

THE LMA CYBER WAR EXCLUSIONS – 18 APRIL 2023

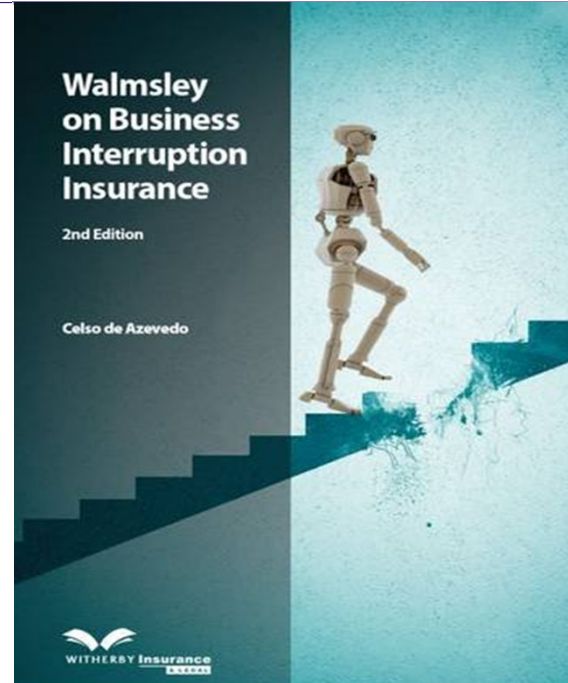
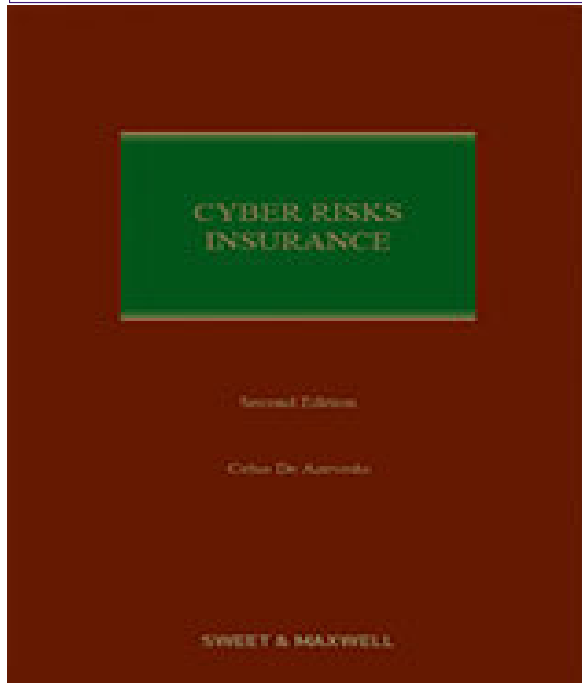
SPEAKER:

CELSO DE AZEVEDO – BARRISTER, ENTERPRISE CHAMBERS

# Speaker

**Celso De Azevedo**

Barrister, Enterprise Chambers



# Hostile Or Warlike Action Exclusion – Merck (New Jersey - USA)

- “This policy does not insure the following:
- A. 1) Loss or damage caused by hostile or warlike action in time of peace or war, including action in hindering, combating, or defending against an actual, impending, or expected attack:
  - a) by any government or sovereign power (de jure or de facto) or by any authority maintaining or using military, naval, or air forces;
  - b) or by military, naval, or air forces;
  - c) or by an agent of such government, power, authority, or forces”

# Hostile Or Warlike Action Exclusion – Merck (New Jersey - USA)

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  - a) by any government or sovereign power (de jure or de facto) or by any authority maintaining or using military, naval, or air forces;
  - b) or by military, naval, or air forces;
  - c) **or by an agent of such government, power, authority, or forces”** ~~or by an agent of such government, power, authority, or forces”~~

**?? NOTHING ABOUT ATTRIBUTION.**

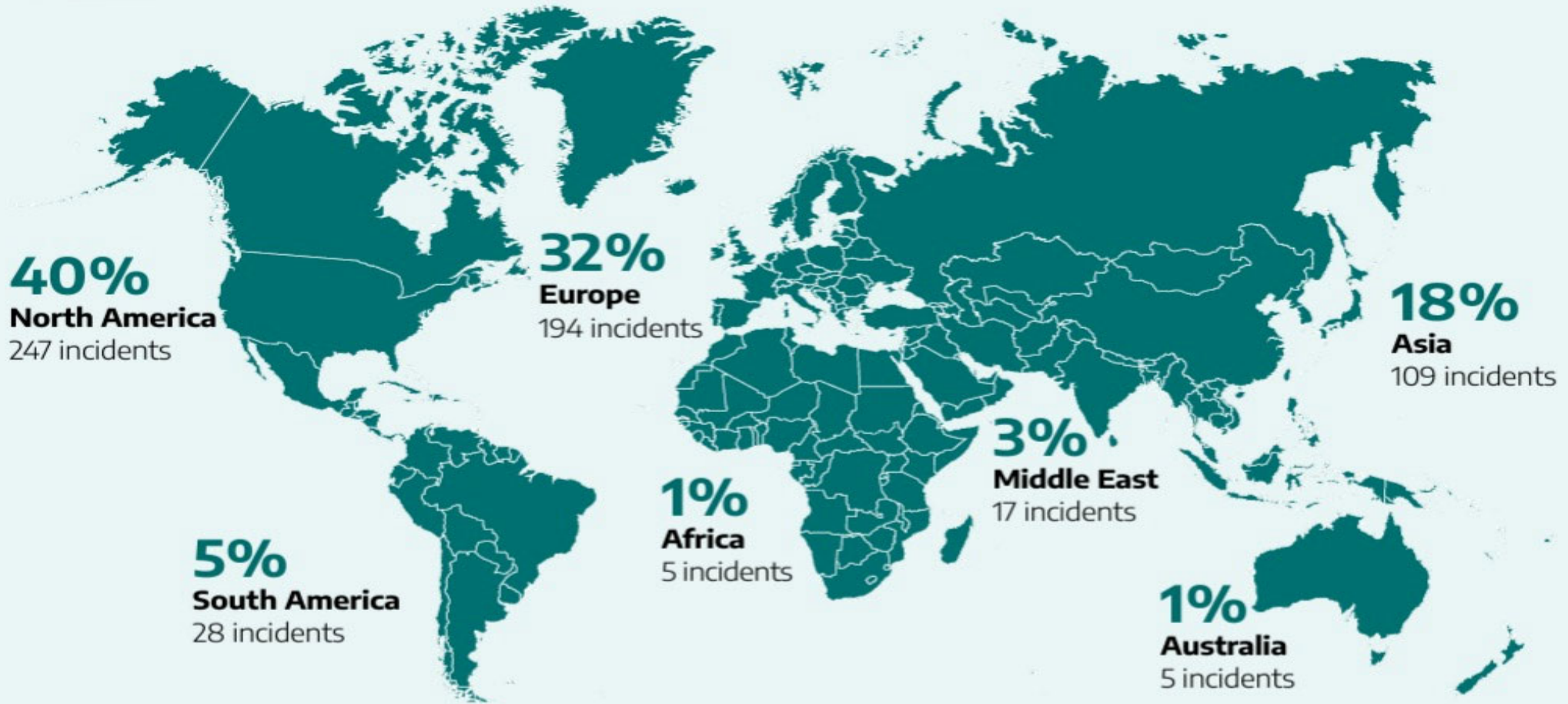
# Hostile Or Warlike Action Exclusion – Merck - New Jersey Court held:

- “parties...aware the cyber attacks of various forms, sometimes from...nation-states have been more common”
- “Despite this, Insures did nothing to change the language of the exemption to reasonably put this insured on notice that it intended to exclude cyber attacks”.
- “Having failed to change the policy language, Merck had every right to anticipate that the exclusion applied only to traditional forms of warfare” and not to cyber attacks such as NotPetya.”

## Merck Appeal – BRIEF OF AMICI CURIAE:THE NEW JERSEY HOSPITAL ASSOCIATION; etc

- Although United States intelligence officials might assert that a cyberattack was conducted from a particular location, ...
- Foreign governments could be expected to deny being involved, so there may well be no evidence on which an insurer could rely.
- ...in the new world of cyber, it may be difficult (if not impossible) for an insurer to meet its proofs under the War Exclusion, and a new approach was needed.

## RANSOMWARE INCIDENTS BY CONTINENT • 2022



# LMA CYBER WAR EXCLUSIONS - OVERVIEW



# Lloyd's Market Bulletin Y5381- 16 August 2022

- **At a minimum**, the state backed cyber-attack exclusion must:
  - ... exclude losses arising from **state backed cyber-attacks** ...
  - ... set out a **robust basis** by which the parties agree on **how any state backed cyber-attack** will be **attributed to** one or more states.

**OLD**

**LMA5564**  
*Broadest*

**LMA5565**

**LMA5566**

**LMA5567**  
*Narrowest*

War (all)

War (all)

War (all)

War (all)

Cyber Operations (CO) -  
**(all)**

1. **Cyber Operations  
in the course of war**

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in the course of war**

2. **Retaliatory CO** b/w  
Specified States (SP)

2. Retaliatory CO  
b/w **Specified States**

2. Retaliatory CO  
**leading two or more SPs  
becoming Impacted  
States**

3. **Major Detrimental  
Impact CO**  
(Sub-limits for "any  
other" CO)

3. Major Detrimental  
Impact CO

3. Major Detrimental  
Impact CO  
**(except for Bystanding  
Cyber Asset)**

# Munich Re Endorsement

1. ... this insurance does **not cover** that part of any loss, damage, liability, cost or expense of any kind (together “loss”) **resulting:**
  - 1.1. directly or indirectly from **war**;
  - 1.2. from a **cyber operation** that is **carried out as part of a war**; or
  - 1.3. from a **cyber operation** that causes a **sovereign state** to become an **impacted state**.

...paragraph 1.3 shall not apply to the direct or indirect effect of a **cyber operation** on a computer system used by the insured or its third party service providers that is **not physically located in an impacted state** but is affected by a **cyber operation**.

Source: Marsh, 22/08/2022 – “A cyber continuum: Cyber war exclusions — moving towards clarity”

# Munich Re Endorsement

1. ... this insurance does **not cover** :

1.1. ;

1.2. ; or

1.3. a **cyber operation** that causes a **sovereign state** to become an **impacted state**.

...paragraph 1.3 shall **not** apply to **operation** on a computer system

effect of a **cyber**

is **not** physically located in an **impacted state**

Source: Marsh, 22/08/2022 – “A cyber continuum: Cyber war exclusions — moving towards clarity”

# NEW LMA CYBER WAR EXCLUSIONS – 2023

LMA5564(A/B) <i>Broadest</i>	LMA5565(A/B)	LMA5566(A/B)	LMA5567(A/B) <i>Narrowest</i>
War (all)	War (all)	War (all)	War (all)
Cyber Operations (CO) - ( <u>any</u> )	CO - as part of / <b>immediate preparation for war</b>	CO - as part of / <b>immediate preparation for war</b>	CO - as part of / <b>immediate preparation for war</b>
	CO - that <b>causes a state to become</b> an <b>Impacted State (IS)</b> ( <b>SUBLIMITS</b> )	CO - that <b>causes a state to become</b> an <b>IS</b>	CO – that <b>causes a state to become</b> an <b>IS</b> ( <b>except for computer system not in IS</b> )

# War and Cyber Operation Exclusion No. 4 - LMA5567A - **NARROWEST**

1. “...this insurance does not cover that part of any loss, damage, liability, cost, or expense, of any kind:
  - 1.1. directly or indirectly arising from a **war**, and/or
  - 1.2. arising from a **cyber operation** that is carried out as part of a **war**, or the **immediate preparation for a war**, and/or
  - 1.3. arising from a cyber operation that causes a **state** to become an **impacted state**.

Paragraph 1.3 shall not apply to the direct or indirect effect of a **cyber operation** on a **computer system** used by the insured or its third party service providers that is **not physically located in an impacted state** but is affected by a **cyber operation**.

# War and Cyber Operation Exclusion No. 4 - LMA5567A - **NARROWEST**

1. “... :

1.1. , and/or

1.2. arising from a **cyber operation** that is carried out as part of a **war**, or the **immediate preparation for a war**, and/or

1.3. .

.



# ATTRIBUTION – 'A' version

Lloyd's Market Association Bulletin - LMA23-002-PD | 18 January 2023 – 8 New Clauses

The 'A' versions meet the requirements of Market Bulletin Y5381...

The 'B' versions do not address attribution and are therefore not compliant without prior agreement from Lloyd's.

# OLD definition of attribution for all LMA Exclusions

- Attribution of a cyber operation to a state

The ***primary*** but not exclusive factor in determining attribution of a cyber operation shall be **whether the government of the state** (including its intelligence and security services) in which the computer system affected by the cyber operation is physically located **attributes the cyber operation to** another state or those acting on its behalf.

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- Attribution of a cyber operation to a state

The ***primary*** but not exclusive factor in determining attribution of a cyber operation shall be **whether the government of the state** in which the computer system is physically located **attributes the cyber operation to** another state

# NEW definition of attribution for all LMA Exclusions 'A'

- Attribution of a cyber operation to a state

Notwithstanding the insurer's burden of proof, ..., in determining attribution of a cyber operation to a state, the insured and insurer will consider such objectively reasonable evidence that is available to them. This may include formal or official attribution by the government of the state in which the computer system affected by the cyber operation is physically located to another state or those acting at its direction or under its control.

# NEW definition of attribution for all LMA Exclusions

- Attribution of a cyber operation **to a state**

..., in determining attribution of a cyber operation to a state, the insured and insurer will consider such **objectively reasonable evidence** that is **available to them**.

**IMPACTED STATE –**  
**MAJOR DETRIMENTAL IMPACT / ESSENTIAL**  
**SERVICE**

# NEW - LMA5565/6/[7] A/B

1.3. arising from a **cyber operation** that causes a **state** to become an **impacted state**.

6. **Impacted state** means any state where a **cyber operation** has had a **major detrimental impact** on:

6.1. the functioning of that state due to disruption to the availability, integrity or delivery of an **essential service** in that **state**, and/or

6.2. the security or defence of that **state**

LMA5565/6/[7]A/B

- **Essential service** means a service that is essential for the maintenance of vital functions of a **state** including, **but not limited to**, **financial institutions** and associated financial market infrastructure, **health services** or utility services.



# Other cyber war exclusions

- War Exclusion Amendatory Endorsement – ‘cyber war’, ‘major detrimental impact’ and ‘essential service’
- Infrastructure/First Party Loss, Failure Exclusion Amendatory Endorsement – ‘Software Remediation’, failure of ‘Financial Market Infrastructure’ and ‘Digital Internet Infrastructure’
- Catastrophic First Party Loss Amendatory Endorsement – ‘BI’ ‘DBI’, ‘cyber extortion’ and ‘data loss recovery’ – sub-limited. ‘Cat Cyber Event’ - failure of cloud service provider or operating system exploit

# Contact us

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