FROM:	Director, Worldwide Markets	EXTN:	6677
DATE:	23 December 2004	REF:	Y3475

SUBJECT: **GAREAT - FRENCH TERRORISM REINSURANCE POOL**

SUBJECT AREA(S):
1. To inform syndicates of the procedures for 2005, including the ability to opt-out of the pool.
2. To provide information on the final data collection for 2004.

ATTACHMENTS: Legal advice

ACTION POINTS: **Managing Agents and Underwriters to note and action opt-out procedure if required.**

DEADLINE(S): **25 February 2005 for the opt-out and 17 March 2005 for final 2004 data collection.**

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1. Opting out of the pool for 2005

GAREAT participation is compulsory for all members of the French Insurers' Association (FFSA) including Lloyd's. However, individual syndicates were given the option to opt out of the pool for 2004. This option will also be allowed for 2005.

All syndicates are opted-in for 2005 unless they specifically opt out. Opt-outs from 2004 will not be carried over.

Syndicates opting out of the pool for 2005 must still include terrorism cover in their policies as required under French law.

Syndicates wishing to opt out of the pool for 2005 must contact Worldwide Markets (WWM) and return a signed copy of the letter that Worldwide Markets will issue to them. The deadline for opting out will be 25 February 2005 and after that date, no changes will be allowed. All syndicates who have not opted out must make a quarterly return to the French office, including nil returns where applicable. Please contact WWM for a copy of the opt-out letter template for 2005. This must be printed out on each syndicate's headed paper and returned to Zoë Kilminster in Worldwide Markets.

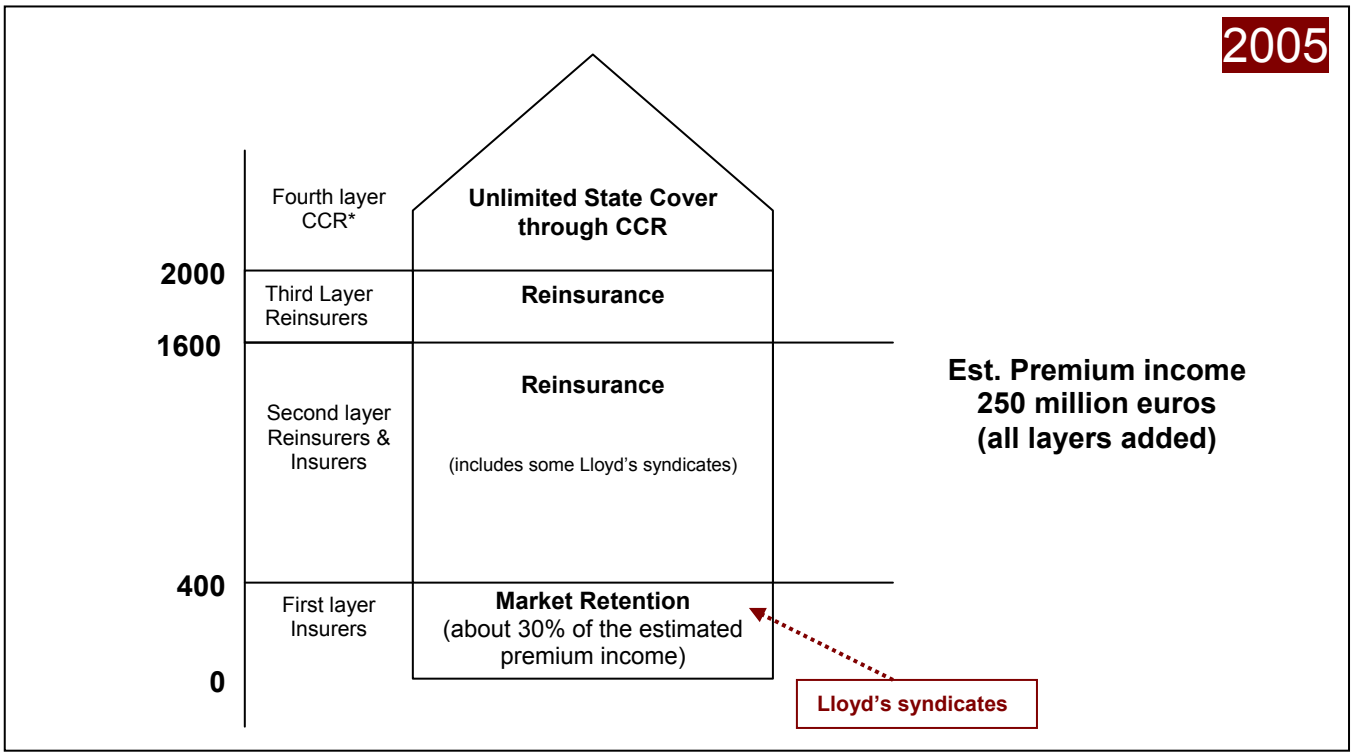
2. Structure of the pool for 2005

The GAREAT pool will be continuing for 2005 with some changes.

During 2004, GAREAT was structured on a four-layer basis, the co-reinsurance pool being involved up to a limit of €400 million. A layer, which was purchased in the commercial insurance and reinsurance market above this up to the limit of €1,650 million, which was led

by Swiss Re. A third layer of reinsurance up to the limit €2,000 million was led by Hannover Re. Unlimited cover via the CCR (a French State-owned reinsurer) guaranteed by the French State was provided above this layer.

For 2005, the second layer of this structure will be from € 400 million to €1,600 million.



This structure should remain in place until the end of 2006, as per the agreement signed between GAREAT and the French Government.

For the reinsurance layers, the security rating (based on S&P ratings) of reinsurers will determine the extent of a reinsurer's participation in the programme. Reinsurers will have their involvement limited according to their security rating, and must have at least a rating of BBB-. Subject to the following conditions:

- Maximum capacity as % of capital from 3 to 7% and as per ratings from €15 to € 325 million with :
    - aggregation of written lines for both layers
    - except if the amount as % of capital is lower (then is the maximum)

- Maximum line for both layers : from 2.5% to 20%

- Minimum written line: 0.25% (second layer) – 0.75% (third layer)

3. Other changes to Gareat in 2005:

- **Rate of Exchange (RoE)**: For the risks rated in currency other than Euros, Syndicates must use a quarterly RoE for every new risk as per below:

  For risk written between 01.01.2005 and 10.03.2005: use the Financial Times rate of 01.01.2005
  For risks written between 11.03.2005 and 10.06.2005: use the Financial Times rate of 01.03.2005
  For risks written between 11.06.2005 and 10.09.2005: use the Financial Times rate of 01.06.2005
  For risks written between 11.09.2005 and 10.12.2005: use the Financial Times rate of 01.09.2005
  For risks written between 11.12.2005 and 31.12.2005: use the Financial Times rate of 01.09.2005

  The French office will confirm the applicable rates of exchange in its quarterly instructions e-mails to participating syndicates, together with the excel file to use for the Gareat declaration.

- **Lloyd's Brokers and Coverholders other than French ones**: The French office will no longer accept Gareat declarations from these intermediaries. Syndicates will have to include in their return the risks written by Lloyd's Brokers, through French lineslips, and by coverholders (other than French) who they have done business with. This means that syndicates should contact these intermediaries in order to obtain the necessary information to include it in their own return. French coverholders should continue to submit separate spreadsheets directly to the French office to declare the risks they write trough their binders.

- **Contracts subject to non-European Law**: Lloyd's French Office has sought legal advice to determine whether it was compulsory to cover terrorism in property policies subject to US state law and jurisdiction and covering a US insured for property worldwide (with property in France). The full details of this professional advice provided by Leboeuf, Lamb, Greene and MacRae is attached to this Market Bulletin. We also enclose a previous memorandum on a similar query for European risks. Although the terrorism cover is recommended, the cession of such risks to Gareat is now officially optional for risks subject to non-European law and jurisdiction.

- **Nuclear, Biological and Chemical (NBC) Terrorism**: French Law prohibits the exclusion of NBC terrorism in property insurance contracts. However, this coverage is not compulsory for reinsurers and most of them now refuse to provide it. Gareat does cover NBC risks and the French State has suggested that the pool might extend its scope of coverage to private risks and professional risks of less than 6 million euros. Consequently, it is likely that in the future, Gareat will set up a second co-reinsurance pool to cover smaller risks. Lloyd's French Office has obtained confirmation from Gareat that this small risks scheme will be separate from the large risks pool and that membership will be fully optional for insurers, even for those who have opted in the current Gareat system. The conditions of cession, rates and coverage are not yet defined. A Market Bulletin will be released when more information is available.

4. Final data return for 2004

The fourth quarter return for 2004 covered risks incepting up to the 10 December 2004. GAREAT will require a further return from syndicates for risks incepting from 11 December to 31 December 2004. As per the collection data for quarter four 2004, the French office will email syndicates the forms to be completed together with the forms for the first quarter 2005. The deadline for this return, together with the first return for 2005 will be 17 March 2005.

5. Further information

Further information regarding the GAREAT can be obtained as follows:

In France, from Lloyd's Paris office

Cécile Peyrade — Tel: +33 1 42 60 43 43
E-mail: cecile.peyrade@lloyds.fr

Lloyd's General Representative in France:
Anne-Gaëlle Leillard — Tel: +33 1 42 60 43 43
E-mail: annegaelle.leillard@lloyds.fr

In London, from Lloyd's Worldwide Markets

Via the Market Services Desk on the first gallery at box 190, Lloyd's extension 6677,
Or e-mail market.services@lloyds.com

Zoë Kilminster — Tel: 0207 327 5772
E-mail: zoe.kilminster@lloyds.com

Marianna Papadakis — Tel : 0207 327 6802
E-mail : marianna.papadakis@lloyds.com

More detailed information on Lloyd's trading rights may be found on www.lloyds.com/worldwide. Select the appropriate country from the Lloyd's trading status box (located on the right hand side of the web page) and this will take you to the Quick Reference Guide for the country selected. More detailed information may then be obtained for certain countries by selecting 'Manual' from the menu on the left hand side of the screen. You will be asked to input a user name and password. Please contact the Worldwide Market Services (contact details as above) in order to obtain this information.
This bulletin is being sent to all compliance officers, managing agents, active underwriters, and Lloyd's brokers.

Julian James
Director
Worldwide Markets

LEBOEUF, LAMB, GREENE & MACRAE
L.L.P.
A LIMITED LIABILITY PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS

130, RUE DU FAUBOURG SAINT-HONORE
75008 PARIS, FRANCE

MEMORANDUM

DATE 24 September 2004

TO: Anne-Gaëlle Leillard – Lloyd's France

FROM: Jean Alisse, Jérôme Da Ros

RE: Terrorism Exclusion clauses

You have asked our advice on whether a Terrorism Exclusion clause contained in insurance property policies subject to US state law and jurisdiction and covering a US insured for property worldwide (with property in France) would be applicable to his French property. Moreover, you asked if, in the event the choice of law and jurisdiction be valid and recognized by French courts, these courts would recognize the validity of the Terrorism Exclusion clause. You also asked whether stand-alone policies insuring terrorism risks for the same properties would trigger a risk of double liability.

In our memorandum of 5 November 2001, we concluded that notwithstanding the choice of foreign law by the parties to an insurance contract, there would be significant risks that the prohibition to exclude the insurer's cover for damage as a result of terrorist attacks be declared non-applicable by French or EU jurisdictions if the insured risk is located in France. Moreover, even where the parties agree that disputes are subject to the exclusive jurisdiction of the courts of a country other than France, we could not exclude that the prohibition be upheld by that other country's courts or by arbitral tribunal.

Please note that following our memorandum of 5 November 2001, a decree (*décret*) of 28 December 2001 and a subsequent order (*arrêté*) of 28 December 2001[1] amended the Insurance Code and set out more flexible rules for the guarantee of terrorism

[1] Decree no 2001-1337 of 28 December 2001 published on 30 December 2001 and Order of 28 December 2001.

risk for policies covering "large risks" only.[2] Under these new rules, in property insurance contracts subscribed for large risks, the amount of the guarantee for terrorism may not be under 20% of the guaranteed amount, net of franchise, for goods transported; and under 20% of the guaranteed amount, net of franchise, or in any case, no less than 20,000,000 euros for other risks. Moreover, property insurance contracts for large risks may not stipulate a franchise of more than twice the guaranteed amount.

However, despite these new rules, the answers to the new set of questions you raise regarding US law do not substantially differ from the answers we gave in our previous memorandum with regard to France and the EU.

I. Competent jurisdiction

As for the jurisdiction, a US insurer and a US insured could choose to elect a US court for an insurance policy issued by covering properties dispersed all over the world, including in France. However, for immovable or movable property located in France, there is a significant risk that an insured may be advised to bring a case before a French court notwithstanding the jurisdiction clause, and that a French court could not decline its competence in application of article R. 114-1 of the Insurance Code.

Article R. 114-1 states that: "In lawsuits relating to the determination and settlement of indemnities due, the defendant is sued before the court of the domicile of the insured, regardless of the type of insurance, except in matters of immovable property or properties movable by nature where the defendant is sued before the tribunal where the insured properties are located."

This article sets up rules of jurisdiction that are considered to be applicable in matters of international relationship. These rules are compulsory as they are public policy rules. This has been confirmed by a judgment of the French *Cour de cassation* of 17 June 1997.[3]

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[2] "Large risks" are defined by defined by article L.111-6 and include the following situations, among others:
- fire, motor vehicle and other property insurance when the insured meets two of the following three conditions: gross assets exceeding 6.2 million euros, turnover of 12.8 million euros and an average of more than 250 employees during the past fiscal year;
- any insurance of railway rolling stock, aircraft, ships and goods in transit.

[3] *Cour de cassation*, Civ. I, 17 June 1997, No 95-18045. In that precedent, an insurance company based in the US (Kentucky) covered a stallion (property movable by nature), which was injured (we have no precision on that damage). A lawsuit was filed both in Kentucky and in France. Although a lawsuit was filed in the US, the French court refused to decline its jurisdiction on the grounds that the stallion was located in France at the time of the damage, triggering the application of article R. 114-1 and thus the jurisdiction of the French court.

Consequently, there is no certainty that the competence of a US judge would not be challenged by an insured according to the provisions of this article.

In the event that regardless of the above rules, none of the parties decided to file a suit with a EU court but with a US state court as stipulated in the contract, it is likely that this court would not decline its competence. Still, the answer to that question would require an analysis jurisdiction-by-jurisdiction.

II. Applicable law

As a matter of principle, the fact that a French court could declare itself competent pursuant to the above rules does not entail that French law would automatically be applicable to the insurance contract. Indeed, the choice of a US state law for an insurance policy subscribed by a US insured covering worldwide properties located all over the world including France, would not be contrary to French law, regardless of the competent jurisdiction, as long as the insurance in question is not a compulsory insurance.

For non-compulsory insurance (for instance fire insurance for industrial property), there is no rule prohibiting in principle the choice of law other than French law when the conditions set out in articles L. 181-1 to L. 181-4 of the Insurance code are met. As a general principle, article L. 181-1. 2. of the Insurance Code states that:

"When the risk falls within the meaning of article L. 310-4 in France[4] and the policyholder does not have his main residence or head office in France, the parties to the contract may choose to apply either French law or the law of the country where the policyholder has his main residence or head office."

Consequently, if a risk is located in France and the policyholder resides in the United States, the parties may choose to elect US law to govern the insurance contract.

As a consequence of the above articles, French law provides for the possibility to choose the law applicable to the insurance contract. Thus, the validity and recognition by French courts of a US state law for a US insured entering into a property insurance with a US insurer should not challenged as long as the above conditions are fulfilled, and we assume that it is the case in the example you are referring to.

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[4] Article L. 310-4 gives the following precisions on the country of location of the risk, which can be:

"1. the country where the property is located when the insurance relates either to immovable property or to immovable property and its contents insofar as the latter is covered by the same insurance policy; (...)4. in all cases other than those referred to in paragraphs 1, 2 and 3 above, the country where the policyholder has his main place of residence or, if the policyholder is a legal entity, the country where the establishment of said legal entity covered by the contract is located."

III. Validity of a Terrorism Exclusion clause in a contract governed by non-French law

Article L. 126-2 of the French Insurance Code states that: "Property insurance contracts may not exclude the insurer's cover for damage as a result of terrorist attacks or bombing perpetrated on the national territory. Any clause to the contrary shall be deemed non-written."

It must be noted that article L. 126-2 only applies to property insurance contracts, so that French law does not prohibit Terrorism Exclusion clauses in liability insurance contracts. On this point, the French *Cour de cassation* decided in its judgment of 13 November 2002 that the non-exclusion should not apply to liability policies, even though these policies related to immovable assets.[5] Insurance contracts often cover both liability and property damages; in that case, the terrorism-exclusion clause will apply only to the cover of property damages.

The issue arising then is: is it possible for a contract governed by non-French law and covering a property located in France to provide for the exclusion of terrorism acts? The answer to this question resides in the application that a French judge would make of article L. 181-3 of the Insurance Code. Indeed, the first paragraph of article L. 181-3 states that article L. 181-1 "may not preclude public policy provisions of French law, which shall be applicable regardless of the law that governs the contract."

The answer to this question does not substantially vary from what we said in our memorandum of 5 November 2001 (page 4), i.e.: the non-exclusion rules are considered mandatory provisions of French law for purposes of the foregoing, and so in the French view would apply whatever law is chosen by the parties. Accordingly, French courts would apply the non-exclusion rules in any dispute involving insurance of risks situated in France, even if the parties are entitled to subject the contract to the law of another country. This will be true whether the insurance is written by insurers established in France or by insurers established in another country.

On the contrary, a US judge would probably not apply the French non-exclusion rules, even though this point depends on the law of the state that governs the contractual relationship and should be considered on a case-by-case basis.

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[5] *Cour de cassation*, Civ. I, 13 November 2002, No 00-18838.

In the light of the above analysis, it is not possible to assure that a Terrorism Exclusion clause contained in an insurance property policy subject to US law and jurisdiction and covering a US insured for property worldwide (with property in France) would not be questioned in case of a terrorist attack on the French property. In that situation, the worse case scenario for the insurer would be that said clause be invalidated and that it be forced to cover the damages caused by terrorist attacks as a normal property damage without any specific limit.

In these circumstances, it is recommended to cover the French property with a local policy and to stipulate all the limitations provided in the order of 28 December 2001 if, of course, the risk insured is a "large risks" as defined by the French Insurance Code.

IV. Risk of double liability

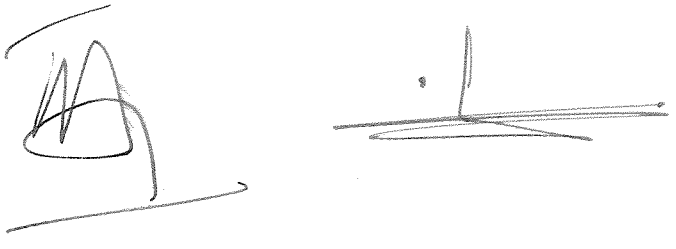
Concerning your second question related to the "cohabitation" of a stand-alone terrorism policy and a property damage policy, the question that you raise of which policy would respond first supposes that there is no Terrorism Exclusion clause in the property damage policy or that the validity of this clause has been denied by a court.

The only situation that would fully eliminate this risk of double liability would be to include in the stand-alone policy a provision that would expressly stipulate that this policy is in excess of any other coverage provided for the same risk.

Still, there is no rule under French law that would prohibit an insured or any interested third party (i) to present a claim under a policy in preference to another one as long as both policies could be applicable or (ii) to try to exhaust both policies successively in order to obtain full recovery of damages. Of course, the only restriction to this principle is that the insured cannot be compensated for more than the actual damage he has suffered.

We consider that this principle would apply not only in the absence of a Terrorism Exclusion clause in the Property damage policy but also when this clause is included but denied by a competent jurisdiction.

Please let us know if you have any further questions on the above.



LEBOEUF, LAMB, GREENE & MACRAE, L.L.P.

MEMORANDUM

November 5, 2001

To: Mr. Torquil McLusky – Lloyd's France

From: Jean Alisse, Reid Feldman

Re: Terrorism exclusion clauses in France.

Per your request, we have examined several issues arising in connection with the proposed use of terrorist exclusion clauses in insurance policies covering French property losses, in light of French legislation prohibiting the use of such clauses. This memorandum discusses (1) the relevant provisions of French law and (2) considerations relating to choice of law and of jurisdiction.

As explained more fully below, the prohibitions in French law and regulation against terrorism exclusion clauses or specific terrorism deductibles or limits (the "Non-Exclusion Rules") constitute mandatory rules of French law which will be applied without exception by French courts. There are circumstances, also described below, in which parties to an insurance policy covering French property could choose to have the policy subject to the law of a country other than France and could subject disputes under the policy to courts in another country or to arbitration. In some such circumstances arguments could be made that the Non-Exclusion Rules should not be applied by the relevant court or arbitral tribunal. However, even in such cases there appears to be a significant risk that non-French courts or arbitrators would nevertheless apply the Non-Exclusion Rules, because they are an expression of mandatory French public policy.

This situation may put insurers covering French property risks in a difficult position, particularly since we understand that reinsurers are currently advising that they wish to exclude coverage of terrorist risks. French law does not prohibit reinsurers from so excluding terrorist risks from their treaties or facultative contracts.[1] The French government-owned reinsurer, the Caisse Centrale de Réassurance, has in similar situations in the past (in the late 1980's and early 1990's) provided such reinsurance (with the guarantee of the French State) to the French market when private reinsurers declined to offer it, and may make such reinsurance available now.

In certain situations it may be possible to fashion financial arrangements (for example, through the use of captives outside of France) which would allow an insurer to

[1] By way of comparison, note that along with provisions of French law requiring property insurance to include natural catastrophe coverage, article L.125-6 of the French insurance code prohibits reinsurers from excluding natural catastrophe risks from their reinsurance of French property risks.

neutralise the terrorism risk for French property coverage, although such arrangements may not be easily adaptable to the general market for property coverage in France. We would be pleased to discuss such arrangements with you further.

1. French legislation prohibiting terrorism exclusion in property policies

The French insurance code[2] provides in article L.126-2 that "Property insurance contracts cannot exclude coverage by the insurer of losses arising from acts of terrorism or attacks committed on the national territory. Any clause to the contrary will be without effect."[3] Article R.126-1[4] states that the property insurance policies to which this prohibition applies are those in clauses 3 through 9 (as defined in article R.321-1), i.e. property damage to land, vehicles including railway rolling stock, aircraft, ships or goods in transit, property damage due to fire and natural forces and other property damage, and business interruption resulting from the foregoing losses. Article R.126-2[5] prohibits including in any such policy a deductible or coverage limit for terrorist acts or attacks against the State which is different from the deductible or coverage limit for losses from other causes.

The provisions of L.126-2 were adopted in 1986 (law No. 86-1020 of 5 September 1986), in the aftermath of a series of terrorist attacks in France, and replaced similar provisions applicable only to fire and automobile policies. R.126-1 and R.126-2 were adopted by decree in 1987 (Decree No. 87-459 of 29 June 1987). The 1986 law and 1987 decree also established a guarantee fund to make payments to those suffering bodily injury from terrorist acts committed in France or to French nationals suffering such injuries from terrorist acts abroad. This fund is financed by a contribution payable on each French property policy (currently 22 FRF per policy).

It is clear that the Non-Exclusion Rules apply only to the classes of insurance mentioned above and do not extend to other classes of insurance such as casualty, life, health, legal assistance, credit or miscellaneous financial losses. In particular, pure event cancellation policies do not fall within the listed classes and the Non-Exclusion Rules do not apply to such policies.

The Non-Exclusion Rules apply only in cases of acts of terrorism or attacks on the French State which are committed on French national territory.[6] They do not explicitly contain any rules of territorial application based on the location of the

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[2] All references herein in the form L.__ or R.__ are to the French Insurance Code (Code des assurances).

[3] "Les contrats d'assurance de biens ne peuvent exclure la garantie de l'assureur pour les dommages résultant d'actes de terrorisme ou d'attentats commis sur le territoire national. Toute clause contraire est réputée non écrite."

[4] "Les contrats d'assurance de biens mentionnés à l'article L.126-2 sont ceux qui relèvent des opérations d'assurance figurant aux 3 à 9 de l'article L.321-1 ou qui couvrent les pertes d'exploitation résultant des sinistres affectant les biens assurés."

[5] "Les contrats d'assurance de biens ne peuvent stipuler, pour les dommages résultant d'actes de terrorisme ou d'attentats, de franchise ou de plafond autres que ceux qu'ils prévoient pour des dommages de même nature qui n'auraient pas pour origine un acte de terrorisme ou un attentat."

[6] Continental France (including Corsica), French overseas departments and territories (Martinique, Guadeloupe, Guiana, the St. Pierre et Miquelon archipelago, Mayotte, New Caledonia, French Polynesia and Wallis and Fortuna).

property covered. Accordingly, on their face the Non-Exclusion Rules would apply to property outside France, for example in Switzerland, damaged by a terrorist act committed across the border in France, but not to property in France damaged by a terrorist act committed across the border in Switzerland.

The Non-Exclusion Rules apply to "acts of terrorism" (*actes de terrorisme*) and "attacks" (*attentats*). Although acts of terrorism are not defined in the French Insurance Code, the definition of these concepts found in the Penal Code, while not automatically applicable in the insurance context, would probably serve as the basic reference in any court interpretation of the Non-Exclusion Rules. "Acts of terrorism" are defined in article 421-1 of the New Penal Code as the commission of certain enumerated offences against individuals or property (homicide, assault, kidnapping, hostage-taking, hijacking, intentional damage to property, offences relating to explosives or conventional, biological or chemical weapons, etc.) when the offences are "intentionally related to an individual or collective undertaking, the aim of which is to severely disrupt public order through intimidation or terror". As for "attacks" (*attentats*), legislative history indicates that this term is simply an additional reference to acts of terrorism (although there is a separate definition of *attentat*, article 412-1[7] of the Penal Code, which refers to attacks aimed against the French State).

The definition of acts of terrorism given above does not include war (foreign or civil), organised crime without intent to disrupt public order, acts of vengeance or riots and mass demonstrations (*émeutes et mouvements populaires*). It is not mandatory that losses from war, riots and mass demonstrations be included in French property coverage; however, if an event could be characterised as an act of terrorism as well as an act of war, riot or mass demonstration, French courts would probably consider it as an act of terrorism and disallow the exclusion.

2. Choice of law and election of jurisdiction

Insurance policies covering French property losses can in some cases be made subject either to French law or to the law of another country, and can contain clauses granting exclusive jurisdiction to courts in countries other than France or to arbitral tribunals in France or elsewhere. However, the Non-Exclusion Rules would nevertheless be considered to apply in any legal action before French courts and potentially in actions before the courts of other countries or before arbitral tribunals.

2.1. The situation in actions before French courts

The French insurance code (articles L.181-1 through L.181-4) allows flexibility in the choice of the law applicable to an insurance contract in certain cases, including (a) if the risk is situated, or the subscriber resides or is headquartered, outside France, (b) if the insured is a business enterprise and the risks are situated in several

[7] "Constitue un attentat le fait de commettre un ou plusieurs actes de violence de nature à mettre en péril les institutions de la République ou à porter atteinte à l'intégrité du territoire national. »

countries or (c) in the case of so-called "large risks" as defined by the code.[8] However, those articles also provide that notwithstanding the choice of another law, the mandatory provisions of French law (*dispositions d'ordre public*) will apply (subject to the application of mandatory provisions of the laws of other EEA Member States insofar as insured risks are situated in such other Member States or the insurance is required by the laws of such other States). The Non-Exclusion Rules are considered mandatory provisions of French law for purposes of the foregoing, and so in the French view would apply whatever law is chosen by the parties.

These provisions of French law are consistent with E.U. law, notably article 7 of the Second EU Non-Life Directive (Directive 88/357 of 22 June 1988). In addition, the insistence by French law on the mandatory nature of the Non-Exclusion Rules for risks situated in France is likely to be considered consistent with article 28 of the Third Non-Life Directive (Directive 92/49 of 18 June 1992), which allows a Member State to require compliance with a special category of mandatory rules, which protect the "general good", and into which the Non-Exclusion Rules appear to fall.

Accordingly, French courts would apply the Non-Exclusion Rules in any dispute involving insurance of risks situated in France, even if the parties are entitled to subject the contract to the law of another country. This will be true whether the insurance is written by insurers established in France or by insurers established in another Member State which provide insurance in France.

2.2. The situation before courts of other countries

In a policy covering French property losses, the parties might agree that the applicable law is that of a country other than France and that disputes are subject to the exclusive jurisdiction of the courts of the same or another country. Whether or not these choice-of-law and election-of-jurisdiction clauses would be upheld would depend on the law of the country in question, on E.U. legislation and on applicable treaties. However, even if the choices were upheld, the relevant non-French court might still apply the French Non-Exclusion Rules.

E.U. legislation allows a Member State some flexibility in deciding which mandatory provisions of the laws of other States will be given effect in the first State. The Second Non-Life Directive provides in article 7(1)(g) that when the law of one State is permitted to be chosen by the parties, this shall not prejudice the application of the mandatory rules of another Member State if "all the other elements relevant to the situation at the time of the choice"[9] are connected with such other Member State. That Directive also provides in article 7(2) that a Member State has the option, whatever law is chosen by the parties, to apply the mandatory rules of the Member State in which the

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[8] "Large risks" are defined by defined by article L.111-6 and include the following situations, among others:

- fire, motor vehicle and other property insurance when the insured meets two of the following three conditions: gross assets exceeding 6.2 million euros, turnover of 12.8 million euros and an average of more than 250 employees during the past fiscal year;
- any insurance of railway rolling stock, aircraft, ships and goods in transit.

[9] Emphasis supplied

risk is situated or which imposes the obligations to take out the insurance in question. Consistent with these and other provisions of the Second Non-Life Directive, it is possible for a Member State to allow the choice of the law of a country other than France to govern a policy covering French property, and not to require application of mandatory rules of French law (such as the Non-Exclusion Rules), if the subscriber resides or is headquartered outside France.

Making an insurance policy subject to the law of a Member State which would not recognise the French Non-Exclusion Rules as mandatory might be effective only if disputes arising under the policy were resolved by a court which would not itself automatically apply the Non-Exclusion Rules. However, to achieve that result at least two things would be necessary: (a) the choice of jurisdiction would have to be honoured by courts of other States which could under general rules have jurisdiction over the insurer or its assets; and (b) there would have to be some assurance that the court or arbitral tribunal chosen would not itself apply the Non-Exclusion Rules.

It is possible in certain circumstances for the parties to an insurance policy covering French property to grant exclusive jurisdiction to the courts of a country other than France. Since insurance covering French risks would by hypothesis be written by an EEA insurer, and since the test of an exclusive jurisdiction clause is whether it would be honoured by courts of the insurer's domicile (or other jurisdiction where its assets are located), rules applicable to choice of jurisdiction are those in the Brussels Convention of 27 September 1968. This Convention sets out rules on the jurisdiction of courts of contracting States, including specific rules applicable to insurance contracts. The Convention provides in article 8 that insurers can be brought before the courts of either the State of their domicile (including the country where any branch or other establishment is located) or the State of domicile of the subscriber of the insurance (if that is a contracting State) and in article 9 that, in case of a property or liability policy relating to real property or both real and personal property subject to the same loss, the insurer can be brought before the courts of the State where the "harmful event" occurred. Further, article 12 of the Convention provides that these rules of competence cannot be altered by contract except in certain cases, including among others (i) when the subscriber and the insurer are domiciled in the same State and they elect to grant exclusive jurisdiction to the courts of that State (provided that the laws of that State permit such an election), (ii) when the subscriber is not domiciled in a contracting State (provided that the insurance is neither a mandatory insurance or nor an insurance of real estate in a contracting State) or (iii) for insurance of maritime shipping or aircraft related to their commercial or goods in transit using such shipping or aircraft in whole or in part or loss of business related to such shipping or aircraft, and accessory risks.

Accordingly, by application of the Brussels Convention, in order for election of jurisdiction outside France to be effective in a policy covering property situated in France, one of the following conditions must be met: (1) exclusive jurisdiction must be granted to the courts of a contracting State in which both the insurer and subscriber are domiciled, (2) the policy must not cover French real estate (i.e. it may cover personal property only) and the subscriber must not domiciled in a contracting State or (3) the policy must be for insurance of maritime shipping or aircraft as described above.

Finally, whether or not such an election of jurisdiction outside France would be useful in avoiding the Non-Exclusion Rules would of course depend on whether the courts of the country selected would apply those Rules despite an express exclusion in the policy. The answer to this question will require an analysis jurisdiction-by-jurisdiction. Subject to such an analysis, it appears that there is at least a significant risk that courts in some jurisdictions would not give effect to a terrorism exclusion clause (or special terrorism deductibles or limits), notwithstanding choice of the law of a country not incorporating the French Non-Exclusion Rules, because to give effect to such clause would violate public policy of France. This result could be justified by the general principle of comity (in common-law jurisdictions) or international public order (in civil law jurisdictions), as well as by reference to principles of choice of law.[10]

For example, in England it is an oft-cited principle of jurisprudence that English courts will not enforce a contract which is illegal or contrary to public policy in the place of performance. This principle might be applied to justify application of the Non-Exclusion Rules to insurance policies covering French risks subject to the law of another country.

2.3. The situation in arbitration

An arbitration clause in an insurance policy covering French property will be upheld under French law when the insured is acting in a professional capacity. The validity of arbitration clauses in other jurisdictions (for example, the one where a non-French insurer is established) would depend on the relevant national law.

However, in an arbitration on a policy made subject to the law of a country other than France, an arbitral tribunal may nevertheless consider the application of mandatory provisions of the law of relevant countries, including the French Non-Exclusion Rules.

Note that this situation is not one dealt with squarely by the provisions in the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, or by provisions of national law, which permit courts to refuse to enforce an award when it is contrary to the public policy of the country where enforcement is being sought. This is because the likely posture of any dispute at the enforcement level would involve the insured attempting to enforce the award against the insurer, in the insurer's country (by hypothesis an EEA Member State where the insurer is established). If the arbitral tribunal applied the Non-Exclusion Rules to award recovery to the insured despite a terrorist exclusion in the insurance policy, it may be difficult to argue that this is a violation of the public policy of the country of enforcement.

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[10] Note that the Rome Convention of 19 June 1908, although not applicable to contracts of insurance covering risks situated in E.U. Member States, expresses the principle, which may have force independent of the Convention, that "effect may be given to the mandatory rules of the law of another country with which the situation has a close connection, if and in so far as, under the law of the latter country, those rules must be applied whatever the law applicable to the contract. In considering whether to give effect to these mandatory rules, regard shall be had to their nature and purpose and to the consequences of their application of non-application" (article 7.1).

It is commonplace in international arbitrations that arbitrators will consider the application of mandatory provisions of the law of the country of performance of a contract, even if the contract is subject to the law of another country. In some instances arbitrators have been known to apply such mandatory provisions in their decisions, for example in cases involving application of competition or anti-corruption laws. Despite the fact that the Non-Exclusion Rules can be distinguished from competition or anti-corruption laws, it is possible that an arbitrator would feel bound to apply those Rules.

Moreover, when arbitrators are given the power to act as *amiables compositeurs* or *ex aequeo et bono*, they are said to remain obligated to apply fundamental requirements of public policy. Arguments could be made that an arbitrator with such powers should adhere to the unequivocal instructions of the parties in their contract and, in the case of an insurance policy covering French property, exclude terrorist risks, if the contract so stipulates. But our review suggests that even in such cases there would be a risk that the arbitrator would disregard the terrorist exclusion, if the arbitrator considered the French Non-Exclusion Rules to constitute a rule of fundamental public policy.

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Please let us know if you have any further questions about the foregoing.

J. A. / R. F.