

THE CHARTERED INSTITUTE OF LOSS ADJUSTERS

UNDERSTANDING THE COMMERCIAL ALL RISKS POLICY

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This paper is prepared with loss adjusters and others investigating claims under the commercial all risks policy in mind. It is based on the ABI all risks wording, which is reproduced as an appendix and in the text by kind permission of ABI.

Inevitably, when seeking to apply the policy to the circumstances of a loss, interpretation can be a matter of opinion and debate. Whilst I acknowledge with thanks advice from colleagues and friends, the views expressed in this paper are mine and whilst I have done my best to produce a logical interpretation of the policy, I acknowledge that there may be other equally valid opinions.

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INTRODUCTION

Before being able to understand the commercial all risks policy, it is necessary to have a firm grasp of four fundamental principles of insurance:

- The doctrine of proximate cause
- The contra proferentem rule
- The ejusdem generis rule
- The rules of construction of the policy

Proximate cause

When considering the exclusions within the all risks policy, it is essential that proximate cause is always kept in mind. If the loss is proximately caused by an excluded peril, it will not be covered by the policy.

The proximate cause of the loss need not be the last event immediately preceding the loss in a chronological sense; the last event may be merely a link in the chain connecting the loss with the proximate cause. There must be a relationship of cause and effect. The loss should be connected with the cause by a chain of circumstances leading naturally and in the ordinary course of events from one to the other. The cause will then be the proximate cause, however long the chain of events might be.

Most losses are very straightforward and the cause is obvious. Or, in the context of the all risks policy, it will be obvious that an exclusion applies or it does not. It will then be equally obvious that the loss is either covered by the policy or not.

Problems arise when there are exceptions in the policy or where more than one cause may have operated or where one or more of those causes is not covered by the policy. In such cases, it is essential to establish the proximate cause before it can be confirmed that the loss is covered by the policy.

If one of the two or more perils operating together is covered by the policy (or, in the case of the all risks policy, not excluded), that will be sufficient for the policy to respond to the loss.

Case law provides many examples of circumstances which at first sight might suggest the proximate cause is obvious, but where, on more detailed enquiry, different conclusions are reached. The contrasting judgements in the well-known cases of *Gaskarth v Law Union Insurance Company* (1876) and *Johnston v West of Scotland Insurance Company* (1828) illustrate the point. In *Gaskarth's* case, a fire left a wall standing but in a weakened state. Several days later, the wall was blown down in a

violent gale. A claim was made under a fire only policy, but Insurers denied liability on the grounds that the proximate cause was not fire. The court decided that the storm was the intervention of a new cause. In Johnston's case, the circumstances were similar, except that the storm occurred two days after the fire. The damage was held to be proximately caused by fire. The difference is probably largely because of the time available to the Insured to take steps to secure the wall.

More recent cases have helped to define proximate cause, including two arising out of an earthquake in Kingston, Jamaica in January 1907. In *Tootal Broadhurst Lee Co. Ltd. v London & Lancashire Fire Insurance Co.* (1908), the policy excluded fire caused by or through earthquake. In summing up, the judge instructed the jury to the effect that if they found that the fire was set in operation by the earthquake and then spread by natural causes (for example by the wind or one thing catching fire from another) then the proximate cause was earthquake and the loss was not covered. The jury did so find. The Jamaica earthquake also led to the case of *Pawsey & Co. v Scottish Union and National Insurance Co.* (1908), which produced the generally accepted definition of proximate cause:

The active efficient cause that sets in motion a train of events which brings about a result without the intervention of any force started and working actively from a new independent source"

In the context of proximate cause, it is also important to be aware of the rules for determining on which party is the onus of proving the loss is covered by the policy. To be able to recover under an all risks policy, the Insured must demonstrate:

- that the property damaged or destroyed has been insured under the policy
- that he has an insurable interest in the property
- that the loss occurred within the policy period
- the value of the loss suffered

This should be contrasted with the position under a perils policy, where the Insured must also demonstrate the operation of one of the perils insured by the policy. Under the all risks policy, if Insurers wish to rely on an exclusion, they must demonstrate the operation of that exclusion. There is one exception to this general rule (Exclusion 15, the Northern Ireland over-riding exclusion), see page 26.

The contra proferentem rule.

Policy wordings should be unambiguous. Unfortunately, this is not always so and in cases where the wording is ambiguous, it should be construed against the party drawing up the wording (i.e. Insurers).

The ejustem generis rule.

Words should be construed in their context. For example, in exclusion 9.1, (see page 20) damage in respect of “curiosities” is excluded. This word must be read in the context of the other items listed as being outside the scope of the policy - “jewellery precious stones precious metals bullion furs curiosities works of art or rare books”. What is intended to be excluded is high value small bulk items that should really be insured separately elsewhere under a special policy. The word “curiosities” (although probably never capable of definition to any degree of satisfaction) is undoubtedly incorporated to exclude otherwise undefined objects falling within the same general category as the other listed goods.

Rules of construction of the policy

The ordinary rules of construction apply.

Words should be used in their ordinary sense unless specifically defined.

The whole of an exclusion must be read. For example, exclusion 8 (see page 20) might, at first sight, indicate that damage caused by freezing or by escape of water from any tank, apparatus or pipes (etc.) is excluded, which is not the intention. The last line - which refers to any building that is empty or not in use - must not be overlooked. The exclusion is only relevant to damage caused by freezing in respect of any building that is empty or not in use.

The basic intention is that cover is granted unless an exclusion operates. However, it is often necessary to test every potential exclusion. More than one exclusion might apply.

THE GEOGRAPHY OF THE POLICY

The policy consists of 6 sections:

- The operative clause
- Definitions
- Exclusions
- General provisions
- General conditions
- Claims conditions

There will also be a schedule setting out details of the Insurer, policyholder, policy period, sums insured, deductibles, etc..

Insurers can delete or amend exclusions (or indeed any other part of the policy).

THE OPERATIVE CLAUSE

The operative clause is in fairly simple terms:

The Insurer agrees (subject to the terms, definitions, exclusions, provisions and conditions of this policy) that if after payment of the first premium any of the Property Insured described in the Schedule be accidentally destroyed or damaged during the period of insurance (or any subsequent period for which the Insurer accepts a renewal premium) the Insurer will pay to the Insured the value of the property at the time of its loss or destruction or the amount of the damage or at the Insurer's option reinstate or replace such property or any part of it

provided that the liability of the Insurer under this policy shall not exceed

(i) in the whole the total sum insured or in respect of any item its sum insured or any other limit of liability stated in the Schedule at the time of the loss destruction or damage

(ii) the sum insured (or limit) remaining after deduction for any other loss destruction or damage occurring during the same period of insurance, unless the Insurer shall have agreed to reinstate any such sum insured (or limit).

This policy incorporates the Schedule, Specification and Endorsements which shall be read together as one contract. Words and expressions to which specific meaning is given in any part of this policy shall have the same meaning wherever they appear.

In simple terms, the policy will respond provided:

- the terms and conditions, of the policy are observed
- the premium has been paid
- the property damaged or destroyed is insured by the policy

- the cause of the loss is not excluded
- the event giving rise to the loss occurs within the currency of the policy

In connection with the last point, it is important to draw a distinction between the event causing the damage and the occurrence of the damage itself. They need not be contemporaneous. Accordingly a situation could arise in which an event occurs before the inception of the policy, but the damage that is the inevitable consequence of that event is within the policy period. In such a case, the loss will not be covered.

Insurers undertake to indemnify the Insured, but reserve the right to fulfil that promise by payment of money or by replacement or repair. The payment in respect of repairs cannot exceed the total value of the item or items damaged. Insurers' overall limit of liability is the sum insured or limit shown in the Schedule. The sum insured is reduced by any payments made unless Insurers agree to reinstate the sum insured after a loss.

Finally, the operative clause makes it clear that the whole policy must be read together and words shall have their usual meaning unless defined. If defined, they shall have the same meaning wherever used in the policy.

DEFINITIONS

The definitions are also fairly simple. There are only two:

1. The word “DAMAGE”, in capital letters, shall mean loss or destruction of or damage to the Property Insured

This is simply to avoid constant repetition of the phrase “loss destruction of or damage to the property insured”

2. The words “Defined Peril” shall mean fire, lightning, explosion, aircraft or other aerial devices or articles dropped therefrom, riot, civil commotion, strikers, locked-out workers, persons taking part in labour disturbances, malicious persons other than thieves, earthquake, storm, flood, escape of water from any tank apparatus or pipe or impact by any road vehicle or animal.

The incorporation of what appears to be a list of most of the perils one would expect to find in a perils policy could cause some confusion. It is there because in some of the exclusions, Insurers’ intention is to provide cover for the “standard perils”, but not for “all risks”. (E.g. exclusion 9, see page 20).

Some of these perils are less straight forward than they might appear at first sight. Some have been judicially defined. For the sake of completeness, they are defined here:

Fire. The ignition of something that ought not to be on fire. The effects of flames, heat, smoke and extinguishment water are all fire damage provided there has been ignition of something that ought not to have been on fire. Thus, smoke from a deliberately lit bonfire will not be within this definition, neither is smoke from incomplete combustion of heating oil and the like.

Lightning. Whether or not there has been a lightning strike should be obvious. The problem is always establishing that the lightning has caused the damage.

Explosion. The case of Commonwealth Smelting v Guardian Royal Exchange (1984) provides a judicial definition of explosion as “an event that was violent, noisy and one which was caused by a very rapid chemical or nuclear reaction or the bursting out of gas or vapour under pressure”.

Aircraft or other aerial devices or articles dropped therefrom. What constitutes an aircraft should be uncontentious. Aerial devices can be a little more difficult. The phrase will probably encompass space satellites and launch vehicles, hang gliders, hot air balloons and the like. Insurers generally accept ice falling from aircraft within this wording.

Riot, civil commotion, strikers, locked out workers, persons taking part in labour disturbances, malicious persons other than thieves. Riot is defined in the Public Order Act, 1986. The essential elements are identified in this definition from the Act. "Where there are 12 or more persons who are present together use or threaten unlawful violence for a common purpose and the conduct of them (taken together) is such as would cause a person of reasonable firmness present at the scene to fear for his personal safety, each of the persons using unlawful violence for the common purpose is guilty of riot."

Civil commotion has been discussed in legal cases going back to the 18th Century. The generally accepted definition is "an insurrection of the people for general purposes, not necessarily amounting to a rebellion". (Langdale v Mason, 1780). There needs to be an element of noise to satisfy the inclusion of the word "commotion".

If there has been damage by locked out workers or persons taking part in labour disturbances, that should be obvious.

However, malicious damage is a little more difficult. It is accepted that there does not need to be any malice toward the Insured; foolish mischief or misbehaviour will be sufficient for this peril to have operated.

Earthquake. As for lightning, earthquake damage should be obvious.

Storm. There have been a number of legal cases that help to define storm. The leading case is Oddy v Phoenix Assurance (1966), where in judgement it was said that storm "connotes some sort of violent wind usually accompanied by rain hail or snow. Storm does not mean persistent bad weather, nor does it mean heavy rain or persistent rain on its own". In the later case of S & M Hotels v Legal & General Assurance Society (1972) it was suggested that "a storm must be something more prolonged and widespread than a gust of wind".

Flood. Flood is the escape of water from a natural or artificial watercourse, or inundation from the sea. Case law (Young v Sun Alliance 1976) confirmed that gradual seepage did not constitute flood. By contrast, the Insurance Ombudsman reported in 1992 a case involving flood water surrounding a 16th Century house. As this old building did not have any damp proofing, there was water penetration. It was held that there had been a flood and it was not necessary for the flood to be within the building for the policy to respond. Although a "domestic" situation and - like all of

the Ombudsman's decisions - not to be regarded as a precedent, the logic would hold true under this policy.

Escape of water. This should be self explanatory. The cost of repairing the pipe etc. from which the water escapes will not be covered unless damaged by another insured peril (or in the context of the all risks policy, by a cause not excluded).

Impact. Whilst generally self explanatory, it is worth recording that damage caused by the weight of a vehicle rolling over property rather than colliding with it and damage by goods falling from vehicles is not damage by impact.

Careful checking of the perils will be required when appropriate as they do not exactly coincide with those found in perils policies.

EXCLUSIONS

The exclusions are the major part of the policy. The list looks formidable - 16 clauses covering 2 pages. However, careful analysis enables them to be broken down into 6 categories:

- Exclusions of events clauses 1- 9
- Exclusions of property clauses 10-13
- The standard war exclusion clause 14
- The standard ionising radiation exclusion clause 15
- The Northern Ireland over-riding exclusion clause 16
- Consequential loss clause 17.

Exclusions can be deleted in individual policies and the original policy document (rather than a specimen) may need to be examined to see which need consideration.

Before proceeding to examine each exclusion in turn, consideration must be given to the two overrides appended to some of the exclusions. One or other or both apply to some of the exclusions.

The two overrides are:

(a) but this shall not exclude such DAMAGE not otherwise excluded which itself results from a Defined Peril or from any other accidental loss destruction or damage

(b) but this shall not exclude subsequent DAMAGE which itself results from a cause not otherwise excluded

The main intention of the two overrides is to preserve the conventional fire and perils cover.

The first overrider is best understood by working backwards from the damage. One should not simply stop at the cause that is proximate in time and, if that is excluded, decline the claim. This confirms the principle of proximate cause.

For example, if dry rot (excluded by exclusion 2.1) is caused as a result of flood - a Defined Peril - the damage will be covered by the policy.

Alternatively, there is an exclusion of destruction of or damage to buildings caused by its own collapse or cracking unless resulting from a Defined Peril insofar as it is not otherwise excluded. If the collapse or cracking results from one of the Defined Perils, for example earthquake or storm or flood, then the damage will be covered as those perils are within the list of Defined Perils. However, if the cracking resulted from subsidence (provided the subsidence is not caused by a Defined Peril, e.g. flood) because subsidence is excluded by exclusion 4.1, the loss will still be excluded.

The second overrider quite simply means that if an excluded peril eventually results in damage not excluded by the policy, the later damage will be paid.

For example, if steam leaks from a pressure vessel, and condenses on to electrical switch gear which short-circuits (excluded by exclusion 2.5) and causes a fire which spreads to other contents and the building, the fire damage is not excluded and the damage will be paid by the policy.

Alternatively, there is an exclusion in respect of defective design or materials (exclusion 1.1). If a defectively designed component gives rise to a fire that causes subsequent damage, the fire damage will be covered by the policy.

Each group of exclusions will now be considered in turn:

1. Exclusions of events

Exclusion 1

This policy does not cover

DAMAGE caused by or consisting of:

1.1 inherent vice, latent defect, gradual deterioration, wear and tear, frost, change in water table level, its own faulty or defective design or materials

1.2 the bursting by steam pressure of a boiler (not being a boiler used for domestic purposes only), economiser or other vessel machine or apparatus in which internal pressure is due to steam only and belonging to or under the control of the Insured

1.3 pressure waves caused by aircraft or other aerial devices travelling at sonic or supersonic speeds

but this shall not exclude subsequent DAMAGE which itself results from a cause not otherwise excluded.

Many of the excluded events will require no definition or explanation. Those that might are these:

Inherent vice. Inherent is “existing in and inseparable from something else; innate; natural”. (Shorter Oxford Dictionary). Vice is “blemish or fault” (Shorter Oxford Dictionary). Inherent vice is therefore some natural fault such as the propensity for new mown hay to ferment, heat up and ignite.

Latent defect. Latent is “concealed, not visible or apparent; dormant; undeveloped but capable of development” (Shorter Oxford Dictionary). In the context of this policy it is probably “dormant” or “undeveloped” that Insurers have in mind. A latent defect is

one that may have been in existence for some time (possibly since construction of the building, or manufacture of plant or stock) but which remains concealed or undeveloped until the loss arises or the cause giving rise to the loss begins to develop. For example, undersized roof timbers that give no cause for concern (and were probably not known to be undersized) until there is a heavy snowfall accompanied by strong winds. The combination of snow and wind loading then causes the collapse of the roof.

Wear and tear is one of those “insurance phrases”, constantly used without much thought as to its exact meaning. An acceptable meaning would be the gradual wearing away or using up of an item through the effluxion of time, or the general “knocks and bangs” that property is prone to in use.

Change in water table level. This is a relatively recent exclusion (1989) possibly arising out of problems that have been encountered in central London. As the demand for water in the capital has diminished as industry has moved out, artesian wells have fallen out of use and water tables have been rising. Basements thought to be above the water table have been suffering water penetration. The important point is that the exclusion is in respect of changes in the level of the water table, up or down. A fall in the water table resulting in soil shrinkage could also cause serious damage, which would not be covered by the policy.

Its own faulty or defective design or materials. The words “its own” are significant. If there is damage to property insured as a result of faulty or defective design or materials in some other item, that does not cause the exclusion to operate. What constitutes defective design or materials should be capable of precise evaluation, if necessary following specialist enquiry or testing.

The bursting by steam pressure of a boiler (not being a boiler used for domestic purposes only), economiser or other vessel machine or apparatus in which internal pressure is due to steam only and belonging to or under the control of the Insured. There is a potential problem in establishing whether the boiler is used other than for domestic purposes. It is accepted that a boiler used solely for heating water for washing in WCs, space heating (not part of a trade process) and for canteens and the like, even in commercial premises will be “domestic”. The purpose of this exclusion is to exclude from this policy risks that should more properly be covered under an engineering policy.

Pressure waves caused by aircraft or other aerial devices travelling at sonic or supersonic speeds. Such losses are recoverable from RAF, CAA, BAA or airlines (subject of course to being able to produce evidence of cause of damage and culpability).

Exclusion 2

This policy does not cover

DAMAGE caused by or consisting of:

2.1 faulty or defective workmanship, operational error or omission, on the part of the Insured or any of his employees

but this shall not exclude

(a) such DAMAGE not otherwise excluded which itself results from a Defined Peril

(b) subsequent DAMAGE which itself results from a cause not otherwise excluded

2.2 acts of fraud or dishonesty by the Insured's employees

but this shall not exclude such DAMAGE not otherwise excluded which itself results from a Defined Peril

Faulty or defective workmanship. It will often be difficult to establish conclusively whether this exclusion has operated. Detailed enquiry will often be required. The important point to be remembered is that the exclusion only applies in respect of faulty or defective workmanship by the Insured or his employees.

Operational error or omission. Likewise it will often be difficult to establish conclusively whether this exclusion has operated. Detailed enquiry will often be required. Again, the important point to be remembered is that the exclusion only applies in respect of operational error on the part of the Insured or his employees.

Exclusion 3

This policy does not cover

DAMAGE caused by or consisting of:

3.1 corrosion, rust, wet or dry rot, shrinkage, evaporation, loss of weight, dampness, dryness, marring, scratching, vermin or insects.

3.2 change in temperature colour flavour texture or finish

3.3 theft or attempted theft

DAMAGE consisting of:

3.4 joint leakage, failure of welds, cracking, fracturing, collapse or overheating of boilers, economisers, superheaters, pressure vessels or any range of steam and feed piping in connection therewith

3.5 mechanical or electrical breakdown or derangement in respect of the particular machine apparatus or equipment in which such breakdown or derangement originates

but this shall not exclude

(a) such DAMAGE not otherwise excluded which itself results from a Defined Peril or from any other accidental loss destruction or damage

(b) subsequent DAMAGE which itself results from a cause not otherwise excluded

It is important to note that the first 3 paragraphs exclude “damage caused by or consisting of” and the last 2 exclude only “damage consisting of”.

Corrosion is not the same as rusting. Rust is a form of corrosion. To corrode is to eat away by degrees, especially chemically.

Rust is a particular kind of corrosion of ferrous metals.

Whilst *scratching* should be easy to determine, *marring* may prove a little more difficult. The dictionary definition of “to mar” is “to spoil, to impair, to injure, to damage, to disfigure”.

The definition of *vermin* was the subject of debate by the Insurance Ombudsman in his 1988 report. Whilst the Ombudsman’s decisions are specifically stated not to be precedents, they do have persuasive value. Many Insurers take decisions on policy liability with them in mind.

The Ombudsman said there were conflicts between various dictionary definitions. He came to the conclusion that the test must be not so much what the abstract meaning of the word is but rather what any ordinary person would understand to be the intention. He thought that clearly the intention is to exclude from cover damage done by wild creatures whose nature it is to do that kind of damage. Since the subject matter of the policy is the building and moveable possessions, the only kind of vermin contemplated by the policy are those that would do damage to that kind of property. Rodents, moth larvae, woodworm and the like are examples, but there is no closed list; the criterion is whether or not the creature does the damage complained of as part of its ordinary nature.

Insects are capable of biological definition, the essential elements of which are a segmented body and three pairs of legs.

Joint leakage, failure of welds, cracking, fracturing, collapse or overheating of boilers, economisers, superheaters, pressure vessels or any range of steam and feed piping in connection therewith. Boiler is a generic term the equipment used to convert water into steam. A pressure vessel ought to be any part of the equipment certified against the appropriate BS (UK), ASME (USA) or DIN (German) standard. A

superheater is equipment within a boiler that increases the temperature of the steam. An economiser is a heat exchanger that extracts heat from flue gases which is then used to pre-heat water coming into the boiler.

Mechanical or electrical breakdown or derangement in respect of the particular machine apparatus or equipment in which such breakdown or derangement originates. Derangement is the difficult word. Under the ejusdem generis rule, it is submitted that the whole section needs to be read in the context of breakdown. However, this word was considered by the Insurance Ombudsman in his 1989 report (in the context of the delay section of a holiday insurance policy). There was cover (inter alia) in respect of delay resulting from derangement of the aircraft. Insurers suggested this meant there must be some mechanical breakdown or structural defect in the aircraft. The Ombudsman thought this was too narrow an interpretation and felt that it could be said that the aircraft itself was deranged when it was unable to take off because of a computer breakdown at Air Traffic Control (ATC). Notwithstanding that if there was any derangement it was in ATC rather than in the aircraft, the Ombudsman found for the Insured.

A more likely definition would be some temporary malfunction perhaps caused by an electrical surge, or a simple failure to operate. For example, an item of equipment that worked perfectly satisfactorily until moved from one side of the factory to another, but when powered up again simply refuses to operate. There has been no damage in the move or any other obvious cause of the malfunction.

Exclusion 4

This policy does not cover

loss or destruction or damage caused by pollution or contamination but this shall not exclude destruction of or damage to the Property Insured, not otherwise excluded, caused by

(a) pollution or contamination which itself results from a Defined Peril

(b) a Defined Peril which itself results from pollution or contamination.

Contamination is defined as “to defile by mixing with, to pollute, to corrupt, to infect”. To pollute is “to befoul physically, to contaminate, to make offensive or harmful to human animal or plant life”.

The overrides incorporated into the wording here, indicate that pollution or contamination that itself results from a Defined Peril or a Defined Peril that itself results from pollution or contamination will not be excluded.

Exclusion 5

This policy does not cover

DAMAGE caused by or consisting of:

5.1 subsidence ground heave or landslip unless resulting from fire explosion earthquake or the escape of water from any tank apparatus or pipe

5.2 normal settlement or bedding down of new structures

5.3 disappearance, unexplained or inventory shortage, misfiling or misplacing of information

Subsidence, ground heave or landslip unless resulting from fire explosion earthquake or the escape of water from any tank apparatus or pipe. Subsidence and landslip are the subject of case law definitions. Subsidence is sinking, that is movement in a downward direction (Allen & Sons Billposting Ltd. v Drysdale, 1939) and landslip is a rapid downward movement under the influence of gravity of a mass of rock or earth on a slope (Oddy v Phoenix, 1966). In contrast to the cover under the domestic policy wording, it should be noted that the exclusion is in respect of all subsidence heave or landslip, not just subsidence or heave of the site or landslip.

The phrase *normal settlement* presents a likely area for dispute, as there is no obvious definition of what constitutes normal.

The final section of this exclusion emphasises the “accidental” nature of the policy. This section excludes unexplained losses, such as those discovered in the course of stocktaking.

Exclusion 6

This policy does not cover

destruction of or damage to a building or structure caused by its own collapse or cracking unless resulting from a Defined Peril in so far as it is not otherwise excluded.

Little explanation is required. The overrider allowing for damage proximately caused by a Defined Peril makes this exclusion less severe than it might appear at first sight. In effect, cover for the usual perils policy perils is available. Note that the exclusion of collapse or cracking is confined to the building or structure that has collapsed. Subsequent damage to other buildings or structures caused by the collapsed building or structure will be covered.

Exclusion 7

This policy does not cover

DAMAGE in respect of moveable property in the open, fences and gates caused by wind rain hail sleet snow flood or dust.

This should cause few problems in practice. It is a common exclusion in many policies, designed to exclude property vulnerable to storm and the like in the open.

Exclusion 8

This policy does not cover

DAMAGE

8.1 caused by fire resulting from its undergoing any heating process or any process involving the application of heat

8.2 (other than by fire or explosion) resulting from its undergoing any process of production packing treatment testing commissioning servicing or repair

Caused by fire resulting from its undergoing any heating process or any process involving the application of heat. This is a standard exclusion in many fire policies and as such will be familiar to most adjusters. The exclusion only relates to the property actually undergoing the process involving the application of heat and any damage by the spreading fire will be covered.

(Other than by fire or explosion) resulting from its undergoing any process of production packing treatment testing commissioning servicing or repair. Although this is a much wider exclusion, it should again be noted that the exclusion is only in respect of the damage to the property being produced, tested, etc., and any subsequent damage will not be excluded. Fire and explosion damage are not excluded anyway.

Whilst the majority of the circumstances excluded should be self explanatory, there can be occasions when it is not entirely clear whether the loss arises from one of the circumstances excluded. For example, if a machine has been serviced or newly installed and is being “run up” to full operating speed when accidental damage occurs, is the loss as a result of testing? There is scope for debate on this topic.

Exclusion 9

This policy does not cover

DAMAGE

9.1 caused by freezing

9.2 caused by escape of water from any tank apparatus or pipe

9.3 caused (other than by fire or explosion) by malicious persons not acting on behalf of or in connection with any political organisation

in respect of any building which is empty or not in use

All of these exclusions should be self explanatory. The key point is the overrider at the end, which indicates that the exclusions only apply in respect of any building that is empty or not in use.

2. Exclusions of property

Exclusion 10

This policy does not cover

DAMAGE in respect of

10.1 jewellery precious stones precious metals bullion furs curiosities works of art or rare books

10.2 property in transit

10.3 fixed glass

10.4 glass (other than fixed glass) china earthenware marble or other fragile or brittle objects

10.5 computers or data processing equipment

10.6 money cheques stamps bonds credit cards or securities of any description

other than such DAMAGE caused by a Defined Peril in so far as it is not otherwise excluded.

Jewellery. Items of personal adornment of value usually of precious metal, often containing precious or semi-precious stones. Watches can in some cases constitute jewellery. Other items such as insignia associated with honours may also constitute jewellery.

Precious stones. Notwithstanding that good semi-precious stones can be worth more than poor precious stones, the definition of precious stones is conventionally confined to diamonds, emeralds, sapphires and rubies. Other stones will generally be set as jewellery and therefore nevertheless caught by the exclusion. It may be argued that any stone that is of high value or of great price is - by definition - precious.

Precious metals. By convention, the precious metals are only gold silver and platinum, including in alloy form.

Bullion. Precious metals in “pure”, usually bulk, form.

Curiosities. This is the difficult word to define in this section. The dictionary definition is a “strange or rare object”. An acceptable definition in the context of this exclusion is probably collectibles, “unique” items, items with a “history” that would otherwise be unremarkable, rare items or those with unusual characteristics that

enhance their value. Establishing what is “rare” in any particular circumstance is likely to be a subjective judgement.

Works of art. Paintings, drawings, sculptures and the like. One dictionary definition that probably meets Insurers’ intention of “art” in this context is “the skilful production of the beautiful in visible form”. Items that have a value in addition to the utilitarian function of the object or whose prime function is decorative are likely to be considered as works of art.

There may be scope for debate over “limited edition” reproductions. Most will not be true works of art. However, if they have been “remarqued” (signed by the artist, sometimes with a small sketch, after printing), they may well be works of art.

The definition should be applied to the object at the time of insuring the item rather than the time of manufacture. What might have been unexceptional 200 years ago (e.g. a hand painted porcelain dinner plate or a wooden cased clock) could easily today be considered a work of art.

Rare books. Age will not be the only criterion; some contemporary first editions may nevertheless be rare. What constitutes “rare” may pose a problem. The dictionary definition is “uncommon, unusual, exceptional, seldom found, of uncommon excellence”.

Property in transit. The transit may include whilst the property is in a warehouse; it does not have to be in a moving vehicle.

China. Common name for soft paste porcelain, a fine semi-transparent earthenware. Porcelain becomes vitreous on firing.

Earthenware. Pottery, which is permeable to water before firing.

Exclusion 11

This policy does not cover

11.1 vehicles licensed for road use (including accessories thereon) caravans trailers railway locomotives rolling stock watercraft or aircraft

11.2 property or structures in course of construction or erection and materials or supplies in connection with all such property in course of construction or erection

11.3 land roads pavements piers jetties bridges culverts or excavations

11.4 livestock growing crops or trees

unless specifically mentioned as insured by this policy.

Most of these exclusions should be self explanatory. What these exclusions have in common is that all the items can be covered elsewhere, e.g. under a motor policy, CAR policy, agricultural policy, etc.. Note that road vehicles do not have to be on the road, merely licensed for road use. They could be in use on a factory site, etc..

Exclusion 12

This policy does not cover

Property which at the time of the happening of DAMAGE is insured by or would but for the existence of this policy be insured by any marine policy or policies except in respect of any excess beyond the amount which would have been payable under the marine policy or policies had this insurance not been effected.

This is a standard exclusion found in most property policies designed to prevent contribution between marine and property policies. This may be thought to be a remote possibility, but it is often the case, for example, that commodity traders' stocks are insured under a marine policy, even when in store.

Exclusion 13

This policy does not cover

any property more specifically insured by or on behalf of the Insured.

This is quite straight forward and a standard exclusion. Adjusters should always check to see if there are any other policies in force.

3. The standard war risks exclusion

Exclusion 14

This policy does not cover

DAMAGE occasioned by war invasion act of foreign enemy hostilities (whether war be declared or not) civil war rebellion revolution insurrection or military or usurped power nationalisation confiscation requisition seizure or destruction by the government or any public authority.

The wording is all-encompassing, but some of the words used may need some explanation.

Military power is not confined to the legitimate standing army. It would encompass any military force. Usurped power implies an illegal or unelected government or government by force of arms. Civil war implies the effects of some major organised armed force in conflict with the legitimate government.

Nationalisation, confiscation, requisition, etc. by the government or public authority implies the action was taken legitimately by a competent authority. The action may be taken as a reaction to hostilities or civil war, insurrection, etc. or for any other reason.

The exclusion will encompass measures to resist enemies, as well as action of the enemy. However damage caused by training activities in peacetime will not be excluded, e.g. an RAF aircraft crash.

Enemy action even long after a war would be excluded, e.g. an up to now unexploded bomb left from World War II. They are still being found more than 50 years after the end of the war.

4. The standard nuclear risks exclusion

Exclusion 15

This policy does not cover

loss or destruction of or damage to any property whatsoever or any loss or expense whatsoever resulting or arising therefrom or any consequential loss directly or indirectly caused by or contributed to by or arising from

(a) ionising radiations or contamination by radioactivity from any nuclear fuel or from any nuclear waste from the combustion of nuclear fuel

(b) the radioactive toxic explosive or other hazardous properties of any explosive nuclear assembly or nuclear component thereof

There are special pool arrangements to cover these risks, so no need for them to be covered in this policy.

5. The Northern Ireland overriding exclusion

Exclusion 16

This policy does not cover

DAMAGE in Northern Ireland occasioned by or happening through or in consequence of

(a) riot civil commotion and (except in respect of DAMAGE by fire or explosion) strikers locked out workers or persons taking part in labour disturbances or malicious persons

(b) any unlawful wanton or malicious act committed maliciously by a person or persons acting on behalf of or in connection with any unlawful association.

For the purpose of this exclusion

“unlawful association” means any organisation which is engaged in terrorism and includes an organisation which at any relevant time is a proscribed organisation within the meaning of the Northern Ireland (Emergency Provisions) Act 1973

“terrorism” means the use of violence for political ends and includes any use of violence for the purpose of putting the public or any section of the public in fear

In any action suit or other proceedings where the Insurer alleges that by reason of the provisions of this exclusion any DAMAGE is not covered by this policy the burden of proving that such DAMAGE is covered shall be upon the Insured

Significantly, it is worth noting that if it is suggested by Insurers that this exclusion should apply, the onus of proving that it does not is on the Insured, rather than it being on the Insurers to prove that it does apply. This is a reversal of the usual position.

The riot, civil commotion, etc. does not have to be of a political nature, although, by definition, the malicious damage does.

Usually, if there is any doubt about whether there has been a terrorist attack (for example, no organisation claims responsibility) it is necessary to obtain a certificate from the Chief Constable of the RUC confirming the cause. If it is determined that there has been riot or any unlawful wanton or malicious act committed maliciously by a person or persons acting on behalf of or in connection with any unlawful association compensation is payable by the Government through the agency of the Northern Ireland Office.

Notwithstanding that the terrorism campaign has encompassed the mainland, this exclusion applies only to damage in Northern Ireland.

6. The consequential loss exclusion

Exclusion 17

This policy does not cover

consequential loss or damage of any kind or description except loss of rent when such loss is included in the cover under this policy

This is straight forward. It confirms that this is a material damage only policy. There is a corresponding consequential loss all risks wording which broadly follows this policy.

THE GENERAL PROVISIONS

1. Condition of average (Underinsurance)

The sum insured by each item (under each column) of this policy (other than those applying solely to fees, rent, removal of debris or private dwelling houses) is declared to be separately subject to Average.

Whenever a sum insured is declared to be subject to Average, if such sum shall at the commencement of any DAMAGE be less than the value of the property covered within such sum insured, the amount payable by the Insurer in respect of such DAMAGE shall be proportionately reduced.

This is the standard pro rata condition of average and thus should be familiar to all adjusters.

2. Explosion

In respect of any vessel machinery or apparatus, or its contents, belonging to or under the control of the Insured which requires to be examined to comply with any Statutory Regulations cover against destruction or damage thereto caused by an explosion originating therein is subject to the provision that such vessel machinery or apparatus shall be the subject of a policy or other contract providing the required inspection service.

Once again this should be self explanatory. However, adjusters should be aware of this provision which is a condition precedent to liability in respect of this type of explosion damage. The other policy or contract would be an engineering or boiler policy.

3. Deductibles

This policy does not cover the amounts of the deductibles stated in the Schedule in respect of each and every loss as ascertained after the application of all other terms and conditions of the policy including any condition of Average (underinsurance).

Yet again, this should be familiar to all adjusters. It confirms that the deductible or excess is applied after all other adjustments.

4. Contracting Purchaser's Interest

If at the time of DAMAGE the Insured shall have contracted to sell his interest in any building hereby insured and the purchase shall not have been but shall be thereafter completed, the purchaser on completion of the purchase (if and

so far as the property is not otherwise insured against such DAMAGE by him or on his behalf) shall be entitled to benefit under this policy without prejudice to the rights and liabilities of the Insured or the Insurer until completion.

Usually known as the purchaser's interest clause, this gives the benefit of the policy to an uninsured purchaser between exchange of contracts and completion. There has to be completion. The policy does not transfer to him, merely the benefit of it. At completion the policy lapses.

THE GENERAL CONDITIONS

1 Policy voidable

This policy shall be voidable in the event of misrepresentation misdescription or non-disclosure in any material particular.

This is a condition precedent to the contract. If there has been misrepresentation, misdescription or non-disclosure, Insurers will wish to consider whether it is material and this clause gives them the opportunity to avoid the policy at their option. The decision to avoid the policy will rest with the Insurers; it is not an automatic case of avoiding the policy. They will only seek to avoid the policy if the misrepresentation, misdescription or non-disclosure is material.

2 Alteration

This policy shall be avoided with respect to any of the Property Insured in regard to which there be any alteration after the commencement of this insurance

(a) by removal or

(b) whereby the risk of DAMAGE is increased or

(c) whereby the interest of the Insured ceases except by will or operation of law

unless admitted by the Insurer in writing.

The first point to be noted is that if there has been any alteration, this clause applies only to the item the subject of the alteration, not the whole policy. Insurers may chose to accept the alteration, possibly on payment of an additional premium or after imposition of conditions.

The types of alteration should be self explanatory, possibly except for the interest of the Insured ceasing by operation of law. The law only operates in the case of death intestate or bankruptcy.

The alteration has to be permanent. The question of whether the risk of damage has been increased is subjective. Insurers would probably only apply the exclusion if the increase in risk is blatant.

If the alteration has not been advised, the policy will have been avoided from the date of the alteration.

3 Warranties

Every warranty to which this policy or any item thereof is or may be made subject shall from the time the warranty attaches apply and continue to be in force during the whole currency of this policy. Non-compliance with any such warranty in so far as it increases the risk of DAMAGE shall be a bar to any claim in respect of such DAMAGE provided that whenever this policy is renewed a claim in respect of DAMAGE occurring during the renewal period shall not be barred by reason of a warranty not having been complied with at any time before the commencement of such period.

This is a change from the Standard Fire Policy clause relating to warranties. There, non-compliance with any warranty, whether representing an increase in risk or not, is a bar to any claim. Once again, this opens up the possibility of debate over whether the breach of warranty has increased the risk of damage.

Any breach of warranty (assuming it is subsequently rectified) will not affect the policy after renewal.

As warranties are not always obviously warranties, for the sake of completeness, the accepted definition of a warranty is as follows:

“An undertaking by the Insured that some specified thing shall, or shall not, be done, or that some condition shall be fulfilled, or whereby the Insured affirms or denies the existence of a specified fact or facts.”

4 Reasonable Precautions

The Insured shall take all reasonable precautions to prevent DAMAGE.

This confirms the common law duty on the Insured to try to prevent losses under the policy. It is as close as the policy gets to the traditional admonition to the Insured to act as if uninsured.

THE CLAIMS CONDITIONS

Insurers will not seek the protection of the claims conditions unreasonably, but will need to be advised if it looks as if there has been any material breach of the

conditions. If there has, the claim may be declined. Each condition will be considered in turn as follows:

1 Action by the Insured

(a) in the event of DAMAGE the Insured shall

- notify the Insurer immediately

- notify the Police Authority immediately it becomes evident that any DAMAGE has been caused By Malicious Persons

- carry out and permit to be taken any action which may be reasonably practicable to prevent further DAMAGE

- deliver to the Insurer at the Insured's expense

(i) full information in writing of the property lost destroyed or damaged and of the amount of the DAMAGE

(ii) details of any other insurances on any property hereby insured

within 30 days after such damage (7 days in the case of DAMAGE caused by riot civil commotion strikers locked-out workers or persons taking part in labour disturbances or malicious persons) or such further time as the Insurer may allow

(iii) all such proofs and information relating to the claim as may reasonably be required

(iv) if demanded, a statutory declaration of the truth of the claim and of any matters connected with it.

(b) No claim under this policy shall be payable unless the terms of this condition have been complied with.

Notification of damage must be made to the Insurer. Technically, notification to brokers is not acceptable unless they are acting as agents for the Insurers. What constitutes immediate notification will depend upon circumstances. For example, if the Insured did not become aware of damage until some time after it occurred, notification immediately thereafter would probably be acceptable provided it is still within the specified 7 days for riot etc.. The acid test would be whether the position would have been any different had the notification been sooner. In other words, has Insurers' position been prejudiced by any delay.

The Insured's common law duty to mitigate his loss is reinforced here. The wording requires the Insured to take reasonable actions to prevent further damage and in addition prevents him hindering the Insurers if they wish to take any action. What

constitutes action that is reasonably practicable will depend on the circumstances of each case. Unfortunately, it is all too common for the Insured to sit back and take no action until advised or instructed by Insurers or adjusters what to do. Whether this is reasonable will depend on the nature of the Insured. One should expect a more sophisticated response from a more sophisticated or larger Insured.

If it is considered there has been a failure to mitigate the loss, resulting in a larger claim than would otherwise be the case, Insurers would be entitled to repudiate liability for the claim.

At his own expense, the Insured must deliver full details of the loss and other policies. It is sometimes overlooked that such details must be supplied within 30 days after the loss unless Insurers give an extension of time. When acting for Insurers, adjusters should not give a blanket extension of time. If an extension of time is genuinely required for good reasons, a specified extension (e.g. "a further 30 days") should be given. Insurers are not happy to have claims outstanding longer than necessary and will expect adjusters to press for early presentation and agreement of claims. The passage of time can make the adjustment of claims more difficult as memories fade and evidence gets lost.

The requirement to deliver details of the claim within 7 days in the case of DAMAGE caused by riot civil commotion locked out workers or persons taking part in labour disturbances or malicious persons is because of the ability of Insurers to seek a recovery from the police in respect of riot damage under The Riot Damages Act 1886, but all claims have to be delivered to the police authority within 14 days (unless the police grant an extension).

The requirement to deliver proofs and information relating to the claim is carefully worded. The proofs and information need not be confined to that relating to the subject matter of the claim or in support of the sums claimed or damage suffered. This gives the adjuster support for reasonable requests for background information. The question of what is reasonable is - inevitably - debatable. It will depend on the circumstances of the claim.

Great care must be taken over the use of statutory declarations. A statutory declaration is a statement made before a Commissioner of Oaths and any untruth is perjury and a criminal offence. Under no circumstances should an adjuster ever demand a statutory declaration without the specific approval of Insurers. Once a statutory declaration has been taken, Insurers will have to decide either to accept or reject the claim. It is a move of the last resort.

2 Fraud

If a claim is fraudulent in any respect or if any fraudulent means are used by the Insured or by anyone acting on his behalf to obtain any benefit under this policy or if any DAMAGE is caused by the wilful act or with the connivance of the Insured all benefit under this policy shall be forfeited.

The important point is that if any fraudulent means are used the whole benefit under the policy is forfeit, not just that part of the claim to which the fraud relates. The potential problem is what constitutes fraud. It has been held that exaggeration for the purpose of claim negotiation is not necessarily fraud.

3 Reinstatement

If any property is to be reinstated or replaced by the Insurer the Insured shall at his own expense provide all such plans documents books and information as may reasonably be required. The Insurer shall not be bound to reinstate exactly but only as circumstances permit and in a reasonably sufficient manner and shall not in any case be bound to expend in respect of any one of the items insured more than its sum insured.

This clause relates not to the reinstatement memorandum (where the initiative for a claim on the basis of reinstatement is with the Insured) but reinstatement at the option of the Insurer (the operative clause). This clause makes it clear that Insurer's liability should be no greater than if settlement is by a cash payment. The Insured has to provide all the plans etc. that he would have to produce if he were himself reinstating. Furthermore, this clause prevents the Insured unreasonably insisting on strict and meticulous reinstatement. Reinstatement needs only be as near to the original as is reasonable. Finally, the clause indicates that when reinstating, the Insurers' liability is restricted to the sum insured.

Care should be taken before embarking on this course of action. It changes the contract from one to indemnify by payment of money to one of specific performance. If the work is not satisfactory, the problems rest with Insurers rather than the Insured and rectification can increase Insurers' costs beyond what was originally anticipated. Whilst Insurers seek to limit their liability to the sum insured, in the case of a partial loss, they can still be called upon to pay more than the loss suffered as a result of such problems. There is also a requirement upon Insurers to proceed with reasonable speed, failing which they may face a claim for damages.

4 Insurers Rights following a Claim

On the happening of DAMAGE in respect of which a claim is made the Insurer and any person authorised by the Insurer may without thereby incurring any liability or diminishing any of the Insurer's rights under this policy, enter take or keep possession of the premises where such DAMAGE has occurred and take possession of or require to be delivered to the Insurer any property insured and deal with such property for all reasonable purposes and in any reasonable manner. No claim under this policy shall be payable unless the terms of this condition have been complied with.

No property may be abandoned to the Insurer whether taken possession of by the Insurer or not.

This is a very important clause for adjusters who fall within the definition of “person authorised”. It enables Insurers or their agents to take such steps as may be necessary to investigate claims, mitigate damage and assess the loss without affecting their rights under the policy. It also prevents property being abandoned to Insurers. It is also a protection against a potential trespass action by the policyholder.

This clause gives adjusters the right to enter any premises where there has been damage. Most Insureds will co-operate, but there are occasions when they are less than willing and this clause may have to be drawn to their attention. This clause is binding on the Insured only. If others, for example the fire brigade or police who may still be making enquiries, refuse access, this clause is of no value.

5 Contribution and Average

If at the time of any DAMAGE there is any other insurance effected by or on behalf of the Insured covering any of the property lost destroyed or damaged the liability of the Insurer hereunder shall be limited to its rateable proportion of such DAMAGE.

If any such other insurance shall be subject to any average (underinsurance) condition this policy if not already subject to any such condition of average shall be subject to average in like manner.

If any such other insurance is subject to any provision whereby it is excluded from ranking concurrently with this policy either in whole or in part or from contributing rateably the liability of the Insurer under this policy shall be limited to that proportion of the DAMAGE which the sum insured under this policy bears to the value of the property.

The first paragraph relates to contribution involving the same rights and interests. Contribution is a complex subject outside the scope of this paper, but in simple terms, the loss should be apportioned between the two or more policies at the time of agreeing the loss and separate acceptance forms taken for the loss under each policy. (Contrast this with ABI rules on contribution, where the loss is agreed under the policy primarily liable and a single acceptance form taken with apportionment subsequently agreed between Insurers).

Rateable proportion is deliberately vague to allow for the apportionment either on the basis of sums insured (concurrent policies, not subject to average - unlikely in the context of the commercial all risks policy) or independent liability (concurrent or non-concurrent policies, subject to average).

The second paragraph simply brings any policy not subject to average into line with any other policy which is subject to average. In reality, as virtually all commercial policies are subject to average, this provision is unlikely to be needed very often.

The last paragraph will prevent Insurers being disadvantaged in the event that the sum insured under this policy is inadequate and there is another policy not subject to contribution. For example, Lloyds policies generally have a non-contribution clause. Average will apply to limit the payment under this policy.

6 Subrogation

Any claimant under this policy shall at the request and expense of the Insurer take and permit to be taken all necessary steps for enforcing rights against any other party in the name of the Insured before or after any payment is made by the Insurer.

Whilst essentially confirming the common law position on subrogation, this condition extends Insurers' rights so they apply before the claim is paid, rather than just afterwards.

7 Arbitration

If any difference arises as to the amount to be paid under this policy (liability being otherwise admitted) such difference shall be referred to an arbitrator to be appointed by the parties in accordance with statutory provisions. Where any difference is by this condition to be referred to arbitration the making of an award shall be a condition precedent to any right of action against the Insurer.

This should be generally self explanatory. Arbitration only applies in relation to matters of quantum, not policy liability. Whilst the cost of arbitration can now be much the same as litigation, arbitration still has an advantage in that the result can be kept confidential.

There are finally two footnotes which address amendments to the wording relating to deductibles and the inclusion of the subsidence perils. They should cause no difficulty and will not be debated here.

REPORTING

Adjusters should adopt standard report formats. However, if it looks as if an exclusion or exclusions apply, a separate section on policy liability should be incorporated. It is recommended that adjusters identify each and every exclusion that might apply and why it is considered that it does or does not apply. A recommendation on each potentially relevant exclusion and policy liability overall should be incorporated and Insurers' views on policy liability should be sought.

Adjusters could usefully draw up a check list of points to be verified before confirming to Insurers and the Insured that the loss is covered (or otherwise), incorporating the following:

- Is the property damaged or destroyed insured under the policy?

- Does the Insured have an insurable interest in the property?
- Is the loss within the policy period?
- Has the premium been paid?
- Has there been accidental loss destruction or damage?
- Do any exclusions apply?
- Do any overrides cancel the effect of the exclusions?