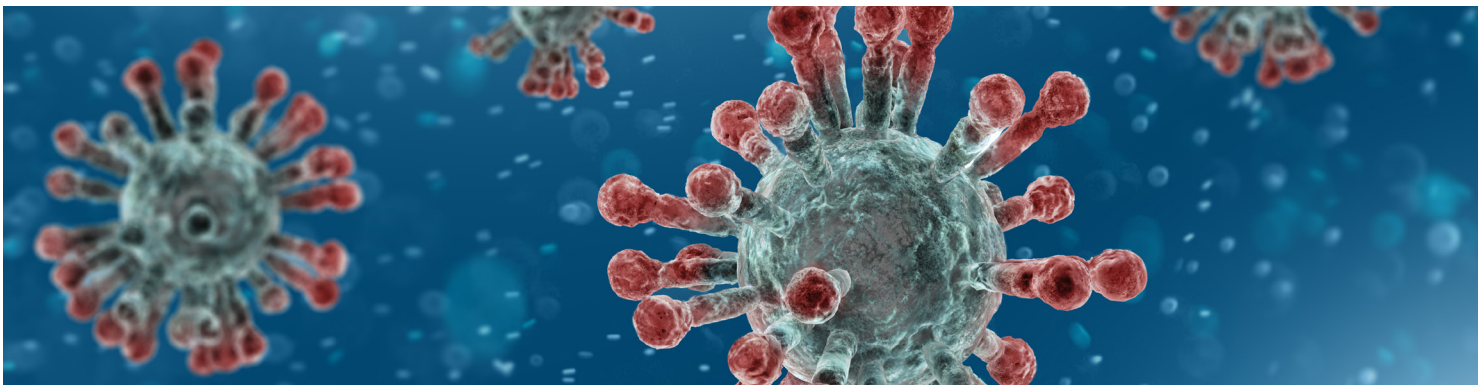


International risk team



“Covid-19” and its potential implications for business interruption insurers

In the context of the novel coronavirus dominating international news headlines, RPC Partners Antony Sassi and Mark Errington, consider some key insurance issues with respect to the potential application of notifiable disease and supply chain extensions to standard business interruption insurance policies.

Background

Insurers considering claims arising in the context of the 2019 novel coronavirus (now scientifically termed 2019-nCoV or Covid-19) are likely to face some similar issues to those that arose as a consequence of the SARS (severe acute respiratory syndrome) pandemic in 2003.

At the time of writing, it appears that Covid-19 may be more contagious (those infected are contagious while they are asymptomatic) and its scale and geographical spread are likely to be greater than that of SARS (the effects of

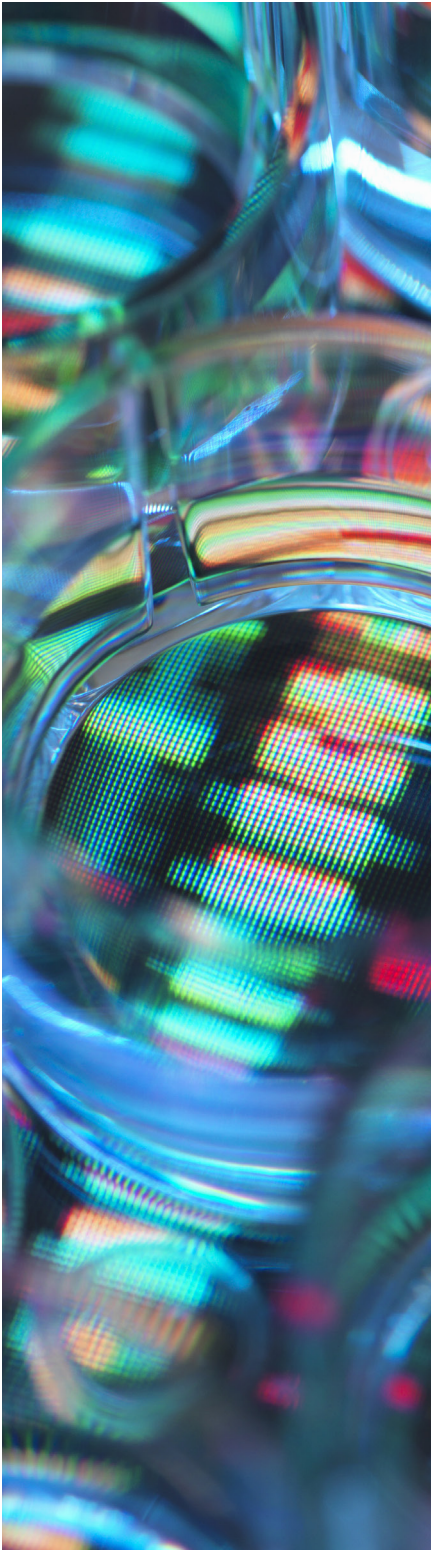
which were restricted to Mainland China and Hong Kong and, to a more limited degree, other Asian countries).

Antony Sassi represented the successful respondent insurers in the leading insurance case that arose in Hong Kong in connection with SARS; *New World Harbourview Hotel Co. Ltd & Ors v ACE Insurance Ltd & Ors* (2012) 15 HKCFAR 120, a landmark judgment of the Hong Kong Court of Final Appeal. *New World* is the leading common law authority on the trigger for infectious disease extensions in business interruption policies.

Key points

In the *New World* case, several key points were confirmed by the five judges of the Hong Kong Court of Final Appeal in their unanimous judgment in favour of insurers. In particular:

- business interruption insurance provides an indemnity for losses arising from specific insured perils, with cover triggered according to the wording of the insuring clause and extensions in the policy
- common law courts (for example, in Hong Kong and Singapore) interpret



insurance contracts in the same manner that they interpret commercial contracts – giving effect to a contractual provision according to the words used in the context of the policy as a whole, so as to make sense of a particular provision

- “Notifiable human contagious or infectious disease” meant an infectious or contagious disease which was required by law to be notified to the relevant authorities
- SARS became a “notifiable disease” within the terms of the relevant policies when it was gazetted as such under the Prevention and Control of Disease Ordinance (Cap 599) (the “Ordinance”), even though the first incidence of the disease occurred some six weeks before that date. It was only after SARS was added to the 1st Schedule of the Ordinance that there was a mandatory requirement to notify
- the position would have been different for diseases which were already statutorily notifiable under the Ordinance, where cover would have been triggered as soon as there was an incident
- as cover was not retrospective, losses arising from SARS were only covered once it officially became a notifiable disease in Hong Kong, at which point it became an insured peril and triggered the policy
- the calculation of standard revenue under the policies should include the (downward) effect that a notifiable disease (in that case SARS) had upon the revenue of a business prior to the date upon which it became a notifiable disease
- business interruption cover is not “profit guarantee” insurance.

Property and casualty insurance

It is likely that losses incurred by insureds with respect to Covid-19 may include loss of income and clean-up and decontamination costs.

Typical business interruption wordings cover loss resulting from an interruption to an insured’s business in consequence of physical damage to insured property at the specified premises. However, while contamination (for example by radiation or chemicals) can in certain circumstances amount to physical damage, it is unlikely that premises will be considered to be “damaged” as a result of a disease (and, in any event, contamination is often excluded under standard all risks property insurance “ARPI” policies).

As a consequence, business interruption policies, whether (as is now typically the case) purchased as part of a package together with standard ARPI cover or on a stand-alone basis, will typically not provide cover for losses resulting from infectious diseases unless a specific business interruption extension is included.

Notifiable or infectious disease extensions

Certain “non-damage” business interruption extensions have developed over time to provide cover in situations where there is no damage at the insured’s premises (and are therefore distinct from other types of extensions which typically require damage at, for example, a customer’s, supplier’s or a utility provider’s premises).

These include extensions for loss resulting from interruption to the insured's business resulting from a notifiable, infectious or communicable disease, although they are far from ubiquitous.

Where they are included, certain policies expressly state which diseases fall within the ambit of infectious disease extensions. Being a "novel" disease, however, means that the Covid-19 will not be mentioned by name in existing policies.

Cover under other extensions may be triggered by a requirement that a "notifiable" or an "infectious" disease manifest at the insured's premises (and often) which "directly" and "solely" results in the restriction of use of the premises (whether partial or total) by the order of a competent public authority. Pre-emptive closure of hotels, casinos and leisure parks where there has not been a case of a notifiable disease at the premises would not be likely to trigger cover.

Where extensions provide cover in general terms for notifiable diseases, it is common to see certain diseases (for example SARS; swine flu (H1N1) or avian flu (H5N1)) expressly excluded by way of a carve out to the extension. Again, Covid-19 is a novel disease that will not be expressly excluded by name in policies which inception prior to the outbreak commencing in December 2019.

Other wordings may provide cover for loss in consequence of "any occurrence of a Notifiable Disease at the Premises"; "the discovery of an organism at the premises which is likely to give rise to the occurrence of a notifiable disease"; or "any occurrence of a Notifiable Disease within a radius of 25 miles from the

premises". The geographical limits found in certain clauses would often encompass the entire central business districts of cities such as Singapore and Hong Kong.

However, infectious disease extensions can often narrowly define what constitutes a disease and, as was evident with the *New World* case, until a disease is classified as a "notifiable disease" certain policy wordings may not respond.

Covid-19 has been declared a notifiable disease (which would potentially trigger cover under some wordings) in several jurisdictions. In Hong Kong, for example, "severe respiratory disease associated with a novel infectious agent" (Covid-19) was added to the list of scheduled infectious diseases by a notice dated 7 January 2020 and published in the government gazette on 8 January 2020. Similarly, in Singapore 2019-nCoV was classified as a "dangerous infectious disease" and added to the Second Schedule of the Infectious Diseases Act (Cap. 137) with effect from 29 January 2020. As a consequence, certain of the issues that arose in the *New World* case are less likely to be relevant to claims arising out of Covid-19.

Other business interruption extensions can provide "damage-based" or (less commonly) "non-damage" cover for "denial of access" to premises but these typically require mandatory closure of premises by law enforcement or government agencies exercising statutory powers as a result of certain defined infectious disease(s).

Contingent business interruption risks – customers and suppliers

The biggest losses to many insureds may come from supply chain problems. Reports suggest that car and phone makers and even toilet paper manufacturers have had production operations affected. However, while many businesses typically purchase contingent business interruption extensions, these generally require there to have been damage at the premises of (named or unnamed) customers or suppliers. As a consequence, many such extensions will not respond in circumstances where manufacturing and supply operations are impacted by infectious diseases.

While certain "non-damage" supply chain insurance products exist, which simply respond to any reduction in supply that leads to a loss of output and/or gross profit, these are not standard extensions in most business interruption policies, and many still exclude infectious diseases to one extent or another.

Acts of competent authority

Certain extensions provide cover for losses resulting from interference or interruption to businesses in situations where the actions or edicts of a Government, Local Authority, the police or statutory bodies prevent or hinder access to the insured's premises due to an emergency (often one which is required to endanger life) in the vicinity of the premises. While many such extensions are unlikely to respond, depending upon the wordings in question these extensions could give rise to issues in circumstances where entire cities in China are under de facto lockdown.

Business interruption – some general comments

Losses arising in connection with various business interruption extensions often raise particularly difficult issues of proof for insureds. Furthermore, adjustments may be made to reduce the extent of an insured's business interruption cover where there are "other consequences" arising from the same insured peril which give rise to the loss. It is also possible that a loss is the result of more than one cause and where one of the causes is excluded from the policy it is unlikely that there will be cover.

Many hotel and retail businesses in Hong Kong, for example, have suffered economically already since early/mid 2019 due to the political protests, which appear to have impacted visitor numbers. Businesses are now likely to suffer further losses due to tourists being deterred from visiting certain countries in Asia due to fear or concern over Covid-19. Such losses would not usually be the subject of an indemnity and may need to be taken into account in assessing any covered "loss".

It is also worth noting that business interruption extensions often include significantly lower sub-limits than under the main business interruption indemnity.

Comment

Covid-19 is a public health emergency of international concern (as announced by the World Health Organisation on 30 January 2020). Asia was the epicentre of SARS in 2003 and since then the region has coped with "bird flu" and bouts of influenza. Despite initial fears, a great deal has been learned since SARS.

Businesses should be reviewing their insurance cover and assessing their potential losses. In many cases, it will take a long time to assess losses, but preparations should begin.

Going forward, businesses which do not have such cover should also consider whether they should purchase specific (or more comprehensive) insurance for infectious diseases. Likewise, insurers will be assessing both their potential exposure under existing policies as well as the potential to develop more bespoke policies to respond in the event of infectious diseases.

Antony Sassi and Mark Errington have many years of experience between them in advising insurers and reinsurers on large and complex property and business interruption insurance issues and disputes across Asia.



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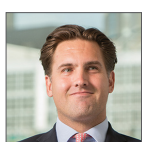
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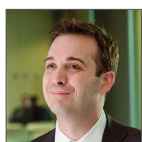
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