Coronavirus /COVID-19

UK Quick Guide – What insurance cover could be impacted?

Due to the worldwide spread of COVID-19, most UK businesses face potentially significant, but as yet unquantifiable, financial losses from the virus. The same can be said for insurers who are being presented with a large volume of claims across most classes of business.

Some insurance policies may not be triggered at all, or equally could provide inadequate cover to meet extensive business losses. Specific terms and conditions of insurance policies will determine whether COVID-19 events are covered. Policy notification and 'general precaution' requirements are also vital.

In this article, we summarise the key corona related insurance issues.

1. Business Interruption

Business Interruption cover for loss of profit (or revenue) is common within commercial policies, and will be what policyholders instinctively look to when faced with a reduction in income, and an increase in costs, when trying to contain the financial fall-out from the virus.

Potential issues to consider -

- Establishing a trigger for coverage. As there is limited scope to claim that there has been property "damage", policyholders will examine the extensions within the policy. Relevant extensions could include Infectious Disease cover (which is normally very tightly drafted) and denial of access and loss of attraction cover (for suppliers and customers). The extent of the cover will entirely depend on the specific wording of the policy;

- Coverage for policies sometimes only extends to "*notifiable disease*" . This excludes new virus related illnesses which are not notifiable until an amount of time has already passed (this was the case with SARS in 2003). This could significantly affect the loss of business cover prior to the disease becoming notifiable. COVID-19 only became notifiable in England on 5 March 2020, so that date acts as the trigger. If there are multiple triggers, calculating loss will be complicated and potentially contentious;

- Some policies provide coverage for a specified list of infectious diseases (or common "Human Diseases"), rather than any notifiable disease. It is unlikely that such policies will cover COVID-19 unless it can be medically established that coronavirus falls within language such as *"any mutant variant thereof"* . In a similar fashion, excluded diseases within policies are also relevant, as there have already been some reported instances that losses from COVID-19 are excluded as a mutant variant of "*SARS or atypical pneumonia*'.

- Causation and measurement of loss will inevitably lead to disputes. When businesses implement certain measures to protect employees, the position will differ from those of a public authority. Litigation is likely to occur over whether any loss arises from business practices or from the absence of customers in the market place;

- Some policies include business income losses caused by actions of a "*civil authority*" (or Public Emergency) which are aligned with imposed curfews, quarantines and transportation restrictions. However, policy language often requires that the business losses are a <u>direct result</u> of the damage to property for cover to be triggered;

- The definition of "*damage*" may very well come under scrutiny over the next few months, if business premises require a professional deep-clean or decontamination after COVID-19 has been discovered on-site, then an issue arises as to whether 'damage' has been suffered and a claim could be presented for the clean-up costs and insured loss of revenue.

- In relation to emergency measures, where a retailer follows government advice and closes down, insurance claims may still be made. Strictly, insurers are only obliged to pay where there is a legal liability to do so (e.g. because of government obligation). However, statements made by the UK Chancellor and the Prime Minister in the week commencing 16 March, made it clear that insurers have agreed not to challenge the decision of a business to close temporarily as a result of Covid-19, despite not being ordered to do so. This is expected to be applied, although, there is no guarantee that this will be the case**.**

- Finally, any emergency measures that are introduced by insurers in relation to COVID-19 must show consistent and fair treatment of customers as per the recent statement by the Financial Conduct Authority. Specifically, Outcome 3 must be noted, as consumers must be provided with clear information before, during and (most importantly in a COVID-19 context) after the point of sale. Similarly, Outcome 6 must also be adhered to, as insurers must not impose unreasonable post-sale barriers to any insurance product or in relation to any claim in the wake of the virus.

2. Contingent Business Interruption

Contingent business interruption coverage protects against economic losses to a person on whom the insured depends for its business (such as a supplier or a customer). For businesses dependent on supply chain production, contingent business interruption coverage often provides coverage for a supplier who suffers a loss and prevents the delivery of goods.

Potential issues to consider –

- Contingent business interruption insurers may require the supplier be identified specifically or scheduled in the insured's policy for coverage to exist;

- Whilst many businesses purchase contingent business interruption extensions, these usually require there to have been damage at the premises of customers. Occasionally, there is non-damage supply chain insurance, but these are not standard extensions in most business interruption policies;

- Coverage is often also only limited to "*direct*" suppliers or "*direct*" customers situated within the geographic territory and where it has been specifically stated that they cannot be excluded under the policy;

- The burden is also on the insured to demonstrate that the business loss was caused by damage that "*directly or indirectly prevented*" a client from receiving services. If the insured cannot identify any interruption, there is likely to be no coverage. This could become problematic, as it may be difficult to determine the reason behind the shutdown of suppliers of customer locations.

3. Business /Trade Finance / Credit

As recession threatens the global economy and financial pressures take their toll on businesses impacted by COVID-19, one class of business likely to be impacted is business / trade finance / credit insurance. Insureds will look to their policies to check whether they are covered against non-payment of debts.

The trade credit insurance market, which is worth an estimated $11 billion, covers late or unpaid debts and insures against non-payment by foreign buyers due to expropriation, currency issues or political unrest. Cover is provided to companies trading within the UK as well as internationally and assists with growing profitably at all stages of the business cycle whilst minimizing the risk of unexpected customer insolvency.

Potential issues to consider –

- The trigger for such policy cover will usually occur on the expiry of "*the waiting period*" which is a period of time agreed with an insurer where a payment is late. Whilst it is fairly common for an invoice to be paid after the due date, if the invoice has not been paid for 90 days the insurer should be notified and the policy could then be triggered;

- A third trigger can also either arise from the insolvency of a customer or counterparty or where a customer or counterparty has failed to pay trade credit debts. In this instance, the policy will outline specifically what constitutes "*insolvency*" and must be reviewed carefully;

- It is worth noting, there are also obligations under these types of policy for the insured to prevent and/or minimise their losses. This requirement is invariably for the insured to take "*all reasonable steps*" to minimise losses (a process which is often highly contentious and requires legal advice). Furthermore, insurers often require they assist the insured with taking preventative or mitigating action during the process of taking "*reasonable steps*";

- It will be important to analyse the force majeure clause in a contract to interpret whether a Trade Credit insurance policy covers particular losses from non-payment. However, it will likely hinge on whether the insured has sought specific extended coverage of political and other risks, as the risk of repudiation of a sales contract is not usually insured.

4. Political Risk

Political Risk insurance operates in a similar manner to trade credit polices by mitigating against the loss of commercial assets, income or property as a result of a political risk event. These policies provide coverage for political violence, expropriation, currency inconvertibility, non-payment and contract frustration, which could all arise as symptoms of the COVID-19 pandemic.

Political risk insurance is typically purchased by multinational corporations, importers, exporters, project lenders, financial institutions and contractors in industries such as construction and engineering.

Potential issue to consider –

- An occurrence, such as those stated in the definitions of a political risk policy, which prevents the meeting of a financial commitment by a counterparty could activate the policy. Scenarios can include general moratoriums announced by a government, economic difficulties in the counterparty's country or national administrative measures. All of which could feasibly arise in the context of the Covid-19 outbreak.

5. Event Cancellation

Where business interruption cover is either not available or not suitable to cover losses, event cancellation policies could be increasingly relied upon. These policies cover losses from an event being cancelled due to particular perils.

Potential issues to consider -

- There is no standardized approach for terms of cover provided in event cancellation policies; some may exclude cover for cancellation caused by infectious diseases. For those that do, the cover may only be specifically for the insured premises and there may also be a pandemic exclusion.

- Insurers may take the position that event cancellation was not "*necessary*" or was "*avoidable*" where there was no recommendation issued from a competent authority. Coverage may also not extend simply because of low ticket sales arising from the further spread of COVID-19;

- The notifiable date becomes even more significant in relation to cancellation cover, because any event cancelled before the disease became notifiable will be uncovered. With COVID-19 becoming notifiable in Scotland on 22 February, in Northern Ireland on the 29 February and England on the 5 March, the variety of dates could become particularly relevant for claims in this instance.

6. Company Directors and Officers

Directors and officers insurance policies may provide coverage for the costs and liabilities arising from shareholder lawsuits as a consequence of the spread of the virus. Specifically, litigation arising from unreasonable actions (or inaction) by directors, economic loss from inadequate contingency planning and failure to disclose the risk posed to financial performance.

Potential issues to consider –

- Certain D&O polices' contain bodily injury exclusions which will prevent shareholders from claiming any coronavirus related injury under the policy. Specifically, consideration should be given to bodily injury exclusions which provide for a strict or narrow construction of policy language;

- Similarly, pollution or contamination exclusions may become increasingly relevant depending on the facts of the claim. Although these exclusions are primarily aimed at avoiding the exposure of clean-up costs for environmental disasters, any exclusion using 'absolute' wording could be utilised to exclude follow-on claims arising from COVID-19 losses;

- Conduct exclusions could also come to the fore over the coming months, as many D&O insurance policies exclude coverage for certain misconduct. The interpretation of conduct language could become significant if company management's response to COVID-19 becomes subject to shareholder litigation. Conduct occurring "*in fact*" could lead to insurers determining the exclusions application, whilst the use of "*final adjudication*" could lead to the exclusion being determined via insurance coverage proceedings.

- The UK government recently announced that it would be introducing legislation as a matter of urgency to amend the UK's insolvency law including a temporary suspension of the wrongful trading regime to remove the threat of personal liability for directors, which will have retrospective effect from 1 March. We will have to wait for the draft legislation to see exactly how this will operate, and how much protection it will afford. However it will likely relieve the directors and the company from some or all of the wrongful trading implications subject to certain conditions and for a limited period only.

7. Employer's Liability

Coverage from employers' liability insurance relates to third-party claims by employees against businesses due to personal injury suffered as a result of the insureds' business activities. Coverage will usually be provided if insured businesses failed to take steps to protect employees against being exposed to the virus.

As this is compulsory insurance in the UK, Employers' Liability cover tends to be more standardized and could therefore be less contentious on coverage.

Potential issues to consider -

- The policy will only be triggered if an employer does not follow reasonable steps to protect its employees. The appropriateness of these steps will hinge on the understanding by the employer of the extent of the risk being posed to the workforce and whether they have complied with government guidance or requirements;

- Actions under this form of policy must address whether the claimed injury is truly work-related and will focus on the injured employee's activity when they were exposed and the time and the location of the exposure. Employees and employers whose work is related to coronavirus should maintain detailed records flagging when they may have contracted the virus;

- The employee must establish a direct causal connection to the workplace as "*ordinary diseases of life*" (those to which the general public are equally exposed) are more often than not excluded from workers' compensation insurance programs. If COVID-19 is caught, for example, from an event at the office that directly flows from the work being performed, it could be suggested that the disease is the result of an accident which caused the illness;

- Employers' liability insurance, in the UK, cannot include terms limiting the insurer's liability where the insured employer has not exercised reasonable care.

8. Product Liability

Personal injury claims would fall under product liability coverage in the event of a COVID-19 contaminated product infecting consumers. However, given the manner in which the virus is believed to be transmitted it is perhaps more likely that there will be claims that claims relating to manufacturers of pharmaceutical, medical and sanitary products which are utilized to stop the transmission of the virus, help control the symptoms or cause side-effects will come to the fore instead.

Potential issues to consider –

- Coverage issues could possibly arise in relation to claims surrounding product effectiveness, such as where they are unable to prevent the transmission or help treat symptoms. However, many policies contain efficacy exclusions, which means that only the liability for injury or damage caused by the product would be covered, not the product failing to fulfil its intended function;

- A claim raised in relation to the side effects of, for example, either a medicine or a vaccine is likely to be covered.

9. Health care

Many health care providers purchase error & omissions insurance or, as it is more commonly referred to, hospital professional liability coverage. This is a specialized insurance policy to provide cover for any health care provider and any bodily injury arising from medical practice.

Potential issues to consider –

- Whilst these types of policies exclude bodily injury to employees occurring during employment (such as an employee being exposed to an infectious disease whilst at work) they often provide broad coverage for a "*breach of duty*" or any negligent "*act or omission*";

- Such policies can also respond to claims that a healthcare professional acted, or did not act, in a way which resulted in a non-employee (such as a patient) contracting COVID-19.

Please feel free to get in touch to discuss any of the issues raised in this note:

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