

Flying in crises areas Insurance law implications

3rd Aviation Law Afternoon Workshop

Lars Gerspacher

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Synopsis

- Ukraine as an example of a crisis area
- How do insurers grapple with crisis areas?
- Exclusions
- Cancellation, revision and automatic termination
- Adverse change in risks
- Cover of war and allied perils

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Ukraine crisis



Ukraine crisis

- Crimean crisis: In 2014 soldiers of ambiguous affiliation began to take control of strategic positions and infrastructure within the Ukrainian territory of Crimea.
- Annexation of Crimea by Russia on 18 March 2014.
- Putin admitted on 17 April 2014 that Russian troops had been active in Crimea and said this had laid the ground for the Crimean status referendum.
- Demonstrations by pro-Russian groups in the Donbass area of Ukraine escalated into an armed conflict between the separatist forces of the self-proclaimed Donetsk and Luhansk People's Republics and the Ukrainian government.
- In September 2014, fighting between separatists and Ukrainian government forces broke out at Donetsk International Airport.

Ukraine crisis

- In November 2014 the Ukrainian military reported intensive movement of troops and equipment from Russia into the separatist controlled parts of eastern Ukraine.
- Russia has denied allegations of its involvement in eastern Ukraine; so called 'stealth invasion'.



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How insurers grapple with crises areas



- The usual means
 - Enumerative list of countries covered
 - Exclusions
 - Cancellation, revision and automatic termination
 - Adverse change in risks
 - Cover of war and allied perils
- These are mainly used in hull and spares insurance; the insurers can define the terms and conditions of cover and exclude certain risks.
- Liability cover usually cannot be excluded for crisis areas:
 - All Member States of the EU and the EEA as well as Switzerland apply EC Regulation 785/2004 providing for compulsory liability insurance for passengers, baggage and cargo owners as well as third parties.
 - Other countries have similar provisions in relation to compulsory insurance.

How insurers grapple with crises areas



- EC Regulation 785/2004 on insurance requirements for air carriers and aircraft operators

"Article 2 / Scope

1. This Regulation shall apply to all air carriers and to all aircraft operators flying within, into, out of, or over the territory of a Member State to which the Treaty applies."

Article 4 / Principles of insurance

1. Air carriers and aircraft operators referred to in Article 2 shall be insured in accordance with this Regulation as regards their aviation-specific liability in respect of passengers, baggage, cargo and third parties. The insured risks shall include **acts of war, terrorism**, hijacking, **acts of sabotage**, unlawful seizure of aircraft and **civil commotion**."

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 - Geographical exclusions
 - War and allied perils exclusion clauses
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Exclusions

- Insurers can exclude certain risks from the cover (Art. 33 ICA applies).
- Article 33 ICA requires that the exclusion is unambiguous and ambiguous terms in the insurance policy are interpreted against the insurer.
- For crisis areas
 - Geographical exclusions
 - War and allied perils exclusion clauses
- Geographical exclusions do not require a causal link between the cause and the loss if a loss occurs in this area.
- Exclusion of certain types of risks takes may exclude new areas of crisis.
- Both types can be combined.

Exclusions

Geographical exclusions

- Kiln Clause LSW617, starting with A, now G (03/08/11):
 1. Notwithstanding any provisions to the contrary and subject to clauses 2 and 3 below, **this Policy excludes** any loss, damage or expense howsoever **occurring within the geographical limits of any of the following countries and regions:**
 - (a) Algeria, Burundi, Cabinda, Central African Republic, Congo, Democratic Republic of Congo, Eritrea, Ethiopia, Ivory Coast, Liberia, Mauritania, Nigeria, Somalia, The Republic of Sudan, South Sudan.
 - (b) Colombia, Ecuador, Peru.
 - (c) Afghanistan, Jammu & Kashmir, Myanmar, North Korea, Pakistan.
 - (d) Georgia, Nagorno-Karabakh, North Caucasian Federal District.
 - (e) Iran, Iraq, Libya, Syria, Yemen.
 - (f) Any country where the operation of the insured Aircraft is in breach of United Nations sanctions.

Exclusions

Geographical exclusions

- Kiln Clause LSW617G
 - "2. However coverage pursuant to this Policy is granted:
 - (a) for the overflight of any excluded country where the flight is within an internationally recognised air corridor and is performed in accordance with I.C.A.O. recommendations; or
 - (b) in circumstances where an insured Aircraft has landed in an excluded country as a direct consequence and exclusively as a result of force majeure."



Exclusions

Geographical exclusions

- Some insurers started explicitly mentioning Ukraine in letter (d).
- There is no UN Resolution in place that prohibits the operation of an aircraft in Ukraine.
- Russian sanctions against Ukraine: ban on the use of Russian airspace by Ukrainian aircraft.
- Sanctions against Iran:
 - UN Security Council Resolution 1929 of 9 June 2010 only relates to military aircraft.
 - U.S. Sanctions against Iran resulting in a total ban on selling aircraft or repair parts to Iranian aviation companies.

Exclusions

War and allied perils exclusion clauses

- Typical exclusion clause AVN.48B:

"WAR, HI-JACKING AND OTHER PERILS EXCLUSION CLAUSE (AVIATION)

This Policy does not cover claims **caused by**

- (a) War, invasion, acts of foreign enemies, hostilities (whether war be declared or not), civil war, rebellion, revolution, [...].
- (b) Any hostile detonation of any weapon of war employing atomic or nuclear fission and/or fusion or other like reaction or radioactive force or matter.
[...]
- (d) Any act of one or more persons, whether or not agents of a sovereign Power, for political or terrorist purposes and whether the loss or damage resulting therefrom is accidental or intentional.
- (e) Any malicious act or act of sabotage.
[...]"

Exclusions

War and allied perils exclusion clauses

- What do these expressions mean?
- What is currently happening in the Donbass region?
- War?
- Civil war?
- Rebellion?
- In what area?
- MH17?

Exclusions

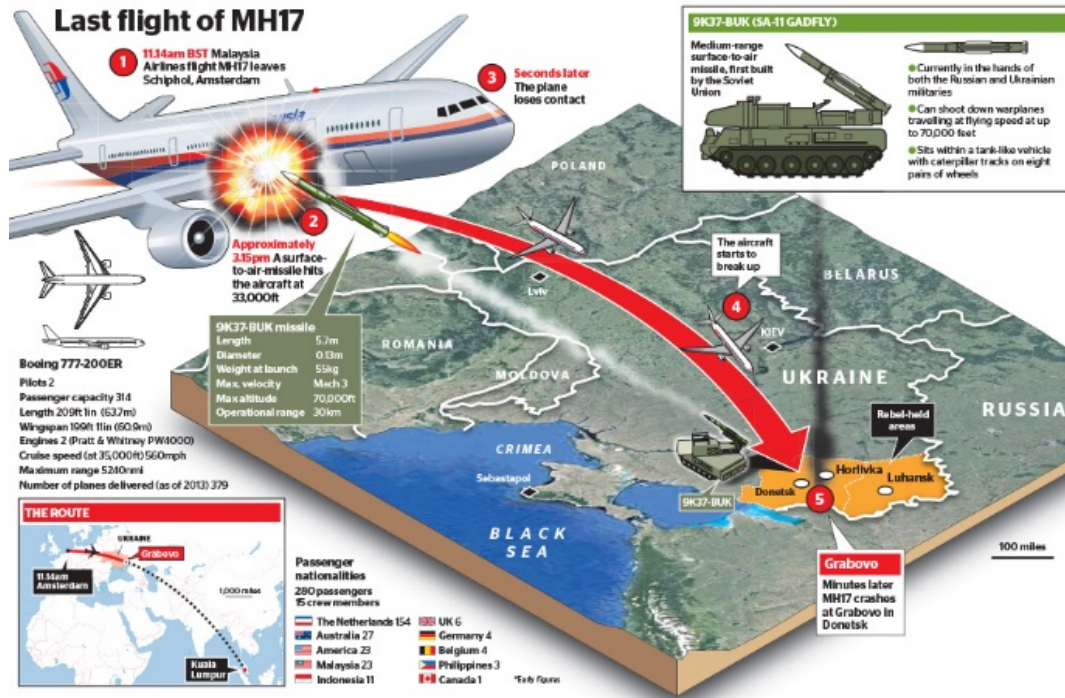
War and allied perils exclusion clauses

- What do these expressions mean?
Understanding of the reasonable assured
- What is currently happening in the Donbass region?
- War?
A contest by force between two or more nations, carried on for any purpose, or armed conflict of sovereign powers.
- Civil war?
Two or more opposing parties within a country resort to arms to settle a conflict or when a substantial portion of the population takes up arms against the legitimate government of a country.
- Rebellion?
Deliberate, organised resistance, by force and arms, to the laws or operations of the government, committed by a subject.
- In what area?

Exclusions

War and allied perils exclusion clauses

- MH17?



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Cancellation/revision/autom. termination

War and allied perils exclusion clauses



- E.g. LSW555D:
- Cancellation by short notices:

“This Policy may be cancelled by the Assured or Underwriters giving notice not less than 7 days prior to the end of each period of 3 months from inception.”
- Revision:

"Underwriters may give notice, effective on the expiry of 7 days from midnight G.M.T. on the day on which notice is issued, **to review the rate of premium and/or the geographical limits.** In the event of the review of the rate of premium and/or geographical limits not being accepted by the Assured then at the expiry of the said 7 days, this Policy shall become cancelled at that date."

Cancellation/revision/autom. termination

War and allied perils exclusion clauses



- Automatic termination:

“Whether or not such notice of cancellation has been given this Insurance shall TERMINATE AUTOMATICALLY

Upon the outbreak of war (whether there be a declaration of war or not) between any of the following States, namely, the United Kingdom, the United States of America, France, the **Russian Federation**, the People’s Republic of China.

PROVIDED THAT if the Aircraft is in the air when such outbreak of war occurs then this insurance, subject to its terms and conditions and provided not otherwise cancelled, terminated or suspended, will be continued in respect of such Aircraft until the said Aircraft has completed its first landing thereafter.”

Cancellation/revision/autom. termination

War and allied perils exclusion clauses



- What happens if the following arises:
 - War between Ukraine and Russia?
 - US or NATO assisting Ukraine in the war against Russia?

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Adverse change in risks

- Assuming that war, civil war or rebellion breaks out in a region outside LSW617G
- Increase in risks caused by the policyholder (Art. 28 ICA)?
 - If the increase is considerable, the insurer is entitled to terminate the policy with immediate effect.
 - The change in risks is deemed considerable if the facts which increased the risk were considered to be relevant at the conclusion of the contract.
 - If the increased risks causes the insured event or increases the loss the insurer will not be obliged to cover the (additional) loss.
 - The insurer may also terminate the policy. There is no specific deadline to terminate (BGE 99 II 67).
 - If the assured notifies the insurer of the increase the insurer has to terminate the policy within 14 days upon receipt of notification.
 - It requires an act of the policyholder (or its senior management). Acts of employees or other affiliates are usually not sufficient.

Adverse change in risks

- What happens if the following arises?
 - Landing in Kiev vs. Donetsk?
 - Pilot remains in an area where war or civil war has broken out?
 - Flight to an area where war or civil war has broken out already?



Adverse change in risks

- Increase in risks without the policyholder (Art. 30 ICA):
 - The policyholder is obliged to notify the insurer without delay.
 - If the insurer provided in the policy a right to terminate it, the insurer can terminate the policy with 14 days upon receipt of the notification by the policyholder.

“The Insurer shall be released from duty to indemnify where the Insured increases the risk without the Insurer's consent or allows a third party to do so after the policy has been arranged.”
 - If the insurer did not provide in the policy a right to terminate, the terms and conditions of policy remain applicable without any changes.
 - If the policyholder fails to notify, Art. 28 ICA applies.
- No duty to prevent the loss unless the policy states otherwise.

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Cover of war and allied perils

- Inclusion of passive war risks, i.e. the assured is not a participant
- LSW555D Hull War and Allied Perils

SECTION ONE: LOSS OF OR DAMAGE TO AIRCRAFT

Subject to the terms, conditions and limitations set out below, this Policy covers loss of or damage to the Aircraft stated in the Schedule against claims excluded from the Assured's Hull "All Risks" Policy as caused by:

- (a) **War, invasion, acts of foreign enemies**, hostilities (whether war be declared or not), **civil war, rebellion**, revolution, **insurrection**, martial law, military or usurped power or attempts at usurpation of power.
- (b) Strikes, riots, civil commotions or labour disturbances.
- (c) Any act of one or more persons, whether or not agents of a sovereign power, for political or terrorist purposes and whether the loss or damage resulting therefrom is accidental or intentional.
- (d) Any malicious act or act of sabotage.

[...]

Cover of war and allied perils

- LSW555D Hull War and Allied Perils

SECTION THREE: GENERAL EXCLUSIONS

This Policy excludes loss, damage or expense caused by one or any combinations of any of the following:

- (a) war (whether there be a declaration of war or not) between any of the following States: the United Kingdom, the United States of America, France, the Russian Federation, the People's Republic of China [N.B. **Permanent Members of the UN Security Council**]; nevertheless, if any Aircraft is in the air when an outbreak of such war occurs, this exclusion shall not apply in respect of such Aircraft until the said Aircraft has completed its first landing thereafter;
- (b) [...]

Thank you for your attention!

Lars Gerspacher

Attorney-at-law, LL.M. Maritime Law (Southampton)
gerspacher@gbf-legal.ch

gbf
Attorneys-at-law

P.O. Box 1661
Hegibachstrasse 47
8032 Zurich
Switzerland

T +41 43 500 48 50
F +41 43 500 48 60

P.O. Box 1911
Route de Pré-Bois 20
1215 Geneva Airport
Switzerland

T +41 22 533 48 50
F +41 22 533 48 54

contact@gbf-legal.ch
www.gbf-legal.ch