

Coronavirus (COVID-19): Insurance response for UK clients

A public health emergency of international concern

Over the past few weeks, concern in the UK has intensified as increasing numbers of people have been diagnosed with Coronavirus (COVID-19). On the 30 January 2020, based on the World Health Organization's (WHO) declaration that this is a public health emergency of international concern, the UK Chief Medical Officers raised the risk to the UK from low to moderate.

There are many ways that businesses might be affected by the escalating virus outbreak, e.g. absent employees, enforced closures, increased global disruption causing supply chain issues, travel restrictions, reduced customer footfall, as well as various self-imposed controls. The UK Government recently announced that Coronavirus (COVID-19) will be formally listed as a notifiable disease, which will help businesses claim from their insurances. However, despite various press reports that the listing of Coronavirus (COVID-19) as a notifiable disease would unlock the door for businesses to make insurance claims, the position is actually much less clear cut.

This paper examines the probable response of those policies most likely to be affected and some of the potential issues that may arise in pursuing a claim.

Business Interruption

Business Interruption (BI) insurance is typically purchased as part of a commercial property or package/combined policy and is intended to protect businesses against income loss resulting from disruption to their operations.

It primarily provides cover for loss following physical damage (e.g. by fire) to insured tangible property. So, despite news stories to the contrary, the ability for a Coronavirus (COVID-19) related claim to succeed under a BI insurance is hampered from the outset. Whilst property may become physically contaminated and uninhabitable due to the presence of a contagious disease, this in itself nor the need to decontaminate property may meet the 'physical damage' requirement of the policy. In addition, BI insurance invariably contains a pollution and contamination exclusion that removes or limits any such coverage.

Whilst Coronavirus (COVID-19) induced disruption neither immediately nor naturally falls within the traditional parameters of BI insurance, various policy extensions (where applicable) may improve this position. These extensions do vary significantly from one policy to another and almost all will be limited in terms of both monetary

sum (sometimes aggregated in the period of insurance) and a shortened indemnity period. Given the current situation, there are several extensions deserving of further attention:

Notifiable Disease

Notifiable disease extensions provide coverage where loss results from disruption directly due to discovery of a human contagious disease at the insured premises (sometimes extending to within its vicinity). Policies differ as to the scope of the cover and the exact circumstances that triggers cover, so individual policies must be reviewed. For example, most policies will be restricted to a specific list of diseases only, and because Coronavirus (COVID-19) is a new human disease, it will not be included in such listing and cover will not apply. Occasionally, cover may be provided on an unspecified diseases basis, where no diseases are affirmatively expressed in the policy, with cover relying on the applicable list of notifiable diseases that are controlled and regulated centrally e.g. by Health Protection (Notification) Regulations 2010 and Public Health etc. (Scotland) Act 2008. As of the following dates, Coronavirus (COVID-19) is now listed as a notifiable disease across all regions of the UK i.e.

- Scotland: Coronavirus (COVID-19) became notifiable on 22 February 2020
- Northern Ireland: Coronavirus (COVID-19) became notifiable on 29 February 2020
- Wales and England: Coronavirus (COVID-19) became notifiable on 6 March 2020.

In most cases, the cover extension will only operate if business is impacted as a result of receiving direct advice from a relevant authority. Policy language varies, and some policies express in very narrow terms which authority must provide that advice. As with BI generally, events that impact wider area can modify the affect the policy response, but this will depend on the specifics of any loss. Losses due to proactive action alone that disrupts the business is not normally recoverable.

This policy extension is an area of cover that insurers are actively reviewing, and in view of the ongoing epidemic, may decide to actively exclude Coronavirus (COVID-19) from cover that might have otherwise provided it, because of its pandemic capability, which many insurers may deem too high a risk to insure.

Suppliers and customers extensions

With various governments imposing 'lockdown' protocols on certain cities and ports, supplies from these locations have been severely affected either due to the inability to move goods or a shortage of available workforce. However, a standard BI insurance suppliers and customers extension provides cover for loss arising from physical damage to tangible property only (cover is often further restricted to limited perils only), and as a result the supply chain issues and loss of custom caused by the virus or associated human capital issues are simply not within the scope of these extensions.

Denial of access / Loss of attraction extensions

The extent of cover under these types of extensions varies considerably, although the majority are designed to trigger following physical damage to property. Elements of non-damage cover may be provided but these will generally relate to restrictions imposed by the authorities that affect access to/from the covered premises. Even without these limitations, the standard inclusion of pollution and contamination exclusions is likely to preclude any loss related to a virus outbreak.

Event cancellation

Event cancellation insurance is usually purchased as a standalone insurance covering potential loss of revenue or costs incurred, should a specific event not proceed as planned, including for example compulsory cancellation where authorities prevent large gatherings of people. Whilst the coverage provided tends to be of a bespoke nature, it will broadly cover any cause beyond the policyholder's control, subject to a short list of exclusions.

Whilst the bespoke nature of cover makes it difficult to generalise about the ability of a policyholder to make a valid claim, one common exclusion relates to loss caused by a 'Communicable Disease'. Prior to the current epidemic, it may have been possible to extend coverage to include this. Now, insurers are very unlikely to agree to such an extension for any new policy being incepted.

Revenue and costs for events cancelled due to fear or apprehension alone would not be recoverable. Such a cancellation is not considered by insurers to be either necessary or beyond the policyholder's control

Marine Cargo

A Marine cargo policy is a material damage cover first and foremost, that responds to physical loss or damage to insured property rather than frustrations of contract. There is no specific evidence of the Coronavirus (COVID-19) directly affecting goods so the main areas for concern are thought likely to be delay or rejection by government authorities or customers. Generally, a Marine cargo insurance excludes claims for delay and provides no cover for rejection of goods, nor for consequential loss.

Policy extensions may apply (where agreed) that will provide limited coverage for additional costs and expenses that have been reasonably incurred following unplanned rejection, quarantine or simple deviation of the voyage to another port.

Liability

Businesses operating in the UK owe a duty, both in both tort and statute¹, to their employees and third parties, to safeguard their health and safety, which may be adversely affected by their business activities. It is foreseeable that, where an infection can be traced to a particular location, decisions taken by the business in the handling of the virus outbreak (in particular in relation to staff for whom home working is impractical) could result in claims for unreasonably exposing employees, customers or other third parties to the risk of virus contamination.

UK Employers' Liability

Failing to take reasonable measures to safeguard an employee could result in an Employers' Liability (EL) claim against the employer. UK EL insurance policies respond to Bodily Injury, which includes cover for disease claims where the disease arises out of and in the course of employment.

Importantly, whilst the EL Regulations 1998 expressly prohibit an insurer from refusing to indemnify an insured for their actions or omissions e.g. for failing to take reasonable care of the well-being of their employees, insurers can seek reimbursement from an insured of any amounts paid out in circumstances where, in their view, there has been a fundamental breach of some form of policy obligation or policy condition, by the insured.

Public and Products Liability

Likewise, Public and Products Liability (PL/PR) insurance policies respond to liability for Bodily Injury, and as such, on the face of it, will respond in much the same way as EL coverage. However, unlike an approved EL policy, insurers of PL/PR policies are free to rely on any policy condition that would permit them to avoid or reduce the claim in question, e.g. for deliberate or reckless acts by the insured that could reasonably be expected to cause injury or damage. Whilst, in this instance, the burden of proving whether an insured has acted deliberately or recklessly will usually be upon the insurer, decisions taken by businesses in the handling of the virus outbreak and whether they have complied with Government guidance or requirements will certainly have a strong bearing on the outcome of any claim.

Whilst liability claims against businesses may encounter significant causation issues in proving that the infection was caused by the actions of the insured, EL or PL/PR policies will be expected to incur legal costs for the defence of such claims as would otherwise be covered under the policy terms.

Directors and Officers Liability

In certain jurisdictions D&O policies may respond to economic loss claims brought by shareholders following diminution in share value. However, many of these policies could contain broad exclusions of cover for losses indirectly related to 'bodily injury' (the definition of which, like EL and PL/PR policies, will include disease).

¹ For example, under the Health & Safety at Work Act 1974, Employers' have a duty to protect the 'health, safety and welfare' at work of all their employees, as well as others on their premises, including temps, casual workers, the self-employed, clients, visitors and the general public.

Group Travel

Cover entitlement and the type of reimbursable expenses may vary depending on the policy in question. In general terms, policies will not provide any cover for claims relating to the Coronavirus (COVID-19) outbreak for travel made against the advice of the Foreign and Commonwealth Office (FCO), (at the time of writing this would apply to certain locations only e.g. areas of China, South Korea and Italy).

In addition, depending on the date that travel arrangements were made, loss of deposits and cancellation costs may not be recoverable, as insurers exclude loss arising from a 'known and foreseeable' risk, which will apply to arrangements made after the Coronavirus (COVID-19) outbreak was well known. Regardless of these limitations, the balance of the policy will remain valid e.g. the medical expenses section, again provided travel is not against the FCO advice.

As a standard policy term, disinclination to travel alone (regardless of cause) is excluded as standard and would not be regarded as a valid claim.

Summary

The extent of cover available under key insurances can vary considerably. As with every contract, the devil is in the detail, with the policy response dependent upon both the actual language of the policy in question and the exact circumstances of loss. As yet at least, there has been no rush of claims being presented to insurers and it remains to be seen the financial impact Coronavirus (COVID-19) will have. Notwithstanding this, now is the time to review your policy's expected response and determine either potential avenues for, or obstacles to, the recovery of losses associated with the continuing Coronavirus (COVID-19) outbreak.

Your usual Aon advisor can provide you with both further information about the expected response of your own policies as well as, additional information regards the managing of risks.

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