

Practical issues resulting from the impact of lockdown restrictions on BI/DSU losses

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There has been much discussion about the general impact of Covid-19 on the insurance sector. In this note we highlight some practical issues (re)insurers are facing following the imposition of lockdown restrictions implemented by governments on existing or new BI/DSU losses where there is covered PD that is unconnected with Covid-19.

The first issue relates to the prolongation of DSU/BI losses because of delayed repair works, which may be the result of Covid-19 restrictions. For example:

- On an existing loss for, say, a turbine in a power plant, what would be the position if the repair of a key component (eg the

turbine rotor) is prolonged because the repair workshop, which could be local or in Europe/the U.S., is closed during the pandemic?

- What happens if the repair of, say, a supermarket that has been damaged during the civil unrest that broke out in various parts of the world prior to the pandemic is delayed because construction is stopped on the basis that it is a “non-essential” activity?

An obvious concern for (re)insurers dealing with BI (and DSU claims) is that the lockdowns and associated delays can be lengthy and open-ended. Depending on the policy wording and rules applicable in the relevant

jurisdiction, (re)insurers might wish to challenge the view that they are liable for prolongation costs.

BI loss resulting from covered PD will typically be covered subject to the application of any deductible. However, what happens if the BI (DSU) gets prolonged because it is impossible for the insured to perform the repairs? In such a case, the BI loss for which an indemnity is sought could be said not to be simply the result of the covered PD. The prolonged BI loss might be considered to have been caused by the government restrictions and not by any covered PD.

Different jurisdictions have their own rules on causation. For example, Colombia applies the doctrine of “adequate cause” and seeks to establish the “adequate cause” of the loss, rather than the “proximate cause” as under English law. Adequate cause requires the damage/loss to be a foreseeable consequence of the act which caused it. It cannot be assumed that the application of the rules of causation of the relevant foreign jurisdiction will lead to the same result as the application of English law would.

It is also necessary to consider carefully what has in fact caused the time for carrying out the repairs to be prolonged. The position varies from country to country, for example in some countries the government restrictions do not apply to key sectors such as energy, food, health, mining, etc. Also, the restrictions differ depending on the location, ie some restrictions are more severe in some locations than others and have been brought in at different times.

There is also the risk that the Covid-19 restrictions are used as an excuse by insureds where a delay in repairs is the result of some other cause.

It is obviously sensible to confirm, amongst other things, when the damage was discovered, when repair contractors were contacted, whether the insured sought alternative contractors or whether the repairs could have been carried out by the insured’s personnel.

If the insured has simply been slow to carry out repairs, a recovery could be (partially) disallowed, for example, on the basis of a failure to mitigate.

Of course, the loss adjusters’ task is more difficult if it is not possible to carry out a site visit. Even if it is possible to enter a country, the adjuster may be required to self-isolate for two weeks upon arrival.

This causes its own problems. Adjustments in, for example, Latin American jurisdictions are subject to strict time limits and lockdown restrictions could result in loss adjusters being required to report without the opportunity properly to assemble the evidence.

The second main issue relates to quantifying a loss in a Covid-19 context. For example:

- What if a manufacturer of surgical gowns/masks had an existing BI loss prior to Covid-19? The anticipated sales against which actual sales are being compared to compute the BI loss could have risen dramatically from March.
- Conversely, some countries have, for example, closed mines. The anticipated sales against which actual sales are being compared to compute the existing/ongoing BI loss would have fallen through the floor at the beginning of March.

BI cover in the case of all risks policies is typically intended to put the insured in the position it would have been in, but for the occurrence of the physical damage. Policies will typically refer to the actual (BI) loss suffered and the principle is also reflected in “trends” or “other circumstances” clauses which provide that sales projection (based on historic experience) should be modified to reflect trends in sales or external events which would mean the actual BI loss the insured has suffered is likely to differ from the projection.

Where the insured’s actual performance has improved as a result of the Covid-19 pandemic, insurers may have limited their exposure. For example, in the electricity spot market, for any ‘spikes’ caused by an increased spot market price (due to a shortage of generated electricity) underwriters can cap their exposure by hourly, daily, weekly or monthly indemnity caps. In any event, the insured’s recovery will be limited by reference to the insured values.

The above examples illustrated how the adjustment can work both for and against the insured. It must also be recognised that insureds may be in difficult financial circumstances and any insurance claim will have greater value to them than in normal operating conditions.

Although this second issue involves applying the basic principle that, generally speaking, an insured cannot recover more than its actual loss, the concept of loss is often informed by the interpretation of (often unclear) policy language and it cannot be assumed that the result will always be the same when applying the laws of different jurisdictions.



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