RPC

International risk team

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Aggregation issues in Covid-19 related claims

A lot of electronic ink has been used by lawyers to debate whether coronavirus on the surface of physical things constitutes damage. Although that may have seemed a crucial question some weeks ago before the lock-down it is probably largely academic now. Economic activity in the UK and globally has ground to a halt not because of contaminated door handles and lift buttons but because of the measures taken by governments around the world to limit human interaction in an attempt to stop the spread of the disease. For example, in the UK the Government provided 'guidance' on social distancing in mid-March. And in late March 2020, the UK government required a large number of non-essential businesses to close their premises and imposed restrictions on individuals' movement: see Health Protection (Coronavirus, Business Closure) (England) Regulations 2020 (SI 350/2020). Around the world other national governments and agencies and state and provincial governments have imposed similar restrictions at different times.

These governmental measures have had a devastating effect on the domestic and global economy. And the disease itself has brought about a terrible human cost, notwithstanding the governmental measures. The loss of life and the loss to economies around the world will continue for months, if not years. Although it is not the purpose of this article to reinforce the misery that everyone is experiencing, it necessarily informs how various insurance products may be engaged and also the extent to which they may be engaged.

It is axiomatic that virtually every business line of insurance will be impacted to a greater or lesser degree: casualty, property, trade credit, contingency, D&O, energy, marine, aviation. The direct claims will then flow through reinsurance and retrocession programmes. Leaving aside the underlying merits of particular claims, it will be necessary to consider how claims are allocated and limited under both insurance policies and reinsurance treaties.

Most insurance policies apply deductibles and limit claims (vertically and horizontally) by reference to an "event" or "occurrence" (which are usually synonymous). That is the "aggregating" factor. The "aggregating factor" requires the vertical 'lumping together' of otherwise separate losses.

The aggregating factors in reinsurance and retrocession contracts are more varied and depend on the particular function of the contract. Sometimes the aggregating factor is an "occurrence" or "event". Sometimes it is the "cause" and less frequently (but for particular reinsurance products) it is "per risk" or "per policy". There are other permutations.

As a general rule "cause" based aggregating factors appear more frequently in reinsurance contracts than direct insurance contracts. Not surprisingly, "cause" based aggregating factors permit more aggregation than an "event" aggregating factor (which we discuss in further detail below because it is the most common aggregating factor). This is because a "cause" is linguistically and conceptually a more inclusive and abstract idea than an "event". Thus the English cases say that a "continuing state of affairs" as well as "the absence of something happening" can qualify as a "cause". When "cause" is modified by the word "originating" this may be construed as a reference to the broadest possible unifying factor in the 'history' of the losses.

Aggregation can cut both ways. If aggregation is not possible individual claims may fall beneath the deductible or excess– which benefits the (re)insurer. Alternatively, there may be multiple claims well in excess of the deductible or excess. That may benefit the (re)insured in terms of horizontal coverage. Where aggregation is required this may limit the horizontal exposure of the policy – one limit will be paid and that is all. Accordingly, English Courts do not view aggregation as a pro-insured or pro-insurer issue which pre-disposes them to favour one side or the other. They approach this question neutrally.

Particular businesses in particular industries are likely to generate many different types of claims from the current situation. Take a cruise-line company, for example:

- there could be claims by passengers and crew (on different ships) on the basis that inadequate measures were taken by the cruise-line company to protect them from the virus and also for the emotional distress of being stuck on board a ship for weeks
- the shareholders in the company may bring claims against the management for having failed to implement appropriate measures to deal with the pandemic timeously or underplaying the impact of the pandemic on the future performance of the business
- the company may bring a claim against its insurers for the loss of revenue and additional costs caused by the governmental orders to idle its ships for months
- the company may also have insurance in respect of its obligation to refund the cost of future holidays
- there may even be claims by the company for de-contaminating ships.

So there is a mixture of liability claims (public liability, employers' liability and D&O) and property/economic claims (BI and pure property). Many other industries will generate a combination of claims: the hospital and care industry, the hotel, leisure and hospitality industry, the aviation industry, the retail industry, the construction industry and so on. Furthermore, as we move out of lock-down and businesses get up and running again the potential for liability exposures in particular increases because it will be harder for businesses to say that they were not aware of the risks associated with Covid-19.

Some of these claims will have merit. Some will not. However, it will be necessary to consider how the aggregating "factor" in a variety of insurance and reinsurance contracts will work.

Let us primarily consider "event" or "occurrence" since this is the most frequently used aggregating factor. As mentioned above, they are often used inter-changeably. It is also the aggregating factor in respect of which there has been the most case-law, at least as far as English law is concerned.

- An "event" or "occurrence" is something that happens "at a particular time, at a particular place and in a particular way". In Caudle v Sharp, the Court of Appeal observed that while the Second World War, the Hundred Years' War or the Ice Age might in ordinary language be described as an "event", that is not what an "event" means as an aggregating factor in a (re) insurance contract. In a (re) insurance contract an "event" requires "some causative element" in the sense that it is causally responsible for the losses (although it does not need to be the proximate cause) and it must not be "too remote" in the sense of just describing a background factor. The "event" also needs to be something that can be properly described as an "event". Accordingly, an event cannot be a state of affairs or a state of mind or a series of different negligent acts or omissions.
- In determining whether losses arise from a single event, the court will often apply the concept of "unities", first introduced in the Dawson's Field Award (29 March 1972). These were adopted by Rix J in Kuwait Airways Corp v Kuwait Insurance Co SAK (No. 1). The unities are those of (a) cause, (b) locality, (c) time and (d) the intention or motive of any human agents.
- In Kuwait Airways 15 aircraft were effectively stolen by Iraqi forces from Kuwait Airport (which they had captured) following the invasion of Kuwait in 1990. The insured claimed losses of almost US$700m in respect of the stolen aircraft. However, the policy contained a limit of US$300m "any one occurrence, any one location". Rix J held that the loss of the 15 aircraft could be aggregated; he treated the successful invasion of Kuwait including the capture of the airport, as a single "occurrence". He found the found the four unities were present. He also held that the nature of a war risks policy (which is intended to respond to war-like situations) made it appropriate to take a generous approach to the meaning of "occurrence".
- However, whilst the unities are a helpful guide, they do not represent a rigid test. The court will approach the question "globally and intuitively". In other words, they will use common-sense to

arrive at an outcome that 'feels right' in the circumstances.

- Perhaps, on the face of it, the most informative case on the application of "event" or "occurrence" in the current context of governmental decrees is IF P&C Insurance Ltd v Silversea Cruises Ltd. A cruise-line company was insured against loss of revenue resulting from government warnings regarding terrorism. The cover was subject to a "per occurrence" deductible of US$250,000. Following the 9/11 attacks, the US Government issued a series of warnings to US citizens against travel abroad. The issue in the case was how the cruise-line's claims for loss of revenue from lost and cancelled bookings should be aggregated. Tomlinson J said that it would be "absurd" to treat individual government warnings as a separate occurrence, not least because it would be impossible to identify the causal effect of each warning on bookings. He equated "occurrence" with "event" and said: "Where there are multiple warnings arising out of a single defining event, at any rate one of the magnitude of 11 September, it seems to me to accord with common sense and what the parties' intention must have been to regard those warnings ... as a single occurrence, since they all arise out of the same set of circumstances, both actual and threatened."

Applying these authorities on "event" or "occurrence" to the current situation and the example of the cruise-line operator given above it might be tempting to say that the "event" is the global coronavirus pandemic and thus all the individual claims against a particular policy (be it property or liability – which may be part of a package policy) should be aggregated as a single claim and all outwards claims by the insurer to its reinsurances should likewise be aggregated. However, the objection may be that is too simplistic. Although the pandemic might be regarded as an "event" in human history (like the Spanish Flu of 1918) it does not readily meet the "at a particular time, at a particular place and in a particular way" test like, for example, a hurricane (or indeed, 9/11) does. The pandemic is an ongoing process of disease transmission and sickness taking place over weeks and months. Nor when it comes to the four unities does the "pandemic" necessarily meet, for example, the causation requirement:

- in the case of claims by passengers and crew the basis for the claims would be the inadequate measures taken to prevent the disease coming on board in the first place and its subsequent spread. However, it might also be said an omission like that is not naturally described as an "event". Furthermore, there could be many different ships in different parts of the world each with their own captains failing to implement appropriate measures
- as concerns the claims for loss of revenue these losses will have been caused in the main by the governmental orders to cease business. However, different governments around the world have made different orders at different times each having their own impact on the cruise-line business. Furthermore, as mentioned above, the pandemic is not like 9/11 which as it name suggests was truly an "event". This perhaps distinguishes the present situation from the situation in the Silversea Cruises case
- likewise any claims for de-contamination of vessels will each be caused by different instances of the disease coming on board different vessels at different times
- when it comes to a potential D&O claim against the company directors for underplaying the seriousness of the pandemic the cause of that is not the pandemic itself, the governmental closure orders or the failure to implement appropriate safety measures for people on board the ships. It will be a collective act of negligence on the part of the board for overstating the future performance of the business.

It will be recognised that the same issues arise when it comes to insurers' outward reinsurance programmes and, in turn, the reinsurers' retrocession programmes. In short, there is no obvious unifying "event" to which all these different types of claims are referable and which enable claims within a given book of business, let alone an entire portfolio, to be 'lumped together'.

Ultimately, technical analysis may well have to yield to pragmatism, at least to some extent. However, a massive amount of money turns on these issues and what an insurer considers to be a workable approach may not be a view shared by its reinsurers and their retrocessionaires, leaving aside the different types of follow-the-settlement provisions that exist in reinsurance and retrocession agreements. It is therefore worthwhile to give proper consideration to these issues now and to put in place coherent methodologies for dealing with them so future conversations with risk partners are as focussed and constructive as they can be.

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