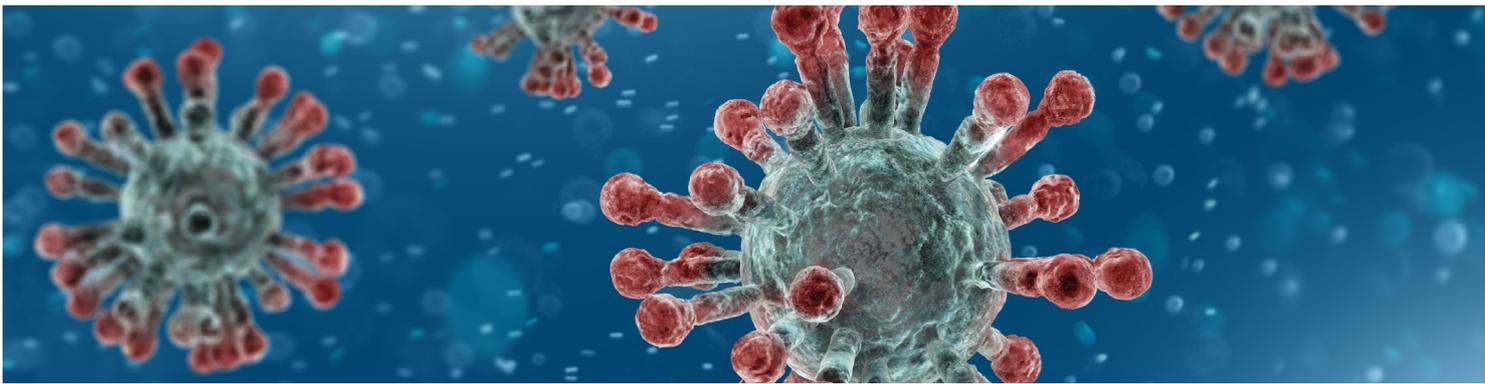


RPC risk alert



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

In the context of the novel coronavirus dominating international news headlines, RPC 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 (scientific name 2019-nCoV or Covid-19 caused by the SARS-CoV-2 Virus) are likely to face some similar issues to those that arose as a consequence of the SARS (severe acute respiratory syndrome) pandemic in 2003.

Yesterday (11 March 2020) the World Health Organisation labelled the Covid-19 as a pandemic. As of today there are 596 confirmed cases in the UK and 10 deaths. It appears that Covid-19 may be more contagious than SARS and

its scale and geographical spread are already considerably greater than SARS (the effects of which were restricted to Mainland China and Hong Kong and, to a more limited degree, other Asian countries).

RPC Partner 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.

New World – 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 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; and
- 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.

The physical damage proviso

Typical business interruption wordings cover loss resulting from an interruption to an insured’s business in consequence of physical damage to insured property and physical damage is a requirement for cover. However, we consider it doubtful that the coronavirus can be said to damage property. Although the virus may be present on the surface of inanimate objects it does not change their inherent physical condition or nature. Furthermore, the current scientific consensus is that the virus will die, even without chemical cleaning, within a matter of days if it is outside a human host. It is also not yet clear whether the primary transmission mechanism is the touching of physical surfaces with the virus present on them rather than simply breathing in air which contains the virus. In other words, the “contamination” of physical surfaces may not, in fact, be causally relevant to any interruption of the business. Aside from that, All Risks property insurance (ARPI) often expressly excludes loss and damage arising from “contamination”.

Accordingly, 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, may not provide cover for losses resulting from Covid-19 unless a specific non-damage 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/notifiable disease provisions. Being a new disease, however, means that the Covid-19 will not be mentioned by name in existing policies.

Some policies define “notifiable disease” as a finite list of specified diseases known to have existed at the date of policy inception. These policies, in the absence of any other relevant provision, will not respond to Covid-19.

Others define “notifiable disease” with reference to public health legislation or the actions of public bodies and so coronavirus will fall within that definition with effect from the date that it was declared a notifiable disease in the relevant jurisdiction.

Covid-19 has been declared a notifiable disease throughout the UK:

- The Public Health (Scotland) Act 2008 was amended on 22 February 2020;

- The Public Health Act (Northern Ireland) Act 1967 followed suit on 29 February 2020;
- In England – Covid-19 was added to the list of notifiable diseases within the Public Health (Control of Disease) Act 1984 on 5 March 2020; and
- In Wales it was listed as a notifiable disease and syndrome in the Health Protection (Notification) (Wales) Regulations 2010 as of 6 March 2020.

However, 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 new disease that will not be expressly excluded by name in policies which inception prior to the outbreak commencing. Certain extensions may exclude/carve-out “any pandemic Influenza or strain identified by the World Health Organisation” or “any pandemic coronavirus or strain identified by the World Health Organisation” and such exclusions will need to be considered carefully to establish if they are operable and, if so, from what date.

Depending on the specific wording used within the exclusion there may be questions as to whether Covid-19 could fall within the scope of an such exclusions. The International Committee on Taxonomy of Viruses (ICTV) announced “severe acute respiratory syndrome coronavirus 2 (SARS – CoV-2) as the name of the new virus on 11 February 2020. The name was chosen because the virus is genetically related to the coronavirus responsible for the SARS outbreak of 2003. While related, the two viruses are different. On the same day

the WHO announced “COVID-19” as the name of the disease caused by the virus SARS-CoV-2. Broadly worded exclusions including language such as “any variant thereof” may operate to exclude cover.

Another potential limitation to cover arises from the fact that many extensions require a connection between the notifiable disease and the Insured Premises.

Wordings often 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”.

There are likely to be evidential issues around proving the existence or occurrence of the virus at the relevant premises. It is unlikely that an insured will have the facilities to prove that the virus is or was present or occurred at the premises. The fact that one or more people who work in a particular premises have contracted the virus does not mean that the virus occurred or was present there; they could have contracted the virus outside the premises and spread it between themselves whilst, for example, socialising outside work. Also, the virus would appear to survive for up to only a few days on an inanimate surfaces and so may have disappeared by the time any tests are done for its presence, leaving aside any surface cleaning that may already have killed it.

In addition, there are likely to be issues in respect of causation arising from closure of businesses. Cover under some extensions may only be triggered by a requirement that a “notifiable” disease manifests itself at the insured’s premises

and 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 therefore be likely to trigger cover.

Denial of access

Other business interruption policies 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). Such clauses may become applicable in circumstances where, for example, the Government orders the closure of food and retail businesses, as happened in Italy yesterday.

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. In the absence of physical damage (discussed above), 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 public body

Certain clauses 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 (and often one that endangers life) in the vicinity of the premises. Again, it is possible that such cover may become relevant depending upon its precise terms and the nature of any restrictions on movement the Government may impose in the future.

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.

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

Concluding comments

Covid-19 is a global public health emergency and, indeed, it is now officially a pandemic.

The English government’s decision to make coronavirus a “notifiable disease” in early March was reportedly influenced by wanting to assist businesses to claim for linked losses from their insurers.

In response to the government’s actions, the ABI commented:

“...It may be possible to buy consequential business interruption cover for notifiable diseases as an extension to a business insurance policy, subject to any policy terms and conditions. Standard business insurance policies are designed and priced to cover standard risks, not those that are very unlikely, such as the effects of Covid-19...”¹

The ABI’s statement is a reminder that an insurer’s liability under a policy is a function of its terms and conditions and that policyholders cannot simply rely on the fact that they have been affected in some way by the Covid-19 virus as the basis for a claim.

Going forward, businesses which do not have such cover will be considering 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 specific infectious diseases.

Key contacts

Property/Business interruption



Victoria Sherratt
Partner

+44 20 3060 6263

victoria.sherratt@rpc.co.uk

Asia



Antony Sassi
Partner

+852 2216 7101

antony.sassi@rpc.com.hk

Asia



Mark Errington
Partner

+65 6422 3040

mark.errington@rpc.com.sg

International Risk and Reinsurance



Leigh Williams
Partner

+44 20 3060 6611

leigh.williams@rpc.co.uk

Accident & health/Employers liability/Travel



Gavin Reese
Partner

+44 20 3060 6985

gavin.reese@rpc.co.uk

Contingency/Political risk & trade credit



Naomi Vary
Partner

+44 20 3060 6522

naomi.vary@rpc.co.uk

D&O



Simon Goldring
Partner

+44 20 3060 6553

simon.goldring@rpc.co.uk

Construction



Alan Stone
Partner

+44 20 3060 6380

alan.stone@rpc.co.uk

Life sciences



Dorothy Flower
Partner

+44 20 3060 6481

dorothy.flower@rpc.co.uk

1. <https://www.abi.org.uk/news/news-articles/2020/03/abi-comment-on-coronavirus-and-commercial-insurance/>