

Client Advisory

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Hong Kong Protests – Risk Advice and Policy Coverage Concerns

The unprecedented, large-scale protests and demonstrations in Hong Kong have now entered their second full month and, perhaps more concerning, have entered into a new phase marked by increasing reports of physical violence to persons and damage to premises. The protests have also taken on a multi-focused aspect, branching out from protests surrounding government centers and/or buildings and involving commercial centers, subway stations and other transportation infrastructures. In light of this ongoing scenario, Marsh has undertaken a market-wide review of insurance and risk aspects of these events as well as coverage issues under clients' contracts of insurance. Pursuant to that review, Marsh advises as follows:

At the current juncture, all governmental or quasi-governmental organizations have the highest risk.

However, the following entities also have a higher risk threat level:

- Entities that work in partnership with governmental entities, or quasi-governmental agencies.
- Entities that are located, geographically close to government centers, governmental entities, or quasi-governmental agencies (Revenue Tower, Legislative Council Complex).

- Transportation infrastructure centers/entities (MTR stations, Peak Tram, Ferry Terminals).
- Entities located in "high profile" commercial centers (Admiralty, Central, Sheung Wan).
- Entities located in, or have significant operations in, "high risk" areas (Yuen Long).
- Entities located in or near "iconic buildings" or structures (The Golden Bauhinia, Hong Kong Observation Wheel, Bank of China Tower).
- Utility companies (including electric, gas, water and telecommunications).

Risk Response

Regardless of heightened risk threat level, all Hong Kong-located clients should immediately review and update their business contingency plans ("BCP") and crisis response protocols ("CRP") for specific protocols that relate to any protest, demonstration or other disturbance. Specifically, such BCPs and CRPs should include the following:

- Security measures to protect from harm of injury patrons or employees of the entity, and any and all other persons on the premises of the client.

- Security measures to protect the premises of the client from damage/fire.
- Protocols for engaging with and assisting first responders: police, fire emergency and medical technicians.
- BCP for partial or full closure of business operations to accomplish the above requirements.
- A working emergency information/communication system for all employees of clients to ensure that closures, suspensions or dangerous situations, and responses thereto, can be communicated immediately and fully (with particular attention to employees' safety if they travel through "high risk areas").

Policy Coverage Concerns

With respect to insurance, clients are advised to review their requisite cover, particularly any Political Violence/Political Risk ("PV/PR") cover and, more importantly in the absence of a PV/PR policy, their Property All Risk ("PAR"), Contractors All Risk ("CAR"), Public Liability ("PL") and Employees' Compensation ("EC") policies.

With respect to PAR, CAR and PL policies, unfortunately our analysis shows that the market is not uniform in carrier approach to these issues and some policies have an absolute exclusion/exception ("exclusion") in respect of strikes, riots and civil commotions (the so-called "SRCC" exclusion) and others may not. Still others may have an SRCC extension. Even in instances where there is an SRCC extension of cover, language can sometimes be ambiguous in its definition and a full policy review to ensure that coverage is sufficient to respond to the situation now at hand in the Hong Kong market is vital.

Essentially, the SRCC exclusion where present in a policy, is handled in two different ways; the first is an absolute exclusion of "strike", "riot" and "civil commotion", and the second is a sub-exclusionary clause contained in a "War/Civil War" or similar exclusion. Typically, the absolute exclusion will involve language such as follows:

The Insurers shall not indemnify the Insured in respect of loss, damage or liability directly or indirectly caused by or arising out of:

strike, riot, lock out, civil commotion or persons taking part in labor disturbances.

Such language is broad in wording and, as terms such as "strike", "riot" and "civil commotion" are not always defined, they would be designated their dictionary or "normally understood" meanings; which should be broader than any legal or statutory definition of such terms.

In situations where the exclusion is a sub-exclusionary clause of the "War/Civil War" exclusion/exception, the language will sometimes read as follows:

This policy does not cover Damage caused directly or indirectly by or through or in consequence of any of the following occurrences:

- war, invasion, act of a foreign enemy, hostilities or warlike operations (whether war be declared or not), civil war;*
- Mutiny or civil commotion assuming the proportions of or amounting to a popular uprising, military uprising, insurrection, rebellion, revolution or usurped power.*

As can be seen from this language, found on any number of policy forms, including on EC forms, coverage can be predicated upon the actual level of engagement of the general population in any riot or uprising in order to qualify under the exclusion. Clearly, opinions on when a riot or demonstration qualify as a "civil commotion" that "assumes the proportions of a popular uprising" may differ and, hence, there is a degree of ambiguity, even in this exclusion. However, the intent here is to only exclude those demonstrations or civil commotions that rise to the level of "revolution" or "popular uprising". Do the current protests qualify? Insureds would argue "no." Some insurers may not agree and, hence, this is an area that should be addressed as early on a possible in any loss where this exclusionary language is involved.

In addition to the above, some exclusions, even where included in the "War/Civil War" exclusions, will also simply list "strike", "riot" and "civil commotion" as separate items that are not covered, full stop. An example of this, paraphrased from a PL policy is as follows:

The Company shall not be liable in respect of any consequence of war, invasion, act of foreign enemy, hostilities or warlike operations (whether war be declared or not), civil war, rebellion, revolution, insurrection or military or usurped power, riot, strike or civil commotion.

Again, this is an absolute exclusion. Accordingly, the policy must be examined, and all exclusionary clauses related to "war", "civil war", "riot" and "civil commotion" analyzed in full, in order to confirm the presence, or absence, of cover in this area.

Further, although it would certainly be difficult to classify the protests in Hong Kong as some type of "act of terror," some insurers could argue for it to apply to this situation, especially if large premises or property damage ensues as part of the protests. This language will usually read as follows:

This policy does not cover the use or threat of force, violence and/or harm or damage to life or to property (or the threat of such harm or damage) including, but not limited to, nuclear radiation and/or contamination by chemical and/or biological agents, by any person(s) or group(s) of persons, committed for political, religious, ideological or similar purposes, express or otherwise, and/or to put the public or any section of the public in fear.

Again, it would be difficult, we believe, for insurers to wield this language against coverage. However, should any smaller group either splinter off (or take advantage) of the protests to commit such acts, this exclusion could, indeed, be triggered.

Where there is a specific extension for riots and civil commotion under some policies (particularly PAR) there may yet be some concerns. Usually an extension will start with broadly worded language such as:

This insurance is intended to cover physical damage to the property and/or interest insured directly caused by one or more of the following perils:

1. Riots;
2. Civil commotions; and/or
3. Strikes,

Physical loss of the property and/or interest caused by:

4. Looting occurring during Riots.

However, such extensions have exclusionary language which again incorporates “Insurrection” or “Popular Uprisings” and, in some instances, this coverage may also include exclusions/exceptions for:

- Total or partial cessation of works.
- Business interruption or any kind of consequential loss.
- Permanent or temporary dispossession or, potentially, loss of access resulting from the lawful orders or actions of governmental authorities (blocking railroad stations, streets, or other access), and/or confiscation, commandeering or requisition by any lawfully constituted authority or body, or unlawful occupation by any person.

As can be seen from this language, paraphrased from examples of PAR policies, this phraseology could be used by carriers to curtail coverage to only damage to the property and not any consequential loss. Other language which might potentially be used to curtail coverage is language in the definitions section which includes the following:

“Riot” is an act of a group of at least 12 (twelve) persons who in the execution of their common purpose cause public disturbance tumultuously with violence and damage to the property of others.

“Civil commotion” is an act of a large number of people acting together disrupting public peace and disturbance tumultuously with violence and a chain of destruction of a large number of properties, indicated by the cessation areas or schools or public transportation in one city for at least 24 (twenty four) consecutive hours commencing before, during or immediately after the event.

In this instance, one can see that the definitions include time elements and scale elements that may, also, be used by carriers to argue for the incident not being covered.

Lastly, we note that even a PV/PR policy should also be construed carefully when reviewed. Typically, these policies will cover the following:

- *Riots, Strikes and/or Civil Commotion*
 - *Riots: a violent disturbance by three (3) or more persons assembled together which threatens the public peace.*
 - *Strikes: any willful act of any striker or locked-out worker in the furtherance of a strike or in resistance to a lockout or any act of any lawfully constituted authority for the purpose of suppressing or minimizing the consequence of such act.*
- *Malicious Damage*
 - *Loss, damage or destruction of property caused by anyone intending to cause harm or mischief whether or not said harm or mischief is committed during a disturbance of the public peace and where such malicious act is committed for political, religious or ideological purposes.*

These policies typically have fairly comprehensive cover besides this, and may also include a business interruption component. In addition, some policies may contain coverage for loss of access or business interruption due to local, or even regional, denial of access because of blocked roads, rail stations, or due to crowd actions (or, again, lawful governmental actions such as barriers, government announced closures, etc.). However, there are certain exclusions of which clients need to be wary, including loss or damage from escape of pollutants, landscaping loss (which can sometimes be an expensive loss in the Hong Kong market) and, with respect to business interruption, indirect losses due to a contractual breach (or loss of a lease) and loss of market share. Again, the language varies greatly in the market, so careful examination of wording is necessary.

Conclusions

Clearly, a robust and efficient CRP, heightened security procedures, and BCP guidelines that enable your business, property and patrons to be protected and recover from (or up and running after) any civil disturbance are paramount. Failure to have these procedures in place may lead to liability issues should any damage to third parties occur, so risk responsiveness is key in this situation. From an insurance perspective, knowing your policy language is an absolute necessity. Certainly, in this area with the differences in form, language and cover, detailed study is imperative. Marsh can assist all clients if they need clarity with the scope of cover in this regard.

With respect to coverage, we note that carriers may be loath to change or strengthen certain terms in your policy (or even offer the cover at all at this juncture). However, strength in the brokering process and a strategic plan for a coverage response for these types of events will be critical, in the future, to strengthen and secure this cover if needed. Marsh, with its robust and inveterate market relationships and position as a global leader, will utilize all of its assets and experience in this regard.

Please contact your Marsh representative if you wish to obtain further information, or if you wish to obtain details of our full service risk advisory review regarding these current events from both a technical risk and an insurance perspective.

Essentially, this is a situation where “forewarned is forearmed” and we encourage all clients to contact us if you have any questions or if you have any other insurance coverage, claims and risk advisory needs.

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