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Insights

REINSURANCE: AGGREGATION OF COVID LOSSES POST-STONEGATE

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On 17 October 2022, the English Commercial Court delivered three very significant, related judgments, which in part considered aggregation of business interruption losses arising from COVID-19, copies of which can be found at the following links: *Stonegate v MS Amlin and others*, *Various Eateries v Allianz*, *and Greggs v Zurich*.

Although several other issues were in dispute, the key issue addressed in all three judgments is the extent to which UK business interruption losses "*arise from, are attributable to or are in connection with a single occurrence*". Notwithstanding that the Court was interpreting these words in the context of the Marsh Resilience insurance wording from the perspective of the reasonable insured shortly after the commencement of business interruption loss, the decisions and reasoning reached by the Court in these cases will be of considerable interest to reinsurers and cedants alike.

These decisions offer some insight as to how the English courts may approach questions of aggregation on event-based contracts with wordings such as "each and every occurrence" or "arising out of an event" (an "event" being synonymous with an "occurrence" as a matter of English law).

SUMMARY OF AGGREGATION ISSUE

Two of the three insureds (Stonegate and Various Eateries) sought to argue that there were multiple occurrences in order that they could claim that the applicable sub-limits for business interruption loss applied on a per premises basis. The primary argument was that each infection was a separate occurrence, and therefore there were separate occurrences in the vicinity of each premises permitting insureds to claim multiple sub-limits. The third insured, Greggs, primarily argued that each of the various government announcements or measures was a separate occurrence.

The four insurers involved in these cases primarily sought to argue that there was only one or a small number of occurrences, such that only a single or small number of limits of liability would be payable.

The potential financial impact was extreme in the Stonegate case: Stonegate claimed entitlement to more than £1.1bn of cover on the basis it could claim sub-limits per premises, whereas insurers claimed their liability would be capped at £2.5m for business interruption loss and £15m for increased cost of working (before retentions).

The insurers collectively advanced many theories as to what might amount to a single occurrence, which can be summarised and grouped as follows:

1. Single case of COVID: that because the Supreme Court found that any one case was causative of the government response and loss, all losses could be aggregated on the basis they are in connection with any one single case;

2. By virology: e.g. the emergence of the COVID-19 virus genome was a single occurrence;

3. By initial transmission/outbreak in Wuhan:
   a. the initial "spillover" or first human infection of COVID-19 from animals in Huanan Market in Wuhan was a single occurrence;

   b. the outbreak of COVID-19 in Wuhan was a single occurrence;

4. By first arrival/outbreak in the UK:
   a. the first transmission of COVID-19 within the UK was a single occurrence;

   b. the initial introduction of COVID-19 to the UK was a single occurrence;

   c. the initial outbreak in the UK was a single occurrence;

5. The pandemic or continuation of infection across the UK was a single occurrence;

6. By level of cases/the "tipping point" (i.e. the level of cases in the UK reached 'tipping point' which was a single occurrence);

7. The coordinated response of the UK government from March to December 2020 was a single occurrence; and

8. As Greggs argued, each individual government restriction or announcement was a single occurrence.

COURT FINDINGS

The Court rejected most of the insurers' theories as to what could constitute a single occurrence. The Court agreed the following could be single occurrences: (a) an initial "spillover" or first human infection at Huanan Market in Wuhan, (b) a first transmission of COVID-19 infection in the United Kingdom (or any other individual infection for that matter, following the Supreme Court's decision

as to what constitutes an "occurrence" in the context of COVID-19), and (c) a particular government measure or announcement.

None of the virology options, outbreaks of COVID-19, the pandemic itself, nor coordinated government responses could be said to be single occurrences. In particular, the Court found there was no single coordinated government response, but a number of occurrences as different measures were implemented at different times, affecting different places. The pandemic itself should be "*considered as having been composed of a large number of cases, which occurred at different places and at different times*"; i.e. many occurrences.

While the initial Wuhan infection and first transmission to a patient in the United Kingdom were each capable of being called an "occurrence" (as with any other infection), the Wuhan infection was causally too remote to UK business interruption losses be considered a relevant occurrence, and no one UK infection "*had more significance as a unifying factor than any other*" and was therefore not a basis by which to aggregate business interruption losses across England or the UK.

The Court ultimately found that the single occurrences that could unify the insureds' losses were specific government announcements or measures that caused loss. In particular, the UK government COBR meeting of 16 March 2020 was found to be a relevant single occurrence, as was the announcement of 20 March 2020. The Court was not in a position, at this stage of the proceedings, to determine which losses in fact arise from the 16 or 20 March occurrences. Losses occurring after 4 July 2020 in England (when the first lockdown measures came to an end) could not typically be said to be arising from or in connection with the 16 March 2020 or 20 March "occurrences". Rather, later lockdown restrictions, including on a city by city basis (where certain UK cities such as Leicester were subjected to more stringent restrictions at times) would constitute further, separate occurrences.

RELEVANCE TO REINSURANCE MARKET

Many cedants have presented reinsurance claims on the basis that their COVID-19 losses can be aggregated by reference to a single "event" or "occurrence", such as by reference to the pandemic itself, an outbreak of COVID-19 in a particular country, or ongoing emergency measures in response to the pandemic. These new decisions provide English law authority that an ongoing state of affairs such as a pandemic, ongoing emergency measures, or an 'outbreak' is unlikely to amount to an "event" or "occurrence". Rather, in the context of COVID-19 losses, an "event" or "occurrence" will be an individual infection (or small group of infections happening in the same place at the same time) or a particular government measure or announcement.

Cedants and retrocedants may argue that the approach taken to an "occurrence" in the insurance context is not appropriate in the reinsurance or retrocession context, where cedants typically argue that broader concepts of aggregation apply. However, unless and until these decisions are appealed,

they will remain the most recent English law authority for some time as to what can constitute an “event” or “occurrence” in the context of COVID-19 claims.

The Court considered the key authorities typically cited in reinsurance aggregation disputes, including reinsurance cases concerning the meaning of an “event” or “occurrence”, giving further importance to these decisions as authority on an “event” or “occurrence” in the context of COVID-19 reinsurance claims. However, as the vast majority of reinsurance contracts contain arbitration clauses that impose confidentiality obligations, we are unlikely to see English law authority on reinsurance cases.

Stonegate has already been reported in the press as having indicated its intention to appeal, so we expect these cases will not be the final word on these issues.

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