

CORONAVIRUS (COVID-19): INSURANCE ISSUES

The outbreak of Coronavirus (Covid-19) and the resulting disruption to travel and supply chains, as well as to operations, risks exposure to significant losses for many businesses. Those losses may well be covered under insurance. We consider the steps that businesses with policies governed by English law need to take to determine whether relevant cover is available, and to maximise the prospects of the insurance responding where it is.

Are losses insured?

It is important to identify at the outset which policies may respond to losses. Compliance with policy provisions around notification and management of losses is often a prerequisite to cover, so insureds need to understand fully what they are required to do by those policies:

- **Event Insurance** – the outbreak has already led to the cancellation of trade, arts and sporting events, many of which will be covered under bespoke event cancellation insurance.
- **Business Interruption** – historically, business interruption cover is not sold as a standalone policy, but as an add-on to property or all-risks insurance. It commonly insures loss of income arising from physical damage, but variants exist providing broader cover that do not impose this requirement.
- **Credit insurance** – this insures against the risk of non-payment by a contractual counterparty, and usually covers a specific risk or book of business. To the extent that supply chains become disrupted and payments are not made, it may respond.

Common issues

For event and business interruption insurance, a key question is likely to be whether the policy trigger has been met. Businesses have had to take difficult decisions about how to manage their responses, and whether the circumstances require them to cancel events or stop operations. Whether insurance responds in such situations will depend on the precise wording.

Credit insurance requires that the underlying obligor had a legal obligation to pay, as it insures credit rather than legal risk. Accordingly, where it is excused from its payment obligations as a result of the outbreak, for example, because of a force majeure clause, there may well be no cover for the resulting non-payment.

It is also important to review the policy exclusions, which may exclude losses arising in certain situations, or certain categories of losses.

Where an insured has suffered many losses, a key question may be whether these are treated as one loss, or several losses, for the purposes of the insurance. Policies commonly include “aggregation” language setting out what constitutes one loss: this will be important as it will impact both when policy sub-limits apply, and whether any deductible is applied once or multiple times.

Managing a claim

Insurance policies will set out what steps an insured needs to take when an actual or potential loss arises. This should be complied with carefully, in particular any clause identified as a “condition precedent” or “warranty” need to be strictly complied with, as a breach will, in certain circumstances, enable the insurer to reject a claim without needing to show that the breach caused loss. In particular, insureds should consider:

- **Notification** – policies will set out what needs to be notified and when. Typically, an insured needs to notify actual and potential losses, with precise thresholds set out in policies as to when this obligation arises and how quickly notification must be made. Insurers should be provided with sufficient information to understand the nature of the (potential) loss.
- **Submission of claim** – to obtain payment, typically an insured needs to provide a “proof of loss” to insurers describing the nature and amount of losses suffered, and how they have been caused by an insured event. Insurers may require further information about the losses before determining whether to pay a claim.
- **Mitigation of loss** – insurance only covers losses which are fortuitous, and therefore may not cover losses arising from the insured’s mis-handling of its response to an insured event. Many policies also impose express duties on an insured to mitigate its loss. It is important to understand at the outset what the legal and contractual duties are, and to ensure they are complied with. In particular, insureds may need to preserve, or exercise, contractual or legal rights they have to recover their losses from third parties.

Payment

The nature and scale of the outbreak may result in serious cashflow issues for certain businesses. Where the relevant insurance policy was taken out after 4 May 2017, there is an obligation (under s28 of the Enterprise Act 2016) for an insurer to pay any claim “*within a reasonable time*”. What is “reasonable” is undefined, and uncertain, but relevant factors in assessing this include the type of insurance, the size and complexity of the claim, compliance with any relevant statutory or regulatory rules or guidance and factor’s outside an insurer’s control.

In the event that an insurer fails to pay within a reasonable time, an insured can claim damages for any loss arising from the breach. Therefore, an insured may have a remedy if the delay caused additional cash flow difficulties which affected its ability to carry on its business. It is possible to opt out of the Act in non-consumer insurance, provided that the transparency requirements are satisfied.

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