y deberán asumir, con carácter subsidiario, en la forma que lo establezca el Gobierno Nacional, aquellos riesgos que presenten características especiales". (Destaca la Sala)

El decreto 1730 de 1991, Estatuto Orgánico del Sistema Financiero - EOSF, en el artículo 1.5.1.4.5, reiteró este precepto, el cual fue reglamentado por el decreto 1828 de 1992, así: "Las entidades aseguradoras en las cuales participe el capital estatal en un porcentaje igual o superior al cincuenta por ciento (50%) deberá asumir de manera inmediata en la oportunidad que señale el Gobierno Nacional, por conducto del Ministro de Hacienda y Crédito Público, aquellos riesgos relacionados con circunstancias excepcionales cuando por sus especiales características no puedan ser asumidos razonable y oportunamente por las demás aseguradoras.

"La determinación del valor asegurado y las condiciones modales del riesgo asumido serán convenidas en cada caso entre la entidad respectiva y el Ministro de Hacienda y Crédito Público, atendiendo las particulares circunstancias que demanden la expedición del seguro". (art. 1º)

El decreto 663 de 1993 contentivo del EOSF, reiteró el precepto contenido en el artículo 1.5.1.4.5. del decreto 1730 de 1991, norma sustituida por lo dispuesto en la ley 80 de 1993, la cual a su vez fue reglamentada por el decreto 1436 de 1998, en materia de selección de intermediarios de seguros mediante concurso público.

La posibilidad de proteger riesgos de especiales connotaciones - con carácter subsidiario por conducto de las empresas aseguradoras con capital estatal cualificado, desapareció de la legislación.

6. Valga recordar que el país tiene tradición en la constitución de fondos especiales dentro del esquema de intervención del Estado en materia de seguros, como por ejemplo los fondos de promociones de exportaciones, acompañados de intervenciones subsidiarias o de garantías - al efecto valga mencionar los fondos de garantía -.

Desde 1992 el Ministerio de Hacienda y Crédito Público celebró con la Previsora S. A. un contrato de seguro para amparar los vehículos de servicio público que padecieran daños por actos mal intencionados de terceros, que cubre además los daños provenientes de huelgas, amotinamientos, conmociones civiles y terrorismo cometidos por grupos subversivos.

En este orden de ideas, dentro del sector se ha propuesto la constitución de un fondo de riesgo de terrorismo, para desarrollar la actividad aseguradora y reaseguradora con participación de las aseguradoras del mercado nacional, operado por una entidad habilitada y expresamente autorizada para ello, de manera que pueda asumir y trasladar los riesgos a nombre de las entidades suscriptoras.

7. En lo atinente a mecanismos precautelativos para proteger las entidades públicas arrendatarias de bienes inmuebles de posibles demandas por daños causados en ataques terroristas, no es fácil ofrecer soluciones. Sin embargo, salta a la vista que deberán adelantarse todas las gestiones necesarias para garantizar la seguridad de tales bienes por conducto de la fuerza pública, de manera que pueda procesalmente demostrarse la diligencia al respecto y evitar así reparos por omisión y su relación causal con el daño.

Sin embargo, como lo ha sostenido la Sección Tercera de la Corporación:

"Cuando el atentado es dirigido en concreto contra un elemento representativo del Estado, se produce en relación con los administrados damnificados un desequilibrio de las cargas públicas, o un daño especial, que si bien no es causado

por el Estado, es padecido en razón de él, y en ese caso surge un título de imputación que permite impetrar la reparación" 13

"Si el atentado es indiscriminado, no es selectivo, y tiene como fin sembrar pánico y desconcierto social, como una forma de expresión por sus propias características cierra las puertas a una posible responsabilidad estatal ya que es un acto sorpresivo en el tiempo y en el espacio, planeado y ejecutado sigilosamente, y por lo mismo en principio imposible de detectar por los organismos encargados de la seguridad pública y como ya se ha dicho, los deberes del Estado, que son irrenunciables y obligatorios, no significan que sean por principio omnisciente, omnipresente ni omnipotente, para que responda indefectiblemente y bajo toda circunstancia.

"Tratándose de los actos dañinos causados por la subversión, se tienen otras características adicionales a los definidos como terroristas. En efecto, las organizaciones al margen de la ley con supuestas o abiertas pretensiones políticas, incluyen en su plan de acción el ataque contra la riqueza pública y privada, su actuar es permanente o latente y su presencia aunque reconocida, es desconocida en cuanto a su ubicación geográfica, pues es más o menos generalizada en todo el territorio nacional, actuando de modo sorpresivo, sobreseguro contra sus blancos elegidos, a la manera terrorista."

Por lo expuesto, la Sala concluye:

En Colombia, constitucional y legalmente, el régimen de aseguramiento es estrictamente reglado. La libertad de contratación de seguros, tipos contractuales, responsabilidades, riesgos asegurables, etc. se encuentran sujetos a las reglamentaciones legales pertinentes y como quiera que dentro de éstas no se encuentra consagrado un sistema obligatorio de cubrimiento total en materia de terrorismo debidamente autorizado por la Superintendencia Bancaria, no puede sino concluirse que la compañía aseguradora a la cual se hace mención en la consulta, carece de la obligación de aseguramiento en la forma plena requerida, sin perjuicio de los amparos que estén previstos mediante la cobertura de AMIT.

Sin embargo, el Estado puede no sólo fijar las políticas y planes de aseguramiento de riesgo a cargo de los particulares, del propio Estado o de ambos, que conduzcan dentro de la equidad y demás principios de la actividad aseguradora, a una mayor y efectiva cobertura, sino también señalar las regulaciones e intervenciones de las autoridades administrativas que garanticen su cumplimiento y efectividad.

Por lo tanto el Estado, debe tomar las medidas pertinentes que la naturaleza, trascendencia, impacto económico, interés público y demás aspectos de los daños eventuales que puede sufrir la población demanden, a fin de darle mayor o plena garantía, de acuerdo con las circunstancias económicas, sociales y políticas del caso.

Todo lo anterior se entiende sin perjuicio de la responsabilidad que a falta de estos seguros pueda corresponderle al Estado conforme a la Constitución y a la ley.

Transcribese al señor Director del Departamento Administrativo de la Presidencia de la República. Igualmente, envíese copia a la Secretaría Jurídica de la Presidencia de la República.

CESAR HOYOS SALAZAR Presidente de la Sala

SUSANA MONTES DE ECHEVERRI

FLAVIO AUGUSTO RODRÍGUEZ ARCE

AUGUSTO TREJOS JARAMILLO

ELIZABETH CASTRO REYES Secretaria de la Sala

¹ El Consejo de Estado sobre el particular tema de terrorismo, ha expresado: "Una forma de violencia contemporánea es el denominado terrorismo del cual pueden citarse las siguientes definiciones: Del latín terror. Doctrina política que funda en el terror sus procedimientos para alcanzar fines determinados. El terrorismo no es por lo tanto un fin sino un medio. Su historia es tan antigua como la humanidad. Hay muchas formas de terrorismo: el físico, el psicológico, el religioso, el político, etcétera. El terrorismo es, en suma, la denominación por el terror. En todo caso de una manera coercitiva, no dialoga y se impone por la violencia. // Desde el punto de vista del Derecho Penal, el Terrorismo se manifiesta mediante la ejecución repetida de delitos por los cuales se crea un estado de alarma o temor en la colectividad o en ciertos grupos sociales o políticos... El terrorismo es una figura heterogénea,

pues puede revestir formas muy distintas de delitos, aunque predominan los que van contra las personas eligiendo la víctima entre jefes de Estado, ministros, muchedumbres o los que atentan contra la propiedad, ejecutándose en su mayoría por medio de incendios o explosivos... ". // "Dominación por el terror. Sucesión de actos de violencia ejecutados para infundir terror. Generalmente, el terrorismo es utilizado como medio de lucha por algún grupo político, (...). En tiempos más próximos han utilizado el atentado terrorista muchas organizaciones nacionalistas, principalmente en los países colonizados...". Sección Tercera, sentencia Enero 27/00. Radicación No. 8490.

2 Superbancaria, Concepto DS y C- 1497, mar. 26/85.

3 Los actos terroristas y el Seguro Privado en Memorial del XII Encuentro Nacional, Asociación Colombiana de Derecho de Seguros "ACOLDESE". El Seguro en la Propiedad Horizontal y ante los Actos Terroristas. Medellín Octubre de 1986, páginas 85 y 86.

4 La cita corresponde a la intervención de los autores en el Segundo Congreso Ibero- Latinoamericano de Derecho de Seguros celebrado en la ciudad de México. véase en los Conflictos Bélicos en el Derecho de Seguros. Editorial Temis, Bogotá, 1993, páginas 62 y 63.

5 En orden a establecer una relación de causalidad entre la pérdida ocasionada por actos terroristas y el riesgo de guerra, Thomas E. Galyean señala cinco factores para que se entienda cumplida dicha relación a saber: La fuerza de guerrilla que realiza el acto paramilitar está envuelta activamente como un beligerante dedicado a la guerra. Que el grupo guerrillero tenga suficiente fuerza en forma que sus actos agresivos generales requieran una resistencia militar, cada vez que fuera posible por parte de las fuerzas armadas del enemigo. Que el acto terrorista por sí mismo caiga dentro del área a la que normalmente esté circunscrita la guerra en cuestión. Que el acto resultante de la pérdida sea concurrentemente intencionado por los que lo hicieron para conseguir algo militarmente significativo contra sus enemigos. Y finalmente, que el equipo usado para causar el daño y la pérdida sea el tipo que normalmente se pueda prever como resultado de un acto de guerra...". Citado por Esteban Jaramillo Ob. Cit. Página 88.

6 En el mismo sentido véase J. Efrén Ossa G. y Carlos Ignacio Jaramillo. ob. cit. página 99.

7 En un Estado Social de Derecho, dentro del cual el Poder Público asume responsabilidades tales como la racionalización de la economía, el mejoramiento de la calidad de vida de los habitantes, la distribución equitativa de las oportunidades y los beneficios del desarrollo, no menos que la de promover la productividad y la competitividad, y que tiene a su cargo la orientación de la política económica hacia el desarrollo armónico de las regiones (artículo 334 C. P.), la libre competencia no puede erigirse en derecho absoluto ni en barrera infranqueable para la actividad de intervención del Estado. Esta se debe dar, por mandato de la ley, en la explotación de los recursos naturales, en el uso del suelo, en la producción, distribución, utilización y consumo de bienes, todo lo cual implica indudables limitaciones, correctivos y controles para la iniciativa particular. Se trata, al fin y al cabo, de realizar fines esenciales del Estado como los de promover la prosperidad general y garantizar la efectividad de los principios, derechos y deberes consagrados en la Constitución (preámbulo y artículo 2° C. P.), en ejercicio de un papel dinámico y activo inherente a su función básica de dirección general de la economía (artículo 334 C.P.).

8 Dispone el artículo 150 de la Carta: "Corresponde al Congreso (...) 8. Expedir las normas a las cuales debe ajustarse el gobierno para el ejercicio de las funciones de inspección y vigilancia que señala la Constitución".

9 Sentencia C- 233/97: "Es claro que las funciones de inspección, vigilancia y control, en el ámbito al que se refiere la norma que se acaba de citar, se inscriben dentro de la perspectiva más amplia de la necesaria intervención del Estado y del interés público que debe ser resguardado y también lo es que constituyen mecanismos especiales diseñados para realizar, de modo concreto y en un sector determinado de la actividad económica, las orientaciones generales de la política estatal y para verificar, en el área respecto de la cual operan, la cristalización de los imperativos anejos [sic] al interés colectivo."

10 Sentencia C- 233/97: "Se deduce de los anteriores predicados que el desempeño de las competencias atribuidas a algunas superintendencias en lo atinente a la inspección, vigilancia y control está condicionado a la cabal observancia de las directrices que la ley trace con arreglo a criterios estables que, sin embargo, no impiden la actuación ágil y oportuna de estos organismos, encargados de verificar en la práctica la transparencia de las operaciones sometidas a su escrutinio, ni enervan la flexibilidad por estos requerida para hacer efectivos en las situaciones concretas los postulados constitucionales y legales, todo lo cual exige que se los dote de los instrumentos y de las atribuciones necesarias.

11 Sent. C-269/99: "La Corte en la sentencia C-232 de 1.997, destacó los presupuestos técnicos del contrato de seguro y su condición de "contrato en masa", en la forma en que necesariamente in extenso, deben citarse a continuación: //

'Dentro de los presupuestos técnicos del seguro, que son los llamados a garantizar la estabilidad de la empresa aseguradora, figura la "ley de los grandes números", que enseña que "Mientras mayor sea el número de exposiciones, más estrecha será la diferencia entre los resultados efectivos y los esperados como probables con un número infinito de exposiciones" (Launie J.J. Lee J. Finley y Baglini Norman A., Principles of Property and Liability Underwriting. Insurance Institute of America, first edition, 1976, pág. 321, citados por J. Efrén Ossa G., Teoría General del Seguro - La Institución, Temis, Bogotá, 1988, pág. 36). Esto, para la gestión aseguradora, significa que mientras más grande sea la cantidad de riesgos contractualmente asegurados en un ramo, más certeza tendrá el asegurador de que la siniestralidad se acerque al nivel proyectado. Este principio básico, complementado con el de la probabilidad estadística, explica por qué la empresa de seguros se dedica a una operación razonablemente técnica y no a una serie irresponsable de apuestas, sometidas al capricho del azar. Por esto se ha dicho que " (...) Del continuo registro que efectúa de determinados hechos, la estadística deduce coeficientes tanto más exactos cuanto mayor ha sido el número de las observaciones y más dilatado el período de su examen. Con base en el pasado, la estadística puede proyectar sus cálculos para el futuro. Y de ahí se desprende la probabilidad estadística." (J. Efrén Ossa G., ob. cit. Teoría General del Seguro - La Institución, pág. 36). // En otras palabras, la empresa aseguradora, para no caer en un negocio aleatorio absoluto, requiere de una producción masiva, la cual - fuera de nutrir el capital con el que se pagarán los siniestros- posibilita el funcionamiento del cálculo de probabilidades y de la ley de los grandes números. Así, el asegurador desplazará el ámbito del azar de la totalidad de un ramo determinado, a cada uno de los riesgos asumidos, individualmente considerados. Como lo enseña el profesor Joaquín Garrigues, el "(...) azar domina siempre toda operación de seguro aisladamente considerada. Pero la explotación en masa, que caracteriza la actividad de las empresas aseguradoras, permite un cálculo preciso sobre la realización del riesgo y se funda en un doble dato: primero, que los riesgos que amenazan la vida o el patrimonio no afectan a todos, ni los afectan en la misma medida (...); segundo, que los hechos fortuitos, cuando se observan en gran número, demuestran una realización regular. Esta ley (llamada ley de los grandes números) permite a las empresas aseguradoras determinar, con referencia a cierto plazo de tiempo y a cierto objeto asegurado, la frecuencia con que resulta afectado por un riesgo también determinado." (Joaquín Garrigues, Curso de Derecho Mercantil, sexta edición, Porrúa, México, 1981, pág. 248) (...)' // De lo anterior se deduce, que la viabilidad técnica del contrato de seguro está unida a la producción masiva del mismo, en cuanto permite generar una estabilidad económica en las aseguradoras y de esta forma una garantía respecto del pago de los siniestros que se presenten en el correspondiente ramo. Entonces, si el pago de las primas adeudadas a las compañías de seguros en virtud de las pólizas expedidas por los riesgos asumidos, constituye la principal fuente de ingresos de esta actividad, cualquier alteración en su recaudo modificaría el equilibrio que por aquel mismo se obtiene de conformidad con las leyes estadísticas y cálculo de probabilidades propios de esta Industria."

12 "De acuerdo con el artículo 335 de la CP., la actividad aseguradora es de interés público y se ejerce con arreglo a la ley. Consulta el interés público que en los contratos de seguros, la parte débil que, por lo general, se identifica con el asegurado o beneficiario, realizadas las condiciones a las que se supedita su derecho reciba efectivamente y en el menor tiempo posible la prestación prometida." (Sentencia T -057 de 1.995. M.P. Dr. Eduardo Cifuentes Muñoz).

13 Consejo de Estado, Sección Tercera. Magistrado Ponente, JESÚS MARÍA CARRILLO BALLESTEROS. Radicación No. 8490. Santa Fe de Bogotá. D.C. veintisiete (27) de enero de dos mil (2000)

CONSEJO DE ESTADO

SALA DE LO CONTENCIOSO ADMINISTRATIVO

SECCIÓN TERCERA

RESPONSABILIDAD DEL ESTADO POR ACTOS TERRORISTAS - Regímenes aplicables según el caso: falla del servicio o riesgo excepcional / FALLA DEL SERVICIO POR ACTOS TERRORISTAS - Se aplica cuando los hechos sobrepasan la situación de violencia ordinaria vivida / RESPONSABILIDAD POR RIESGO EXCEPCIONAL - Se aplica cuando en un actuar legítimo la autoridad coloca en riesgo a unas personas en aras de proteger a la comunidad

El problema jurídico se centra en determinar si es imputable al Estado a título de omisión los daños padecidos a un asegurador por el pago del seguro al beneficiario quien perdió unos bienes por terceros indeterminados, en una vía pública. La responsabilidad del Estado por actos terroristas parte del supuesto de que el acto o la conducta dañosa son perpetrados por terceros ajenos a él, trátase de delincuencia común organizada o no, subversión o terrorismo. Para explicar esta situación la jurisprudencia ha aplicado, según el caso, los regímenes de responsabilidad por falla y por riesgo, según el caso; así: -Responsabilidad por falla cuando el daño se produce como consecuencia de la omisión del Estado en la prestación de los servicios de protección y vigilancia, es decir, cuando la imputación se refiere a la actuación falente o irregular de la Administración por su actuar omisivo, al no utilizar todos los medios que a su alcance tenía con conocimiento previo (previsible) para repeler, evitar o atenuar el hecho dañoso del tercero. Para determinar si la conducta del Estado fue anómala o irregular, por acción o por omisión, frente al hecho dañoso perpetrado por el tercero debe analizarse si para la Administración y para las autoridades era previsible que se desencadenara el acto terrorista. Este aspecto constituye uno de los puntos más importantes a analizar dentro de este régimen, pues no es la previsión de la generalidad de los hechos (estado de anormalidad del orden público) sino de aquellas situaciones que no dejan casi margen para la duda, es decir, las que sobrepasan la situación de violencia ordinaria vivida. Y se aplicará el régimen de Responsabilidad por riesgo excepcional cuando en un actuar legítimo la autoridad coloca en riesgo a unas personas en aras de proteger a la comunidad. La Sala ha precisado que los elementos estructurales de esta forma de responsabilidad son: “Un riesgo de naturaleza excepcional para los administrados que aparece por la amenaza potencial contra los instrumentos de acción del Estado – instrumentales, humanos y de actividad – en época de desórdenes públicos provenientes y propiciados por terceros que luchan contra el mismo Estado y que se concreta con el ataque real de esos instrumentos y la consecuencia refleja en los administrados (personas o bienes), que quebranta la igualdad frente a las cargas públicas. El daño a bienes protegidos por el derecho. El nexo de causalidad, entre el daño y la conducta de riesgo creada por el Estado, con eficiencia de producir aquel ... La responsabilidad patrimonial del Estado se ve comprometida cuando en ejercicio de sus actividades y obrando dentro del marco de las disposiciones legales, utiliza recursos o medios que colocan a los particulares o a sus bienes en situación de quedar expuestos a un riesgo de naturaleza excepcional; éste dada su gravedad excede las cargas normales que deben soportar los particulares como contrapartida de las ventajas que resulta de la existencia de dicho servicio público. La Sala no desconoce que el daño en sí mismo considerado no lo produjo el Estado, sino un tercero, pero si advierte que para su producción el mencionado riesgo sí fue eficiente en el apareamiento del mismo”.

NOTA DE RELATORIA: Ver sentencias del 5 de septiembre de 1996, exp. 10461, del 8 de febrero de 1999 exp. 10731 y del 10 de agosto de 2000 exp. 11585 de la Sección Tercera del Consejo de Estado

FALLA DEL SERVICIO DE DEFENSA - Cuando ocurre constituye una falla relativa del servicio. La previsibilidad se torna en una situación cualificada necesaria cuando se trata de imputaciones jurídicas por falla en el servicio, en este caso por actos terroristas / RESPONSABILIDAD POR RIESGO EXCEPCIONAL - Inexistencia / ACTOS TERRORISTAS - Quema de vehículos por grupos al margen de la ley

La falla endilgada en la demanda se sustentó, jurídicamente, en la omisión de la Nación en el deber constitucional de protección, vigilancia y seguridad de los bienes de las personas residentes en el territorio y se concretó, en los hechos relativos a que para las autoridades era previsible el suceso de un acto terrorista, tanto por el lugar, una zona de “desorden público” en la que delinquen activamente cuadrillas de guerrilleros como por el modo en que los organismos de seguridad conocían la situación vivida en esa región. Frente al tema de las obligaciones constitucionales, legales y reglamentarias de las competencias de las fuerzas militares, la Carta Política enseña que éstas ejercen la defensa de la Nación, primordialmente para la soberanía, la independencia, la integridad del territorio nacional y del orden constitucional (art. 217). La concepción jurídica en la fijación de esos deberes de defensa de la soberanía, independencia e integridad del territorio nacional y del orden constitucional, por su propia naturaleza, implica que esos intereses jurídicos tutelados estén amenazados o se estén vulnerando; que la situación de amenaza o de vulneración sean ciertas, concretas, determinadas y

por tanto previsible en las circunstancias de tiempo y lugar, porque el modo delictual siempre es sorpresivo; el conocimiento por parte del Estado de una situación de esas, jurídicamente lo incita, a poner en movimiento su actuar. La previsibilidad se torna pues en una situación cualificada necesaria cuando se trata de imputaciones jurídicas por falla en el servicio, en este caso por actos terroristas. Por ello es que la jurisprudencia, apreciando, de una parte, el marco jurídico del deber del Estado - que por lo demás la Constitución no califica de permanente -, y las circunstancias que lo ponen en movimiento, alude a que la responsabilidad del Estado puede darse por falla pero dentro de esas circunstancias relativas (falla relativa del servicio), debido a que a los militares no puede exigírseles que hubieran actuado cuando el mismo administrado sintió confianza en desplegar sus actividades en lugares y tiempo en los que no existía amenaza visible, a esas actividades. Examinando los hechos probados en el caso concreto, se observa que la información que tenía el demandado en cuanto a que en la zona – donde ocurrió el hecho dañoso – han operado grupos subversivos, como en la mayoría del país, tal situación de conocimiento sobre hechos históricos o pasados no hacen que ese conocimiento se traduzca, para el futuro, en situaciones de PREVISIBILIDAD porque esta cualidad dice de lo futuro y probable en la ocurrencia de hechos. Por lo tanto, no se probó que en el zona había señales de inminencia de ocurrencia de ataques – en el momento que ocurrió el hecho - para que la autoridad activara el deber de defensa y/o de conjuración para evitar actos terroristas o para terminarlos. Por lo tanto los hechos demostrados de incineración de veintiún vehículos Peugeot y del hurto de dos, el pago de indemnización por parte del Asegurador – hoy demandante – al propietario de las mercancías, no son imputables al Estado porque no se demostró que éste hubiese incumplido el deber de defensa, porque no conoció previamente a la ocurrencia de los hechos de una situación actual y cierta de inminente necesidad de defensa. También se observa que los hechos demandados no ocurrieron porque el Estado creó un riesgo con el cual expuso al dañado directo y al indirecto (cesionario legal) a sufrir una carga mayor a los demás administrados. Nota de Relatoría: Ver sentencia C-048 del 24 de enero de 2001, de la Corte Constitucional

DERECHO A LA PAZ - Naturaleza jurídica: Derecho colectivo. Puede dar lugar al ejercicio de la acción indemnizatoria

Se observa que entre los derechos de los administrados que están relacionados con los deberes Estatales está el de la paz “que es un deber de obligatorio cumplimiento”, según el artículo 22. Sin embargo el derecho a la paz no es de los derechos constitucionales de aplicación inmediata. Al respecto dice lo siguiente el artículo 85 constitucional: “Son de aplicación inmediata los derechos consagrados en los artículos 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 23, 24, 26, 27, 28, 29, 30, 31, 33, 34, 37 y 40”. El derecho a la paz es de los derechos de tercera generación, de carácter “proclamatorio” en razón de las dificultades para que de ellos se predique eficacia jurídica; es un derecho constitucional de carácter colectivo, según lo disponen el artículo 88 ibídem, el decreto ley 2.591 de 1991 (art. 3 num 3º) y la ley 472 de 1998, en el antepenúltimo inciso del artículo 4º cuando señaló: “Igualmente son derechos colectivos los definidos como tales en la Constitución, en las leyes ordinarias y los tratados de derecho internacional celebrados por Colombia”. Cuando tal derecho ha sido quebrantado y se han producido daños no solo a los intereses colectivos sino a los individuos que de él hacen parte, el afectado tiene acción indemnizatoria frente al agente o agentes del daño; el Estado será agente del daño en concurrencia con otros cuando acaezcan las situaciones especiales y fundadas de exigibilidad (previsibilidad) de la obligación de presencia para evitar o conjurar la alteración, que ya se explicaron.

Sentencia 3251(13251) del 02/05/02. Ponente: MARIA ELENA GIRALDO GÓMEZ, Actor: SEGUROS LA ANDINA S.A., Demandado: NACIÓN -MINISTERIO DE DEFENSA NACIONAL-

CONSEJO DE ESTADO

SALA DE LO CONTENCIOSO ADMINISTRATIVO

SECCIÓN TERCERA

Consejera ponente: MARIA ELENA GIRALDO GÓMEZ

Bogotá, D. C., dos (2) de mayo de dos mil dos (2.002)

Radicación número: 68001-23-15-000-1995-3251-01(13251)

Actor: SEGUROS LA ANDINA S.A.

Demandado: NACIÓN -MINISTERIO DE DEFENSA NACIONAL-

Referencia: ACCIÓN DE REPARACIÓN DIRECTA

I. Corresponde a la Sala decidir el recurso de apelación interpuesto por la parte demandante contra la sentencia proferida por el Tribunal Administrativo de Santander, el día 13 de noviembre de 1996, por medio de la cual resolvió:

“**PRIMERO.** Niéganse las pretensiones de la demanda

SEGUNDO. Condénase en costas a la parte demandante” (fol. 276).

II. Antecedentes procesales:

A. Actuación en la primera instancia.

1. Demanda:

La presentó la sociedad Seguros La Andina S.A., ante el Tribunal Administrativo de Santander el día **13 de julio de 1995** y la dirigió contra la Nación (Ministerio de Defensa Nacional).

a. Pretensiones.

“PRIMERA: Que la Nación - Ministerio de Defensa Nacional es responsable para la reparación del daño, por los hechos, acciones u omisiones, así como por la falla en el servicio de las autoridades públicas, ocurridos el día 30 de marzo de 1994, en las horas de la tarde en el sitio llamado La Lizama, jurisdicción de Barrancabermeja, por el incendio y destrucción de veintiún (21) automóviles, marca Peugeot, y por la sustracción de dos (2) automóviles de la misma marca, los cuales se identificaron por las siguientes características:

1. Berlina 306 XR – 5 puertas – 5 velocidades, dirección asistida, evalunas eléctricos puertas Del, proyectores anti-niebla, aire acondicionado, cierre central de puertas, chasis No. VF37AL6A230304943, motor No. 10KJB11001904, color beige mayfair.
2. Berlina 306 XR – 5 puertas – 5 velocidades, dirección asistida, evalunas eléctricos puertas Del, proyectores anti-niebla, aire acondicionado, cierre central de puertas, chasis No. VF37AL6A230321711, motor No. 10KJB11002022, color rojo feria.
3. Berlina 306 XR – 5 puertas – 5 velocidades, dirección asistida, evalunas eléctricos puertas Del, proyectores anti-niebla, aire acondicionado, cierre central de puertas, chasis No. VF37AL6A230304812, motor No. 10KJB11001912, color rojo albaicin.
4. Berlina 306 XR – 5 puertas – 5 velocidades, dirección asistida, evalunas eléctricos puertas Del, proyectores anti-niebla, aire acondicionado, cierre central de puertas, chasis No. VF37AL6A230304944, motor No. 10KJB11001906, color beige mayfair.
5. Berlina 306 XR – 5 puertas – 5 velocidades, dirección asistida, evalunas eléctricos puertas Del, proyectores anti-niebla, aire acondicionado, cierre central de puertas, chasis No. VF37AL6A230304637, motor No. 10KJB11001900, color gris quartz.
6. Berlina 306 XR – 5 puertas – 5 velocidades, dirección asistida, evalunas eléctricos puertas Del, proyectores anti-niebla, aire acondicionado, techo corredizo, cierre central de puertas, chasis No. VF37AL6A230303826, motor No. 10KJB11002032, color beige mayfair.
7. Berlina 306 XR – 5 puertas – 5 velocidades, dirección asistida, evalunas eléctricos puertas Del, proyectores anti-niebla, aire acondicionado, techo corredizo, cierre central de puertas, chasis No. VF37AL6A230303829, motor No. 10KJB11002035, color rojo feria.

8. *Berlina 306 XR – 5 puertas – 5 velocidades, dirección asistida, evalunas eléctricos puertas Del, proyectores anti-niebla, techo corredizo, cierre central de puertas, chasis No. VF37AL6A230316600, motor No. 10KJB61000904, color verde mayerling.*
9. *Berlina 306 XR – 5 puertas – 5 velocidades, dirección asistida, evalunas eléctricos puertas Del, proyectores anti-niebla, aire acondicionado, techo corredizo, cierre central de puertas, chasis No. VF37AL6A30316538, motor No. 10KJB61000912, color rojo feria.*
10. *Berlina 306 XR – 5 puertas – 5 velocidades, dirección asistida, evalunas eléctricos puertas Del, proyectores anti-niebla, techo corredizo, cierre central de puertas, chasis No. VF37AL6A30316602, motor No. 10KJB61000878, color rojo feria.*
11. *Berlina 306 XR – 5 puertas – 5 velocidades, dirección asistida, evalunas eléctricos puertas Del, proyectores anti-niebla, cierre central de puertas, chasis No. VF37AL6A230321706, motor No. 10KJB61000910, color beige mayfair.*
12. *Berlina 306 XR – 5 puertas – 5 velocidades, dirección asistida, evalunas eléctricos puertas Del, proyectores anti-niebla, cierre central de puertas, chasis No. VF37AL6A230316599, motor No. 10KJB61000897, color azul sajonia.*
13. *Berlina 306 XR – 5 puertas – 5 velocidades, dirección asistida, evalunas eléctricos puertas Del, proyectores anti-niebla, cierre central de puertas, chasis No. VF37AL6A230316532, motor No. 10KJB61000885, color azul sajonia.*
14. *Berlina 306 XR – 5 puertas – 5 velocidades, dirección asistida, evalunas eléctricos puertas Del, proyectores anti-niebla, cierre central de puertas, chasis No. VF37AL6A230316503, motor No. 10KJB61000908, color azul sajonia.*
15. *Berlina 306 XR – 5 puertas – 5 velocidades, dirección asistida, evalunas eléctricos puertas Del, proyectores anti-niebla, aire acondicionado, cierre central de puertas, chasis No. VF37AL6A230304640, motor No. 10KJB11001903, color blanco banquisa.*
16. *Berlina 306 XR – 5 puertas – 5 velocidades, dirección asistida, evalunas eléctricos puertas Del, proyectores anti-niebla, aire acondicionado, cierre central de puertas, chasis No. VF37AL6A230304808, motor No. 10KJB11001877, color beige mayfair.*
17. *Berlina 306 XR – 5 puertas – 5 velocidades, dirección asistida, evalunas eléctricos puertas Del, proyectores anti-niebla, aire acondicionado, cierre central de puertas, chasis No. VF37AL6A230304949, motor No. 10KJB11001899, color gris quartz.*
18. *Berlina 306 XR – 5 puertas – 5 velocidades, dirección asistida, evalunas eléctricos puertas Del, proyectores anti-niebla, aire acondicionado, cierre central de puertas, chasis No. VF37AL6A230304636, motor No. 10KJB11001879, color verde mayerling.*
19. *Berlina 306 XR – 5 puertas – 5 velocidades, dirección asistida, evalunas eléctricos puertas Del, proyectores anti-niebla, aire acondicionado, cierre central de puertas, chasis No. VF37AL6A230304807, motor No. 10KJB11001893, color beige mayfair.*
20. *Berlina 306 XR – 5 puertas – 5 velocidades, dirección asistida, evalunas eléctricos puertas Del, proyectores anti-niebla, aire acondicionado, cierre central de puertas, chasis No. VF37AL6A230304638, motor No. 10KJB11001689, color rojo albaicin.*
21. *Berlina 306 XR – 5 puertas – 5 velocidades, dirección asistida, evalunas eléctricos puertas Del, proyectores anti-niebla, aire acondicionado, cierre central de puertas, chasis No. VF37AL6A230304809, motor No. 10KJB11001890, color azul sajonia.*
22. *Berlina 306 XR – 5 puertas – 5 velocidades, dirección asistida, evalunas eléctricos puertas Del, proyectores anti-niebla, aire acondicionado, cierre central de puertas, chasis No. VF37AL6A230316061, motor No. 10KJB11001847, color rojo feria.*

23. *Berlina 306 XR – 5 puertas – 5 velocidades, dirección asistida, evalunas eléctricos puertas Del, proyectores anti-niebla, cierre central de puertas, chasis No. VF37AL6A230316504, motor No. 10KJB61000723, color verde mayerling.*

SEGUNDA. *Que la Nación – Ministerio de Defensa, es responsable patrimonialmente por los daños antijurídicos, causados por la omisión de las autoridades públicas, por la no protección de los bienes que fueron destruidos y hurtados, y que sufrió Seguros La Andina S.A., subrogataria legal de DIDACOL – DIDA Colombia S.A., en las circunstancias, de tiempo, modo y lugar, que se relacionarán en los hechos de la demanda.*

TERCERA. *Que el valor de los daños y perjuicios está determinado en la suma de doscientos cuarenta y cuatro millones doscientos ochenta y cinco mil doscientos dos pesos (\$244.285.202.00), indemnización que canceló Seguros La Andina S.A., a su aseguradora DIDACOL – DIDA Colombiana S.A., por la pérdida de los automóviles indicados arriba, durante su transporte en el trayecto interno, con aplicación a la póliza automática de seguro de transporte No. 446.*

CUARTA. *Que la Nación – Ministerio de Defensa Nacional, deberá reconocer y pagar a Seguros La Andina S.A., los intereses, y el reajuste monetario de la depreciación del dinero, que se liquidarán desde la fecha en que se canceló la indemnización, hasta la del pago, así como las costas del proceso y las agencias en derecho.*

QUINTA. *La Nación – Ministerio de Defensa Nacional, deberá pagar a la demandante Seguros La Andina S.A., las sumas de dinero a las cuales sea condenada dentro de los términos consagrados en el artículo 177 del Código Contencioso Administrativo, a la ejecutoria de la sentencia que ponga fin al proceso, o en el término que ésta lo indique” (fols. 184 y 185).*

b. Hechos:

“1. DIDACOL – DIDA COLOMBIANA S.A. contrató con Seguros La Andina S.A., mediante la póliza automática de transporte de seguro de mercancías No. 446, vigente desde el 1 de noviembre de 1992, los riesgos inherentes a este tipo de coberturas, desde cualquier lugar del territorio nacional, hasta cualquier lugar del territorio nacional, por medio de transporte terrestre, cancelando las primas correspondientes a los despachos efectuados durante los meses de febrero y marzo de 1994, en un límite máximo de responsabilidad de tres mil doscientos treinta y seis millones ochocientos cincuenta y dos mil ciento sesenta y dos pesos (\$3'.236.852.162.00), para la totalidad de los bienes asegurados, pero limitándose la responsabilidad del asegurador a la suma de ciento setenta millones de pesos (\$170.000.000.00), por cada despacho.

2. DIDACOL – DIDA COLOMBIANA S.A., compró a ‘automobiles Peugeot’ veintitrés (23) autos mediante facturas comerciales números:

1. No. 257522, por un valor de nueve mil doscientos cuarenta y nueve dólares (US \$9.249.00).
2. No. 257543, por un valor de nueve mil doscientos cuarenta y nueve dólares (US \$9.249.00).
3. No. 257520, por un valor de nueve mil doscientos cuarenta y nueve dólares (US \$9.249.00).
4. No. 257523, por un valor de nueve mil doscientos cuarenta y nueve dólares (US \$9.249.00).
5. No. 257511, por un valor de nueve mil doscientos cuarenta y nueve dólares (US \$9.249.00).
6. No. 257505, por un valor de nueve mil seiscientos sesenta y un dólares (US \$9.661.00).
7. No. 257507, por un valor de nueve mil seiscientos sesenta y un dólares (US \$9.661.00).
8. No. 268448, por un valor de ocho mil novecientos setenta y cinco dólares (US \$8.975.00).
9. No. 257538, por un valor de ocho mil novecientos setenta y cinco dólares (US \$8.975.00).

10. No. 257540, por un valor de ocho mil novecientos setenta y cinco dólares (US \$8.975.00).
11. No. 257541, por un valor de ocho mil quinientos sesenta y tres dólares (US \$8.863.00).
12. No. 257539, por un valor de ocho mil quinientos sesenta y tres dólares (US \$8.863.00).
13. No. 257535, por un valor de ocho mil quinientos sesenta y tres dólares (US \$8.863.00).
14. No. 257531, por un valor de ocho mil quinientos sesenta y tres dólares (US \$8.863.00).
15. No. 257514, por un valor de nueve mil doscientos cuarenta y nueve dólares (US \$9.249.00).
16. No. 257516, por un valor de nueve mil doscientos cuarenta y nueve dólares (US \$9.249.00).
17. No. 257524, por un valor de nueve mil doscientos cuarenta y nueve dólares (US \$9.249.00).
18. No. 257510, por un valor de nueve mil doscientos cuarenta y nueve dólares (US \$9.249.00).
19. No. 257515, por un valor de nueve mil doscientos cuarenta y nueve dólares (US \$9.249.00).
20. No. 257512, por un valor de nueve mil doscientos cuarenta y nueve dólares (US \$9.249.00).
21. No. 257517, por un valor de nueve mil doscientos cuarenta y nueve dólares (US \$9.249.00).
22. No. 257530, por un valor de nueve mil doscientos cuarenta y nueve dólares (US \$9.249.00).
23. No. 257532, por un valor de ocho mil quinientos sesenta y tres dólares (US \$8.863.00).

Todas fechadas el 3 de marzo de 1994, a excepción de la 268448, que lo fue el 10 de marzo de 1994, los descritos en las facturas citadas, e identificados por sus características en el segundo punto de la solicitud de declaraciones y condenas.

3. El INCOMEX, mediante registros Nos. 1139852, 1139853, 1139854 y 1139855, autorizó a DIDACOL – DIDA COLOMBIANA S.A., la importación de automóviles Peugeot, con una cilindrada superior a 1.500 c.c., pero inferior o igual a 3.000 c.c., para ser nacionalizados en la Aduana de Cartagena – Santa Marta o Zona Franca, país de origen y compra Francia, Puerto de Embarque Zeebrugge por vía marítima, válidos hasta el 15 de septiembre de 1994.

4. Los automóviles fueron embarcados a bordo de la M/N ‘AVILA STAR’, y amparados por los conocimientos de Embarque Nos. BSM012, BSM013, y BSM014, expedidos por Zeebrugge, el 17 de marzo de 1994.

5. Los vehículos fueron nacionalizados en la Aduana de Santa Marta, mediante Manifiesto No. 19100224, fechadas el 27 de marzo de 1994, bajo los formatos Nos. 484782, 484783, 484790, 484791, 484946 y 136392.

6. COLFLETAR, Representantes de Línea Marítimas, expide la Factura No. 9350 del 22 de marzo de 1994, correspondiente a la cancelación de los fletes de los conocimientos de embarque BSM 012/013/014.

7. La Sociedad Portuaria Regional de Santa Marta, mediante autorizaciones fechadas el 29 de marzo de 1994, bajo Nos. 29652, 29654, 29655, 29656 y 29657, autoriza el retiro de sus instalaciones la cantidad de 28 automóviles Peugeot, 306 XR, señalando el número de chasis de cada uno.

8. Los veintiocho (28) vehículos, fueron entregados a automóviles ALGAB y CIA LTDA., para su transporte entre el puerto de Santa Marta y la ciudad de Bogotá, en cuatro (4) despachos, así:

a. En la tractomula de placas SHE – 565, conducida por el señor José Salamanca (7 vehículos), relacionados con la siguiente forma:

- Peugeot 306	Chasis No. 30304943	Pedido 1403
- Peugeot 306	Chasis No. 30303826	Pedido 1404

- Peugeot 306	Chasis No. 30303829	Pedido 1404
- Peugeot 306	Chasis No. 30316535	Pedido 1406
- Peugeot 306	Chasis No. 30316538	Pedido 1406
- Peugeot 306	Chasis No. 30316600	Pedido 1406
- Peugeot 306	Chasis No. 30316505	Pedido 1406

b. En la tractomula de placas SCJ – 110, conducida por el señor Edgar Sogamoso (7 vehículos) relacionados de la siguiente forma:

- Peugeot 306	Chasis No. 30304633	Pedido 1403
- Peugeot 306	Chasis No. 30304807	Pedido 1403
- Peugeot 306	Chasis No. 30304638	Pedido 1403
- Peugeot 306	Chasis No. 30303830	Pedido 1404
- Peugeot 306	Chasis No. 30316503	Pedido 1405
- Peugeot 306	Chasis No. 30316532	Pedido 1405
- Peugeot 306	Chasis No. 30316504	Pedido 1405

c. En la tractomula de placas XH-0563, conducida por el señor Floresmiro González (7 vehículos) relacionados de la siguiente forma:

- Peugeot 306	Chasis No. 30321711	Pedido 1403
- Peugeot 306	Chasis No. 30304812	Pedido 1403
- Peugeot 306	Chasis No. 30304944	Pedido 1403
- Peugeot 306	Chasis No. 30304635	Pedido 1403
- Peugeot 306	Chasis No. 30316599	Pedido 1405
- Peugeot 306	Chasis No. 30321706	Pedido 1405
- Peugeot 306	Chasis No. 30316602	Pedido 1406

d. En la tractomula de placas SNB – 107, conducida por el señor Gonzalo Romero (7 vehículos) relacionados de la siguiente forma:

- Peugeot 306	Chasis No. 30304637	Pedido 1403
- Peugeot 306	Chasis No. 30304640	Pedido 1403
- Peugeot 306	Chasis No. 30304808	Pedido 1403
- Peugeot 306	Chasis No. 30304949	Pedido 1403
- Peugeot 306	Chasis No. 30314809	Pedido 1403
- Peugeot 306	Chasis No. 30316061	Pedido 1403
- Peugeot 306	Chasis No. 30321712	Pedido 1403

Despachos que se hicieron el 29 de marzo de 1994.

9. AUTOMÓVILES ALGAB Y CIA LTDA., facturaron a DIDACOL S.A., el 12 de abril de 1994, el valor de los fletes por el transporte de los vehículos entre Santa Marta y Santa Fe de Bogotá.

10. El día 31 de marzo de 1994, el señor Uriel José Francisco Salamanca Tovar, formula denuncia ante la Unidad Investigativa de la SIJIN, en Barrancabermeja, por el asalto que fueron víctimas las tractomulas de AUTOMÓVILES ALGAB Y CIA LTDA., que conducían los cuatro (4) despachos entre Santa Marta y Bogotá, el día 30 de marzo de 1994, manifestando que el día 29 de marzo los cuatro vehículos de propiedad de AUTOMÓVILES ALGAB Y CIA LTDA., iniciaron su viaje en Santa Marta, hacia las 4:00 de la tarde con destino a la ciudad de Bogotá, pernoctando el mismo día, en el Municipio de Copey, a donde llegaron a eso de las 8:00 de la noche, y reiniciaron el viaje, alrededor de las 4:30 de la mañana, del miércoles 30 de marzo, y cuando cruzaban por un punto conocido como el Líbano en el Departamento de Santander, alrededor del medio día, se les montó un sujeto en cada una de las mulas, instruyéndolos en el sentido que tenían que seguir por una trocha, llegando hasta el punto conocido como La Lizama, en donde los amenazaron con quemar las mulas y los vehículos que conducían, habiéndolos convencido que no les quemaran las tractomulas, para lo cual procedieron a bajar los automóviles Peugeot, que conducían, procediendo a prenderles fuego inmediatamente a los automóviles, y amenazándolos que si no se iban inmediatamente también procederían a quemar los vehículos transportadores, esto los obligó a dirigirse a Puerto Araujo, en donde descansaron para luego proceder a Barrancabermeja, a fin de poner en conocimiento a las autoridades los hechos (sic) que fueron víctimas.

El denunciante manifiesta que los automóviles incendiados fueron veintiuno (21), que los asaltantes tomaron dos (2) vehículos de éstos para huir, y que inexplicablemente salvaron cinco (5) automóviles, más uno marca Hyundai de otra tractomula que se les había unido a la caravana sin pertenecer a la misma empresa.

11. DIDACOL – DIDA COLOMBIANA S.A. mediante carta fechada en Santa Fe de Bogotá, el 13 de abril de 1994, interroga a sus transportadores AUTOMÓVILES ALGAB Y CIA LTDA, las razones por las cuales les entregaron Veintiún (21) vehículos completamente destrozados, y que sucedió con dos (2), que están pendientes de recibir.

12. AUTOMÓVILES ALGAB Y CIA LTDA., por intermedio de su gerente general, en carta calendada el 22 de abril de 1994 da respuesta en el sentido que al parecer estos vehículos fueron incendiados y hurtados por un frente guerrillero, que asaltaron los ‘tractacamiones’ en su ruta a Bogotá.

13. GPA URRUTIA Y CIA CORREDORES DE SEGUROS, a nombre de DIDA COLOMBIANA S.A., informa a SEGUROS LA ANDINA S.A., que la póliza TR-446, se vio afectada por la pérdida del despacho procedente de la Costa Atlántica, a consecuencia del ataque por parte de la guerrilla que destruyó totalmente veintiún (21) vehículos, y se robó otros dos (2).

14. El señor Brigadier General Director de Inteligencia del Ejército, mediante oficio No. 63141-CE-DINTE-INT4-252, fechado el 13 de abril de 1994, le acusa recibo al Director de Importaciones de DIDA COLOMBIANA S.A., DIDACOL, sobre la denuncia por terrorismo y quema de vehículos, y a renglón seguido le manifiesta ‘en lo que respecta a la autoría de los hechos, y a las demás circunstancias de tiempo, modo y lugar, inicialmente esta Dirección se informó en las noticias periodísticas, aparecidas en el diario El Tiempo, del 02-Abr-94, pág. 8ª, y complementadas con los datos suministrados en la denuncia que nos envió’.

15. El Director de Indemnizaciones de Seguros La Andina S.A., en carta fechada el 14 de abril de 1994, bajo No. DI-381/94, solicitó la colaboración de ROBINS DAVIS COLOMBIA, ajustadores internacionales de pérdidas, para que hiciera la investigación sobre el siniestro y determinara el valor de éste, de acuerdo al contrato de seguros consagrado en la póliza número 446.

16. DIDA – COLOMBIANA S.A., mediante carta calendada el 13 de mayo de 1994, solicita la indemnización correspondiente al amparo señalado en la Póliza Automática de Seguro de Transporte No. 446, a la Compañía de Seguros La Andina S.A.

17. Los ajustadores, mediante carta AJ-1430-OR, del 17 de mayo de 1994, rinden el informe definitivo, haciendo un análisis detallado de los hechos, frente a los despachos y los pedidos que había realizado DIDACOL-DIDA COLOMBIANA S.A., adjuntando pruebas gráficas del estado en que se encontraron los vehículos en el lugar que fueron incendiados, así como el valor definitivo del siniestro que debía reconocer y pagar la aseguradora, una vez restado el deducible, y el infraseguro que afectaba la póliza, por un valor de doscientos cincuenta y dos millones quinientos treinta y cinco mil doscientos dos pesos (\$252.535.202).

Es de destacar en este informe, el oficio fechado el 13 de abril de 1994, bajo No. 63141-CE-DINTED-INT4-252, mediante el cual el señor Director de Inteligencia del Ejército, da respuesta a la petición que formula el Director de Importaciones de DIDA COLOMBIANA S.A., en el cual manifiesta que la Dirección de Inteligencia del Comando del Ejército se informó en las noticias periodísticas aparecidas en el diario El Tiempo, del 2 de abril de 1994, complementadas con los datos suministrados en la denuncia que les envió.

18. GPA URRUTIA y CÍA, Corredores de Seguros, en carta fechada el 23 de mayo de 1994, bajo No. UR-0239, informa a Seguros La Andina S.A, que la entrega del salvamento está a cargo del señor Ricardo Andrade, en las antiguas instalaciones de DIDA COLOMBIANA S.A., hoy de PRACO.

19. El señor Oscar Miguel Montoya Olarte, mediante carta fechada el 26 de mayo de 1994, le ofrece en compra a Seguros La Andina S.A., de la chatarra de los veintiún (21) automóviles marca Peugeot, por la suma de doscientos cincuenta mil pesos mcte (\$250.000.00), tomándola en el lugar y estado en que se encuentran, la oferta es aceptada habiendo cancelado el proponente la suma ofrecida, y mediante carta del 30 de mayo de 1994, bajo No. DI-555/94, la Aseguradora autoriza a DIDA COLOMBIANA S.A, la entrega de la chatarra.

20. En ejercicio del derecho de petición, consagrado en la Constitución Nacional, en carta fechada el 8 de septiembre de 1994, Seguros La Andina S.A., solicita al Director de Inteligencia del Ejército, información relativa al conocimiento del Ejército Nacional, si en las zonas de Barrancabermeja (Santander), y el Líbano, jurisdicción de San Alberto Cesar, operan grupos guerrilleros, y si en desarrollo de investigaciones posteriores, se han podido establecer nuevos elementos de tiempo, modo y lugar, en cuanto a la acción guerrillera perpetrada en marzo 30 de 1994, en contra de la propiedad DIDA COLOMBIANA S.A., en donde resultaron incinerados veintiún (21) vehículos, y otros dos (2), fueron hurtados.

21. En carta DNI-1093-94, del 8 de septiembre de 1994, dirigida a la Fiscalía Regional de Barrancabermeja, Seguros La Andina S.A., le manifiesta que ha tenido conocimiento que a órdenes de ese Despacho se encuentran dos (2) vehículos recuperados por las autoridades dando las características de uno de ellos, e informando que fue hurtado el 30 de abril de 1994 (sic), al parecer por miembros de la guerrilla colombiana, y que en base de la póliza No. 446, se ha subrogado en los derechos del mencionado automotor, acompañado copia de la factura y declaración de aduanas.

22. En la misma fecha, mediante carta No. DNI-1094-94, remitida a la Fiscalía Regional de Barrancabermeja, Seguros La Andina S.A., solicita la colaboración de la Fiscalía para que el señor Juan Llanos, pueda inspeccionar los dos (2) automotores marca Peugeot 306 XR, modelo 1994, que se encuentran a órdenes de esa Fiscalía y que les pertenecen, a fin de iniciar las acciones necesarias para que les sean entregados como legítima propietaria.

23. Con oficio No. 68455-CI-DINTE-INT4-252, del 26 de septiembre de 1994, el Director de Inteligencia del Ejército Nacional, da respuesta al requerimiento formulado por Seguros La Andina S.A., así:

1. Es de conocimiento del Ejército Nacional que en las zonas aledañas a Barrancabermeja (Santander), delinquen activamente las cuadrillas de bandoleros autodenominadas ‘Resistencias Yariquíes, Manuel Gustavo Chacón y Capitán Parmenio del E. L. N., y las cuadrillas 24 y 26 de las F. A. R. C., cometiendo toda clase de delitos contra la vida y bienes de los asociados.

2. En el Líbano, jurisdicción del municipio de San Alberto (Cesar) delinquen activamente las cuadrillas ‘Camilo Torres Restrepo’ del E. L. N., 20 y 23 de las F. A. R. C., siguiendo las mismas modalidades delictuales de ataques indiscriminados a la vida y bienes de la población civil, violación del derecho internacional humanitario, secuestro de personas, destrucción de vehículos, etc.

3. No se han establecido nuevos elementos de tiempo, modo, y lugar en cuanto a la acción de los bandoleros el 30-Mar-94 en contra de la propiedad de DIDA COLOMBIANA S.A.

24. En memorial del 15 de noviembre de 1994, nuevamente Seguros La Andina S.A., solicita a la Fiscalía Regional de Barrancabermeja la entrega de los dos (2) vehículos Peugeot, 306 XR, modelo 1994, por haber cancelado la indemnización a su aseguradora DIDACOL, y haberse subrogado en sus derechos.

25. Con carta fechada el 12 de diciembre de 1994, el señor Luis Antonio Jiménez Sánchez, presenta oferta a Seguros La Andina S.A., para la compra de los dos (2) vehículos marca Peugeot, 306 XR, modelo 1994 colores rojo y verde que se encuentran a órdenes de la Fiscalía Regional de Barrancabermeja, ofreciendo la suma de ocho millones de pesos (\$8.000.000.00), en el estado, lugar y condición en que se encuentran, y asumiendo los costos y demás imprevistos.

26. El 4 de abril de 1995 se firma el contrato de compraventa de los dos automotores, identificándolos también por el número del motor y del chasis, por un precio de ocho millones de pesos (\$8.000.000.00), y constando el pago mediante recibo de caja No. 406832, del día 6 de abril de 1995.

27. Mediante Fax de abril 11 de 1995, la asistente judicial de la Fiscalía Regional Delegada de Barrancabermeja, comunica a Seguros La Andina S.A., para que agote los trámites relacionados con la entrega de los vehículos marca Peugeot, que se encuentran en calidad de depósito en las instalaciones de la Sección de Transportes del Batallón Antiaéreo Nueva Granada.

28. El 13 de mayo de 1994, bajo orden de pago No. 47593, Seguros La Andina S.A., cancela a su asegurado DIDACOL – DIDA COLOMBIANA S.A., la suma de doscientos cincuenta y dos millones quinientos treinta y cinco mil doscientos dos pesos mcte (\$252.535.202.00), pago que es confirmado mediante la constancia

expedida por el sr. Ricardo Juan Boada Rivas, representante legal de la asegurada, expedida el 21 de abril de 1995, autenticando su firma ante Notario, el 11 de mayo del mismo año.

29. Mediante factura No. 0740 del 18 de mayo de 1994, Robins Davis International Loss Adjusters, factura a Seguros La Andina S.A., el valor de los servicios y gastos correspondientes al ajuste de la póliza automática de transporte No. 446.

30. Mediante orden de pago No. 47616, Seguros La Andina S.A., cancela a ROBINS DAVIS COLOMBIA LTDA., el valor de los servicios y gastos, que sufragó con ocasión del ajuste del siniestro relatado arriba, por la suma de un millón cuatrocientos ochenta y siete mil quinientos treinta pesos (\$1'487.530.00).

31. En resumen deducidos los valores de ventas de salvamento por parte de Seguros La Andina, y adicionadas con los costos del ajuste, Seguros La Andina S.A., sufrió una pérdida económica de \$245.762.732.00” (fols. 185 a 196).

2. Actuación procesal:

a. Admisión:

Inicialmente el Tribunal ordenó corregir la demanda; en consecuencia la actora la corrigió y además adicionó la demanda en el capítulo de pruebas, solicitó dictamen pericial sobre el valor de intereses y la devaluación monetaria que se causen sobre el valor de la pérdida de los automóviles “a partir de la fecha de presentación de la demanda el 11 de julio de 1995, a la fecha que se dicte sentencia condenatoria contra la Nación – Ministerio Defensa Nacional (fols. 204 y 205, 206 y 207).

El día 1º de septiembre de 1995 se admitieron la demanda y su adición; el demandado y el Agente del Ministerio Público fueron notificados los días 20 de octubre y 4 de septiembre de 1995 (fols. 209 a 214).

b. Contestación:

El demandado solicitó la denegación de las pretensiones y propuso a título de excepciones de fondo los siguientes hechos:

Falta de legitimación en la causa por activa e indebida representación del demandante se basó en que el señor Eduardo Sarmiento Pulido quien ha conferido poder para demandar y dice actuar en nombre y representación de la sociedad Seguros La Andina S.A., y resulta que no acreditó en forma plena su condición de representante legal de la empresa “como quiera que de conformidad con el certificado de representación legal expedido por la Superintendencia Bancaria el representante legal de la sociedad es el señor Jhon Stanley Phillips Griffiths, Presidente de la Sociedad, en cuyas faltas accidentales, temporales o definitivas es reemplazado por el primer suplente y a falta de éste por el segundo suplente que es el señor Eduardo Sarmiento Pulido. Al no acreditarse la falta o ausencia del presidente o la ausencia o falta del primer suplente mal puede aceptarse al señor Eduardo Sarmiento Pulido como representante legal de la actora y correlativo a lo anterior cualquier petición o cualquier acto que aquel ejecute debe ser valorado como personal sin comprometer a la sociedad comercial “Seguros La Andina S.A.”.

Falta de legitimación en la causa por activa de la sociedad comercial “Seguros La Andina S.A.” argumentó que la sociedad actora adujo la calidad de subrogatoria legal de los derechos de la empresa “DIDA COLOMBIANA S.A.” perjudicada con el acto criminal ocurrido el 30 de marzo de 1994 con fundamento en el contrato de Seguros Nr. 446 “para tal efecto y como prueba de la titularidad de sus derechos, acompaña el recibo de indemnización y acto de cesión de los derechos y acciones con cabeza de la empresa DIDA COLOMBIANA S.A., en documento suscrito por el señor Ricardo Juan Boada Rivas, que dice ser el representante legal de la empresa en cita, mientras el certificado de existencia y representación legal expedido por la Cámara de Comercio de Bogotá cita en tal calidad al señor Gustavo Pradilla García”.

Expuso como argumento de fondo que conforme al Código de Comercio, el contrato de seguro es solemne, bilateral, oneroso, aleatorio y de ejecución sucesiva; que son partes de él el asegurador (asume el riesgo) y el tomador (traslada el riesgo) arts. 1.036 y 1.037 y añadió que “Por ministerio de la ley y del contrato el asegurador, en este caso, Seguros La Andina S.A., asumió lucrándose de la actividad comercial, el riesgo o suceso incierto que originó el perjuicio y se obligó frente al tomador en los términos del contrato de seguro. No opera la subrogación de que trata el artículo 1.096 del Código de Comercio contra la Nación – Ministerio de Defensa Nacional, toda vez que la norma en cita subroga

todos los derechos del asegurado contra las personas del siniestro, que de conformidad con los hechos expuestos en el libelo y según la denuncia de carácter penal formulada ante la Fiscalía General de la Nación, se señalaron como responsables del siniestro a sujetos pertenecientes a un grupo guerrillero que opera en el sur del Cesar municipio de San Andrés y área del Magdalena Medio Santandereano. La responsabilidad objetiva propia del derecho público dista sustancialmente de los principios y elementos que gobiernan el contrato de seguros con el derecho privado colombiano” (fols. 215 a 218).

c. Pruebas, conciliación y alegatos:

El Tribunal decretó pruebas el día 31 de enero de 1996; luego citó a audiencia de conciliación, el día 1 de agosto de 1996 que fracasó porque la parte demandada manifestó expresamente que no tenía ánimo conciliatorio porque los argumentos exceptivos por ella planteados en la contestación tenían la probabilidad de prosperar. Posteriormente corrió traslado para alegar, por auto de 23 de mayo siguiente. La parte demandada y el Ministerio Público guardaron silencio (fols. 224 a 225, 227, 234 a 235 y 240).

La **parte demandante** reiteró la solicitud de acceder a las súplicas de la demanda por fallas en el servicio por omisión del deber de protección de los ciudadanos al que están obligadas las autoridades; expuso que de conformidad con las pruebas documentales se estableció que la zona donde ocurrieron los hechos delinquen activamente cuadrillas de bandoleros, que dicha situación es conocida por los organismos de seguridad adscritos al Ministerio de Defensa pero que no obstante no protegen a las personas en sus bienes, evitando que se cometan desmanes contra la vida y las propiedades de los asociados; que las autoridades sólo actúan después de ocurridos los hechos. Frente a la contestación de la demanda, criticó a la demandada porque no desvirtuó los hechos, ni objetó ni controvertió las pruebas documentales presentadas con la demanda; y en relación con las excepciones dijo:

- *En cuanto a la legitimación en la causa por activa e indebida representación:* que la agilidad de la actividad mercantil implica que las empresas tienen una organización que les permite repartir el trabajo mediante delegación automática en materia de representación de la sociedad para evitar la acumulación del trabajo y para atender con eficiencia el cumplimiento del objeto social de la sociedad: que en el caso concreto, de conformidad con el certificado de existencia y representación, el Presidente de la aseguradora ejerce la representación legal, tiene tres suplentes quienes lo reemplazan indistintamente en sus faltas accidentales. El Vicepresidente Técnico es el encargado de los seguros y los reaseguros de conformidad con los estatutos y fue quien esgrimió esa calidad y otorgó el poder al abogado por estar facultado para ello.
- *En cuanto a la legitimación en la causa de la aseguradora,* resaltó que el Código de Comercio señala que el asegurador que pague una indemnización se subrogará por ministerio de la ley hasta concurrencia de su importe en los derechos del asegurado contra las personas responsables del siniestro (art. 1.096) y, en este caso, Seguros La Andina S.A. reconoció y pagó la indemnización fruto del siniestro a su asegurado DIDA COLOMBIANA S.A. ‘DIDACOL’ la cual recibió el pago, como lo certificó; que el uso y las costumbres de la actividad aseguradora han aceptado que los intermediarios entre el asegurador y el asegurado, hoy asesores de seguros, reciban a nombre del beneficiario el pago de las indemnizaciones “sin que esto haya conllevado a que se considere que este pago y recibo por él, se encuadre dentro de la excepción de falta de legitimación en la causa”.

En lo que concierne con el tema de fondo debatido, afirmó que “Si los organismos de Seguridad adscritos al Ministerio de Defensa estuvieran cumpliendo normal e eficientemente con la función constitucional ordenada por el artículo 2 de la Constitución Nacional, con el establecimiento de retenes y patrullajes permanentes para dar la protección a todas las personas residentes en Colombia, en el trayecto de la carretera que comunica a la Costa Atlántica con el interior del país y viceversa, no podríamos calificar la existencia de la falla del servicio por omisión, y los hechos por los cuales se interpuso la demanda no hubieran ocurrido y, además, no se habría producido el daño antijurídico de que trata el artículo 90 de la Constitución Nacional por el cual es responsable el Estado”.

Indicó que concretamente se acreditó la concurrencia de los tres elementos responsabilidad. La falla, porque fue el señor Brigadier General Director de Inteligencia del Ejército quien certificó que en el área de ocurrencia de los hechos en forma permanente operan cuadrillas de bandoleros pero dijo sólo conocer los hechos con ocasión del informe que le remitió el damnificado y por la información de prensa. El daño porque se demostró con el incendio y hurto de los bienes por los cuales el asegurado sufrió una lesión patrimonial y el asegurador también al pagar sumas superiores al valor real de la prima y la relación de causalidad porque si las autoridades cumplieran con su obligación de proteger a todas las personas residentes en Colombia estos hechos no hubieran ocurrido (fols. 241 a 268).

3. Sentencia apelada

El Tribunal negó las súplicas de la demanda y condenó en costas a la parte demandante. En primer término manifestó que las excepciones planteadas por la demandada son infundadas, de una parte, porque el poderdante es suplente del gerente y lo reemplaza en todas sus faltas y de otra, que la circunstancia de que una persona distinta al gerente de la sociedad demandante haya firmado el recibo de indemnización y el documento que convierte a esta sociedad en cesionaria de los derechos, no desvirtúa la calidad con la que concurre a este proceso la actora.

En segundo término, mencionó las pruebas y de ellas concluyó que no existe, en este caso, actividad administrativa generadora o causa de los perjuicios sufridos por la firma demandante como subrogatoria, tanto es así que la denuncia penal por la pérdida de los vehículos destruidos por el fuego y sustraídos a la firma transportadora se dirigió contra desconocidos (presumiblemente guerrilleros), por tanto el ilícito y los daños son imputables a terceros ajenos a la Administración y consideró que es imposible exigir al Estado proteger de todos los peligros a todos los habitantes en todos los sitios del territorio Colombiano. Añadió que el conocimiento tanto del Ejército como de la ciudadanía del lugar donde operan los grupos guerrilleros no modifica las condiciones objetivas de peligro que en un momento determinado pueden presentarse en algunos sitios por la actuación de los subversivos. Definió que el demandado no incurrió en omisión toda vez que no hubo por parte de la firma damnificada solicitud de protección especial para el transporte de los vehículos, por tanto mal puede exigir a la fuerza armada que estuviera presente en el sitio del asalto para impedir su ocurrencia. No se probó el daño antijurídico imputable al Estado (fols. 269 a 277).

4. Recurso de apelación:

La actora solicitó la revocatoria de la sentencia y que, en su lugar, se acceda a la petición de declaratoria de responsabilidad de la administración; criticó al Tribunal porque no tuvo en cuenta que la demanda se entabló contra la conducta omisiva y no contra acciones de las autoridades; por las consideraciones hechas. Para tal efecto se basó en el artículo 2 de la Constitución Nacional sobre los deberes de las autoridades, concretamente la protección de la vida, honra, bienes, creencias, derechos y libertades de todos los residentes sin que se condicione tal deber a la solicitud previa de las personas. Aseveró que si la autoridad reconoce que es de público conocimiento las actividades de la guerrilla en el lugar de los hechos tenía la obligación de mantener una estrecha vigilancia para prevenir durante las 24 horas del día la ocurrencia de los hechos de lo contrario la conducta de la administración es omisiva y vincula su responsabilidad y le obliga a resarcir los perjuicios. Además, la misión básica y fundamental de la fuerza pública es la de prevenir y reprimir tales actos ilícitos.

Añadió que el Tribunal no se percató que con posterioridad a los hechos sí hubo actuación posterior de las autoridades cuando el batallón antiaéreo Nueva Granada recibió en calidad de depósito dos automóviles marca Peugeot que fueron objeto del ilícito a petición de la Fiscalía General de la Nación mediante providencia de la Dirección Regional de Cúcuta y explicó que “esta referencia la hacemos en el sentido de confirmar que las autoridades sí conocían del ilícito, pero su actuación fue posterior, lo cual confirma la omisión en el cumplimiento de sus deberes legales y constitucionales por parte de las autoridades encargadas de proteger los derechos fundamentales, con lo cual se confirma la falla en el servicio de seguridad”.

Criticó el argumento de que las firmas aseguradoras cuando otorgan la póliza adquieren obligaciones y riesgos que deben asumir a cambio del pago sin tener en cuenta la previsión del artículo 1.096 del Código de Comercio que faculta al asegurador para subrogarse, por ministerio de la ley, en los derechos del asegurado contra las personas responsables del siniestro, como en efecto se hizo, al subrogarse contra la Nación (Ministerio de Defensa Nacional) por la omisión en la protección de los derechos fundamentales señalados. Finalmente, se remitió expresamente al alegato de conclusión (fols. 290 a 294).

B. Actuación en segunda instancia:

Esta Corporación admitió el recurso por auto de 6 de mayo de 1997 y luego ordenó correr traslado a las partes y al Ministerio Público para que presentaran alegaciones (fols. 296 y 298).

La **parte demandante** solicitó se revoque la providencia y en su lugar se acceda a las pretensiones, reiteró los argumentos del recurso y de los alegatos de conclusión; criticó la relevancia que la demandada pretende se le otorgue al contenido de la denuncia penal porque los terceros desconocidos pudieron realizar los hechos delictuosos gracias a que

las autoridades no tomaron medidas para prevenir la violación de derechos fundamentales a pesar de tener conocimiento sobre las continuas actuaciones de los subversivos en el lugar (fols. 305 a 308).

La **parte demandada** solicitó se confirme de la sentencia; argumentó que el amparo afectado con la póliza automática de transporte (No. 446) fue el de terrorismo por tanto la aseguradora asumió los riesgos propios y además recibió a satisfacción las primas pactadas y que en la denuncia penal formulada por el señor José Uriel Francisco Salamanca del día 31 de marzo de 1994 ante la Sección de Policía Judicial e Inteligencia de Barrancabermeja se lee: “delito terrorismo, sindicados 12 frente de las F. A. R. C.” Por consiguiente, si bien se presentó un daño éste no puede ser imputado a la administración ni por acción ni por omisión puesto que quienes cometieron el hecho fueron terceros ajenos a la entidad; que aun cuando las autoridades tienen la obligación de brindar protección a todos los habitantes en su honra y bienes es necesario entender que al Estado no se le puede exigir lo imposible dada la forma como operan los grupos subversivos (fols. 300 a 303).

El señor **Agente del Ministerio Público**, doctor Germán Rodríguez Villamizar, solicitó la confirmatoria de la sentencia apelada; dijo que no aparece establecida la falla del servicio alegada porque la demandante debió asumir el costo del siniestro por la pérdida de los vehículos incinerados y hurtados; no se estableció quiénes fueron realmente los autores de los hechos delictivos; no se probó que los daños fueran resultado de una falla del servicio por omisión de los deberes a cargo de las fuerzas del orden; no se acreditó la existencia de peticiones o requerimientos de protección especial para el transporte de los vehículos importados. Frente a este punto destacó que en casos como el que se discute ha sido reiterada la jurisprudencia en exigir que los afectados hayan solicitado la protección de la fuerza pública y que frente a dicha solicitud, a pesar de la evidencia del peligro, la Administración no hubiese actuado; no resulta suficiente para deducir la omisión de vigilancia sobre los vehículos que una autoridad militar haya certificado sobre la existencia de grupos subversivos y delincuenciales en la región donde aconteció el hecho, “hoy por hoy, en todas las vías nacionales por donde transiten automotores se requerirían innumerables vigilantes estatales, cuya existencia el Estado Colombiano no puede física ni económicamente sostener, y entonces, contra una dura realidad socioeconómica, se le estaría exigiendo al patrimonio estatal la satisfacción imposible de todos los desafueros que las fuerzas subversivas y delictuales ejecuten contra los colombianos”.

Concluyó que ni siquiera el calificativo de “zona roja” amerita una vigilancia especial para cada ciudadano e insistió en que sólo cuando el ciudadano solicite protección especial y la fuerza pública se niegue sin fundamento, se puede considerar que hay falla del servicio por omisión pero en este caso no se solicitó, por consiguiente no se dio falla del servicio ni hay lugar a declarar la responsabilidad del ente demandado (fols. 309 a 317).

El día 21 de febrero de 2002 se admitió el impedimento del Consejero Rodríguez Villamizar por haber conceptuado para este proceso, cuando ostentó la calidad de Procurador Delegado ante esta Corporación (fols. 321 a 323).

Se procede a decidir previas las siguientes,

III. CONSIDERACIONES:

Corresponde a la Sala decidir el recurso de apelación interpuesto por la parte actora contra la sentencia denegatoria proferida el día 13 de noviembre de 1996 por el Tribunal Administrativo de Santander. Las situaciones relativas a ser la sentencia de primera instancia desestimatoria absoluta de las pretensiones de la demanda y de condena en costas y tener el recurso de apelación interpuesto la finalidad de que aquella se revoque permiten a la Sala, jurídicamente, el análisis en forma amplia.

Aunque el demandante es el único que impugnó la sentencia, porque le fue adversa, se analizará oficiosamente la representación de la parte actora, que fue punto reprochado por el demandado en la primera instancia, para que no quede duda sobre la debida representación.

A. Representación de las Sociedades mercantiles aseguradoras:

El Código de Comercio en la regulación general para las sociedades enseña lo siguiente:

“Artículo 196. La representación de la sociedad y la administración de sus bienes y negocios se ajustarán a las estipulaciones del contrato social, conforme al régimen de cada tipo de sociedad. A falta de estipulaciones, se entenderá que las personas que representan a la sociedad podrán celebrar o ejecutar todos los actos y contratos comprendidos dentro del objeto social o que se relacionen directamente con la existencia y

el funcionamiento de la sociedad. Las limitaciones o restricciones de las facultades anteriores que no consten expresamente en el contrato social inscrito en el registro mercantil no serán oponibles a terceros”.

Y en la regulación especial para las sociedades anónimas, sobre la representación y las facultades de quienes la ostentan, prevé, respectivamente, lo siguiente:

Artículo 440. *La sociedad anónima tendrá por lo menos un representante legal con uno o más suplentes, designados por la junta directiva para períodos determinados, quienes podrán ser reelegidos indefinidamente o removidos en cualquier tiempo. Los estatutos podrán deferir esta designación a la asamblea.*

Artículo 442. *Las personas cuyos nombres figuren inscritos en el correspondiente registro mercantil como gerentes principales y suplentes serán los representantes de la sociedad para todos los efectos legales, mientras no se cancele su inscripción mediante el registro de un nuevo nombramiento”.*

Particularmente:

- *En cuanto a la sociedad anónima demandante se probó con certificado de la Superintendencia Bancaria, que se constituyó el día 24 de diciembre de 1937, que le fueron autorizados los ramos de “automóviles”, entre otros, y que la representación legal estaría a cargo del gerente quien tiene tres suplentes que lo reemplazan indistintamente en sus faltas accidentales, temporales o definitivas.*
- *En cuanto a la representación para el momento de presentación de la demanda, en el certificado se lee que estaba a cargo, entre otros, para el señor Eduardo Pulido Sarmiento (segundo suplente del presidente y Vicepresidente Técnico); documento autenticado, fol. 3.*

Por lo tanto, como las normas antes transcritas del Código de Comercial otorgan, salvo restricción expresa en el contrato social inscrito, la calidad de representantes de la sociedad anónima - para todos los efectos legales – al Presidente y a sus suplentes, es obvio jurídicamente que en este caso quien demandó tenía la representación a pesar de ser suplente porque el contrato social mencionado no lo restringió y además en el certificado de la Superbancaria se advierte la representación sin límites de los suplentes.

B. Problema jurídico e imputaciones:

Se centran, de un lado, en determinar si es imputable al Estado a título de omisión los daños padecidos a un asegurador por el pago del seguro al beneficiario quien perdió unos bienes por terceros indeterminados, en una vía pública.

De otro lado, las imputaciones jurídicas de la demanda fueron hechas a título de falla en el servicio, por omisión del deber de protección, vigilancia y seguridad de los bienes de las personas residentes en el territorio y las imputaciones fácticas o circunstancias que rodearon los hechos según el demandante fueron las siguientes:

- **De lugar:** porque en la zona que ocurrió el hecho dañoso era zona de “desorden público”, en la cual delinquen activamente cuadrillas de guerrilleros;
- **De modo:** porque a pesar de que esa situación era conocida por los organismos de seguridad, adscritos al Ministerio de Defensa, no se tomaron las medidas necesarias para proteger a las personas en sus bienes y para evitar que se cometieran desmanes contra la vida y las propiedades de los asociados; el Estado sólo actuó después de ocurridos los hechos, olvidando su función de prevención de actos ilícitos; si los organismos de Seguridad adscritos también a dicho Ministerio estuvieran cumpliendo normal e eficientemente con la función constitucional ordenada por el artículo 2º, con el establecimiento de retenes y patrullajes permanentes para dar la protección a todas las personas residentes en Colombia, no se daría la falla del servicio por omisión y los hechos por los cuales se demandó no hubieran ocurrido ni se hubiera producido el daño antijurídico (art. 90 C. N.).

Antes de proceder al análisis de fondo la Sala se referirá a los siguientes aspectos:

C. Cuestiones previas:

1. Sobre la prueba

El material probatorio de este juicio es únicamente documental y fue adjuntado con la demanda y en su mayoría se trata de documentos privados sin autenticar, algunos suscritos por la sociedad importadora de los vehículos DIDACOL S.A., y otros por la propia aseguradora (hoy actora) dentro del trámite de investigación del siniestro, reclamación y pago del seguro a favor en aquella y de recuperación de salvamentos, los cuales serán apreciados por la Sala porque fueron allegados al proceso bajo la vigencia del decreto ley 2.651 de 25 de noviembre de 1991, que autorizó lo siguiente respecto de los siguientes medios de prueba – entre otros -:

.Frente a los documentos declarativos emanados de terceros que podían ser estimados por el juez sin necesidad de ratificar su contenido, salvo que la parte contra la cual se aducen solicite su ratificación de manera expresa (art. 22 num. 2) y

.Frente a los documentos presentados por las partes que se reputarían auténticos sin necesidad de autenticación ni presentación personal cuando fueren incorporados a un expediente judicial independientemente que tuvieran como destino servir o no de prueba (art. 25).

Por tanto la parte interesada en su contradicción debió solicitar su ratificación expresamente y/o tacharlos de falso, en al oportunidad legal (art. 289 C. P. C) . En el caso concreto la Nación al contestar la demanda no solicitó pruebas ni pidió la ratificación de esos documentos ni los tachó de falsos. Por lo tanto son apreciables.

2. Cuestión previa sobre la acción de reparación directa por subrogación de derechos del asegurador demandante.

a. La demandante, Compañía de Seguros LaAndina S. A. , adujo en la demanda que es la subrogataria, por ministerio de la ley, en los derechos del asegurado (DIDACOL) contra la Nación responsable del siniestro, porque pagó la indemnización a DIDACOL, hasta concurrencia de su importe.

b. La subrogación por pago indemnizatorio es un derecho que otorgan la ley civil y mercantil, entre otros, contra los presuntos responsables del siniestro. En efecto:

. El Código Civil dispone que la subrogación es la transmisión de los derechos del acreedor a un tercero, que le pagó (art. 1.666); que la subrogación del tercero en los derechos del acreedor se hace en virtud de la ley o de una convención (art. 1.667 ib); que la subrogación, legal o convencional, traspasa al nuevo acreedor todos los derechos, acciones y privilegios del antiguo, así contra el deudor principal como contra cualesquiera terceros obligados.

. El Código de Comercio, aplicable a la legislación de seguros, prevé a favor del asegurador la subrogación legal en los derechos de su asegurado en aquellos eventos en que aquél pague la indemnización, limitado claro está hasta concurrencia del importe. Le permitirá ejercer las acciones y reclamar contra las personas responsables del siniestro (art. 1.096). Igualmente indicó que al asegurado se le prohíbe renunciar a sus derechos contra terceros responsables del siniestro so pena de perder el derecho a la indemnización y de otra, la obligación, a petición del asegurador, de hacer todo lo que esté a su alcance para permitirle el ejercicio de sus derechos derivados de la subrogación so pena de perder o reducir la indemnización (arts. 1.097 y 1.098 ib).

c. En tal materia de la subrogación, con base en dichos Códigos, la doctrina Colombiana ha dicho:

“Si la indemnización a cargo del asegurador...encuentra su origen en la responsabilidad indirecta, la subrogación es viable, sujeta - claro está - a las limitaciones previstas por el art. 1.098, toda vez que ‘las personas obligadas a la reparación de los daños causados por las que de ellas dependen, tendrán derecho para ser indemnizadas sobre los bienes de éstas, si los hubiere’ (C.C., art. 2.352)...

La subrogación personal del asegurador en los derechos del asegurado contra las personas responsables del siniestro (art. 1.096), que puede ser general (id, inc. 1º) o especial (id., inc. 2º), está sujeta a los siguientes presupuestos legales:

A. Subrogación general:

La general (a) a la vigencia de un seguro en el momento del siniestro, (b) a la indemnización del daño causado por el siniestro y (c) a la identificación de un responsable civil de este daño.

a) El titular de la acción subrogatoria no es otro que 'el asegurador' vinculado a la víctima del daño por un contrato específico de seguro, que cubra el interés afectado por el siniestro, contra el riesgo que lo ha causado y que haya estado vigente en el momento de su ocurrencia. La subrogación asegurativa solo encuentra su origen legal en el contrato de seguro...Si,...al registrarse el siniestro el contrato no se había celebrado o ya había expirado, no podrá darse la subrogación....

b) El título de la subrogación legal solo se integra con la indemnización efectiva del daño asegurado, esto es, con el pago. No basta el nacimiento de la obligación a cargo del 'asegurador', que deriva de la ocurrencia del siniestro (art. 1.054). Ni la promesa formal de cumplirla. Importa, claro está, que el pago se haga de buena fe y al titular del derecho a la prestación asegurada...Lo que importa en síntesis, como origen de la subrogación, es que el asegurador indemnice al asegurado el mismo daño imputable a la responsabilidad del tercero, con base en el contrato de seguro...

c) El tercer presupuesto de la subrogación es que el daño ya indemnizado, en virtud del contrato de seguro, sea imputable a la responsabilidad de una persona distinta del asegurado o, mejor aún, que dé origen a una acción de responsabilidad civil de este contra aquella. La responsabilidad misma puede ser subjetiva u objetiva, contractual o extracontractual, basarse en la culpa presunta o en la culpa probada, directa o indirecta, porque la ley no distingue. 'El asegurador...se subrogará...en los derechos del asegurado contra las personas responsables del siniestro' (art. 1.096)...por la vía de la subrogación, el asegurado 'trasmite' al asegurador, ope legis, su propio derecho, el mismo que le confiere la ley como damnificado por el hecho ilícito. Luego, en ejercicio de la acción subrogatoria, es asegurador debe invocar y probar los hechos constitutivos de la obligación a cargo del responsable en armonía con la naturaleza de la responsabilidad que le da origen. Y, entre ellos, el daño y su magnitud económica. No basta, como es obvio, la prueba de la indemnización pagada al asegurado en virtud del contrato de seguro que también es necesario, desde luego, como presupuesto y límite de su derecho a la subrogación. Debe probar, además, el derecho del asegurado y su valor.

B.

Subrogación especial:

En la subrogación especial debe también (a) existir o preexistir un seguro vigente en el momento del siniestro que, con iguales elementos que en la general, esté destinado, más exactamente, haya sido suscrito por el acreedor (tomador-asegurado) para proteger su derecho real en la cosa asegurada (art. 1096, inc. 2°), (b) haberse pagado la indemnización por el asegurador y, (c) no haberse extinguido, claro está, la obligación del deudor. Porque, además, en esta hipótesis, se hubiera extinguido también, por falta del interés asegurable, el seguro respectivo. Lo que la ley no exige, como presupuesto en la subrogación especial, es que el siniestro sea imputable a la responsabilidad de un tercero. Dada su naturaleza, esta circunstancia es irrelevante" (11).

d. Ahora, particularmente, se demostró que la demandante en este juicio fue aseguradora de DIDACOL, que cuando acaeció el siniestro de pérdida de bienes le pago indemnización al asegurado. Sobre estas afirmaciones en el juicio existen las siguientes pruebas:

d.1. Que la sociedad DIDA COLOMBIANA S.A. "DIDACOL" suscribió una póliza automática de transporte con la Compañía de Seguros La Andina S.A., el día 17 de marzo de 1993, por \$170.000.000.00 como suma asegurada, con cobertura completa dentro del país; se aseguró una vigencia retroactiva de 11 de noviembre de 1992 y con "amparo básico, aver. particular, fal. de entrega, saqueo". Dentro de los bienes y trayectos asegurados, las partes especificaron: "Vehículos automotores y repuestos para los mismos" y "despachos en el interior del país y despachos locales. DEDUCIBLES: 1.5% Mínimo \$1.000.000 terrorismo sobre el valor total del despacho. 0.25% mínimo \$500.000 otras pérdidas". Dentro del mismo contrato de seguro de transportes (No. 446), en fecha de 21 de abril de 1994, en cuanto a intereses, amparos, suma asegurada, deducibles y primas, se lee:

"Trayecto No. 48. Desde y hasta cualquier territorio nacional.

Intereses asegurados: Amparo básico \$3'.236.852.162 que comprende los despachos efectuados durante los meses de febrero y marzo de 1994, despachos nacionales según relación adjunta al certificado arriba citado (el número 16)".

Se incluyó "Aver.particular" \$3'.236.852.162, fal. de entrega \$3'.236.852.162 y saqueo \$3'.236.852.162.

¹¹ Ossa Efrén. Teoría General del Seguro. El contrato. Bogotá. Ed. Temis. 1991. Págs. 182, 190 a 193.

Cláusulas Huelga, Deducible, pago de prima” (documento privado autenticado, fols. 4 a 8).

d.2. Que el día 13 de mayo de 1994, la sociedad DIDACOL S.A. solicitó a la Compañía de Seguros La Andina S.A. el pago de \$252'535.202 por concepto de indemnización, por la pérdida por terrorismo en hechos ocurridos el 30 de marzo de 1994; manifestó que la reclamación se sujetaba a los términos, condiciones y estipulaciones de la póliza automática de transportes No. 446 y se comprometió a colaborar con la subrogación de la compañía en los términos de las condiciones de la póliza (documento privado, fol. 79).

d.3. Que DIDACOL S.A. recibió de Seguros La Andina S.A. por concepto de indemnización única, total y definitiva por la pérdida, la suma de \$252.535.202 (documento privado, fol. 170 y 171).

Esas pruebas evidencian que existió un contrato de seguro de responsabilidad (póliza automática de transportes) entre La Andina S.A y DIDACOL S.A; que dentro de los riesgos asegurados estaba amparado el “terrorismo” (art. 1.054 C. Co.) con un deducible en monto exacto, lo cual permite clarificar que no se aplicaba al caso concreto el artículo 1.105 ⁽¹²⁾ sobre la generalidad de excluir los riesgos catastróficos; que la aseguradora pagó efectivamente a la asegurada \$252.535.202 que correspondían al monto de la indemnización pactada (concurrencia del importe arts. 1.073 y 1.080, mod. Ley 510/99) por la ocurrencia del siniestro (art. 1.072 incendio de vehículos) imputable a tercero (acto terrorista).

En consecuencia, si se cumplieron los presupuestos de la subrogación en los derechos del asegurado para ejercitar la acción indemnizatoria.

D. Marco general de la “Responsabilidad del Estado” en relación con los actos terroristas:

La responsabilidad del Estado por actos terroristas parte del supuesto de que el acto o la conducta dañosa son perpetrados por terceros ajenos a él, trátase de delincuencia común organizada o no, subversión o terrorismo. Para explicar esta situación la jurisprudencia ha aplicado, según el caso, los regímenes de responsabilidad por falla y por riesgo, según el caso; así:

- ***Responsabilidad por falla*** cuando el daño se produce como consecuencia de la omisión del Estado en la prestación de los servicios de protección y vigilancia, es decir, cuando la imputación se refiere a la actuación faliente o irregular de la Administración por su actuar omisivo, al no utilizar todos los medios que a su alcance tenía con conocimiento previo (previsible) para repeler, evitar o atenuar el hecho dañoso del tercero.

Para determinar si la conducta del Estado fue anómala o irregular, por acción o por omisión, frente al hecho dañoso perpetrado por el tercero debe analizarse si para la Administración y para las autoridades era previsible que se desencadenara el acto terrorista. Este aspecto constituye uno de los puntos más importantes a analizar dentro de este régimen, pues no es la previsión de la generalidad de los hechos (estado de anormalidad del orden público) sino de aquellas situaciones que no dejan casi margen para la duda, es decir, las que sobrepasan la situación de violencia ordinaria vivida, a título de ejemplo: región en la que se ha declarado turbado el orden público, paro de transportes, revueltas masivas callejeras, población bajo toque de queda, amenaza de toma subversiva anunciada a una población esto en cuanto hace a los conglomerados sociales; amenazas o atentados previos contra la vida en cuanto hace a las personas individualmente consideradas, etc.

Queda claro entonces que la sola circunstancia de que el afectado no haya solicitado protección previa especial no siempre será causal que permita exonerar a la administración de su deber de protección y vigilancia sino dependiendo del caso particular pueden existir otras circunstancias indicadoras que permitieran a las autoridades entender que se cometería un acto terrorista. Si del estudio fáctico y probatorio se concluye que para la Administración sí existieron circunstancias que indicaban la probabilidad de comisión de un acto terrorista y no obstante teniendo algo más que una suposición omitió tomar las medidas necesarias para prestar el servicio de

¹² “**Artículo 1.105.** Se entenderán igualmente excluidas del contrato de seguro las pérdidas o daños que sufran los objetos asegurados, o los demás perjuicios causados por:

1. Guerra civil o internacional, motines, huelgas, movimientos subversivos o, en general, conmociones populares de cualquier clase, y
2. Erupciones volcánicas, temblores de tierra o cualesquiera otras convulsiones de la naturaleza”.

vigilancia y protección y ese acto terrorista causó daños le sería imputable responsabilidad a título de falla dada la transgresión a su deber de proteger a las personas y bienes de los residentes en el país; profusamente así, se ha pronunciado la Sala ¹³.

- *Responsabilidad por riesgo excepcional* cuando en un actuar legítimo la autoridad coloca en riesgo a unas personas en aras de proteger a la comunidad.

La Sala ha precisado que los elementos estructurales de esta forma de responsabilidad son: “Un riesgo de naturaleza excepcional para los administrados que aparece por la amenaza potencial contra los instrumentos de acción del Estado – instrumentales, humanos y de actividad – en época de desórdenes públicos provenientes y propiciados por terceros que luchan contra el mismo Estado y que se concreta con el ataque real de esos instrumentos y la consecuencia refleja en los administrados (personas o bienes), que quebranta la igualdad frente a las cargas públicas. El daño a bienes protegidos por el derecho. El nexo de causalidad, entre el daño y la conducta de riesgo creada por el Estado, con eficiencia de producir aquel ... La responsabilidad patrimonial del Estado se ve comprometida cuando en ejercicio de sus actividades y obrando dentro del marco de las disposiciones legales, utiliza recursos o medios que colocan a los particulares o a sus bienes en situación de quedar expuestos a un riesgo de naturaleza excepcional; éste dada su gravedad excede las cargas normales que deben soportar los particulares como contrapartida de las ventajas que resulta de la existencia de dicho servicio público. La Sala no desconoce que el daño en sí mismo considerado no lo produjo el Estado, sino un tercero, pero sí advierte que para su producción el mencionado riesgo sí fue eficiente en el apareamiento del mismo” ⁽¹⁴⁾.

Además ha dicho lo siguiente en las siguientes providencias:

En sentencia de 5 de septiembre de 1996:

“En cuanto a la imposibilidad jurídica de aplicar la tesis del daño especial resulta pertinente indicar que en primer lugar los hechos y daños fueron causados por terceros que si bien obraron al margen la ley no por ello automáticamente e indefectiblemente vinculan patrimonialmente al Estado para resarcir perjuicios, pues no es dable exigir de la administración lo imposible, o aquellas cargas que superen su verdadera capacidad de acción y reacción para controlar el orden público, toda vez que sus recursos no permiten disponer al pie de cada ciudadano, en cada metro de las vías, en cada rincón del país un agente del orden para garantizar la seguridad en términos absolutos de nuestra organización política” ⁽¹⁵⁾

En sentencia de 8 de febrero de 1999:

“En relación con la responsabilidad del Estado por los daños producidos a las personas o a los vehículos que prestan servicio público de transporte o de carga por actos terroristas, la jurisprudencia ha considerado...que en los casos en que se obliga al transportador a prestar el servicio en momentos de alteración del orden público, el Estado debe responder por los perjuicios que aquéllos sufran, así se preste la debida vigilancia, porque se produce en estos casos un desequilibrio en las cargas públicas” ¹⁶

Y en providencia de 10 de agosto de 2000:

“...es necesario el estudio de las circunstancias en que ocurren los hechos, en cada caso concreto, para establecer si el Estado es responsable del daño sufrido por los demandantes. Adicionalmente, es claro que para la Sala que reflexiones similares a las expuestas en tales providencias, con base en los regímenes antes referidos, permiten obtener, con fundamento en el artículo 90 de la Constitución Política vigente, conclusiones parecidas, en la medida en que antes, como ahora, el punto central de la discusión se sitúa en uno de los elementos fundamentales de la responsabilidad, la imputabilidad del daño.

En efecto, con base en el análisis de los casos antes citados, se concluye que el Estado sólo fue condenado en aquéllos en que no se pudo establecer la existencia del hecho de un tercero, como causal de exoneración de responsabilidad, dado que el mismo no resultaba ajeno a la acción u omisión del Estado. Y para ello, la Sala

¹³ Frente a este tratamiento pueden consultarse sentencias de la Sección Tercera, de 13 de mayo de 1996, expediente 10.627, actor Gustavo Garrido Vecino; de 5 de septiembre de 1996, expediente 10.654, actor Augusto Anaya Hernández; de 3 de abril de 1997, expediente 12.378, actor Gonzalo Rojas Velásquez.

¹⁴ Sentencia de 19 de abril de 2001. Exp. 12.179. Actor: María Margarita Cáceres Zambrano y otros.

¹⁵ Expediente: 10.461. Actor: Laureano Calviche y otro.

¹⁶ Expediente 10.731. Actor: Eduardo Navarro Guarín.

debió precisar, en cada caso, cual era el alcance de su deber de vigilancia y protección. Es ésta la razón por la cual se acudió, en algunos eventos, al concepto de relatividad de la falla del servicio, que más precisamente alude a la relatividad de las obligaciones del Estado y, por lo tanto, permite determinar, en cada situación particular, si el daño causado resulta o no imputable a la acción u omisión de sus agentes. En otros eventos, como se vio, la imputabilidad surge de la creación de un riesgo, que es considerado excepcional, en la medida en que supone la puesta en peligro de un grupo particular de ciudadanos, como consecuencia del desarrollo de una actividad dirigida a proteger a la comunidad en general. No se trata aquí, entonces, de la existencia de una acción u omisión reprochable de la administración, sino de la producción de un daño que, si bien es causado por un tercero, surge por la realización de un riesgo excepcional, creado conscientemente por ésta, en cumplimiento de sus funciones. Y es la excepcionalidad del riesgo lo que hace evidente la ruptura del equilibrio frente a las cargas públicas y posibilita el surgimiento de la responsabilidad patrimonial del Estado” (17)

Dentro del marco constitucional y jurisprudencial anterior se entrará en la materia del litigio.

E. Caso particular:

1. Medios de prueba

a.1. El **día 24 de diciembre de 1937** se constituyó la sociedad comercial Seguros La Andina S.A., le fueron autorizados los ramos de “automóviles ()” (documento autenticado, fol. 3).

a. 2. El **día 5 de mayo de 1976**, se constituyó la sociedad DIDA COLOMBIANA LTDA ‘DIDACOL LTDA’ que luego se transformó en sociedad anónima cuyo objeto social es la fabricación, ensamble y reparación, la importación, compra venta, la representación y distribución de vehículos automotores (documento público autenticado, fols. 175 a 178).

a.3. El **día 3 de marzo de 1994**, “Automóviles Peugeot” – Francia expidió las facturas de 23 vehículos Peugeot a favor de DIDA COLOMBIANA S.A. que coinciden en su descripción con los relacionados en el acápite de hechos de la demanda (documentos privados autenticados, fols. 11 a 33).

a.4. El día 17 de marzo de 1993, la DIDACOL suscribió póliza automática de transporte con la Compañía de Seguros La Andina S.A., como ya se indicó antes. Luego el 21 de abril de 1994 dentro del mismo contrato de seguro de transportes (No. 446) en cuanto a intereses, amparos, suma asegurada, deducibles y primas, se lee:

“Trayecto No. 48. Desde y hasta cualquier territorio nacional.

Intereses asegurados: Amparo básico \$3’.236.852.162 que comprende los despachos efectuados durante los meses de febrero y marzo de 1994, despachos nacionales según relación adjunta al certificado arriba citado (el número 16)”.

Se incluyó “Aver.particular” \$3’.236.852.162, fal. de entrega \$3’.236.852.162 y saqueo \$3’.236.852.162. Cláusulas Huelga, Deducible, pago de prima” (documento privado autenticado, fols. 4 a 8).

a.5. El **día 17 de marzo de 1994**, se expidió el conocimiento de embarque de 23 de los vehículos Peugeot desde el puerto de Zeebrugge con destino a DIDA COLOMBIANA S.A. en el puerto de Santa Marta (documento privado autenticado, fols. 38 y 39).

a.6. El **día 28 de marzo de 1994** se pagaron los aranceles de importación de los 23 automóviles y se declaró el valor en aduanas (documentos privados autenticados, fols. 41 a 60).

a.7. El **día 29 de marzo de 1994**, la Sociedad Portuaria Regional de Santa Marta S.A., expidió el documento único de salida de la zona franca de los 23 vehículos (documento privado vía fax, fols. 62 a 65 y documento privado sin autenticar, fol. 66).

a.8. El **día 31 de marzo siguiente**, el señor José Uriel Francisco Salamanca Tovar formuló denuncia penal y narró lo siguiente:

“el día martes salimos de Santa Marta como a la cinco de la tarde con destino a

¹⁷ Expediente 11.585. Actor: Noemí Revelo de Otálvaro y otros.

Bogotá y el mismo martes llegamos a un pueblito llamado Copey como a las 20 horas de la noche y salimos de allí como a las cuatro y media de la mañana del día miércoles con el fin de llegar a la ciudad de Bogotá y pasando por el Líbano (Stander) como a eso de las doce y media del día se nos montó un sujeto a cada una de las mulas y nos manifestaron que teníamos que meternos por la trocha hasta que llegamos por un sitio llamado La Lizama en donde nos dijeron que nos iban a quemar las mulas con todo lo que lleváramos pero nosotros les insistimos para que no nos quemaran las mulas entonces llegamos a la conclusión de que bajábamos los carros que transportábamos pero que no nos quemaran las mulas y fue así como nos dispusimos a bajar los vehículos e inmediatamente les prendieron fuego y fue así como después de que estaban ardiendo en llamas nos dijeron que nos fuéramos ya que si no nos iban a quemar las mulas y fue así como nos fuimos para Puerto Araujo con el fin de descansar”.

Dijo que los delincuentes eran 6 jóvenes (hombres y mujeres) vestidos de pantalones verdes y botas de caucho, que portaban diferentes tipos de armas como fusiles, metralletas y revólveres, y dijeron pertenecer al 12 frente de las F. A. R. C.; precisó que la mayoría de los vehículos, que pertenecían a la Compañía DIDACOL, fueron incinerados y hurtados (fols. 71 y 72).

a.9. El **día 6 de abril de 1994**, la sociedad GPA Urrutia y Cía – Corredores de Seguros informó a Seguros Andina S.A que la póliza TR-446. DIDA COLOMBIANA N/Sntro. 940049 se vio afectada por la pérdida de un despacho que venía de la Costa Atlántica “a consecuencia del ataque por parte de la guerrilla que destruyó totalmente 21 vehículos y se robó otros dos” (documento privado, fol. 75).

a.10. El **día 12 de abril de 1994**, la sociedad Automóviles ALGAB y cía Ltda. expidió 3 facturas cambiarias de transporte que detallaron el valor del transporte de 28 vehículos de Santa Marta a Bogotá, dentro de los que figuran los vehículos Peugeot pero en dos de ellas no hay valores expresos y en ninguna figura que hayan sido aceptadas (documentos privados, fols. 67 a 70).

a.11. El **día 13 siguiente**, sucedieron los siguientes hechos:

la sociedad DIDA COLOMBIANA S.A. envió comunicación a Automóviles ALGAB, en la que se lee:

“En marzo 29/94, atendiendo nuestras instrucciones, les fueron entregados en la ciudad de Santa Marta para transportar a Bogotá, los siguientes vehículos:...

Como de los 28 vehículos, tan solo recibimos cinco (5) en perfectas condiciones, les agradecemos nos aclaran:

1. ¿Por qué razón nos entregaron veintiún (21) vehículos completamente destrozados?, y

2. ¿Qué sucedió con los dos (2) vehículos que aún estamos pendientes de recibir?”

(documento privado, fol. 73).

El Director de Inteligencia del Ejército respondió a DIDACOL S.A., lo siguiente:

“...acuso recibo de su comunicación DCBS-0487 del 07-ABR-94, con la cual acompañó fotocopia de la denuncia penal No. 8921, formulada por el señor José Uriel Francisco Salamanca Tovar, ante la Sala de Denuncias de la Sección de Policía Judicial de Inteligencia (SIJIN) de Barrancabermeja (S), por los delitos de ‘terrorismo y quema de vehículos (6)’ valorados en 320 millones de pesos aproximadamente. Sobre el particular, manifiesto a Usted que, en lo que respecta a la autoría de los hechos y las demás circunstancias de tiempo, modo y lugar, inicialmente esta Dirección se informó en las noticias periodísticas aparecidas en el diario El Tiempo del 02-abr-94, pág. 8A, y complementadas con los datos suministrados en la denuncia que nos envió” (documento público, fols. 76 y 139).

a.12. El **día 22 de abril siguiente**, Automóviles ALGAB respondió lo siguiente a DIDACOL S.A.: “el día 29 de marzo en el sitio La Lizama, en hechos conocidos ampliamente por ustedes y publicados en la prensa escrita y televisión, grupos guerrilleros, al parecer del 12 frente de las F. A. R. C., asaltaron los tractocamiones, incendiaron los vehículos y se apoderaron de dos (2) vehículos restantes, sin que hasta la fecha se conozca su paradero” (documento privado vía fax, fol. 74).

a.13. El **día 13 de mayo de 1994**, la sociedad DIDACOL S.A. solicitó a la La Andina S.A. el pago de \$252’ .535.202 por concepto e indemnización por la pérdida por terrorismo en hechos ocurridos el 30 de marzo de 1994, manifestó que la reclamación se sujetaba a los términos, condiciones y estipulaciones de la póliza automática de

transportes No. 446 expedida por la aseguradora y se comprometió a colaborar con la subrogación de la compañía en los términos de las condiciones de la póliza (documento privado, fol. 79).

DIDACOL S.A., recibió de Seguros La Andina S.A. por concepto de indemnización única, total y definitiva por la pérdida por quema de 21 vehículos Peugeot 306 en hechos ocurridos el 30 de marzo de 1994 y amparados bajo la póliza de transportes 446 (documento privado autenticado, fol. 171, documento privado, fol. 170).

a.14. El **día 26 de mayo de 1994**, el señor Oscar Miguel Montoya Olarte presentó oferta de compra a Seguros La Andina S.A. por el salvamento de 21 automóviles Peugeot (chatarra) por un valor total de \$250.000, la cual fue aceptada por la aseguradora (documentos privados, fols. 157 a 159).

a.15. El **día 8 de septiembre de 1994** Seguros La Andina S.A. solicitó al Director de Inteligencia del Ejército la adición a los términos del oficio de 13 de abril de 1994 para que certifique “si es de conocimiento del Ejército Nacional que en las zonas de Barrancabermeja (Santander) y El Líbano, jurisdicción de San Alberto (Cesar), operan grupos guerrilleros...y sin en desarrollo de investigaciones posteriores, siempre que ello no represente reserva alguna, se han podido establecer nuevos elementos de tiempo, modo y lugar en cuanto a la acción guerrillera perpetrada en marzo 30 de 1994 en contra de la propiedad de DIDA COLOMBIANA S.A., en la que resultaron incinerados 21 vehículos nuevos y otros dos fueron hurtados para ayudarse en la huida” (documento privado, fol. 160). Igualmente en esa fecha la aseguradora envió comunicación a la Fiscalía Regional de Barrancabermeja reiterando solicitud de información sobre dos vehículos Peugeot que fueron recuperados y que corresponden en sus características a los que fueron hurtados el 30 de marzo de 1994 (documentos privados, fols. 161 y 162).

a.16. El **día 26 de septiembre de 1994**, el Director de Inteligencia del Ejército respondió a seguros La Andina S.A., lo siguiente:

“1. Es de conocimiento del Ejército Nacional que en las zonas aledañas a Barrancabermeja (Sder), delinquen activamente las cuadrillas de bandoleros autodenominadas ‘Resistencias Yariquies’, ‘Manuel Gustavo Chacón’ y ‘Capitán Parmenio’ del ‘E. L. N.’ y las cuadrillas 24 y 36 de las ‘F. A. R. C.’ cometiendo toda clase de delitos contra la vida y bienes de los asociados. 2. En el Líbano, jurisdicción del municipio de San Alberto (Cesar), delinquen activamente las cuadrillas ‘Camilo Torres Restrepo’ del ‘E. L. N.’, 20 y 23 de las ‘F. A. R. C.’, siguiendo las mismas modalidades delincuenciales de ataques indiscriminados a la vida y bienes de la población civil, violación del Derecho Internacional Humanitario, secuestro de personas, destrucción de vehículos, etc. 3. No se han establecido nuevos elementos de tiempo, modo y lugar en cuanto a la acción de los bandoleros el 30-mar-94 en contra de la propiedad de ‘DIDA COLOMBIANA S.A.’. (documento público, fol. 163).

a.17. El **día 15 de noviembre de 1994**, la aseguradora La Andina S.A. solicitó a la Fiscalía Regional de Barrancabermeja la entrega de dos vehículos Peugeot recuperados y que se encuentran a órdenes de ese Despacho (documento privado, fols. 164 y 165).

a.18. El **día 12 de diciembre de 1994**, el señor Luis Antonio Jiménez Sánchez presentó oferta de compra a seguros La Andina S.A. de los dos vehículos Peugeot recuperados (documento privado autenticado, fol. 166).

a.19. El **día 4 de abril de 1995**, entre el señor Jiménez Sánchez y Seguros La Andina S.A. se celebró contrato de compraventa de los dos vehículos automotores recuperados (documento privado, fol. 167).

Partiendo de esas pruebas, se analizará el caso.

2. Análisis particular; régimen aplicable y crítica probatoria

La falla endilgada en la demanda se sustentó, jurídicamente, en la omisión de la Nación en el deber constitucional de protección, vigilancia y seguridad de los bienes de las personas residentes en el territorio y se concretó, en los hechos relativos a que para las autoridades era previsible el suceso de un acto terrorista, tanto por el lugar, una zona de “desorden público” en la que delinquen activamente cuadrillas de guerrilleros como por el modo en que los organismos de seguridad conocían la situación vivida en esa región.

El análisis de responsabilidad bajo ese título de imputación jurídica, por actos terroristas, requiere de la concurrencia de varios elementos:

- ***El desconocimiento por acción u omisión a deberes constitucionales, legales, reglamentarios o administrativos por parte del Estado que correlativamente implican derechos de los administrados, en situaciones concretas previsibles.***
- ***El daño, cierto, particular, anormal, a las personas que solicitan reparación, a una situación jurídicamente protegida o que genere confianza legítima por parte del Estado.***
- ***El nexo de causalidad adecuado, determinante y eficiente, entre el daño y la conducta irregular del Estado.***

Frente al tema de las obligaciones constitucionales, legales y reglamentarias de las competencias de las fuerzas militares, la Carta Política enseña que éstas ejercen la defensa de la Nación, primordialmente para la soberanía, la independencia, la integridad del territorio nacional y del orden constitucional (art. 217).

La concepción jurídica en la fijación de esos deberes ***de defensa*** de la soberanía, independencia e integridad del territorio nacional y del orden constitucional, por su propia naturaleza, implica que esos intereses jurídicos tutelados estén amenazados o se estén vulnerando; que la situación de amenaza o de vulneración sean ciertas, concretas, determinadas y por tanto previsible en las circunstancias de tiempo y lugar, porque el modo delincencial siempre es sorpresivo; el conocimiento por parte del Estado de una situación de esas, jurídicamente lo incita, a poner en movimiento su actuar. La previsibilidad se torna pues en una situación cualificada necesaria cuando se trata de imputaciones jurídicas por falla en el servicio, en este caso por actos terroristas. Por ello es que la jurisprudencia, apreciando, de una parte, el marco jurídico del deber del Estado - que por lo demás la Constitución no califica de permanente -, y las circunstancias que lo ponen en movimiento, alude a que la responsabilidad del Estado puede darse por falla pero dentro de esas circunstancias relativas (***falla relativa del servicio***), debido a que a los militares no puede exigírseles que hubieran actuado cuando el mismo administrado sintió confianza en desplegar sus actividades en lugares y tiempo en los que no existía amenaza visible, a esas actividades.

Desde otro punto de vista se observa que entre los derechos de los administrados que están relacionados con los deberes Estatales está el de la paz “que es un deber de obligatorio cumplimiento”, ***según el artículo 22***. Sin embargo el derecho a la paz no es de los derechos constitucionales de aplicación inmediata. Al respecto dice lo siguiente el artículo 85 constitucional: “*Son de aplicación inmediata los derechos consagrados en los artículos 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 23, 24, 26, 27, 28, 29, 30, 31, 33, 34, 37 y 40*”.

El derecho a la paz es de los derechos de tercera generación, de carácter “proclamatorio” en razón de las dificultades para que de ellos se predique eficacia jurídica¹⁸; es un derecho constitucional de carácter colectivo, según lo disponen el artículo 88 ibídem, el decreto ley 2.591 de 1991 (art. 3 num 3º) y la ley 472 de 1998, en el antepenúltimo inciso del artículo 4º cuando señaló: “*Igualmente son derechos colectivos los definidos como tales en la Constitución, en las leyes ordinarias y los tratados de derecho internacional celebrados por Colombia*”.

Cuando tal derecho ha sido quebrantado y se han producido daños no solo a los intereses colectivos sino a los individuos que de él hacen parte, el afectado tiene acción indemnizatoria frente al agente o agentes del daño; el Estado será agente del daño en concurrencia con otros cuando acaezcan las situaciones especiales y fundadas de exigibilidad (previsibilidad) de la obligación de presencia para evitar o conjurar la alteración, que ya se explicaron.

Esa ha sido la jurisprudencia de la Corporación, antes transcrita, además citada textualmente por la Corte Constitucional en sentencia proferida el día 24 de enero de 2001, mediante la cual definió el juicio de constitucionalidad contra los incisos 3 y 5 del parágrafo 1 del artículo 8 de la ley 418 de 26 de diciembre de 1997 “*por la cual se consagran unos instrumentos para la búsqueda de la convivencia, la eficacia de la justicia y se dictan otras disposiciones*”; dijo:

“Dirección general de la fuerza pública y el retiro de tropas de algunas zonas del territorio.

“() no existe norma constitucional que disponga la presencia permanente, efectiva y real de la fuerza pública en todas y cada una de las zonas geográficas del territorio nacional. Por el contrario, la localización de los militares puede obedecer a estrategias que son válidas en el ejercicio de la función castrense y que deben ser juzgadas y evaluadas con criterios políticos y de capacidad militar, obviamente, dirigidas por el Presidente de la República como comandante supremo de las fuerzas armadas.

15. A lo anterior podría objetarse que la Corte elimina la responsabilidad por omisión de la fuerza pública porque admite que aquella puede ausentarse de las poblaciones colombianas. Esa

¹⁸ Sentencia T-008 proferida el 18 de mayo de 1992. Corte Constitucional.

tesis no es de recibo, como quiera que lo que esta Corporación considera no es que la fuerza pública deje de cumplir con sus funciones, sino que a los militares no puede exigírsele lo imposible materialmente, esto es, su presencia en cada uno de los rincones del país.

Es más, en procesos de responsabilidad extracontractual del Estado, el máximo órgano de lo contencioso administrativo ha reconocido que "el estado notorio de guerra que afronta el país desde aquella época, no imponía a la demandada (Policía Nacional) la obligación de estar presente en todos y cada uno de los rincones de la patria ...frente a la delicada situación de orden público vivida, no podría exigírsele a todas las autoridades públicas competentes, seguridad y vigilancia absoluta" Consejo de Estado. Sentencia de 6 de noviembre de 1997, la tesis de la falla en el servicio relativa viene siendo acogida por esa Corporación en reiteradas oportunidades, dentro de las cuales pueden verse las sentencias del 25 de marzo de 1993, del 15 de marzo de 1996 y 3 de noviembre de 1994, todas de la sección tercera.

No obstante, cuando surjan elementos que permitan prever la posible incursión de grupos al margen de la ley, en zonas donde no hay presencia de la fuerza pública, las autoridades están en la obligación de adoptar mecanismos especiales que garanticen la protección de la población civil. ()” (19)

Particularmente, examinando los hechos probados se observa que la información que tenía el demandado en cuanto a que en la zona – donde ocurrió el hecho dañoso – han operado grupos subversivos, como en la mayoría del país, tal situación de conocimiento sobre hechos históricos o pasados no hacen que ese conocimiento se traduzca, para el futuro, en situaciones de PREVISIBILIDAD porque esta cualidad dice de lo futuro y probable en la ocurrencia de hechos. Por lo tanto, no se probó que en el zona había señales de inminencia de ocurrencia de ataques – en el momento que ocurrió el hecho - para que la autoridad activara el deber de defensa y/o de conjuración para evitar actos terroristas o para terminarlos.

Por lo tanto los hechos demostrados de incineración de veintiún vehículos Peugeot y del hurto de dos, el pago de indemnización por parte del Asegurador – hoy demandante – al propietario de las mercancías, no son imputables al Estado porque no se demostró que éste hubiese incumplido el deber de defensa, porque no conoció previamente a la ocurrencia de los **hechos de una situación actual y cierta de inminente necesidad de defensa.**

Procesalmente se demostró que sólo en forma sobreviniente, al hecho delincuencial, el Estado conoció de la situación y emprendió, inmediatamente, las medidas necesarias de salvamento.

Queda claro que el Estado no omitió el cumplimiento de sus deberes. En este punto, se hace referencia a la alegación fundada del recurrente en cuanto a que el a quo no atinó cuando en la motivación de la sentencia analizó la inexistencia de una conducta activa de la Nación para producir el daño, porque la demanda demandó la INACCIÓN. Sin embargo la falta de precisión en esa materia no otorga ningún derecho al demandante para que sus pretensiones salgan adelante, porque no demostró el hecho constitutivo fundamental de la falla del servicio; se limitó a demostrar la ocurrencia del ataque delincuencial, el conocimiento **pasado** del Estado sobre desórdenes en la zona, pero no a probar la evidente y **nueva** situación actual de amenaza en la zona en la que fuera necesaria la presencia del Estado.

Además, se recaba que tanto al dueño de la mercancía, al transportador y al asegurador de las mismas tampoco les fue previsible esa situación. Esto se infiere de las actividades que desplegaron. Y si el Estado antes de los hechos hubiese informado del peligro en dicha zona y éstos hubieren asumido la conducta propia de riesgo, la imputabilidad de su daño tampoco sería frente al Estado.

Finalmente, también se observa que **los hechos demandados no ocurrieron porque el Estado creó un riesgo** con el cual expuso al daño directo y al indirecto (cesionario legal) a sufrir una carga mayor a los demás administrados, por lo siguiente:

- ⇒ Según la narración de los hechos y los antecedentes probados, la incineración de los vehículos no fue consecuencia de un ataque perpretado contra el Estado (en sus servidores, en sus bienes, en el ejercicio de sus funciones); no se demostró que el Estado fue el blanco de los movimientos ilegales y

¹⁹ Sentencia Corte Constitucional C- 048 de 24 de enero e 2001. Actor: Lincoln Castilla Báez.

que de contra personas y bienes particulares sufrieron la consecuencia de padecer el riesgo creado por el Estado, al ser puntal que persiguen las fuerzas ilegales.

- ⇒ Tampoco los hechos alegados en la demanda y las pruebas practicadas tienen alcance para ubicarlos bajo las especiales circunstancias de que el Estado impuso una carga pública mayor en beneficio de la comunidad. Aunque el incendio de los vehículos causó al demandante la obligación de indemnización del siniestro al asegurado, éste no perdió los bienes como resultado de la imposición del soporte mayor de cargas públicas, lícitas y legítimas, del Estado.

En conclusión no probada la imputabilidad del daño padecido por el Asegurador contra la Nación Colombiana, es claro que la declaración hecha por el Tribunal, de denegación de las pretensiones, habrá de confirmarse.

Desde otro aspecto, la sentencia de primera instancia además de denegar las pretensiones de la demanda condenó en costas a la parte demandante, y ésta en el recurso de apelación solicitó la revocatoria total. Por ello se estudiará ese punto.

F. Condena en costas:

Como para el momento en que se dicta este fallo la ley 446 de 1998 indica, en el artículo 55, que sólo hay lugar a la imposición de costas cuando alguna de las partes haya actuado temerariamente, y ninguna de aquellas actuó de esa forma, se revocará la condena impuesta por el Tribunal. Dicha ley es norma procesal y por tanto de aplicación inmediata. En consecuencia se revocará la condena que el a quo le impuso a la parte demandada, porque así lo dispone la nueva normatividad; la revocatoria no tiene su causa en equivocación del juzgador de primera instancia, pues cuando impuso esa condena lo hizo de acuerdo con la norma vigente en esa época, cual era el artículo original No. 171 del C. A. (²⁰).

En mérito de lo expuesto, el Consejo de Estado, Sala de lo Contencioso Administrativo, Sección Tercera, administrando justicia en nombre de la República y por autoridad de la ley,

FALLA:

MODIFÍCASE la sentencia apelada, proferida por el Tribunal Administrativo de Santander, el día ***13 de noviembre de 1996***. En consecuencia se dispone:

PRIMERO. Deniéganse las súplicas de la demanda.

SEGUNDO. Sin condena en costas.

Cópiese, comuníquese, notifíquese y cúmplase

Ricardo Hoyos Duque
Presidente

Jesús María Carrillo Ballesteros

María Elena Giraldo Gómez

Alir Eduardo Hernández Enríquez

²⁰ A este respecto puede consultarse la sentencia proferida por la Sala el 18 de febrero de 1999; expediente 10.775.

MEXICO

1. DEFINICIÓN DE TERRORISMO

(a) Existe una definición general para “terrorismo”, “actividad terrorista” o algún término relacionado en la legislación y/o jurisprudencia de su jurisdicción?

R. El Artículo 139 del Código Penal Federal, en su Libro Segundo, Título Primero “Delitos contra la Seguridad de la Nación”, Capítulo VI “Terrorismo” establece a la letra lo siguiente:

“Se impondrá pena de prisión de dos a 40 años y multa hasta de \$50,000.00, sin perjuicio de las penas y que correspondan por los delitos que resulten, al que utilizando explosivos, sustancias tóxicas, armas de fuego o por incendio, inundación o cualquier otro medio violento realice actos en contra de las personas, las cosas o servicios al público que produzcan alarma, temor, terror en la población o en un grupo o sector de ella, para perturbar la paz pública o tratar de menoscabar la autonomía del Estado o presionar a la autoridad para que tome una determinación.

Se aplicará pena de 1 a 9 años de prisión y multa hasta de \$10,000.00, al que teniendo conocimiento de las actividades de un terrorista y de su identidad no lo haga saber a las autoridades.”

(b) Si existe una definición (legal o jurisprudencial), ¿qué finalidad legal tiene esa?

R. El Código Penal Federal define terrorismo a efecto de que establece el tipo penal de terrorismo a efecto de que el mismo .

2. TERRORISMO Y REDACCIÓN DE LA PÓLIZA.

(a) ¿Excluyen las pólizas de seguros y reaseguros escritos en su país la cobertura de los aseguradores y reasegurados para riesgos de guerra? En caso afirmativo, ¿existe algún tipo de distinción entre seguros concertados con consumidores y con empresas/profesionales? Por favor conteste esa pregunta en relación con los distintos ramos o sectores.

R. Sí, en seguros de daños aparece la exclusión para riesgos de guerra. No existe distinción entre seguros concertados con consumidores y con empresas/profesionales.

(b) ¿Excluyen las pólizas de seguros y reaseguros en su país la cobertura de los aseguradores y reasegurados para riesgos de terrorismo? En caso afirmativo, ¿existe algún tipo de distinción entre seguros concertados con consumidores y con empresas/profesionales? Por favor conteste esa pregunta en relación con los distintos ramos o sectores.

R. Sí aparece la exclusión de riesgos de terrorismo. No existe distinción entre seguros concertados con consumidores y con empresas/profesionales.

(c) ¿Se consideran los riesgos de guerra o sus exclusiones y los riesgos de terrorismo o sus exclusiones o los riesgos de otro tipo de acto políticos o de violencia como daños dolosos?

R. No, es una exclusión específica; hay otra exclusión para actos dolosos en general.

(d) ¿Existen definiciones del terrorismo en los contratos de seguros o reaseguros?. Por favor conteste esa pregunta en relación con los distintos ramos o sectores. Si estas definiciones han sido introducidas como respuesta a acontecimientos recientes, ¿hay diferencia entre éstas y las previsiones anteriores?

R. En algunos contratos si se define el terrorismo, en los seguros de daños. No hay diferencia entre éstas y las previsiones anteriores.

(e) Si existen restricciones o exclusiones de coberturas en seguros para el terrorismo, ¿cuándo se introdujeron por primera vez estas restricciones y ¿han sufrido estas restricciones algún tipo de cambios debido a acontecimientos recientes?.

R. Se introdujeron a partir de los hechos del 11 de septiembre en Estados Unidos. No han sufrido cambios.

(f) ¿Requieren las definiciones del terrorismo usadas en el Mercado que se haya sufrido realmente un daño físico? En caso afirmativo explicar qué tipo de daño?

R. Se cubre cualquier daño consecuencial derivado de un acto de terrorismo. Definición: Los actos de una persona o personas que por sí mismas o en representación de alguien o en conexión con cualquier organización realicen actividades por la fuerza, violencia o por la utilización de cualquier otro medio con fines políticos, religiosos, ideológicos, étnicos o de cualquier otra naturaleza, destinados a influenciar o presionar al gobierno para que tome determinación o tratar de menoscabar la autoridad del Estado. Las pérdidas o daños naturales directos e indirectos que con un origen mediano o inmediato sean el resultado del empleo de explosivos, sustancias tóxicas, armas de fuego o por cualquier otro medio violento en contra de las personas, de las cosas o de los servicios públicos y que ante la amenaza o posibilidad de repetirse produzcan alarma, temor, terror o zozobra en la población o en un grupo o sector de ella por perturbar la paz pública.

(g) ¿Sobre quién recae la carga de la prueba de que un daño ha sido causado por un acto terrorista?

R. En la aseguradora, porque es exclusión.

(h) ¿Varían las reglas de causalidad en relación al terrorismo?. En particular, ¿opera la exclusión del terrorismo cuando la causa próxima el daño es el terrorismo o es la exclusión más estricta, por ejemplo: la pérdida tiene que ser causada “únicamente y directamente” por el terrorismo?

R. No, no varían. La exclusión es amplia.

(i) Describe –en caso de existir-, qué importancia se atribuye a: la identidad/identificación de los autores de actos de terrorismo; su identificación/asociación con grupos terroristas conocidos; el motivo atribuido al acto del terrorismo (si debe de ser de naturaleza político, religioso o ideológico); el modus operandi usado para cometer un acto terrorista; y/o aquellos a los se pretende influenciar con 1 acto terrorista (p.e. un gobierno)?

R. Para efectos del seguro poca importancia, si se llega a identificar a los autores.

(j) Para definir o probar el tipo de terrorismo, ¿existe dependencia de alguna certificación o declaración gubernamental, judicial o de cualquier otro tipo?

R. Es considerado delito, por lo tanto, deben intervenir la Procuraduría General de la República.

(k) ¿Existe alguna referencia específica, estipulación o problema conocido en relación a los actos terroristas que incluyen contaminación biológica, química, nuclear o de cualquier otro tipo?

R. No.

(l) En la medida en que los riesgos de terrorismo estén cubiertos, ¿utilizan las pólizas límites agregados para limitar la exposición del seguro o reaseguros y obligar a los asegurados o reaseguros a soportar retenciones de algún tipo?

R. En el seguro de crédito específicamente, si.

3. TERRORISMO E INTERVENCIÓN DEL GOBIERNO.

(a) ¿Existen en su legislación nacional, restricciones en las exclusiones de terrorismo en las coberturas de seguros? En caso afirmativo, describela y exponga su aplicación.

R. No.

(b) ¿Se prevé algún esquema por lo cual la cobertura del terrorismo se ponga a la disposición a los asegurados directamente por el propio gobierno? En caso afirmativo, por favor indique la fecha de introducción del esquema, su naturaleza, incluyendo límites, franquicias, su objetivo original, su éxito obtenido y los acuerdos financieros?.

R. No.

(c) ¿Se prevé algún esquema por lo cual la cobertura del terrorismo se ponga a la disposición a los aseguradores directamente por el propio gobierno?. En caso afirmativo, por favor indique la fecha de introducción del esquema, su naturaleza, incluyendo límites, franquicias, su objetivo original, su éxito obtenido y los acuerdos financieros.

R. No.

4. ACUERDOS INTERNACIONALES O TRANSFRONTERIZOS.

(a) ¿Puede identificar algún esquema o iniciativa internacional o transfronteriza según la cual los seguros o ayudas para las consecuencias financieras de los actos de terrorismo sean garantizados o apoyados para sectores concretos por ejemplo, aviación, marítimo?

R. No tenemos conocimiento de esquemas o iniciativas internacionales o transfronterizas para garantizar o apoyar los seguros o ayudas para las consecuencias financieras de los actos de terrorismo.

(b) ¿Conoce de algún esquema o iniciativa internacional o transfronteriza que haya ideada o desarrollada desde el 11 de septiembre para proteger a los asegurados, aseguradores o reaseguradores contra l exposición a las actividades terroristas?

R. No tenemos conocimiento de esquemas o iniciativas internacionales o transfronterizas que se hayan ideado o desarrollado desde el 11 de septiembre para proteger a los asegurados, aseguradores o reaseguradores contra la exposición a las actividades terroristas.

5. DECISIONES JUDICIALES Y OTRAS RESOLUCIONES.

(a) Existen decisiones judiciales u otras resoluciones en su país en las que se haya considerado la cobertura de una póliza de seguros/reaseguros respecto a un acto de terrorismo?

R. No tenemos conocimiento de decisiones judiciales u otras resoluciones adoptadas en México en las que se haya considerado la cobertura de una póliza de seguros/reaseguros respecto a un acto de terrorismo.

URUGUAY

1. DEFINICIÓN DE TERRORISMO

(a) Existe una definición general para ‘terrorismo’, ‘actividad terrorista’ o algún término relacionado en la legislación y/o jurisprudencia de su jurisdicción?

No

(b) Si existe una definición (legal o jurisprudencial), ¿qué finalidad legal tiene esa?

No aplica

2. TERRORISMO Y REDACCIÓN DE LA PÓLIZA

(a) ¿Excluyen las pólizas de seguros y reaseguros escritos en su país la cobertura de los aseguradores y reaseguradores para riesgos de guerra? En caso afirmativo, ¿existe algún tipo de distinción entre seguros concertados con consumidores y con empresas/profesionales? Por favor conteste esa pregunta en relación con los distintos ramos o sectores.

Si bien se excluyen los riesgos de guerra, no es usual la distinción entre seguros concertados con consumidores y con empresas.

(b) ¿Excluyen las pólizas de seguros y reaseguros en su país la cobertura de los aseguradores y reaseguradores para riesgos de terrorismo? En caso afirmativo, ¿existe algún tipo de distinción entre seguros concertados con consumidores y con empresas/profesionales? Por favor conteste esa pregunta en relación con los distintos ramos o sectores.

Si bien se excluyen los riesgos de terrorismo, no es usual la distinción entre seguros concertados con consumidores y con empresas.

(c) ¿Se consideran los riesgos de guerra o sus exclusiones y los riesgos de terrorismo o sus exclusiones o los riesgos de otro tipo de acto políticos o de violencia como daños dolosos?

No

(d) ¿Existen definiciones del terrorismo en los contratos de seguros o reaseguros? Por favor conteste esa pregunta en relación con los distintos ramos o sectores. Si estas definiciones han sido introducidas como respuesta a acontecimientos recientes, ¿hay diferencia entre éstas y las previsiones anteriores?

No es habitual la inclusión de tales definiciones.

(e) Si existen restricciones o exclusiones de coberturas en seguros para el terrorismo, ¿cuándo se introdujeron por primera vez estas restricciones y ¿han sufrido estas restricciones algún tipo de cambios debido a acontecimientos recientes?

Tales restricciones existen desde hace varias décadas y no han sufrido cambios recientes.

(f) ¿Requieren las definiciones del terrorismo usadas en el Mercado que se haya sufrido realment un daño físico? En caso afirmativo explicar qué tipo de daño?

No

(g) ¿Sobre quién recae la carga de la prueba de que un daño ha sido causado por un acto terrorista?

No está normado

(h) ¿Varían las reglas de causalidad en relación al terrorismo? En particular, ¿opera la exclusión del terrorismo cuando la causa próxima el daño es el terrorismo o es la exclusión más estricta, por ejemplo: la pérdida tiene que ser causada 'únicamente y directamente' por el terrorismo?

No varían las reglas de causalidad

(i) Describe - en caso de existir-, qué importancia se atribuye a: la identidad/identificación de los autores de actos de terrorismo; su identificación/asociación con grupos terroristas conocidos; el motivo atribuido al acto del terrorismo (si debe ser de naturaleza político, religioso o ideológico); el modus operandi usado para cometer un acto terrorista; y/o el blanco del acto físico, es decir, los que sufren una pérdida directamente y/o aquellos a los se pretende influenciar con el acto terrorista (p.e. un gobierno)?

No existe tal atribución

(j) Para definir o probar el tipo de terrorismo, ¿existe dependencia de alguna certificación o declaración gubernamental, judicial o de cualquier otro tipo?

No

(k) ¿Existe alguna referencia específica, estipulación o problema conocido en relación a los actos terroristas que incluyen contaminación biológica, química, nuclear o de cualquier otro tipo?

No

(l) En la medida en que los riesgos de terrorismo estén cubiertos, ¿utilizan las pólizas límites agregados para limitar la exposición del seguro o reaseguros y obligar a los asegurados o reaseguros a soportar retenciones de algún tipo?

No aplica ya que no se suele cubrir el riesgo

3. TERRORISMO E INTERVENCIÓN DEL GOBIERNO

(a) ¿Existen en su legislación nacional, restricciones en las exclusiones de terrorismo en las coberturas de seguros? En caso afirmativo, descríbela y exponga su aplicación.

No

(b) ¿Se prevé algún esquema por el cual la cobertura del terrorismo se ponga a la disposición a los asegurados directamente por el propio gobierno? En caso afirmativo, por favor indique la fecha de introducción del esquema, su naturaleza, incluyendo límites, franquicios, su objetivo original, su éxito obtenido y los acuerdos financieros.

No

(c) ¿Se prevé algún esquema por el cual la cobertura del terrorismo se ponga a la disposición a los aseguradores directamente por el propio gobierno? En caso afirmativo, por favor indique la fecha de introducción del esquema, su naturaleza, incluyendo límites, franquicios, su objetivo original, su éxito obtenido y los acuerdos financieros.

No

