

# Analyses

## Insurance, Reinsurance and the Impact of Terrorism: An Overview of the South African Position

JP VAN NIEKERK  
*University of South Africa*

The XIIth World Congress of the International Association of Insurance Law, commonly known by the acronym of its French name (Association Internationale du Droit des Assurances) as AIDA, was held in Buenos Aires, Argentina, from 16-19 October 2006.

One of two main themes of the Congress concerned the impact of terrorism on insurance and reinsurance law and practices. Given the events of the last few years, it was a topic the organisers considered highly relevant. Of course, from a South African point of view, the issue is, thankfully, not (or no longer) of such immediacy.

In order to provide the basis for legal comparison, the national chapters of AIDA were requested to respond to a questionnaire on the topic of terrorism that was circulated beforehand. That allowed two general reporters, professors Robert Merkin of England and Jerome Kullman of France, to work through the 20 national responses that were received and to prepare a general report and analysis for discussion at the Congress. (The general report as well as the various national responses may be viewed at <http://www.aida.org.uk/worldcongress06/>.)

South Africa was one of the countries that submitted a response to the questionnaire on insurance and terrorism. What follows is a slightly adapted and updated version of the South African submission. The format is that dictated by the questions posed (these are typeset in bold) and for that reason the following analysis does not pretend to be an exhaustive exposition of the impact of terrorism on South African insurance law.

### 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
- (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 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, two standard exclusions are frequently used 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 with, 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 a 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 five 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 the 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 it 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, Van der Merwe, Van Niekerk & Havenga *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, Van der Merwe, Van Niekerk & Havenga *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 *ibid* 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 observed 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'.

- (f) 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) 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.

and

- (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.

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 certain 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 or able 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.

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 R500 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 the 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, Van der Merwe, Van Niekerk & Havenga op cit in par 274.)

#### 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?

and

- (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?

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 a 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* 52-5, 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* 113-6).

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.zo/news/> (accessed on 21 Nov 2005)).

---