

17 May 2019

IUA Cyber Loss Exclusion Clauses - IUA 09-081 / IUA 09-082

Commentary

Preamble

This commentary is published to outline the overall drafting intent of IUA 09-081 and IUA 09-082 and their intended operation in respect of Cyber Loss. However, it should not be considered definitive or binding advice, legal or otherwise. As with all IUA wordings / clauses, contractual parties are free to adopt either clause, as they deem appropriate to their individual circumstances.¹

Background to the development of the clause

By way of context, in early 2016 the IUA Clauses Committee decided to consider whether a range of cyber clauses, and the definitions and terminology within, remained relevant in light of the rapidly developing cyber risk environment. In November 2016, during the review process, the Prudential Regulation Authority (PRA) published Consultation Paper ([CP39/16](#)) entitled 'Cyber insurance underwriting risk' and subsequently, in July 2017, a Supervisory Statement ([SS4/17](#)). The regulator had highlighted concerns in respect of the potentially unintended or unclear provision of coverage for cyber risks within various classes of insurance business. In particular, it detailed expectations for companies in respect of providing non-affirmative, previously known as 'silent', cyber risk cover. Most notably, Solvency II firms were expected to robustly assess and actively manage their insurance products in respect of this risk and consider the following approaches²:

- adjusting the premium to reflect the additional risk and offer explicit cover;
- introducing robust wording exclusions; and/or
- attaching specific limits of cover.

The IUA Clauses Committee acknowledged the published PRA expectations and suggestions and deemed it appropriate to draft two cyber exclusion clauses that could be utilised to address non-affirmative cyber risk.

Underlying principles and general comments

The rationale behind each clause was as follows:

¹ This commentary does not form part of IUA 09-081 and / or IUA 09-082 and is not intended to be exhaustive or definitive and is subject to any views or interpretation by a Court, regulator or similar body. By including this commentary, the IUA is not providing legal advice and the IUA does not accept any responsibility for subsequent interpretation of the commentary or the accompanying model clause, or any part thereof. Any party considering adopting the model clause, or any part thereof, should seek their own legal advice for clarification of the use and effect of it.

² PRA Supervisory Statement (SS4/17) – Cyber insurance underwriting risk – July 2017. The PRA subsequently issued a further "Dear CEO" letter to insurers in January 2019, re-emphasising its expectations of insurers to suitably manage their cyber exposures.

IUA 09-081 Cyber Loss Absolute Exclusion Clause – this wording was developed to provide market participants with a tool to exclude, in the broadest possible manner, any loss, whether malicious or otherwise, arising out of the use of (or inability to use) a Computer System, Computer Network or Data, each of which are specifically defined within the clause. Additionally, the clause would remove liability arising from losses stemming from the hoax of such and any error, omission or accident in respect of a Computer System, Computer Network or Data.

IUA 09-082 Cyber Loss Limited Exclusion Clause – this clause differs to IUA 09-081 in that Paragraph 2 refers to ‘Cyber Loss...directly caused by’, rather than ‘directly or indirectly caused by’, which ties the proximate cause within the wording to a cyber event.

The Committee acknowledged the broad nature of the exclusions, in particular IUA 09-081, and that such clauses may assist in respect of the PRA’s expectations. However, it was noted that the clauses could also be utilised as a starting or reference point for insurers providing non-standalone cyber coverage, and, through the development of class-specific write backs, allow insurers to explicitly state the extent of cover provided for any Cyber Loss.

Such a write back provision could be drafted in the following manner, to be accompanied by a detailed ‘response’:

Notwithstanding the above, subject to all other terms, conditions and exclusions, this contract shall cover: [response].

Overall, any entity wishing to utilise IUA 09-081 and / or IUA 09-082 will need to consider carefully the breadth of risks excluded and the extent to which they may wish to explicitly provide any cyber related cover.

Commentary on definitions

Having considered the use of various definitions within the market in respect of systems, networks, data and cyber more widely, it was agreed that four terms would be clearly defined within the clauses. Initially a Cyber Loss would be defined, forming the basis of the exclusion in detailing various instances that would be deemed to bring rise to such a loss. To support this exclusion, Computer System, Computer Network and Data would all be defined as those items that could be affected, or used to affect each other, which might bring rise to a Cyber Loss.

Annex 1

CYBER LOSS ABSOLUTE EXCLUSION CLAUSE

1. Notwithstanding any provision to the contrary within this contract, this contract excludes any Cyber Loss.
2. Cyber Loss means any loss, damage, liability, expense, fines or penalties or any other amount directly or indirectly caused by:
 - 2.1 the use or operation of any Computer System or Computer Network;
 - 2.2 the reduction in or loss of ability to use or operate any Computer System, Computer Network or Data;
 - 2.3 access to, processing, transmission, storage or use of any Data;
 - 2.4 inability to access, process, transmit, store or use any Data;
 - 2.5 any threat of or any hoax relating to 2.1 to 2.4 above;
 - 2.6 any error or omission or accident in respect of any Computer System, Computer Network or Data.
3. Computer System means any computer, hardware, software, application, process, code, programme, information technology, communications system or electronic device owned or operated by the Insured or any other party. This includes any similar system and any associated input, output or data storage device or system, networking equipment or back up facility.
4. Computer Network means a group of Computer Systems and other electronic devices or network facilities connected via a form of communications technology, including the internet, intranet and virtual private networks (VPN), allowing the networked computing devices to exchange Data.
5. Data means information used, accessed, processed, transmitted or stored by a Computer System.
6. When this clause forms part of a reinsurance contract, Insured shall be amended to read Original Insured.

Annex 2

CYBER LOSS LIMITED EXCLUSION CLAUSE

1. Notwithstanding any provision to the contrary within this contract, this contract excludes any Cyber Loss.
2. Cyber Loss means any loss, damage, liability, expense, fines or penalties or any other amount directly caused by:
 - 2.1 the use or operation of any Computer System or Computer Network;
 - 2.2 the reduction in or loss of ability to use or operate any Computer System, Computer Network or Data;
 - 2.3 access to, processing, transmission, storage or use of any Data;
 - 2.4 inability to access, process, transmit, store or use any Data;
 - 2.5 any threat of or any hoax relating to 2.1 to 2.4 above;
 - 2.6 any error or omission or accident in respect of any Computer System, Computer Network or Data.
3. Computer System means any computer, hardware, software, application, process, code, programme, information technology, communications system or electronic device owned or operated by the Insured or any other party. This includes any similar system and any associated input, output or data storage device or system, networking equipment or back up facility.
4. Computer Network means a group of Computer Systems and other electronic devices or network facilities connected via a form of communications technology, including the internet, intranet and virtual private networks (VPN), allowing the networked computing devices to exchange Data.
5. Data means information used, accessed, processed, transmitted or stored by a Computer System.
6. When this clause forms part of a reinsurance contract, Insured shall be amended to read Original Insured.