Terrorism as a risk in aviation insurance

Y Janse Van Rensburg

orcid.org/0000-0001-7218-4652

Mini-dissertation submitted in partial fulfilment of the requirements for the degree *Masters of Law* in *Import and Export Law* at the North-West University

Supervisor: Prof AL Stander

Graduation ceremony: May 2018

Student number: 22788875

Abstract

As early as 1914 (World War I), a growing relationship started between the airline industry and aviation insurance. What complicated this relationship was the exclusion of certain risks within a policy. One of these excluded risks was the "war" risk. Years later (especially 2001 after the 9/11 attacks), another complex term, namely "terrorism" emerged. In order to obtain more clarity about the relationship between terrorism and the airline industry, this study examined terrorism as a risk in aviation insurance. Furthermore, recommendations are given as to how terrorism must be interpreted within the aviation insurance context. Reference is made to the meanings and interpretation of the general all-risk policy and the war-risk policy. Both policies were interpreted considering the facts and the court's interpretation of *Pan American World Airways Inc v Aetna Casualty and Surety Co* 505 F2d 989 as this case refers to certain legal considerations and policies of insurance coverage for terrorist acts in aviation of transport of cargo. More recent court cases were also examined and principles compared.

Chapter one of the investigation gives a brief history and a problem statement that illustrate the complexity of the interpretation of terrorism within the aviation insurance industry. From the problem statement, certain questions arose, which were the focus point throughout this investigation.

Chapter two to Chapter five is a thorough investigation and research of the interpretation of terrorism in the aviation insurance context. In Chapter two the two focus points are the interpretation of the all-risk policy and both the War Exclusion and Institute War Clause (Air). It is established that an all-risk policy does have limitations and only covers things that happen by accident, fortuitously or unexpectedly. One of the exclusions in an all-risk policy is the war exclusion. Therefore, provision is made to obtain an Institute War Clause where cover is given to damages suffered in terms of the war-risk exclusion. The Institute War Clause makes provision for covering damages/loss suffered due to war, civil war, military or usurped power, insurrection and civil commotion and riots.

Within the discussion of the Institute War Clause, it appears that terrorism is not an express term discussed within one of these war exclusions. Therefore, Chapter three investigates terrorism as a risk in aviation insurance. It is important to know that there is currently no specific definition for terrorism in the insurance context. The United Nations also has expressed its concerns for its inability to define terrorism. Before no universal accepted definition is established, terrorism will not be totally countered in any field (including the insurance industry). After examining different meanings and interpretations of terrorism, the writer hereof defines terrorism within the context of aviation insurance of cargo as a threat or action which involves serious violence against a person and/or involves serious damage to property (cargo), with the main purpose to influence the government or advancing political, religious, or ideological beliefs. Notwithstanding, when interpreting the 9/11 attacks in the USA, it is clear that these attacks were not acts of war as discussed in Chapter two. Caban makes the point that "terrorism exclusions will become as prevalent as war exclusions in insurance". Because of the 9/11 attacks, terrorism *per se* has been incorporated within the newest edition of the War Risk Clause.

The last important aspect dealt with in this investigation is the proximate cause test. This test is important when deciding whether damages/loss may be claimed under the all-risk policy, or Institute War Clause.

After the investigation, it is submitted that terrorism must be interpreted as a separate occurrence and should the circumstances be tested before one establish that damages/loss was caused by terrorism. In terms of insurance claims, one must bear in mind that the question is not whether a certain event defined within the policy has occurred, but rather if the damages were the result of the certain event defined in the policy. Therefore, an insurer will be liable if the certain event is defined within the policy and if the damages/loss was proximately caused by this event.

Abstrak

So vroeg soos 1914 (die eerste wêreld oorlog) was daar 'n groeiende verhouding tussen die lugvaartbedryf en lugversekering. Wat hierdie verhouding gekompliseer het, was die uitsluiting van sekere risiko's binne 'n polis. Een van hierdie uitgesluite risiko's was die "oorlog" risiko. Jare later (veral 2001 na die 9/11 aanvalle) het 'n verdure komplekse terme ontstaan, naamlik "terrorisme". As gevolg van hierdie onsekerheid van terrorisme in die versekeringsverband, ondersoek die skrywer van hierdie studie terrorisme as 'n risiko in lugvaartversekering. Verder sal aanbevelings gemaak word oor hoe terrorisme binne die lugvaartversekeringsverband vertolk moet word. Verwysing sal ook gemaak word na die betekenisse en interpretasie van die alle risiko polis en die oorlog risiko polis. Beide die polisse sal geïnterpreteer word met inagneming van die feite van *Pan American World Airways Inc v Aetna Casualty and Surety Co* 505 F2d 989, aangesien hierdie saak sekere regsbeginsels oorweeg asook polisse van versekeringsdekking vir terroriste aksies in die lugvaartbedryf waar goedere vervoer word. Meer onlangse hofsake sal ook ondersoek word en beginsels vergelyk word.

Hoofstuk een van die ondersoek gee 'n kort geskiedenis en 'n probleemstelling wat die kompleksiteit van die interpretasie van terrorisme binne die lugvaartversekeringsbedryf illustreer. Uit die probleemstelling het sekere vrae ontstaan wat tydens hierdie ondersoek die fokuspunt sal wees.

Hoofstuk twee tot hoofstuk vyf is 'n deeglike ondersoek van die interpretasie van terrorisme in die lugvaartversekeringsverband. In hoofstuk twee is die twee hooffokuspunte die interpretasie van die alle risiko polis, sowel as die Oorlogsuitsluiting en Instituutoorlogsklousule (Lug). Daar word vasgestel dat 'n alle risiko polis beperkings het en slegs die dinge wat per ongeluk gebeur, toevallig of onverwags, dek. Een van die uitsluitings in 'n alle risiko polis is die uitsluiting van oorlog. Daar word dus voorsiening gemaak vir die verkryging van 'n Institusionele Oorlogsklousule, waar daar voorsiening gemaak word vir skade wat gely is in terme van die uitsluiting van oorlogsrisiko. Die Institusionele Oorlogsklousule maak voorsiening vir die dekking van

skadevergoeding/verlies as gevolg van oorlog, burgeroorlog, militêre of verswakte mag, opstand, en burgerlike oproer en onluste.

In die bespreking van die Institusionele Oorlogsklousule blyk dit dat terrorisme nie 'n uitdruklike term is wat binne een van hierdie oorlogsuitsluitings bespreek word nie. Daarom ondersoek hoofstuk drie terrorisme as 'n risiko in lugvaartversekering. Dit is belangrik om te weet dat daar tans geen spesifieke definisie van terrorisme in die versekeringskonteks is nie. Die Verenigde Nasies het ook hul kommer uitgespreek omdat hul nog nie daarin geslaag het om terrorisme te definieer nie. Voor daar nie 'n universele aanvaarbare definisie vir terrorisme vasgestel kan word nie, sal terrorisme nie beveg kan word in enige veld nie (insluitend die versekeringsbedryf). Na die ondersoek van verskillende betekenisse en interpretasies van terrorisme, definieer die skrywer terrorisme binne die konteks van lugvaartversekering van vrag as 'n bedreiging of aksie wat ernstige geweld teen 'n persoon en/of ernstige skade aan eiendom (goedere) inhou, met die hoofdoel om die regering te beïnvloed of politieke, godsdienstige of ideologiese oortuigings te bevorder. Wanneer die aanvalle van 9/11 in die VSA dus interpreteer word, is dit duidelik vir die skrywer van die studie onder bespreking dat hierdie aanvalle nie oorlogshandelinge was soos in hoofstuk twee bespreek nie. Caban maak die punt dat "terrorisme-uitsluitings so algemeen sal word as oorlogsuitsluitings in versekering ". As gevolg van die aanvalle van 9/11 is terrorisme *per se* in die nuutste uitgawe van die oorlogsrisikoklousule opgeneem.

Die laaste belangrike aspek wat in hierdie ondersoek behandel is, is die naderende oorsaakstoets. Hierdie toets is belangrik wanneer u besluit of skadevergoeding kragtens die alle-risiko-polis of Instituutoorlogsklousule geëis kan word.

Na die ondersoek is die skrywer van mening dat terrorisme as 'n afsonderlike voorkoms vertolk moet word en dat omstandighede getoets moet word voordat 'n mens vasstel of skade/verlies deur terrorisme veroorsaak is. Wat versekeringseise betref, moet daar in gedagte gehou word dat die vraag nie is of 'n sekere gebeurtenis in die polis gedefinieer is nie, maar eerder of die skade die gevolg was van die bepaalde gebeurtenis wat in die polis gedefinieer is. Daarom sal 'n versekeraar aanspreeklik gehou word indien die bepaalde gebeurtenis binne die polis gedefinieer word en indien

die skade/verlies die onmiddellike/naaste oorsaak was van hierdie bepaalde gebeurtenis.

TABLE OF CONTENTS

LIST OF ABBREVIATIONS

CILSA	Comparative and International Law Journal of Southern Africa
IUA	International Underwriting Association
J Air L & Com	Journal of Air Law and Commerce
PFLP	Popular Front for the Liberation of Palestine
PLO	People's Land Order
SA Merc LJ	South African Mercantile Law Journal
THRHR	Journal for Contemporary Roman-Dutch Law
USA	United States of America

1 Introduction

1.1 History

On the 17th of December 1903, the Write brothers made the first controlled airplane in the United States. From here on, the most significant era in transportation history began.[1] The United States first started with the development of a large and complex airline industry that completely changed the transportation and travel industries worldwide.[2] The growth in the insurance industry corresponded with the increased air travel needs. It expanded the insurance market by writing the first aviation insurance policy only a few years after the Wright brothers' first flight in 1903.[3] Before the end of 1910, the Lloyd's Insurance Company of London accepted the first aviation insurance policy. This policy only covered legal liability due to the airplanes of that era not being developed to a point where they were reliable and predictable.[4]

After World War I (that took place from 1914 to 1918), a need for aviation insurance became apparent. However, the risks remained too high for expansive growth in the industry. During 1917 to 1927, insurance companies started to experiment with aviation insurance policies due to these high risks.[5] The modern age of aviation insurance was sparked by World War II (that took place from 1939 to 1945). The insurance industry then started to expand its formative beginnings.[6] Nevertheless, the insurance industry was met with a period of confusion.[7] Insurance companies started to gain experience and adjusted premiums to adequately reflect risks.[8] Insurance companies adapted to meet the shape and needs of the airline industry together with the role of courts.[9]

---

1 Libby 1994–1995 *J Air L & Com* 613; Langley 2009 http://aviation-history.com/early/wright.htm.
2 Libby 1994–1995 *J Air L & Com* 613.
3 Libby 1994–1995 *J Air L & Com* 614.
4 Caban 2003 *J Air L & Com* 427; Libby 1994–1995 *J Air L & Com* 615.
5 Libby 1994–1995 *J Air L & Com* 615. Also see Elias, Tang and Webel 2014 *Congressional Research Service* 3.
6 Libby 1994–1995 *J Air L & Com* 615.
7 Libby 1994–1995 *J Air L & Com* 615-616. Also see Caban 2003 *J Air L & Com* 427.
8 Libby 1994–1995 *J Air L & Com* 616.
9 Libby 1994–1995 *J Air L & Com* 618.

Since World War II, the insurance industry underwent a lot of challenges. In this study, it was necessary to refer to marine insurance as sources on aviation insurance are still limited. The airline industry was used by terrorists to gain some sort of political or belief gain. Terrorism experts point to the hijacking of an El Al Boeing 707 in Italy on 23 July 1968 by members of the Popular Front for the Liberation of Palestine (PFLP) as "the beginning of an era of international terrorism".[10] The following year (1969), a Trans World Airlines flight was yet again hijacked by PFLP members.[11] PFLP members attempted to commandeer four airlines on 6 September 1970, successfully hijacking three.[12] The third hijacked aircraft, a Pan Am 747 hijacked on 6 September 1970, was of relevance for this study in discussing legal considerations and policies of insurance coverage for terrorist acts in aviation of transport of cargo.

On 11 September 2001, one of the worst terrorist attacks in the history of the United States occurred when hijackers flew a hijacked US aircraft into the World Trade Centre. Another hijacked aircraft was flown into the Pentagon and hours later one more hijacked aircraft went down in western Pennsylvania.[13] Subsequent worldwide terrorist attacks affected airlines by the cancelation of third party liability.[14] Furthermore, there was a significant increase in the commercial market regarding the costs of war-risk insurance.[15] Even though the commercial insurance market has stabilised since these attacks, some uncertainties with regard to terrorism as a risk in aviation insurance remain.[16] These uncertainties are discussed hereunder.

---

10 Elias, Tang, and Webel 2014 *Congressional Research Service* 3–4.
11 Elias, Tang, and Webel 2014 *Congressional Research Service* 4.
12 Elias, Tang, and Webel 2014 *Congressional Research Service* 4.
13 Caban 2003 *J Air L & Com* 421. Also see Kruger and Smit 2007 *THRHR* 25: "Die aanvalle op die World Trade Centre en Pentagon in die Verenigde State van Amerika het die belangrikheid van oorlog- en soorgelyke risiko's by die versekering van in- en uitvoergoedere op 'n skrikwekkende manier beklemtoon".
14 Elias, Tang, and Webel 2014 *Congressional Research Service* 1.
15 Elias, Tang, and Webel 2014 *Congressional Research Service* 1.
16 Elias, Tang, and Webel 2014 *Congressional Research Service* 1.

1.2. Problem statement

The following illustrates a problem in terms of insurance in terrorist acts during aviation transport of cargo:

A (a South African company) exports electronic equipment to B (an Italian company). The airplane is on its way to Italy when it is hijacked above Zimbabwe by members of the People's Land Order (PLO). The PLO is an independent group fighting for independence of the territory which they occupy in Nigeria. The airplane is forced to Sudan where it is loaded with explosives. Thereafter, the airplane flies to Cairo, Egypt. The fuses of the explosives are ignited shortly before landing in Cairo and the airplane then explodes. Both the airplane and cargo are entirely destroyed. A is insured in terms of an All Risk Policy (Air Cargo) from an insurance company in South Africa and war-risk insurance from the Institute War Clauses (Air Cargo) from the Lloyd's Insurance Company of London.

The questions that arise are the following: Firstly, will the damages and/or loss be covered by the general all-risk policy? If it is excluded by the provisions of the Lloyd's All Risk Policy, the next question is whether the risk of terrorism will be covered by the Institute War Clause? In other words, the question then is whether the act of terrorism falls within the ambit of the "war risks" in the Institute War Clause?

To answer these questions, reference will be made in Chapter 2 to the meanings and interpretation of the general all-risk policy and the war-risk policy. Both policies will be interpreted considering the facts and the court's interpretation of *Pan American World Airways Inc v Aetna Casualty and Surety Co*[17]as the *locus classicus* for interpreting these policies in aviation insurance. More recent court cases will be examined and principles compared in order to determine the meaning given to these policies in the insurance law field. Thereafter, in Chapter 3, the meaning of terrorism will be investigated. This investigation is based on different principles and meanings within the insurance context. These principles and meanings will be compared with the

[17] *Pan American World Airways Inc v Aetna Casualty and Surety Co* 505 F2d 989, hereinafter the *"Pan American* case".

English law in order to determine whether there is a difference within the interpretation and meanings of these principles between the insurance context and English law. Lastly, before concluding, the proximate cause is discussed in Chapter 4 and interpreted in terms of the said problem statement above. Concluding remarks will follow in Chapter 5. Throughout the investigation of this subject, it was clear that the South African insurance law relies on the English insurance law.[18] Even though it is argued that Roman-Dutch law was generally restored in South Africa as the primary and subsidiary source of insurance law, English law principles still have become part of the South African law and could remain applicable in preference of the Roman-Dutch law.[19] Furthermore, where principles derived from English insurance law have been incorporated into our law and where the principles are not in conflict with the general principles of the South African law, the English insurance law will be of great persuasive force, even if it is no longer of binding authority.[20] Due to the South African insurance law having developed over a long period of time during which the influence of English law was dominant,[21] the English law will be relevant throughout this whole investigation and especially being that there are not that much of South African sources in this specific subject.

2 The All-Risk Policy and the War-Risk Policy in terms of the ICC

In the *Pan American* case, Pan America World Airways brought an action against Aetna Casualty and Surety and two other groups of aviation all-risk insurers, as well as certain war-risk insurers.[22] The action was brought to recover the loss of a Boeing 747, which, while on a flight from Brussels to New York, was hijacked to Egypt and destroyed. The airplane was hijacked by two persons who allegedly acted on behalf of the PFLP. The

18 Even as early as 1879 the role of the English law in the South African law could be noted when the South African legislature incorporated the English law in South Africa by introducing the *General Law Amendment Act* 8 of 1879.

19 Reinecke, Van Niekerk, and Nienaber *South African Insurance Law* 14.

20 Reinecke, Van Niekerk, and Nienaber *South African Insurance Law* 18.

21 Reinecke, Van Niekerk, and Nienaber *South African Insurance Law* 19.

22 See *Pan American World Airways Inc v Aetna Casualty and Surety Co* 505 F2d 989 paras 8–14.

all-risk policy in this case stated that the policy (all-risk policy) does not cover damages due to or resulting from:

1. Capture, seizure, arrest, restraint or detention or the consequences thereof or of any attempt threat, or any taking of the property insured or damaged to or destruction thereof by any Government or Government or governmental authority or agent (whether secret or otherwise) or by any military, naval or usurped power, whether in time of peace or war and whether lawful or unlawful...[23]

2. War, invasion, civil war, revolution, rebellion, insurrection or warlike operations, whether there be a declaration of war or not.[24]

3. Strikes, riots, civil commotion.[25]

The policy of the war-risk insurers stated that these insurers (war-risk insurers) will cover the loss or damage resulting from the following perils:

> War, invasion, acts of foreign enemies, hostilities (whether war be declared or not), civil war, rebellion, revolution or insurrection, military or usurped power of confiscation and / or nationalization or requisition or destruction by any government or public or local authority or by any independent unit or individual engaged in irregular warfare.[26]

The interpretation of these exclusions was the only issue in the *Pan American* case.[27]

It was argued by the all-risk insurers that the destruction of the 747 fell within the exclusion of Clause 1, excluding damage or destruction by any military or usurped power. Furthermore, it was argued that it also fell within the Clause 2 exclusion, excepting invasion, riots and civil commotion. The war-risk insurers on the other hand, did not agree with the all-risk insurers and took the position that the loss of the 747 was not due to or resulting from any of the excluded risks.[28]

As far as the all-risk insurers were concerned, however, the hijacking was caused by PFLP or Palestinian Arab "military or usurped power". The evidence they brought was that these groups operated as paramilitary quasi-governments. Furthermore, they

---

23 Hereinafter "Clause 1".
24 Hereinafter "Clause 2".
25 Hereinafter "Clause 3". See *Pan American World Airways Inc v Aetna Casualty and Surety Co* 505 F2d 989 paras 8–14.
26 *Pan American World Airways Inc v Aetna Casualty and Surety Co* 505 F2d 989 par 17.
27 *Pan American World Airways Inc v Aetna Casualty and Surety Co* 505 F2d 989 par 17.
28 *Pan American World Airways Inc v Aetna Casualty and Surety Co* 505 F2d 989 par 25.

relied on the same evidence to establish that the loss of the 747 was caused by an "insurrection". Based on these two exclusions, they argued that various Fedayeen (organisations of Palestinian refugees wanting Israel to have control over Arab) again had the power over substantial territory from which they excluded government functionaries. The Fedayeen then engaged in violent clashes with the Jordanian army, culminating in a civil war following the September 1970 hijacking.[29] The all-risk insurers also brought the loss of the 747 into the scope of the term "war" and "warlike operations" by arguing that the PFLP engaged in guerrilla warfare. Lastly, the all-risk insurers argued that the hijacking of the 747 related to other hijackings committed on the same day, which constituted a civil commotion.[30]

On the other hand, the war-risk insurers brought evidence supporting their view of the nature and goals of the PFLP and the Middle Eastern situation.[31] To establish which insurer would be liable for the loss, it was firstly essential to understand what each policy means.

These policies were interpreted in terms of the English insurance law, mainly due to the long relationship between the South African and English law. Since the 19th century, the South African courts referred to the English insurance law to supplement the Roman–Dutch law.[32] In *Mutual and Federal Insurance Co Ltd v Oudtshoorn Municipality*[33] (which is regarded as the leading case on the sources of South African insurance law), the court held that the legislature had in effect restored the Roman-Dutch law. The court further held that the Roman-Dutch and the English law of marine insurance both derived from the same original sources.[34] Due to the strong influence that the English law has on the South African marine insurance, some English principles have been incorporated into South African case law (which therefore have persuasive

---

29 *Pan American World Airways Inc v Aetna Casualty and Surety Co* 505 F2d 989 par 25.

30 *Pan American World Airways Inc v Aetna Casualty and Surety Co* 505 F2d 989 par 27. Civil commotion will be discussed in more detail in par 2.2.2.5.

31 *Pan American World Airways Inc v Aetna Casualty and Surety Co* 505 F2d 989 par 29.

32 Reinecke, Van Niekerk, and Nienaber *South African Insurance Law* 16.

33 1985 (1) SA 419 (A).

34 *Mutual and Federal Insurance Co Ltd v Oudtshoorn Municipality* 1985 (1) SA 419 (A) par 431E.
Also see Reinecke, Van Niekerk, and Nienaber *South African Insurance Law* 15.

authority in the South African courts).[35] Marine insurance is the oldest form of insurance and all other forms developed from marine insurance.[36]

Clauses, such as the war-risk clauses have been adopted from the marine insurance policies, as the first needs for such insurance arose within the marine context.[37] It is therefore submitted that the same meanings discussed within the marine insurance context are applicable in the aviation insurance context.

2.1 The All-Risk Policy

2.1.1 Meaning and interpretation of the all-risk policy

The all-risk policy in the insurance context of aviation insurance aims to provide cover for all kinds of risks. The insurer's liability is not unqualified, nevertheless the all-risk policy provides the widest possible coverage.[38] Cover is only for an insured who has an insurable interest.[39] One must bear in mind that nowadays there are writers who believe that the requirement of insurable interest is not necessary for a valid insurance contract to exist.[40]

The definition of insurable interest was first formulated in *Lucena v Craufurd*[41] where Lord Eldon stated that he is unable to point out what is an interest unless it be a right in the property, or a right derivable out of some contract about the property …[42] In *Littlejohn v Norwich Union Fire Insurance Society*[43] the South African court made its first attempt to define insurable interest

---

35 Hare *Shipping Law & Admiralty Jurisdiction in South Africa* 18.

36 Kruger and Stander 2010 *SA Merc LJ* 485 and 491. Also see Stander and Smit 2007 *THRHR* 24: "Om die relevante prayktyksreëls en klousules van die Suid–Afrikaanse seeversekeringsreg korrek te verstaan en te interpreter, moet dit dus binne die konteks van die Engelse reg gedoen word".

37 Galyean 1974 *Californian Western International Law Journal* 318.

38 Kruger and Stander 2010 *SA Merc LJ* 484.

39 Caban 2003 *J Air L & Com* 430. Also see Kruger and Stander 2010 *SA Merc LJ* 492; Reinecke, Van Niekerk, and Nienaber *South African Insurance Law* 322.

40 See Hare *Shipping Law & Admiralty Jurisdiction in South Africa* 864. A discussion of this aspect does not fall within the ambit of this investigation.

41 (1806) 2 Bos & Pul NR 269 127 ER 630 (HL).

42 *Lucena v Craufurd* (1806) 2 Bos & Pul NR 269 127 ER 630 (HL) par 651.

43 1905 TH 374.

> (I)f the (insured) can show that he stands to lose something of an appreciable commercial value by the destruction of the thing insured, then even though he has neither a jus in re or a jus ad rem to the thing insured his interest will be an insurable one.[44]

In *Lorcom Thirteen (Pty) Ltd v Zurich Insurance Company, South Africa Ltd*[45] the court also dealt with the interpretation of insurable interest and it was stated that an owner of an asset had an insurable interest in the asset being that the destruction of the asset would diminish the owner's patrimony by that amount.[46] In short, the existence of an insurable interest is seen as the factor which gives status and content to the insurance contract.[47] In a more recent case, *Lynco Plant Hires & Sales BK v Univem Versekeringsmakelaars BK,*[48] Judge Claassen agreed with the approach in the *Littlejohn case* as stated above.[49] Therefore, it is submitted that the meaning of insurable interest as defined in the *Littlejohn* case is still the leading and most acceptable definition within the context of examining terrorism as a risk in aviation insurance.

2.1.2 What is "risk"?

The risk element is regarded as one of the material and essential elements in an insurance contract.[50] A person is exposed to several circumstances daily which may cause an undesirable change in a specific person's particular, personal, general, or financial situation. This situation is uncertain in the sense that one does not know whether the circumstances will change and, if so, when and to what extent.[51] The possibility of this undesirable change is called a "risk". A risk is thus always coupled with uncertainty.[52]

---

44 *Littlejohn v Norwich Union Fire Insurance Society* 1905 TH 374 paras 380–381, hereinafter referred to as the *"Littlejohn* case*".* Also see Reinecke, Van Niekerk and Nienaber *South African Insurance Law* 27.

45 [2013] 4 All SA 71 (WCC).

46 [2013] 4 All SA 71 (WCC) par 35.

47 Reinecke 1971 *CILSA* 193.

48 2002 5 SA 85 (T).

49 2002 5 SA 85 (T) par 20.

50 Kruger and Stander 2010 *SA Merc LJ* 485.

51 Reinecke, Van Niekerk, and Nienaber *South African Insurance Law* 233.

52 Reinecke, Van Niekerk, and Nienaber *South African Insurance Law* 233.

In an insurance contract, the parties have to come to a decision of the full extent of the possible harm and probability that the harm will materialise to the specific physical object.[53] Therefore, risk refers to the undesirable change because of the possibility of harm. This possibility of harm is the risk, while the cause of the harm will be the peril.

2.1.3 Does an all-risk policy cover all risks?

Even though the term "all-risk" implies that all contingencies are covered, this is in fact not the case. Firstly, it only covers risks – thus uncertainties.[54] Secondly, most of the all-risk policies generally provide coverage subject to the exclusions specifically named within the policy. In the instance where a loss does not come within an exclusion, it still may not be covered under an all-risk policy because it entails a certainty.[55]

The all-risk policy focusses on the exclusions, if any, as mentioned in the policy. Nevertheless, before focussing on the exclusions, one first must determine whether the said loss that occurred, falls within the ambit of the insurance agreement.[56] The leading case on the meaning and interpretation of the all-risk policy is given by Lord Sumner in *British & Foreign Marine Insurance Co v Gaunt*[57]:There are, of course, limits to "all risks". They are risks and risks insured against. Accordingly, the expression does not cover inherent vice or mere wear and tear… It covers a risk, not a certainty; it is something, which happens to the subject-matter from without, not the natural behaviour of the subject-matter, being what it is, in the circumstances under which it is carried. Nor is it a loss which the assured brings about by his own act, for then he has not merely exposed the goods to the chance of injury, he has injured then himself.[58]

---

53 Reinecke, Van Niekerk, and Nienaber *South African Insurance Law* 238.
54 Giaschi "Canadian Law of Marine Insurance Frequently asked Questions" 6.
55 Giaschi "Canadian Law of Marine Insurance Frequently asked Questions" 6.
56 The Brief 2014 *Tort trial & Insurance Practice Section* 13.
57 [1921] 26 Com Cas 247.
58 *British & Foreign Marine Insurance Co v Gaunt* [1921] 26 Com Cas 247 paras 259–260.

Therefore, one would have cover under an all-risk policy if the loss has been caused by fortuity or if the loss is uncertain. Fortuitousness is coupled with uncertainty and is part of the risk concept. It relies on the view that an occurrence needs to be outside the control of a party.[59] In terms of the South African law, damages caused by the negligence of an insured or a representative of the insured will be covered by the all-risk policy.[60] Loss caused by inherent vice, wear and tear or deterioration of the subject matter insured, will not be covered.[61]

2.1.4 Exclusions

The standard all-risk policy automatically excludes damages which are caused by "wear and tear". Wear and tear is regarded as one of the more controversial issues in the maritime insurance law.[62] It is defined as

> the natural and normal weathering of an object and relates to the outcome of the expected life of such object.[63] An example of the interpretation of "wear and tear" is seen in *Johnson Press of America Inc v Northern Insurance Co of New York.*[64] In this case, the roof above the insured's buildings collapsed. Long before the roof collapsed, the insured noticed that portions of the roof and floors were missing. A part of the staircase was also partially collapsed and there was a growth of fungus and damage by water throughout the whole building.[65] The court affirmed judgment in the insurer's favour and held that the collapse was not fortuitous, but that it was rather the result of several excluded causes, which included wear and tear.[66] Consequently, it speaks for itself that an insured who fails to maintain his or her property, cannot hold the insurer liable to repair damages due to ordinary wear.

---

59 Reinecke, Van Niekerk and Nienaber *South African Insurance Law* 235-236.

60 See Hare *Shipping Law & Admiralty Jurisdiction in South Africa* 892; Reinecke, Van Niekerk, and Nienaber *South African Insurance Law* 243.

61 Leakage, breakage and wear and tear is discussed within the same context in the South African law (Hare *Shipping Law & Admiralty Jurisdiction in South Africa* 892).

62 Kruger and Stander 2010 *SA Merc LJ* 503.

63 Kruger and Stander 2010 *SA Merc LJ* 503. Also see Lloyd's Agency Cargo Claims and Recoveries Module 3 22–23: "Ordinary wear and tear is the deterioration that something will suffer use over a period of time".

64 791 N E 2d 1291 (III App Ct 2003).

65 791 N E 2d 1291 (III App Ct 2003) 1291 – 1292.

66 791 N E 2d 1291 (III App Ct 2003) 1292.

Within the same context of "wear and tear", the all-risk policy excludes inherent vice (latent defects).[67] Inherent vice is the

> natural condition or characteristic of the cargo which can be deteriorated without any external influence.[68]

Therefore, it is seen as "a defect or characteristic in the object of risk itself".[69] It involves a physical change to the object that was not caused by any external factor. An example hereof is the transport of food by aircraft. Over time, the food will start to go off or rot which will make it impossible for human consumption.[70] If the food went off or rotted due to the failure of the cooling system in the container in the aircraft, the loss would not be regarded as inherent vice, but rather a fortuitous and external cause. Therefore, wear and tear and inherent vice will by implication not be covered in terms of an all-risk policy.[71] Another interesting aspect regards faulty workmanship or design.[72] This excludes damage or loss caused directly or indirectly by defects.[73] According to Roberts, expert testimony is usually necessary when one must determine whether design defects caused (or contributed) to loss or damage.[74] An example of the courts' interpretation of faulty workmanship is seen in *City of Barre Vermont v New Hampshire Ins Co*[75] where the court held that

> (i)f the intent of the policy was to exclude liability from loss caused by negligence on the part of the contractor, it is not unfair to require that such intent be clearly expressed, particularly when one exclusion from coverage refers to "loss caused... by… any intentional act on the part of the Insured…" Express exclusion of an

---

67 Other examples of "latent defects" include: cracking, corrosion and rot. Also see The Brief 2014 *Tort trial & Insurance Practice* Section 16.

68 Lloyd's Agency *Cargo Claims and Recoveries – Module 3* 22–23.

69 Reinecke, Van Niekerk, and Nienaber *South African Insurance Law* 244.

70 "It does not matter if it does so because of its susceptibility to natural sweating or because of spontaneous combustion or inadequate packaging" (Reinecke, Van Niekerk, and Nienaber *South African Insurance Law* 244).

71 Also see Reinecke, Van Niekerk, and Nienaber *South African Insurance Law* 243: "The reason is that loss or damage to, say, goods or property from those causes are not uncertain, fortuitous but, in the normal cause of the events, inevitable, natural, and bound to happen at some time or another".

72 There are not much in depth discussions on this aspect within the South African context. It is submitted that same approach should be and would probably be followed in South Africa.

73 Roberts 1986 *Insurance Counsel Journal* 100.

74 Roberts 1986 *Insurance Counsel Journal* 100.

75 396 A2d 121 (Vt 1978).

> intentional act would seem a clear indication that the consequences of a negligent act were within coverage, and not excluded.[76]

By now, it should be clear that all-risk policies do not cover all losses. Once the insured demonstrates that there is an existence of an all-risk policy and the possibility of fortuitous physical damages to the property, the burden will then fall on the insurer to prove how the physical damage occurred. It must also be proven that the damages were caused by one or more certainties automatically excluded, or by any other excluded causes of loss (if there are any stipulated).

At this stage, it can be said with confidence that terrorism is a risk. Terrorism can thus fall within the ambit of the all-risk policy since it is not a certainty like wear and tear or inherent vice, but rather an uncertainty. Because the All Risk Policy (Air Cargo) from Lloyd's is applicable in this regard, the question now is whether terrorism is one of the other expressed exclusions? This is discussed in paragraph 2.2.1.

2.1.5 Burden of proof

The same principles applicable in civil matters with regard to burden of proof are applicable in the insurance context.[77]

> An insured who brings a claim under an insurance contract bears the burden of proving that the risk as described in the insurance contract has materialised or, as it was described in one decision, the insured must "bring his claim within the four corners of the promise made to him.[78]

In the instance where the risk is limited in the insurance contract, the onus will be on the insured to prove, on a balance of probabilities, that the claim falls within the description of the insurance contract.[79] Due to the fact that most all-risk policies consist of exclusions, the insurer needs to prove that coverage for the loss is not excluded in

---

[76] *City of Barre Vermont v New Hampshire Ins Co* 396 A2d 121 (Vt 1978) par 122.

[77] Reinecke, Van Niekerk, and Nienaber *South African Insurance Law* 271. Also see Bennett *The Law of Marine Insurance* 107: "It is always incumbent upon the assured to prove according to the civil law standard of proof on a balance of probabilities that the loss the subject of the claim was caused by a peril insured against.

[78] Reinecke, Van Niekerk, and Nienaber *South African Insurance Law* 271. Also see *Eagle Star Insurance Co Ltd v Willey* 1956 (1) SA 330 (A) paras 334B–334C.

[79] Reinecke, Van Niekerk, and Nienaber *South African Insurance Law* 27.

terms of the all-risk policy.[80] In the instance where an insured party has both an all-risk policy and a war-risk policy, the all-risk insurer will have the burden of showing that the loss is excluded from coverage. This must be done before the insured can proceed with claiming coverage for the loss from the war-risk insurer.[81] Under the Lloyd's all-risk policy there are no requirements that the insured must proof how the loss or damage have exactly occurred. The insured only needs to prove that the loss or damage is fortuitous.[82]

2.2 Institute Cargo Clauses (Air Cargo)

By now, it is clear that the all-risk policy does have limitations. It only covers things that happen by accident, fortuitously or unexpectedly. Furthermore, it does not cover eventualities that are certain to happen or are inevitable. Only physical loss/damages causing financial harm are covered.[83] With regard to the all-risk policy in terms of aviation insurance, Caban refers to three general categories into which the all-risk insurance may be divided:[84] first, the "all-risk ground and flight", which provides the broadest coverage for the protection of aircrafts while the aircrafts are on the ground or in the air; second, the "all-risk not in motion", which provides coverage for the physical damage or loss to an aircraft when the said aircraft is on the ground and not moving under its own power or momentum; lastly, the "all-risk not in flight", which covers the aircraft while the aircraft is taxiing, or while it is stationary. If the policy does not expressly refer to any of these categories, the policy will then be a normal all-risk policy as in the case of the ICC (Air Cargo).

---

80 Caban 2003 *J Air L & Com* 430.

81 Caban 2003 *J Air L & Com* 430; The Brief 2014 *Tort trial & Insurance Practice Section* 15: "Only after the insured proves physical loss or damage to covered property does the burden shift to the insurer to prove than an exclusion or limitation bars coverage".

82 Lloyd's Agency *Cargo Claims and Recoveries – Module 3* 8-9. Nevertheless, there are certain types of loss or damages which underwriters expressly do not cover. These types of loss and damages are a study on its own and will therefore not be discussed in this investigation.

83 Reinecke, Van Niekerk, and Nienaber *South African Insurance Law* 243.

84 Caban 2003 *J Air L & Com* 430.

2.2.1 Exclusions

In terms of the ICC (Air Cargo) clause, this insurance policy has specific exclusions. An insured will not be covered in the instance where loss or damage occurred due to the wilful misconduct of the insured. This includes the actions of the insured that are either deliberate or reckless.[85] Furthermore, in terms of this clause, a second exclusion is that of ordinary leakage, ordinary loss in weight, or ordinary wear and tear of the insured's subject matter.[86] A third exclusion clause is the loss or damage caused by insufficiency or unsuitability of packing or preparation of the insured subject.[87] This Institute Cargo Clause specifically states that "packing shall be deemed to include stowage in a container" and "employees shall not include independent contractors".[88] A fourth exclusion is the loss or damage caused by inherent vice.[89] The fifth exclusion is the instance where loss or damage occurred by delay (even if the delay was caused by an insured risk).[90] A sixth exclusion is when the loss or damage has been caused by insolvency or financial default of the operators, owners, or managers of the vessel.[91] Nevertheless, this exclusion will not apply where the insurance contract has been entered in good faith.[92] The last exclusion clause is the instance where loss or damage has been caused directly or indirectly using any weapon (war) or device employing atomic or nuclear fission or fusion or any other like reaction.[93]

Due to the war exclusion, A (in the problem statement) was necessitated to obtain additional cover in terms of the Institute War Clause. Therefore, it is important to also discuss this clause to answer the questions in terms of the problem statement provided.

---

85 Lloyd's Agency *Cargo Claims and Recoveries – Module 3* 21.
86 Lloyd's Agency *Cargo Claims and Recoveries – Module 3* 22–23.
87 Lloyd's Agency *Cargo Claims and Recoveries – Module 3* 22–23.
88 Lloyd's Agency *Cargo Claims and Recoveries – Module 3* 22–23.
89 Lloyd's Agency *Cargo Claims and Recoveries – Module 3* 22–23.
90 Lloyd's Agency *Cargo Claims and Recoveries – Module 3* 22–23.
91 Lloyd's Agency *Cargo Claims and Recoveries – Module 3* 22–23.
92 Lloyd's Agency *Cargo Claims and Recoveries – Module 3* 22–23.
93 Lloyd's Agency *Cargo Claims and Recoveries – Module 3* 24–25.

2.2.2 The interpretation of the War Exclusion and the Institute War Clause (Air)

The war-risk exclusion in the all-risk policy does not cover loss or damages caused by

1. War civil war revolution rebellion insurrection, or civil strife arising therefrom, or any hostile act by or against a belligerent power.
2. Capture seizure arrest restraint or detainment (piracy excepted), and the consequences thereof or any attempt thereat.
3. Derelict mines, torpedoes, bombs or other derelict weapons of war.[94]

Due to this war exclusion in the all-risk policy, Lloyd's has made provision for a war clause, which covers loss or damages suffered due to war, being the Institute War Clause (Air). Due to A (in the problem statement) having cover in terms of an all-risk policy and an Institute War Clause, it is important to understand the war-risk exclusion as well as the Institute War Clause to determine whether A will be covered in terms of the all-risk policy or the Institute War Clause.

2.2.2.1 War

According to Massmann, the English courts have set a precedent when it comes to the interpretation of the term "war" in the insurance industry worldwide.[95] She indicates that American courts follow the British precedent and adhere to the strict doctrine of what constitutes war. This exclusion (war) can only be applied in situations where the damages suffered arose from a "genuine warlike act".[96] According to O' May, there is no specific test to determine whether a state or country is at war.[97] Nevertheless, in the insurance context, it is not necessary for a formal declaration of war.[98]

Caban defines war as

> (h)ostile conflict by means of armed forces, carried on between two nations, states, or rulers, or sometimes between parties within the same nation or state.[99]

---

94 Lloyd's Agency *Cargo Claims and Recoveries – Module 3* 26–27. Also see Institute War Clauses (Air Cargo) date unknown www.lmalloyds.co./CMDownload.aspx?ContentKey=92588.
95 Massmann 2001 *National Underwriter* 40.
96 Massmann 2001 *National Underwriter* 40.
97 O' May *Marine Insurance* 260.
98 O' May *Marine Insurance* 260.
99 Caban 2003 *J Air L & Com* 433.

This definition is however not overall accepted, the reason being that war does not have a technical definition in the insurance context.[100] Furthermore, it also appears that there is no test to determine whether a country or state is indeed at war. Nevertheless, it is not necessary within the insurance context for a formal war to be declared.[101] Therefore, the standpoint was taken that "warlike operations" and "hostile action" are similar and include war.[102]

Caban accepts that the USA courts have followed the British courts' interpretation of the war-risk policy and allowed the war-risk clause to be applicable only when damage is caused by "genuine warlike acts".[103] Even though the *Pan American* case is regarded as the *locus classicus* on war-risk and aviation insurance, another case that also provides significant guidance is *Holiday Inns Inc v Aetna Insurance Co*[104] (although it is not an aviation insurance case). In this case, the court interpreted the war-risk exclusion and approvingly and extensively quoted the *Pan American* case. In the *Holiday Inns* case, the hotel became the centre of a battle between factional groups. These different groups fought for possession and control of the district.[105] Between October 1975 and April 1976, the hotel sustained damages as result of the conflict. The insurer (Aetna) claimed that the conflict which lead to the damages fell under three excluded perils, namely war, civil war and insurrection.[106]

In terms of the war claim, Aetna argued that the fighting in Lebanon could be denied coverage, due to the damages being based on

> … three clearly-defined independent entities, each having the attributes of sovereignty or, at least, quasi-sovereignty…[107]

100 Stander and Smit 2007 *THRHR* 179.
101 Stander and Smit 2007 *THRHR* 180.
102 Stander and Smit 2007 *THRHR* 180–181.
103 Caban 2003 *J Air L & Com* 433–434.
104 571 F Supp 1460 (S D N Y 1983).
105 *Holiday Inns Inc v Aetna Insurance Co* 571 F Supp 1460 (S D N Y 1983) paras 1467–1472.
106 *Holiday Inns Inc v Aetna Insurance Co* 571 F Supp 1460 (S D N Y 1983) paras 1467–1472.
107 *Holiday Inns Inc v Aetna Insurance Co* 571 F Supp 1460 (S D N Y 1983) par 1501.

Both American and English case law that deal with the insurance meaning of "war" define it as

> hostilities carried on by entities that constitute governments at least de facto in character.[108]

It was found in the *Pan American* case that the loss of the aircraft was not proximately caused by any war occurring between recognised states.[109]

Furthermore, it was argued that the loss in the *Pan American* case was due to "guerrilla war". This argument was based on the fact that, in 1970, the PFLP was a guerrilla force engaged in war.[110] Based on this argument, the court found that the PFLP was not recognised by any Arab state and that financial contributions to the PFLP from states, do not give the PFLP the status of a quasi-sovereign state. Therefore, the loss of the aircraft was not caused by any act that was recognised as a warlike act and therefore it was not a guerrilla war.[111] The court in the Pan American case found that there was no proof in the all-risks insurers' argument that the acts of the PFLP were based on warlike operations.[112] The reason that the court made this finding was due to the aircraft not carrying any cargo of military stores.[113] Therefore, the conduct of the PLO was not regarded as "war" or a "warlike act".

---

108 *Pan American World Airways Inc v Aetna Casualty and Surety Co* 505 F2d 989 par 127.

109 *Pan American World Airways Inc v Aetna Casualty and Surety Co* 505 F2d 989 par 129.

110 *Pan American World Airways Inc v Aetna Casualty and Surety Co* 505 F2d 989 paras 131–133.

111 *Pan American World Airways Inc v Aetna Casualty and Surety Co* 505 F2d 989 paras 139 and 141.

112 Both meanings of "warlike act" and "warlike operations" appears to be broader than the meaning of "war". "Warlike act" refers to an act committed only in time of war. "Warlike operation" refers to any military operation in time of war. "Warlike operation" appears to be a little bit broader than "warlike act" being that some academic writers state that it includes international combat (Thomas 1974 *California Western International Law Journal* 323 and 327–328; O' May *Marine Insurance* 257).

113 *Pan American World Airways Inc v Aetna Casualty and Surety Co* 505 F2d 989 par 151.

2.2.2.2 Civil war

The court thereafter turned to the interpretation of "civil war". Due to Aetna failing to prove the existence of insurrection, the court agreed that "civil war was a 'progressive stage' that must first be preceded by insurrection".[114]

The first definition of civil war in the insurance context was made in *Republic of Bolivia v Indemnity Mutual Marine Co Ltd*[115]*.* In later case law, it was noted that it was not Lord Justice Farewell's intention that his definition of civil war in the *Bolivia case*, be recognised as the only definition for civil war.[116] The first court decision with regard to civil war was made in *Curtis & Sons v Mathews* where the following decision was made:

> I am satisfied that Easter week in Dublin was a week not of mere riot but of civil strife amounting to warfare waged between military and usurped powers and involving bombardment.[117]

Furthermore, in *Spinney's (1948) Ltd v Royal Insurance Co Ltd,*[118] a three-question test was established to determine whether a civil war is indeed taking place.[119] These questions are as follows: Firstly, is the conflict between opposing parties?[120] Secondly, what is the purpose of the opposing parties and how did they strive to their

---

114 Caban 2003 *J Air L & Com* 440. See par 2.2.2.4 hereunder.

115 [1909] 1 KB 785 (hereinafter referred to as the *"Bolivia case"*): "A civil war… is never formally declared: it becomes such by its accidents – the number, power and organisation of the persons who originate, and carry it on. When the party in rebellion occupy and hold in a hostile manner a certain portion or territory, have declared their independence, have cast off their allegiance, have organised armies, have commenced hostilities against their former sovereign, the world acknowledges them as belligerents and the contest of war".

116 Stander and Smit 2007 *THRHR* 27.

117 [1918] 2 KB 825.

118 [1980] 1 LI Rep 406.

119 Also see Stander and Smit 2007 *THRHR* 182 – 183 for a more detailed discussion on this three questions.

120 [1980] 1 LI Rep 406 at 430: "I find it difficult to visualise a war of any kind which is not fought between sides. International jurists have started with the concept of war as an armed conflict between states, and have given the same general meaning to a civil war, regarding the latter as concerned either with a conflict between the state and a body of inhabitants who have a sufficient cohesion and apparatus of government to merit recognition as a kind of quasi-state, or with a conflict between two such quasi-states, each claiming to be the state itself. I believe that in the ordinary speech the expression 'civil war' has a wider meaning than this…".

purposes?[121] Thirdly, what is the scale of the conflict and the effects on the public and lives of the people there?[122]

Based on the court's interpretation of civil war, it is submitted that the view of the court is supported that random, indiscriminate and pointless violence does not constitute a civil war. There are no specific elements to determine when there is infact a civil war. However, a violence outbreak will not be immediately regarded as a war.[123] Furthermore, in terms of Aetna's claim of quasi-sovereignty,[124] the court held that the faction (occupying the hotel and doing the damage at the time of fighting) did "not rise to the level of the status of sovereign state".[125] Alternatively, the court held that, even if the group was recognised as a quasi-sovereign entity, it was not at war with another sovereign entity.[126] Therefore, terrorism does not fall within the ambit of civil war.

---

121 [1980] 1 LI Rep 406 at 430: "If all the other requirements are satisfied, I believe that there would be a civil war if the objective was not seize complete political power, but (say) to force changes in the way in which power is exercised, without fundamentally changing the existing political structure. Again, other requirements being satisfied, I believe that there would be a civil war if the participants were activated by tribal, racial or ethnic animosities. Nevertheless, one should… always begin by enquiring whether the parties have the object of seizing or retaining dominium over the whole or part of the state. If it is found that they do not, there may still be a civil war: but it will then be necessary to look closely at the events to see whether they display the degree of coherence and community of purpose which helps to distinguish a war from a mere tumultuous internal upheaval"

122 [1980] 1 LI Rep 406 at 430: "Civil war varies greatly in character. The abundant presence of some elements may compensate for the comparative absence of others… Nevertheless it is possible to build up a list of matters which, among others, should be considered when deciding upon whether internal strife has reached the level of civil war. I would include – the number of combutants; the number of casualties, military and civilians; the amount and nature of the armaments employed; the relative sizes of the territory occupied by the opposing sides; the extent to which it is possible to delineate the territories so occupied; the degree to which the populace as a whole is involved in the conflict; the duration and the degree of continuity of the conflict; the extent to which the public order and the administration of justice have been impaired; the degree of the interruption to public services and private life; the question whether there have been movements of population as a result of the conflict; the extent to which each faction purports to exercise exclusive legislative, administrative and judicial powers over the territories which it controls".

123 Stander Smit 2007 *THRHR* 183.

124 If Aetna could succeed with this argument, then the exclusion would kick in and would Aetna not be held liable.

125 *Holiday Inns Inc v Aetna Insurance Co* 571 F Supp 1460 (S D N Y 1983) paras 1501.

126 *Holiday Inns Inc v Aetna Insurance Co* 571 F Supp 1460 (S D N Y 1983) paras 1503.

In terms of the problem statement, it was alleged that the hijackers acted as terrorists and that the dispute arose between the all-risk insurers and the war-risk insurers, both declining their accountability in terms of the damages suffered. In terms of the above discussions, it is submitted that acts of terrorism do not fall within the ambit of the war-risk exclusions.

2.2.2.3 Military or usurped power

The meaning of "military or usurped power" within the insurance context was first considered in *Drinkwater v The Corporation of the London Assurance.*[127] It was said that military or usurped power

> …only means an invasion of the kingdom by foreign enemies… or an internal armed force in rebellion assuming the power of government, by making laws, and punishing for not obeying those laws…[128]

Therefore, with consideration to events closest to the loss in *Pan American case*, the court concluded that the loss of the aircraft hijacked came "within no fair reading of Drinkwater".[129] After the *Drinkwater* case, the court held in *Langdale v Mason 1 Bennett's Fire Ins*[130] that military or usurped power

> must mean rebellion conducted by authority, as in the year 1745, when the rebels…came to Derby; and if they had ordered any part of the town, or a single house to be set on fire, that would have been by authority of a rebellion… Usurped power takes in rebellion, acting under usurped authority.[131]

The court in the *Pan America case* further referred to the American interpretation where the rule applicable was that a *de facto* government is necessary to constitute a usurped power".[132] Therefore, in view of the court, the all-risks insurers in the *Pan American case* were not successful with their claim that the loss of the aircraft was

---

127 95 Eng Rep 863 (C P 1767). Also see *Pan American World Airways Inc v Aetna Casualty and Surety Co* 505 F2d 989 par 110.

128 *Drinkwater v The Corporation of the London Assurance* 95 Eng Rep 863 (C P 1767). Also see *City Fire Insurance Co v J & H P Corlies* 21 Wend 367 370 (N Y 1839), hereinafter referred to as the *"Drinkwater case"*.

129 *Pan American World Airways Inc v Aetna Casualty and Surety Co* 505 F2d 989 par 110.

130 Cas 16 (KB 1780), hereinafter referred to as the "*Langdale case"*.

131 *Langdale v Mason 1 Bennett's Fire Ins* Cas 16 (KB 1780) at 18.

132 *Pan American World Airways Inc v Aetna Casualty and Surety Co* 505 F2d 989 par 118. Also see *Insurance Co v Boon* 95 US (5 Otto) 117 24 L Ed 395 (1877).

due to military or usurped power because the PFLP did not constitute a *de facto* government to be regarded as a military power or usurped power.[133] Therefore, in terms of the problem statement, the conduct of the PLO does not constitute a military or usurped power.

2.2.2.4 Insurrection

Aside from the claims that the loss was due to war or warlike operations, the all-risk insurers also claimed that the coverage by each of "rebellion, revolution, civil war and insurrection" was excluded.[134] It was established that, if the loss was not caused by insurrection, then rebellion, revolution and civil war would have been automatically excluded.[135] Insurrection, rebellion and revolution are the three stages before a civil war occurs.[136] Insurrection is classified under rebellion and comes down to a group of people who are working against the authority of a state or country.[137]

When interpreting insurrection, the court in *Pan American* referred to *Home Insurance Co v Davila's* [138] definition of insurrection: firstly, insurrection being a "violent uprising by a group or movement" and secondly, "acting for the specific purpose of overthrowing the constituted government" which include the seizing of its powers.[139] In establishing whether the loss was indeed caused by insurrection, the court looked at the two hijackers' intent and concluded:

> The hijackers' contemporaneous statements indicate that their purpose had nothing to do with Hussein; they believed that they were protesting the sale of Phantom jets to Israel by the United States.[140]

Therefore, the conduct of the PLO in the problem statement does not fall within the ambit of insurrection.

---

133 *Pan American World Airways Inc v Aetna Casualty and Surety Co* 505 F2d 989 paras 118–120.
134 *Pan American World Airways Inc v Aetna Casualty and Surety Co* 505 F2d 989 par 153.
135 *Pan American World Airways Inc v Aetna Casualty and Surety Co* 505 F2d 989 par 153.
136 Stander and Smit 2007 *THRHR* 29.
137 Stander and Smit 2007 *THRHR* 29.
138 212 F2d 731 736 (1st Cir 1954) at 1124.
139 *Pan American World Airways Inc v Aetna Casualty and Surety Co* 505 F2d 989 par 154; also see Stander and Smit 2007 *THRHR* 31: "…burgerlike oproer 'n opstand deur 'n aansienlike gedeelte van die bevolking is vir doeleindes van algemene kwaad of onheil."
140 *Pan American World Airways Inc v Aetna Casualty and Surety Co* 505 F2d 989 par 161.

2.2.2.5 Civil commotion and riots

The court in *Pan American* defined "civil commotion" as "essentially a kind of domestic disturbance".[141] The court then referred to disorders which "occur among fellow-citizens or within the limits of one community".[142] Since the loss occurred in the skies over two continents, it was found that the loss did not constitute civil commotion.[143]

Furthermore, the all-risk insurers argued that the loss was due to a riot, being that a riot does not need to be accompanied by an uproar or tumult. The court then held that "a riot occurs when some multitude of individuals gathers and creates a tumult".[144] Therefore, the conduct of the PLO in the problem statement did not constitute civil commotion or riots.

It is submitted that terrorism does not fall within the ambit of any of the above-mentioned terms. Therefore, it is important to do a proper investigation of terrorism.

3 Terrorism

"Terrorism" is regarded as one of the nightmares of the modern world.[145] Hijacking and several other forms of aerial terrorism have developed with its purpose to achieve political ends.[146] To understand terrorism within the context of aviation insurance, it is important to establish what its meaning is, its interpretation within terrorism risk insurance and the government's involvement in acts of terrorism and terrorism risk insurance.

Before examining the meaning of terrorism, it is important to know that there is currently no international accepted definition for terrorism (which include terrorism within the insurance context).[147] Therefore, reference needs to be made to international law. Even though the meaning within the context of international law may

---

141 *Pan American World Airways Inc v Aetna Casualty and Surety Co* 505 F2d 989 par 165.
142 *Pan American World Airways Inc v Aetna Casualty and Surety Co* 505 F2d 989 par 165. Also see O' May *Marine Insurance* 261.
143 *Pan American World Airways Inc v Aetna Casualty and Surety Co* 505 F2d 989 par 165.
144 *Pan American World Airways Inc v Aetna Casualty and Surety Co* 505 F2d 989 paras 175-176.
145 Dempsey 2003 *Columbia Journal of Transnational Law* 651.
146 To my mind the hijacking of an aircraft is the verb of the conduct of terrorists which occurs through terrorism.
147 Rogan 2003 *Tulane Law Review* 1298.

differ when interpreting it within the insurance context, it still may give good guidelines.

The United Nations has expressed concerns over the inability of Member States to define terrorism. The reason why this is regarded problematic is due to the fact that the United Nations is unable to exert its moral authority.[148] Two main factors have been identified as to why the United Nations has been unable to define terrorism. These factors are: firstly, it is argued that, when terrorism is defined, it should include States' use of armed forces against civilians.[149] Secondly, it is argued that people under foreign occupation have a right to resistance.[150] In response to the first factor, it is submitted that normative and legal framework against State violations are far stronger than in the instance of non–State actors.[151] With regard to the second factor, it is submitted that nothing with regard to occupation can justify the targeting and killing of civilians.[152]

It is acknowledged that the terrorism the world is facing today flourishes in different environments.[153] Therefore, it is very difficult to determine one accepted definition suitable and accepted in all environments.

3.1 Defining "terrorism"

"Terrorism" as a term in the insurance context has not yet been clearly defined. To establish in which ambit of insurance policies terrorism falls, it is of utmost importance

[148] United Nations 2017 https://www.un.org/News/dh/infocus/terrorism/sg%20high-level%20panel%20report-terrorism.htm

[149] United Nations 2017 https://www.un.org/News/dh/infocus/terrorism/sg%20high-level%20panel%20report-terrorism.htm

[150] United Nations 2017 https://www.un.org/News/dh/infocus/terrorism/sg%20high-level%20panel%20report-terrorism.htm

[151] United Nations 2017 https://www.un.org/News/dh/infocus/terrorism/sg%20high-level%20panel%20report-terrorism.htm

[152] United Nations 2017 https://www.un.org/News/dh/infocus/terrorism/sg%20high-level%20panel%20report-terrorism.htm

[153] These environments include environments of poverty, despair, humiliation, extremism, political oppression, human rights abuse, foreign occupation,

to determine its meaning within the insurance context. According to Rogan, there is no universally accepted definition (in the legal or insurance context) for terrorism.[154] Nevertheless, the definitions as they are, all focus on the motive of an act and not the act itself.[155] Terrorism can be used as an instrument by different groups of people who have a certain political, religious or ideological motive.[156] After the 9/11 attacks, there was an increase in the revision of war and terrorism exclusion clauses in the non-marine market.[157] Even though the United Nations has not agreed to a suitable definition of terrorism, it does however refer to specific elements which should be included in a definition of terrorism. These elements include

(a) Recognition, in the preamble, that State use of force against civilians is regulated by the Geneva Conventions and other instruments, and, if of sufficient scale, constitutes a war crime by the persons concerned or a crime against humanity

(b) Restatement that acts under the 12 preceding anti -terrorism conventions are terrorism, and a declaration that they are a crime under international law; and restatement that terrorism in time of armed conflict is prohibited by the Geneva Conventions and Protocols;

(c) Reference to the definitions contained in the 1999 International Convention for the Suppression of the Financing of Terrorism and Security Council resolution 1566 (2004);

(d) Description of terrorism as "any action, in addition to actions already specified by the existing conventions on aspects of terrorism, the Geneva Conventions and Security Council resolution 1566 (2004), that is intended to cause death or serious bodily harm to civilians or non-combatants, when the purpose of such an act, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or to abstain from doing any act".[158]

In terms of the insurance context, the International Underwriting Association's (IUA) Technical Underwriting Committee examined the entire interpretation of terrorism and defined it as follows:

---

154 Rogan 2003 *Tulane Law Review* 1298. Also see Theunissen *Die onderskeid tussen seerowery en terrorisme as versekerde risiko's in die seeversekeringsreg* 29.

155 Rogan 2003 *Tulane Law Review* 1299.

156 Theunissen *Die onderskeid tussen seerowery en terrorisme as versekerde risiko's in die seeversekeringsreg* 29.

157 Rogan 2003 *Tulane Law Review* 1329.

158 United Nations 2017 https://www.un.org/News/dh/infocus/terrorism/sg%20high-level%20panel%20report-terrorism.htm

> An act or acts (whether threatened or actual) of any person or persons involving the causing or occasioning or threatening of whatever nature and by whatever means made or claimed to be made in whole or in part for political, religious, ideological or similar purposes.[159]

It is clear from this definition that the IUA broadened the meaning of terrorism by not only focussing on political purposes, but religious, ideological or similar purposes as well. Therefore, its interpretation will have to be properly understood to clearly understand what is meant by terrorism within the insurance context.

At the World Congress of International Association of Insurance Law held in 2006, South Africa was one of the countries that submitted a response to certain questions based on insurance and terrorism.[160] When asked if there is any general definition of "terrorism", "terrorist activity" or any related term in the general law within the South African jurisdiction, South Africa referred to section 1(1) of *The Protection of Constitutional Democracy against Terrorism and Related Activities Act*[161] which defines "terrorist activity" very broadly. The definition includes

a) (d)isplays certain specified features (e.g., involves violence, or endangers life, or causes the destruction of property),

b) (i)s intended to achieve specified consequences (e.g., to intimidate the public, or to force the government to do something), and

c) (i)s committed for specified purpose (e.g., to advance a political or ideological motive or cause).[162]

Furthermore, this act also defines "engages (or engage, or engaging or engagement) in a terrorist activity".[163] This definition includes the

> … commission, performance or carrying out of a terrorist activity; the facilitation of, participation or assistance in, or contribution 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.[164]

---

159 Rogan 2003 *Tulane Law Review* 1329–1330.
160 Van Niekerk 2007 *SA Merc LJ* 71.
161 Act 33 of 2004.
162 Also see Van Niekerk 2007 *SA Merc LJ* 72.
163 Section 1(1) of *The Protection of Constitutional Democracy against Terrorism and Related Activities Act* 33 of 2004.
164 Also see Van Niekerk 2007 *SA Merc LJ* 72–73.

One important aspect of the South African interpretation of "terrorism" is seen in Section 15 of *the Protection of Constitutional Democracy against Terrorism and Related Activities Act.*[165] In terms of this section, a political, ideological, ethnic, philosophical, racial or any other similar motive will not be regarded as a justifiable defence where an offence has been committed for which the definition of terrorist activity forms an integral part.[166] It is indeed so that this definition does not have the purpose to be applicable within the context of insurance law. Nevertheless, it may be useful to establish certain guidelines.

When interpreting the meaning of terrorism, Rogan especially refers to the Northern Ireland's statutory description as being one of the best interpretations of "terrorism":
(1) In this Act "terrorism" means the use or threat of action where –

(a) the action falls within subsection,
(b) the use or threat is designed to influence the government or to intimidate the public or a section of the public, and
(c) the use or threat is made for the purpose of advancing a political, religious or ideological cause.

(2) Action falls within the subsection if it –
(a) involves serious violence against a person;
(b) involves serious damage to property;
(c) endangers a person's life, other than that of the person committing the action;
(d) creates a serious risk to the health or safety of the public or a section of the public, or
(e) is designed seriously to interfere with or seriously to disrupt an electronic system.

(3) The use of the threat of action falling within subsection (2) which involves the use of firearms or explosives is terrorism whether or not subsection (1)(b) is satisfied.[167]

Again, it is clear that "terrorism" is a very complex term and that it now no longer only refers to damages or loss that were suffered, but includes acts of violence, endangerment, as well as risks.[168]

---

165 *Act* 33 of 2004.
166 Van Niekerk 2007 *SA Merc LJ* 73.
167 *Terrorism Act* 2000.
168 One cannot interpret this definition exactly within the insurance context. Therefore, it is recommended that certain minimum requirements may be used to interpret it within the insurance context.

Dempsey argues that terrorism is a symptom of a "more pernicious disease" which could be found between the "military weak, the politically frustrated, and the religiously fanatic".[169]

According to Rogan, the meaning of terrorism within the insurance industry is given its "ordinary and a popular meaning".[170] He explains that this meaning has become familiar through terrorist campaign and would be considered as the

> deliberate causing of damages to property for its own sake, without being coupled with a desire to kill or injure, or at least frighten and intimidate, an act of terrorism.[171]

Therefore, according to him, the wording of various Institute Clauses indicates that terms such as "person acting maliciously" and "terrorist" are more or less the same.[172] Bearing in mind these statutory definitions and international law, Rogan's view is supported in that even though there is no specifically mentioned meaning of terrorism within the insurance industry, all definitions (whether they are statutory or from international law) focus on the motive of an act rather than on the act itself. This motive is the political, religious or ideological (or similar purpose) view which causes damages or loss, violence acts, endangerment, and risks.

In terms of marine insurance, Theunissen gives certain minimum requirements of terrorism:[173] Firstly, it should be a violent act or malevolent and hatred conduct. Secondly, it should be an instillation of fear. Thirdly, the instillation of fear must be against the public. Fourthly, there must be a political, religious or ideological motive. Lastly, the afore-mentioned must be done with the purpose to overthrow the government.

Theunissen's minimum requirements are acknowledged, but is it submitted that, in terms of the insurance context (especially where dealt with cargo), property (cargo) should also be referred to in this regard. Therefore, that terrorism in the context of

---

169 Dempsey 2003 *Columbia Journal of Transnational Law* 651.
170 Rogan 2003 *Tulane Law Review* 1297
171 Rogan 2003 *Tulane Law Review* 1297.
172 Rogan 2003 *Tulane Law Review* 1328.
173 Theunissen *Die onderskeid tussen seerowery en terrorisme as versekerde risiko's in die seeversekeringsreg* 34.

cargo insurance (more specifically aviation insurance) must be defined as follows: terrorism is a threat or action which involves serious violence against a person and/or involves serious damage to property (cargo), with the main purpose to overthrow or influence the government, intimidate the public or to advance political, religious or ideological beliefs.

3.2 Terrorism, war and the 9/11 attacks

Prior to the 9/11 attacks in the USA, terrorism within the insurance context was mainly dealt with within the marine insurance context.[174] Theunissen refers to a passenger ship named Achille Lauro that was hijacked in 1982.[175] The passengers and workers on the ship were held captive. Due to the hijackers claiming the release of Israel detainees, the hijacking was not regarded as piracy but rather as terrorism. This was due to the political motive behind the hijacking.[176] This strengthens the view of the researcher that an act of violence with political motives must be regarded as terrorism. Therefore, even though there are no specific definition, political motive may be regarded as one of the essential characteristics for terrorism.[177] Nevertheless, according to Theunissen it means that terrorism cannot be limited to political motive alone. He convincingly broadens the scope by including attacks for personal gain to be included within the terrorism scope.[178] He convincingly holds that the intention still must be that a terrorist should be regarded as someone who is involved with violence against other persons or property, whatever the purpose or reason is.[179]

---

174 Galyean 1974 *California Western International Law Journal* 318.

175 Theunissen *Die onderskeid tussen seerowery en terrorisme as versekerde risiko's in die seeversekeringsreg* 30.

176 Theunissen *Die onderskeid tussen seerowery en terrorisme as versekerde risiko's in die seeversekeringsreg* 30.

177 Also see Bennett *The Law of Marine Insurance* 206.

178 Theunissen *Die onderskeid tussen seerowery en terrorisme as versekerde risiko's in die seeversekeringsreg* 30.

179 Theunissen *Die onderskeid tussen seerowery en terrorisme as versekerde risiko's in die seeversekeringsreg* 31: "Die daad moet vir homself spreek. Die doel of rede moet aanvaar word om te bestaan. Die voorwaarde is dat dit redelik duidelik moet wees watter terroristegroep die gruweldaad gepleeg het, of op die oorwig van waarskynlikhede dat dit een van 'n aantal van,of kombinasie van sulke groepe was en wat die algemene oogmerke van daardie groep of groepe in die algemeen was."

Many countries have established terrorism risk insurance to respond to a market shortage.[180] This follows after these countries underwent attacks in either their own or in other countries. Examples hereof are the 9/11 attacks, where after many insurers started to exclude terrorism risk.[181] A worldwide cancellation of third party liability war-risk coverage occurred in the commercial market. Furthermore, there was also an increase in the risk of other war-risk insurance.[182] The US Congress then incorporated the *Terrorism Risk Insurance Act* of 2002 (TRIA).[183]

The Report to Congress makes it clear that, identifying loss or damage associated with terrorism risk, can be challenging. This is understandable because of the lack of experience with similar attacks, difficulty in predicting the intentions of terrorists and the potential catastrophic loss or damage that could result.[184] It is the opinion of the researcher that events being covered by terrorism risk insurance differ, depending on the perceived risks in different countries.

Following the 9/11 attacks, there were several War and Terrorism Exclusion Clauses published. The International Underwriting Association's (IUA) Technical Underwriting Committee examined the existing as well as new clauses and furthermore also determined whether any redrafting was necessary.[185]

In terms of the 9/11 attacks, it was important to first establish whether these acts fell within the ambit of the war exclusions. According to Caban, the 9/11 attacks were regarded as acts of terrorism because the terrorists attempted to overthrow the government of the USA.[186] Even though Osama Bin Laden was not the head of a

---

180 GAO 2016 *Report to Congressional Committees* 4–5.
181 GAO 2016 *Report to Congressional Committees* 4–5.
182 Elias, Tang, and Webel 2014 *Congressional Research Service* 1.
183 GAO 2016 *Report to Congressional Committees* 1; also see Freitas 2013 *Journal of Transport Literature* 275: "This act and its extensions obligate the government to share in paying damages for terrorists acts for specified types of coverage…".
184 GAO 2016 *Report to Congressional Committees* 4–5.
185 Rogan 2003 *Tulane Law Review* 1329.
186 Caban 2003 *J Air L & Com* 424.

governmental organisation, he was still the leader of a terrorist group known as Al Qaeda who had a very strong religious drive. In order to prove a claim in terms of the 9/11 attacks under the war-risk policy, the burden of proof laid with the insured who had to prove that the attacks were designed to overthrow the government or were committed by agents of a foreign, sovereign power.[187]

However, if one applies the definitions provided in the War Institute Clause as discussed in Chapter two, it seems that the 9/11 attacks were not acts of war in terms of the context of insurance and legal application, being that there was no war being fought at the time of these attacks nor any warlike activities present. Furthermore, the USA was also not involved in any hostilities with a sovereign government or quasi-sovereign government when the attacks occurred.[188] Caban goes on to explain that the 9/11 attacks were not acts of insurrection, revolution, rebellion or invasion.[189] There must have been a violent uprising with the intent to overthrow the existing powers and to subsequently assume that power. In terms of the meaning given to civil war in the insurance context, it would require the occurrence of one of these events.[190] On these grounds, it is safe to say that the insurers could not rely on terms such as war, civil war, insurrection, etcetera as exclusions in order to avoid the 9/11 liability. Therefore, the insurers will in fact be liable for damages or loss.

The 9/11 attacks have opened many changes in terms of the interpretation of terrorism within a war-risk policy. Caban makes the point that "terrorism exclusions will become as prevalent as war exclusions in insurance".[191]

Because of the 9/11 attacks, terrorism *per se* has been incorporated within the newest edition of the War Risk Clause. Thus, only one last aspect needs to be examined, known as "proximate cause" in order to determine whether A's (as in the problem

187 Caban 2003 *J Air L & Com* 425.
188 Caban 2003 *J Air L & Com* 448.
189 Caban 2003 *J Air L & Com* 448.
190 Caban 2003 *J Air L & Com* 448
191 Caban 2003 *J Air L & Com* 448.

statement) damages/loss fall within the ambit of the all-risk insurers, or the war-risk insurers.

4 Proximate cause

4.1 Meaning and interpretation of proximate cause

In terms of insurance claims, the question is not whether a certain event defined within the policy has occurred, but rather if the damages were the result of the certain event defined in the policy.[192] Therefore, an insurer will be liable if the certain event (peril) as defined within the policy is the cause of the materialisation of the risk as described in the policy insured against.[193] On the other hand, the insurer will not be liable if the proximate cause was an excluded peril.[194] Whether an event ("peril") is covered by a policy or an event is excluded from a policy (exception), it will be affected by the proximate cause. This is known as the "effective, dominant or operative cause".[195] It is defined as follows:

> Proximate cause refers to an action that leads to an unbroken chain of events; events that end with someone suffering a loss. Proximate cause is used to examine how a loss occurred and how many may have played a role in causing the loss. Proximate cause refers to the initial action that caused a loss. The starting point in the chain of events that led to a loss.[196]

Hare refers to a two-step approach in order to explain proximate cause.[197] Firstly, one has to determine what the factual cause of the damages were.[198] Secondly, one has to determine what the scope of the insurer's liability for the factual consequences are.[199] The direct cause of a loss or a damage is sometimes easy to determine. For example, A steals the cargo of B at an airport. It is therefore easy to make the

---

192 Reinecke, Van Niekerk, and Nienaber *South African Insurance Law* 249.

193 Reinecke, Van Niekerk, and Nienaber *South African Insurance Law* 249–250. Also see Hare *Shipping Law & Admiralty Jurisdiction in South Africa* 898.

194 Reinecke, Van Niekerk, and Nienaber *South African Insurance Law* 250.

195 Clarke 1981 *Cambridge Law Journal* 284.

196 See Shambhavi 2012 *Chartered Accountant Practice Journal* 18.

197 Hare *Shipping Law & Admiralty Jurisdiction in South Africa* 898.

198 This question is also known as the "causa sine qua non" or the "but for"–test. Also see Kruger and Stander 2010 *SA Merc LJ* 485: "Deur van hierdie toets gebruik te maak, sal daar vasgestel kan word of daar 'n feitlike kousale nexus tussen die gevaar en die verlies bestaan…"

199 This investigation is known as the "proxima non remota spectator" (proximate cause test).

connection between the cause and the loss.[200] Nevertheless, there are certain problems arising when interpreting proximate clause. One of these problems is the occurrence where one of various factors caused the damages. This problem was heard in *Leyland Shipping Co Ltd v Norwich Union Fire Insurance Society Ltd*[201] and it was stated by Lord Shaw that

> … where various factors or causes are concurrent and has to be selected, the matter is determined as one of fact and choice falls upon the one to which may be variously ascribed the qualities of reality, predominance, efficiency…[202]

Although this is a very old case, the principle in *Reischer v Borvick*[203] was approved in *Leyland*.[204] In *Reischer* a ship was covered against collision with any object. This did not include the perils of the sea. In the process of the ship being on the Danube, the ship struck a "floating snag". It was holed and then began to sink. The master of the ship then managed to plug the gaps and it appeared that, with the use of pumps and continued calm water, the ship would not sink.[205] To get the ship repaired, a tug began to tow the ship into a yard. It appeared that, due to extra pressure of water while the ship was in motion, one of the plugs was forced out. The flow of water was impossible to stop and the vessel was lost.[206] The Queen's Bench made the decision that the loss was covered by the policy, even though it could not be confirmed that the ultimate loss was inevitable. The initial damage to the engine and the hull which then led to damages to the instrumentality of the snag was an inevitable result of the collision.[207] The sinking was regarded as being not inevitable. On this point, the following was held:

---

200 Shambhavi 2012 *Chartered Accountant Practice Journal* 19.
201 [1918] AC 350, hereinafter referred to as *Leyland*.
202 *Leyland Shipping Co Ltd v Norwich Union Fire Insurance Society Ltd* [1918] AC 350.
203 [1894] 2 QB 458, hereinafter referred to as *Reischer*.
204 *Reischer v Borwick* [1894] 2 QB 548. Also see Clarke 1981 *Cambridge Law Journal* 285.
205 *Reischer v Borwick* [1894] 2 Q.B. 548 paras 553.
206 *Reischer v Borwick* [1894] 2 Q.B. 548 paras 553.
207 *Reischer v Borwick* [1894] 2 Q.B. 548 paras 553-554.

> The rule must be applied with good sense, so as to give effect to (the parties') intentions… [the ship] was injured by a peril insured against, and liability to make good that injury arisen and is not denied. The extent of that liability is the matter in dispute… If the ship had sunk and been lost under such circumstances as to render the inference unavoidable that the collision caused the loss, it is plain that the cost of repairing the (initial) damage would not be the (only) liability of the underwriters… it is difficult to see on what principle liability for loss occasioned by that injury can be excluded, except upon the ordinary principles applicable to remoteness of damage. The fact that some fresh cause arises, without which the injury would not have led to further loss, is, I think, in such a case far from conclusive. Assume that this ship would have floated in calm water notwithstanding the injury [the ship] had sustained by the collision, and suppose that, before such injury could be made good, the water became so rough as to get into [the ship] and sink [the ship], by reason only of her injured condition, such loss would, in my opinion, be proximately, though not exclusively, caused by the collision.[208]

This problem was also discussed within the South African insurance context and Reinecke, Van Niekerk and Nienaber explained this problem quite well by stating that the cause had to be "proximate in efficiency" and did not need to be "proximate in time", but rather "immediate in cause".[209] These writers came to this conclusion by referring to *Leyland*.[210]

Even though Hare's two-step approach is widely accepted, in *Incorporated General Insurance Ltd v Shooter t/a Shooter's Fisheries*[211] the Court failed to follow this approach and referred directly to the English law of marine insurance. The court immediately referred to the effective cause of the damages.[212] Nevertheless, in *Napier v Collet & Another*[213] the court found the approach in *Shooter* as correct and in line with Hare's two-step approach.

---

208 *Reischer v Borwick* [1894] 2 Q.B. 548 paras 550–551.

209 Reinecke, Van Niekerk, and Nienaber *South African Insurance Law* 250.

210 For a discussion and practical implementation of this causation theory, see *Commercial Union Assurance Company of South Africa Ltd. v Kwazulu Finance and Investment Corporation and Another* [1995] 2 All SA 628 par 17: "The proximate cause is not merely the one which was latest in time, but the one which is proximate in efficiency". Also see *Rabinowitz v Ned–Equity Insurance Co Ltd* [1980] 3 All SA 360 (W); and *Concord Insurance Co Ltd v Oelofsen* 1992 (4) SA 669 (A).

211 1987 (1) SA 842 (A), hereinafter referred to as *"Shooter"*.

212 *Incorporated General Insurance Ltd v Shooter t/a Shooter's Fisheries* 1987 (1) SA 842 (A) par 23.

213 1995 (3) SA 140 (A) par 143.

With regard to the problem statement above, one must now establish the proximate cause to determine liability. This is done by referring to the *Pan American case* because the focus of this investigation and the subject of the problem statement were certain contingencies during air transport. In this case, the all-risk insurers had the burden of proving that the proximate cause of the loss of the aircraft was included within one of the terms of the exclusions.[214]

4.2 Proximate cause and the Pan American case

In this case, the all-risk policy excluded damage or loss due to or resulting from various perils. This phrase clearly refers to the proximate cause of the damage or loss. The court explicitly stated that "remote causes are not relevant in terms of the characterization of a loss" in the insurance context.[215] This means that causation stops at the physical cause of the loss. Events are therefore not traced back to their metaphysical beginnings. Thus, the words "due to" or "resulting from" will limit the immediate facts surrounding the loss.[216]

The court in *Pan American* refers to *Bird v St Paul Fire and Marine Insurance Co*[217] where the USA courts' limited scope to the causation inquiry is explained.[218] In this case, the insured vessel was damaged by a concussion which was caused by an explosion. This explosion took place in a freight yard about a thousand yards from the vessel. The cause of the explosion was due to a fire setting off a stock of explosives. The insured claimed under the insurance policy covering losses caused by fire. The court's finding was that the loss was not caused by fire. It stated that, in terms of causation within the insurance context, loss is largely a question of fact "depending on the reasonable expectations of businessmen".[219] *Pan American* then expounded that

---

214 *Pan American World Airways Inc v Aetna Casualty and Surety Co* 505 F2d 989 par 50.

215 *Pan American World Airways Inc v Aetna Casualty and Surety Co* 505 F2d 989 par 95.

216 *Pan American World Airways Inc v Aetna Casualty and Surety Co* 505 F2d 989 par 95; also see *Standard Oil Co v United States* 340 US 54 58 71 S CT 135 95 L Ed 68 (1950); *Airlift International Inc v United States* 335 F Supp 442, 449 (S D Fla 1971) aff'd 460 F 2d 1065 (5th Cir 1972) (mem).

217 224 NY 47 120 NE 86 (1918).

218 See *Pan American World Airways Inc v Aetna Casualty and Surety Co* 505 F2d 989 par 97.

219 *Bird v St Paul Fire & Marine* 224 NY 47 120 NE 86 (1918) par 87. Also see *Pan American World Airways Inc v Aetna Casualty and Surety Co* 505 F2d 989 par 97.

the English courts also illustrate how this principle is applied in terms of war related losses.[220] It referred to *SS Co v The King*[221] where a ship (while on voyage) was lost after taking a more northerly route as usual to avoid German submarines. The court held that the loss was caused by a marine peril and not a warlike operation. There was also reference to a mechanical test of proximate causation where the test only focussed on the causes nearest to the loss. This test rests on the principle of *maxim contra proferentem.*[222] Furthermore, in *Sunny Aircraft Service Inc v American Fire & Casualty Co*[223] the principle that the taking characterise the loss has been emphasised. The aircraft in this case was covered for theft. It excluded losses due to war, rebellion or revolution. After the airplane was hijacked it was damaged by a Cuban military plane. The court's finding was that the loss was proximately caused by theft, rather than warlike activities.[224]

The interpretation followed by the court in *Pan American* was based on the English law. Therefore, it is submitted that the South African courts would have made the same decision as the US court in *Pan American* since South African courts also follow this approach the English law.[225]

5 Conclusion

It is clear throughout this investigation that there is still a growing relationship between the airline industry and aviation insurance. What complicates this relationship, however, is the exclusion of certain risks within a policy. One of these excluded risks is the "war" risk. Then, after the 9/11 attacks, another complex term emerged, namely "terrorism" and even though the commercial insurance market has stabilised after the

---

220 *Pan American World Airways Inc v Aetna Casualty and Surety Co* 505 F2d 989 par 97

221 (1919) 2 KB 670 (CA).

222 *"If the insurer desires to have more remote causes determine the scope of exclusion, he may draft language to effectuate that desire" - Pan American World Airways Inc v Aetna Casualty and Surety Co* 505 F2d 989 par 101.

223 140 So 2d 78 (Fla Dist Ct App 1962) aff'd 151 So 2d 276 (Fla 1973).

224 *Pan American World Airways Inc v Aetna Casualty and Surety Co* 505 F2d 989 par 105.

225 The South African courts follow the English rule *in iure non remota causa sed proxima spectator* (Reinecke, Van Niekerk, and Nienaber *South African Insurance Law* 249). Also see *Robinowitz v Ned Equity insurance Co Ltd* [1980] 3 All SA 360 (W).

9/11 attacks, there is still some uncertainties with regard to terrorism as a risk in aviation insurance.

The South African insurance law is mainly based on the Roman-Dutch and the English law of marine insurance which both derive from the same original sources, the *lex Mercatoria*. Marine insurance is also the oldest form of insurance and as explained above, all other forms developed from marine insurance. Therefore, it is submitted that the same meanings discussed within the marine insurance context are applicable in the aviation insurance context. It is necessary to refer to the marine insurance in this study, being that limited sources for aviation insurance exist.

In the problem statement provided, the dispute arose between the all-risk insurers and war-risk insurers based on who is liable for damages and / or loss caused when two members of the PLO hijacked an airplane which then was later destroyed (including the cargo). The first question was whether the damages and/or loss were covered by the general all-risk policy? If it was excluded by the provisions of the Lloyd's All Risk Policy, the next question was whether the risk of terrorism was covered by the Institute War Clause? In other words, whether the act of terrorism falls within the ambit of the "war risks" Institute War Clause?

The aim of the all-risk policy in the insurance context of aviation insurance is to provide cover for all kinds of risks. Nevertheless, the insurer's liability is not unqualified, but still provides the widest possible coverage. Furthermore, it must be kept in mind that the insured must have an insurable interest. A (in the problem statement) has an insurable interest. Furthermore, if A wants to be successful with his claim in terms of the all-risk policy, he (the insured) has to prove that he suffered a loss. The onus is then on the insurers to show that the coverage does not apply and is excluded. Under a named peril policy, on the other hand, the insured must show that a specific peril (which is listed within the policy) is the cause of the loss or damages suffered. The two policies that were main subject to this study were the all-risk policy and the Institute War Clauses.

It is alleged in the problem statement that the damages were caused by an exclusion in the all-risk policy. In order to determine under which policy "terrorism" falls, it is of utmost importance to first examine the different policies and thereafter "terrorism". Due to the war exclusion in the all-risk policy, it is alleged that terrorism does not fall within the ambit of the all-risk policy and should terrorism be regarded as an act falling under the ambit of the Institute War Clause (Air). However, it was established in this investigation that terrorism does not fall within the ambits of war, civil war, military or usurped power, insurrection or civil commotion or riots.

In terms of insurance claims, one must bear in mind that the question is not whether a certain event defined within the policy has occurred, but rather if the damages were the result of the certain event defined in the policy. Therefore, an insurer will be liable if the certain event is defined within the policy.

The last aspect which should be discussed to confirm whether the insurers in terms of the Institute War Clause are liable, is the proximate cause test. Whether an event is covered by a policy ("peril") or an event is excluded from a policy (exception), the proximate cause is known as the effective, dominant, or operative clause. Therefore, one has to prove damages in terms of the all-risk policy and has to prove that danger (for example war) proximately causes damages.

In conclusion, if terrorism does not fall within the ambit of the all-risk policy or the Institute War Clause (Air) – under which policy should it then be incorporated with? This question can only be answered once terrorism is defined and once this definition then universally accepted. If this is the case, then this matter is now more complicated, because the United Nations has also to date failed to define terrorism. Therefore, different elements and views of terrorism were investigated in order to establish the most acceptable definition for terrorism in the aviation insurance context.

Theunissen's view is partially supported that terrorism cannot be limited to political motive alone and that the scope needs to be broadened. Therefore, it is submitted that terrorism should be defined as a threat or action which involves serious violence against a person and/or involves serious damage to property (cargo), with the main

purpose to overthrow or influence the government, intimidate the public or advancing political, religious, or ideological beliefs.

Thus, it is further submitted that terrorism must be interpreted as a separate occurrence and should the circumstances be tested before one establishes that damages or loss were caused by terrorism. This is also why policies (as in the USA) expressly exclude terrorism as an event – due to the fact that it does not fall within the ambit of war, civil war, military or usurped power, insurrection or civil commotion or riots.

BIBLIOGRAPHY

Literature

Bennett *The Law of Marine Insurance*

Bennett HN *The Law of Marine Insurance* (Oxford University Press Incorporated 1996)

Caban 2003 *J Air L & Com*

Caban EE "War Risk, Hijacking & Terrorism Exclusions in Aviation Insurance: Carrier Liability in the wake of September 11, 2001" 2003 *J Air L & Com* 421-448

Clarke 1981 *Cambridge Law Journal*

Clarke M "Insurance: The Proximate Cause in the English Law" 1981 40(2) *Cambridge Law Journal* 284-306

Dempsey 2003 *Columbia Journal of Transnational Law*

Dempsey PS "Aviation Security: The Role of Law in the War Against Terrorism" 2003 *Columbia Journal of Transnational Law* 649–731

Elias, Tang, and Webel 2014 *Congressional Research Service*

Elias B, Tang RY and Webel B "Aviation War Risk Insurance: Background and Options for Congress" 2014 *Congressional Research Service* 1–16

Freitas 2013 *Journal of Transport Literature*

Freitas PJ "Aviation war risk insurance and its impacts on US passenger aviation" 2013 (7) *Journal of Transport Literature* 268–283

Galyean 1974 *Californian Western International Law Journal*

Galyean TE "Acts of Terrorism and Combat by Irregular Forces – An Insurance War Risk" 1974 *Californian Western International Law Journal* 315-339

GAO 2016 *Report to Congressional Committees*

GAO "Terrorism Risk Insurance – Comparison of Selected Programs in the United States and Foreign Countries" 2016 *Report to Congressional Committees* 1–49

Giaschi "Canadian Law of Marine Insurance Frequently asked Questions"

Giaschi CJ "Canadian Law of Marine Insurance Frequently asked Questions" at the *AMUBC Education Seminar* (26 October 2000 Vancouver) 1–12

Hare *Shipping Law & Admiralty Jurisdiction in South Africa*

Hare J *Shipping Law & Admiralty Jurisdiction in South Africa* 2nd ed (Juta 2009)

Kruger and Stander 2010 *SA Merc LJ*

Kruger DJ and Stander AL "Die Aard en Omvang van die 'Alle Risiko' – polis in die Seeversekeringsreg" 2010 (22) *SA Merc LJ* 484-516

Libby 1994–1995 *J Air L & Com*

Libby JB "War Risk Aviation Exclusions" 1994–1995 (60) *J Air L & Com* 609–656

Lloyd's Agency *Cargo Claims and Recoveries – Module 3*

Lloyd's Agency *Cargo Claims and Recoveries – Module 3* (Lloyd's Agency – Network)

Massmann 2001 *National Underwriter*

Massmann S "War Risk Exclusion Legal History Outlined" 2001 *National Underwriter* 40–45

O' May *Marine Insurance*

O' May *Marine Insurance* (Sweet and Maxwell 1993)

Reinecke 1971 *CILSA*

Reinecke MFB "Versekering sonder versekerbare belang?" 1971 *CILSA* 193–223

Reinecke, Van Niekerk, and Nienaber *South African Insurance Law*

Reinecke MFB, Van Niekerk JP and Nienaber PM *South African Insurance Law* (Lexis Nexis South Africa 2013)

Roberts 1986 *Insurance Counsel Journal*

Roberts LE "All-Risk Property Insurance: Problems in determining the Scope of Coverage" 1986 *Insurance Counsel Journal* 88–107

Rogan 2003 *Tulane Law Review*

Rogan P "Insuring the Risk of Terrorist Damage and Other Hostile Deliberate Damage to Property Involved in the Marine Adventure: An English Law Perspective" 2003 (77) *Tulane Law Review* 1295–1331

Shambhavi 2012 *Chartered Accountant Practice Journal*

Shambhavi "Doctrine of Proximate Cause – The Application of Commonsense" 2012 *Chartered Accountant Practice Journal* 18–22

Stander and Smit 2007 *THRHR*

Stander AL and Smit MM "Die uitleg van sekere begrippe soos gebruik in seeversekeringspolisse gemik op die vervoer van goedere vir die in- en uitvoermark (1)" 2001(70) *THRHR* 24–42

Stander and Smit 2007 *THRHR*

Stander AL and Smit MM "Die uitleg van sekere begrippe soos gebruik in seeversekeringspolisse gemik op die vervoer van goedere vir die in- en uitvoermark (2)" 2001(70) *THRHR* 175–198

The Brief 2014 *Tort Trial & Insurance Practice Section*

The Brief "All Risk Insurance" 2014 *Tort Trial & Insurance Practice Section* 13-17

Thomas 1974 *California Western International Law Journal*

Thomas EG "Acts of Terrorist and Combat by Irregular forces – An Insurance War Risk" 1974 *California Western International Law Journal* 315-339

Theunissen *Die onderskeid tussen seerowery en terrorisme as versekerde risiko's in die seeversekeringsreg*

Theunissen AJ *Die onderskeid tussen seerowery en terrorisme as versekerde risiko's in die seeversekeringsreg* (LLM – dissertation North West University of Potchefstroom 2009)

Van Niekerk 2007 *SA Merc LJ* 71

Van Niekerk JP "Insurance, Reinsurance and the Impact of Terrorism: An overview of the South African Position" 2007 (19) *SA Merc LJ* 71–86

Case Law

Airlift International Inc v United States 335 F Supp 442 449 (S D Fla 1971) aff'd 460 F 2d 1065 (5th Cir 1972) (mem)

Bird v St Paul Fire and Marine Insurance Co 224 NY 47 120 NE 86 (1918)

British & Foreign Marine Insurance Co v Gaunt [1921] 26 Com Cas 247

City of Barre Vermont v New Hampshire Ins Co 396 A2d 121 (Vt 1978)

Commercial Union Assurance Company of South Africa Ltd. v Kwazulu Finance and Investment Corporation and Another [1995] 2 All SA 628 (A)

Concord Insurance Co Ltd v Oelofsen 1992 (4) SA 669 (A)

Drinkwater v The Corporation of the London Assurance 95 Eng Rep 863 (C P 1767)

Eagle Star Insurance Co Ltd v Willey 1956 (1) SA 330 (A)

Holiday Inns Inc v Aetna Insurance Co 571 F Supp 1460 (S D N Y 1983)

Home Insurance Co v Davila 212 F 2d 731 736 (1st Cir 1954)

Incorporated General Insurance Ltd v Shooter t/a Shooter's Fisheries 1987 (1) SA 842 (A)

Insurance Co Boon 95 US (5 Otto) 117 24 L Ed 395 (1877)

Johnson Press of America Inc v Northern Insurance Co of New York 791 N E 2d 1291 (III App Ct 2003)

Langdale v Mason 1 Bennett's Fire Ins Cas 16 (K B 1780)

Leyland Shipping CO Ltd v Norwich Union and Fire Insurance Society Ltd [1918] AC 350

Littlejohn v Norwich Union Fire Insurance Society 1905 TH 374

Lorcom Thirteen (Pty) Ltd v Zurich Insurance Company South Africa Ltd [2013] 4 All SA 71 (WCC)

Lucena v Craufurd (1806) 2 Bos & Pul NR 269, 127 ER 630 (HL)

Mutual and Federal Insurance Co ltd v Oudtshoorn Municipality 1985 (1) SA 419 (A)

Napier v Collet & Another 1995 (3) SA 140 (A)

Shipping Co Ltd v Norwich Union Fire Insurance Society Ltd [1918] A C 350

Spinney's (1948) Ltd v Royal Insurance Co Ltd [1980] 1 LI Rep 406.

Pan American World Airways Inc v Aetna Casualty and Surety Co 505 F2d 989

Reischer v Borwick [1894] 2 QB 548

Robinowitz v Ned Equity insurance Co Ltd [1980] 3 All SA 360 (W)

SS Co v The King (1919) 2 KB 670 (CA)

Standard Oil Co v United States 340 US 54 58 71 S CT 135 95 L Ed 68 (1950)

Sunny Aircraft Service Inc v American Fire & Casualty Co 140 So 2d 78 (Fla Dist Ct App 1962) aff'd 151 So 2d 276 (Fla 1973)

Legislation

General Law Amendment Act 8 of 1879

Terrorism Act 2000

Terrorism Risk Insurance Act of 2002

The *Protection of Constitutional Democracy against Terrorism and Related Activities Act* 33 of 2004

Internet

Institute War Clauses (Air Cargo) date unknown www.lmalloyds.co./CMDownload.aspx?ContentKey=92588

Institute War Clauses (Air Cargo) date unknown www.lmalloyds.co./CMDownload.aspx?ContentKey=92588 23 April 2017

Langley 2009 http://aviation-history.com/early/wright.htm

Langley D 2009 *Wright Brothers Biographical Overview* http://aviation-history.com/early/wright.htm accessed 19 July 2017

United Nations 2017 https://www.un.org/News/dh/infocus/terrorism/sg%20high-level%20panel%20report-terrorism.htm

United Nations 2017 *Terrorism* https://www.un.org/News/dh/infocus/terrorism/sg%20high-level%20panel%20report-terrorism.htm 12 February 2018