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Law . Tax

COVID-19 Insurance Implications

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Introduction

The COVID-19 pandemic has extracted a terrible toll on human life and has caused significant disruption to business and investment worldwide. The true economic impact of the pandemic remains to be determined and one issue insurance market participants are currently trying to assess is what claims activity may flow as a result. The current position is unprecedented in modern history and, although it is unclear at this stage how far we can draw on previous financial crises as indicators of future developments, the pandemic is, in our view, likely to have an ongoing material impact on claims activity in a number of areas.

We have set out our immediate thoughts on this possible impact in the following 11 lines of business, which we hope you will find helpful.

Whilst there is an understandable focus on the negative impacts that the pandemic could have on the insurance sector, it may, in time, accelerate more efficient ways of working and bring new opportunities for the industry to assist businesses and society mitigate against the financial risks that could arise from similar events in the future.

If there is any issue you would like to discuss then please do not hesitate to contact me or your usual CMS contact.



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Financial institutions

Financial downturns have historically led to an increase in claims against financial institutions, in particular banks. It is likely the economic shock prompted in part by the measures taken to mitigate the impact of COVID-19 will lead to an increase in disputes. The widespread use of litigation funding, the continued growth of the UK 'Plaintiff bar' who specialise in bringing claims against financial institutions and, following the Great Financial Crisis, increased experience of pursuing 'Class Actions' against financial institutions are factors that will likely assist drive this growth in claims. Trends we could expect to see include:

An increase in cases arising out of fraudulent activity

Financial downturns often expose those involved in nefarious activity – either internal or external to the financial institution. For example, it was during the Global Financial Crisis that the massive Ponzi scheme operated by Bernie Madoff came to light.

A rise in investment related disputes

- The economic consequences of COVID-19 have led to a fall in stock markets around the globe, impacting investors, including individuals and pension funds. Specific areas of dispute could include:
 - Those who invest using leverage have been particularly impacted, as they are required to meet margin calls to support their trading or face being closed out of their positions. We anticipate that this area could be a fertile ground for disputes.
 - The decisions made by investment advisers are likely to come under greater scrutiny. This includes the nature of the investments made, particularly those in companies in heavily affected sectors such as tourism, and the timing of any changes to investment strategy in light of the reporting of COVID-19.
- COVID-19 has led to a number of investment funds, including real estate investment trusts, suspending redemptions. This is likely to attract scrutiny from both financial regulators as well as investors, who are unable to withdraw their funds.

More litigation concerning business lending

- Private equity and hedge funds are now a major source of debt finance for companies. As they are less well capitalised than banks, some may struggle to survive if there is a significant increase in the default rate.
- Many of the measures introduced by Governments to mitigate the impact of COVID-19 concern business lending. As most are in their infancy, and subject to change, there could be disputes between lenders and borrowers, particularly where debts are in the process of being refinanced, or debt facilities are up for renewal.

Increased regulatory scrutiny

The conduct of financial institutions with their customers, for example in relation to extending credit or enforcing security, in response to the drastically changed economic environment is likely to be the subject of scrutiny by regulators.



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Directors & officers

Severe economic dislocation is usually fertile ground for increased claims activity against directors. Whilst the government have announced changes to UK Insolvency law that may have a positive impact on directors' potential exposure we do not anticipate that they will stymie an overall increase in claims volumes. We anticipate three broad claim trends:

Claims in respect of directors' pre-pandemic actions

Specifically, failure to plan for pandemic risk to ensure business continuity, in particular if certain businesses fare particularly badly as compared to their competitors due to poor resilience planning.

While such claims are likely to emerge, they may often be opportunistic and therefore have generally lower prospects of succeeding – there is no comparison to the current situation in living memory and it may be hard to argue that directors are culpable for failing to anticipate such an unlikely event.

An increase in business insolvencies - insolvency has historically been a key driver of D&O claims

Claims against directors that arise from insolvencies may not be directly caused by COVID-19 issues. Rather, we anticipate most claims will arise as a result of detailed scrutiny of other management conduct and decisions by insolvency officeholders. In an economic downturn, lenders, creditors and other stakeholders will look to maximise recoveries by pursuing arguable claims against insured defendants.

Whilst funding may have historically hindered the bringing of such claims, litigation funding and other alternative fee structures have matured significantly and are more widely available than in 2008. We anticipate the existence of this enlarged funding market and a more established framework for pursuing group litigation will play a role in increasing claims activity.

Actions of directors during the pandemic crisis

The current business environment gives rise to all sorts of issues for directors, for example: whether to defer dividend payment; taking drastic steps to save a business from collapse such as trying to avoid contractual obligations which become impossible to fulfil; how best to deal with employment related issues such as furloughing employees on the UK government Job Retention Scheme; and keeping up with rapid regulatory changes. In a best case scenario, the economy may be moving back to some semblance of normality in the near to medium term but there is still a risk that a hindsight driven approach could lead to claims relating to actions taken by directors in the present environment.



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Construction

The construction industry has faced mixed messages throughout the COVID-19 outbreak. Government measures expressly identify work in construction as a job that requires people to travel to their place of work, and that work carried out in people's homes (including by tradespeople) could continue, provided the tradesperson displayed no symptoms, and the 2 metre distance from occupants observed. At the same time, contractors must ensure that employees are able to follow Public Health England guidelines on site, including social distancing, handwashing, and frequent cleaning of regularly touched surfaces.

Suspension of works

Whilst contractors are working to overcome the site constraints of fingerprint entry systems, small canteens and lack of handwashing facilities, many projects have temporarily suspended works/furloughed employees to allow for risk assessments and operational changes. Many works contracts will have suspension/termination clauses of varying complexity and care will need to be taken to make sure parties' steps do not create future contractual difficulties. Physical risks associated with site shut-downs include security and waterproofing issues. In addition, any party subsequently bringing professional negligence/delay claims may face scrutiny over the mitigation of plant and staffing costs, and the documenting of decisions. As works recommence, parties may face greater temptation to cut corners to save time and money, creating the potential for future claims, and issues with workmanship. A prolonged period of shut down may also lead to an increase of claims on historic jobs.

Heightened risk of insolvency

During any period of economic uncertainty the risk of corporate insolvency increases. Project delay will drive up costs and the financial pressure on contractors already operating on small margins, and construction professionals face an uphill battle in securing payment for work. Insurers can expect any party considering or investigating a claim against a contractor or consultant to issue prompt notifications, with a view to pursuing policy limits (under the Third Parties (Rights Against Insurers) Act 2010) in the event that the target of litigation becomes insolvent. We may also see an increase in adjudications for unpaid fees, prompting counterclaims for negligence/breach of contract.

Cladding concerns

A specific tension has arisen where works to remove unsafe cladding (particularly aluminium composite material (ACM) panels) are suspended or threatened by the COVID-19 government measures. The government has released guidance indicating that the removal of unsafe cladding is critical to public safety, and has put into place a project management support team to understand and reduce the impact of COVID-19 on remediation projects. Issues that Insurers should be aware of include:

- a. Typically, the removal of ACM panels is a two-person job, requiring less than a 2m distance between workers; in order to progress these safety critical works, contractors face the difficulty of sourcing appropriate personal protective equipment in markets of increasing demand.
- b. Many buildings have a 24-hr 'waking watch' patrol in place pending removal of unsafe cladding, at significant continuing cost. The National Fire Chiefs Council consider waking watch personnel to be key workers, but, again, employers must find ways to allow their work to continue in line with government guidance.



Technology & Construction Court disputes

The TCC continues to operate, with parties likely to take advantage of temporary CPR changes enabling parties to agree to 56-day extensions to court deadlines, provided no hearing date is threatened. The court continues to conduct hearings remotely where possible (including Part 8 proceedings, enforcement of adjudications, case management conferences), but the practicalities of cross examination with reference to technical documents and evidence may see many trials postponed. This is likely to have an impact on defence/recovery action costs reserves. Insurers can also expect disruption to scheduled expert site visit/inspections, given both the suspension of works, and the difficulties/dangers faced by the experts involved (including closure of hotels and travel difficulties in addition to access and safety issues arising on site). Some parties may begin to explore the viability of remote site inspection.

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Brokers

The key focus for brokers in light of the COVID-19 crisis will be on risk mitigation both in respect of policies already in place and new placements. For existing placements, there is a risk of claims against brokers where cover is denied and where cover for notifiable diseases might have been available in the Market. For new placements, there is a risk that the changed working environment leads to issues falling between the cracks. Being a sector historically founded on face-to-face interaction, brokers will want to ensure that they continue to communicate as much as possible with clients in order to understand the implications for their businesses and their ever-changing insurance needs and carefully evaluate whether existing cover is sufficient.

Sourcing alternative cover

For existing placements, brokers face the risk of E&O claims where an insured finds itself without cover under their policy. While brokers cannot have been expected to have foreseen the current situation, they are often found to owe a very high standard of care and there is a risk of a finding against them where broader cover might have been available in the Market.

Failing to bring attention to important policy conditions

There is also a risk of Brokers failing to ensure that their Insureds are alive to policy provisions that may now be impossible to comply with, for example, an obligation in a property policy not to leave premises unoccupied for more than a certain number of days. Communication will be key to ensuring that the insured is not left exposed where it is unable to comply with a policy term.

Placing issues

For new placements, Brokers will be getting to grips with novel ways of placing business either through the electronic placing platform or by email. This will lead to novel issues around when insurers are bound and may leave brokers exposed if they cannot evidence that cover has been bound.

Documenting instructions

Brokers may also find themselves, through no fault of their own, without instructions or unable to obtain cover. To mitigate against this risk, it is more important than ever for brokers to take detailed attendance notes of their communications with clients and insurers, to give sufficient warnings to their clients of the duty of fair presentation and to allow sufficient time for renewal processes.

Scope of cover

Similarly, managing client expectations on coverage going forwards may lead to risk factors for Brokers and they will need to be ready and able to advise their clients clearly on the scope of cover available in relation to COVID 19 and consider whether additional cover might be required e.g. for cyber attacks or for D&O insurance to protect against personal liability if the insured were to go insolvent.



Gaps in cover

Cover going forwards for COVID 19 is likely to be difficult to obtain and there may be a rise in coverage disputes where insureds find themselves with an unexpected gap in cover and thus turn to the broker to fill the gap.

Business continuity

Generally, Brokers will need to review their business continuity plans and update as appropriate to take into account novel risk factors of having their staff, clients and insurers working from home. For example, there may be an increased risk of scams or inability through IT issues to complete a broke etc. Further, the pandemic had led to an increased number of claims being made particularly in relation to travel, property/business interruption and contingency policies, which may prove harder to manage while working from home.

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Aviation and Travel

The aviation industry is one of the most severely impacted by COVID-19. The majority of countries have travel restrictions or bans in place to prevent the spread of the virus. These restrictions and bans, combined with trip cancellations, are expected to cost the industry hundreds of billions of pounds. Whilst many different types of aviation insureds are likely to suffer economic hardship, airlines are thought to be the worst affected with many likely to face bankruptcy in the coming months if state aid is not received.

Passenger claims

With the reduction in air travel, insurers are likely to face fewer claims. However, there is a possibility of claims being brought against airlines by passengers who contracted COVID 19 mid-flight, although there are hurdles to overcome under English law; such claims might be more likely in other more litigious jurisdictions.

Reduced premiums

As a result of insureds' decreased exposure to claims, insurers are likely to come under pressure to reduce premiums, consider rate changes and receive push back on timing for premium instalments.

Employment law issues

We expect aviation insureds to face a number of employment issues, including having to make redundancies, given the reduction in trade.

Insolvency risk

Insolvencies are likely to hit many aviation insureds (like FlyBe) as the number of flights have decreased dramatically.

Travel claims

Many coverage issues are arising with travel insurance policies such as exclusions for claims arising as a result of government regulations and issues around the timing of FCO travel guidance. This may well result in an increase in FOS claims as consumers seek compensation for their losses.

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Healthcare

Unsurprisingly, the COVID-19 outbreak is likely to increase the risk of claims facing medical professionals. Many medical professionals now find themselves in unfamiliar territory, perhaps working in new roles, each requiring different working practices and experience levels. Equally, those professionals who are best equipped and have the experience to deal with situations such as these, are being placed under considerable strain, with patient numbers increasing exponentially (and less support available) which has the potential to lead to greater numbers of mistakes being made.

It may still be some time before we see the inevitable emergence of COVID-19 related claims in the aftermath of the crisis, with all the attention rightly focussed at the moment on the national effort to tackle the crisis but we anticipate the following trends in due course.

Responsible party

As private healthcare providers continue to assist the NHS in providing PPE equipment, access to premises and staff - questions arise as to who might be responsible for any claims arising from their use. For example there may be claims against medical professionals, who are contracted to private healthcare providers, but for acts of alleged negligence whilst on NHS premises. Although, under the terms of the Coronavirus Act 2020, the government has offered to provide indemnification to medical professionals where they do not have any existing indemnity arrangement in place, there may still be disputes over who is liable to pay the costs of defending any prospective claims and/or as to contribution and indemnity issues between the parties where professionals do have pre-existing cover.

Risks of underqualified staff

As the NHS reaches out to former medical professionals and (in efforts to maximise the size of the available workforce) they are recruited and utilised within roles where they may be underqualified or lacking experience, this could lead to claims arising from alleged malpractice. Where those medical professionals are no longer covered by their MDO/ open market insurance, they will have to seek indemnification under the terms of the government indemnity scheme introduced by the Coronavirus Act 2020.

Closure of practices

Certain medical practices, where 'non-essential' services were being offered, may have to close as patients remain in lockdown (or because they are ordered to close by the UK Government). For example, cosmetic dental practices may be forced to close leading to claims for cover in respect of business interruption losses.

Product liability claims

Companies that have not historically manufactured medical devices (such as ventilators and PPE) are now volunteering to assist with making as many as possible in a very short space of time. This may heighten the risk of mistakes being made which could lead to claims against companies from aggrieved patients, medical staff and/or family members where devices/PPE fails to perform as requested. Manufacturers may therefore seek indemnification for (and queries may arise in relation to) product liability claims. Insurers and brokers can expect such manufacturers to seek clarification as to whether their insurance cover extends to medical devices.



Accelerated development of drugs

Claims may arise from a shortened timescale for pharmaceutical processes. There may be claims where patients have suffered because drugs and vaccines have been made, tested and used much more rapidly than normal in an attempt to find an appropriate treatment/ more testing as soon as possible. Equally, there may be claims where testing has proven to be unreliable and individuals have subsequently contracted the virus (either directly or passed it on to others) despite believing they were now immune.

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W&I

The most immediate impact of the COVID-19 crisis is likely to be on M&A deal flow, with greater volatility in equity and debt markets as a result of the global impact and unprecedented restrictions on business operations. This impact may vary from country to country and sector to sector. We expect, however, that W&I insurance will remain a valuable part of the M&A toolkit.

Delay in new claims

If there are to be claims these typically follow some 6-18 months post transaction, in the case of General Warranties (often later in the case of Tax Warranties) and so there may be a hiatus in new notifications following the lack of deal flow.

Less impact in respect of historic transactions

For deals bound prior to 2020, the risks of breaches of warranty arising directly as a result of COVID-19 will be limited by the fact that warranties are a statement of fact at a given time and therefore generally relate to matters known up to that point rather than being forward looking. However, that will depend on the precise wording of particular warranties, with warranties relating to matters such as insurance arrangements, material contracts and key suppliers possibly coming under scrutiny.

Impact on economy will drive claims activity

More generally, most companies are going to come under huge pressure as a result of COVID-19, whether due to a general lack of productivity / reduced business as a result of uncertainty and disruption caused by government measures, or the direct consequences of government orders to close trading premises / shut down offices that are reliant on face-to-face transactions (e.g. food, drink, retail, leisure and hotel businesses, to name a few). That may mean:

- Where a business is facing financial difficulties, other non COVID-19 related problems coming to light, which otherwise might not have been uncovered.
- Insureds actively looking to access insurance policies in order to identify possible recoveries, to offset the negative impact of COVID-19 on their business.
- Insureds pursuing claims under insurance policies they might otherwise not have pursued in better financial times.

Precautionary notifications

It is conceivable that where deals closed in the last 12-18 months and financial problems have emerged within the target business as a result of the current crisis, this will prompt precautionary notifications by insureds who wish to ensure notification is made within the policy period, even if these issues prove ultimately to be specific to the current crisis rather than the result of a breach of warranty. We therefore expect the COVID-19 situation, indirectly, to lead to an increased incidence of notifications for deals bound pre-2020 over the next c. 12-24 months.



Change in underwriting focus

The unprecedented crisis will almost certainly impact due diligence processes, valuation models and contractual protections on those deals which proceed in the short and medium term. Amongst other things, we would expect an increased focus on due diligence in respect of supply chains, key agreements, business continuity, customer payment terms, financial stability and compliance with laws/regulation, and acquisition agreements may include more COVID-19 specific clauses. Valuations may also be revised to take account of new assumptions about the post-crisis business and financial environment. W&I underwriters will undoubtedly respond to these changes in their own underwriting and due diligence. These will all, in turn, fall for consideration when breach of warranty and quantum are being considered.

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Cyber

The National Cyber Security Centre has noted an increase in the number of threat actors who are seeking to exploit COVID-19 by adapting phishing and social engineering attacks to fit a COVID-19 'theme'. There is also evidence that threat actors are seeking to take advantage of security vulnerabilities in IT infrastructure that supports home working. Overall, however, levels of reported cyber crime have not increased. This is consistent with our experience by reference to the number of notifications we are receiving. We anticipate that this trend may not continue, as threat actors seek to take advantage of the disruption that COVID-19 has had on working arrangements and diversion of IT resources. We also think it is likely that, in the current environment, breaches may take longer to be identified, with the result that there could be a significant time lag in them being reported to Insurers. We may therefore see a spike in claims activity over the next 3 – 6 months.

Increased home working changes risk environment

The sharp increase in remote working and quick roll out of associated IT infrastructure, systems and programmes presents a 'target rich' environment for threat actors, particularly in respect of companies that have not invested significantly in systems that support home working and/or those that are having to rapidly increase capacity.

Increased pressure on IT systems

Even without the added pressure of targeted attacks from threat actors, many company IT networks will be unprepared for the volume of remote workers, which could present operational issues and lead to outages. In such circumstances, Insureds may look to pursue coverage for the costs for system outages or network interruptions, if their policy provides such cover. Many companies will also seek to strengthen their networks following systems outages to ensure that their networks can handle the increased pressure in the event of another pandemic, which could give rise to betterment issues.

Risk of poor cyber hygiene

The associated complications with working from home will likely lead to poor cyber hygiene from employees e.g. using personal email accounts and printing confidential documents at home. We anticipate this will increase the risk of inadvertent breaches of data protection obligations by Companies, which could necessitate increased notification to the ICO and data subjects.

Calculation of BI loss

Where companies have the misfortune of suffering a cyber breach whilst their businesses operations are essentially suspended due to government order, there may be associated coverage issues with the apportionment of Business Interruption Losses.



Pressure on claims response

COVID-19 will have an adverse impact on the financial health of many companies and hence their ability to fund expensive investigation and remediation work. Many Insurers providing emergency response coverage require that vendors are appointed directly by the Insured, requiring Insureds to assume financial obligations to them. This is likely to lead to increased pressure on Insurers to make coverage determinations even quicker than is normally the case.

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Law firms face an unprecedented range of challenges during the COVID-19 pandemic and the associated government measures, and are employing a range of coping mechanisms. On an operational level, IT infrastructure and working-from-home practices are being initiated and developed to facilitate client due diligence procedures, court and service deadlines, and execution of documents. On a cyber security level, firms are contending with concerns about the confidentiality of video-conferencing software and the increased potential for data breaches, and on a compliance level, firms have seen an increase in fraudulent and/or phishing activity, and concerns about the ability to meet undertakings. In this fast-changing environment, the risk of claims (whether arising from the pandemic or day-to-day business) is inevitably increased.

Smaller firms more exposed

Smaller firms are more likely to be exposed to claims. At the same time as having fewer resources and staff, i.e. for some firms, being less able to work remotely and proportionately more affected by sickness, smaller firms may be more likely to be criticised for delays in advice and/or ceasing working. This is because some solicitors are being treated as keyworkers, including those acting in connection with the execution of wills and criminal work.

Issues with property transactions

HM Government has released guidance on moving house during the epidemic. This is summarised as 'Homebuyers and renters should, where possible, delay moving to a new house while measures are in place to fight coronavirus. If moving is unavoidable for contractual reasons and the parties are unable to reach an agreement to delay, people must follow advice on staying away from others to minimise the spread of the virus.' This gives rise to a host of issues for conveyancers to consider and, potentially, exposure for those solicitors and their insurers. These include:

- Undertakings must still be complied with.
- Exchanging contracts without some provision for delay; unless the contract is frustrated, a party not completing will be in default. This may lead to the loss of deposits and/or interest.
- If the parties wish to vary the contract after exchange, care needs to be taken not to unintentionally create a new contract.
- If parties have already completed, it is unclear what the impact of the government's guidance will be. Social distancing could be very difficult during a house move. The British Association of Removers has recommended that removers 'should only complete any moves that are underway and immediately cancel or postpone any move that has not yet started' Anecdotally, we are aware of situations in which purchasers have insisted their vendors leave a property. Clients need to be adequately warned and prepared.



Greater client exposure to fraud

With more lawyers working away from the office, best practice that is observed in the office could slip. Potential weak links are:

- Papers being taken from the office and not stored/disposed of securely.
- Work laptops being connected to personal devices such as memory sticks.
- Home Wi-Fi systems lacking appropriate firewalls/security (and/or work laptops lacking such security).
- Where client account payments are made, more reliance on email and most firms will not have access to verifiable internal telephony, leading to a greater risk of fraud (such as fake president fraud).

Procedural pitfalls

The civil courts are sitting (telephone and VC hearings) and litigation continues. Again, there are numerous potential pitfalls for the unwary. These include:

- Deadlines will need to be complied with. Formal applications will need to be made to extend periods of time.
- Rules of service have not changed, particularly relevant where premises are closed, or where a party wants to effect service by email.

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Surveyors

It will not take too much recollection of the turbulent times in the aftermath of the 2008 financial crisis to recall that the Surveying profession, and valuers in particular, were subject to a tsunami of claims. This was keenly felt by the Surveying profession and its Insurers, with insurance premiums rising and withdrawals from the market. Thankfully, the improving economic outlook of recent years, together with lessons being learned, has seen a calming of the seas and a period of some stability.

However, with uncertainty looming as a consequence of COVID-19, there are likely to be some choppy waters ahead. Some issues which may arise include:

Reliability of valuations

It has been reported that Lenders have been particularly concerned about the reliability of valuations during such uncertain times. This coupled with the financial hardship that many individuals and corporates are likely to suffer will create conditions not dissimilar to the GFC and Surveyors may once again find their valuations under the spotlight.

In particular, automated valuation models are likely to come under scrutiny like never before given the restrictions on lending to low LTV loans only and the practical difficulties in undertaking physical inspections.

Disposal of repossessed properties

A prolonged stagnation of the property market will be a concern for those advising on the disposal of repossessed properties. Those Surveyors acting as LPA receivers will want to be on point both in terms of managing the property during the stagnation and the eventual realisation of its value.

Risks for portfolio market advisers

Those advising in the portfolio market are also going to come under scrutiny as the suitability of investments and reliability of tenants will come under the microscope.

Failure of projects

It is not just valuation surveyors who can anticipate being in the receiving line should the claims start to flow. The past years have shown that monitoring surveyors can equally expect to face some scrutiny and as projects fail due to cashflow difficulties this is only likely to increase.



Changes to PI cover

Surveyors PI cover, which has only recently seen some increased appetite amongst Insurers, may again become hard to obtain. To this end, it is noteworthy that the RICS were aiming to introduce amendments to the scope of the minimum terms cover in April 2020. These are aimed at combating challenging market, a lack of availability and to increase flexibility for Insurers. As a reminder, the 3 main proposals for changes in cover being:

1. introduction of a Fire Safety Exclusion (i.e. the post-Grenfell related issues);
2. allowing insurers to make the excess applicable to defence costs; and
3. allowing the policy to be written on an aggregate (unlimited round the clock) reinstatement basis.

In such challenging times these changes, and indeed further flexibility, may be required more than ever.

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Following an initial series of direct claims by policyholders (which may or may not be covered), a wave of COVID-19 related claims notifications is now reaching reinsurers. Notifications so far have tended to be made on a broad basis without identifying specific loss or damage. Along with inevitable claims on travel, life and health insurance, we consider that reinsurers are likely see claims clustering around the following lines:

- a. Property / business interruption, including landlords' loss of rent (although the property damage required to trigger traditional business interruption cover may not have been suffered by the insured, unless there are specific extensions within the policy);
- b. Contingency policies (such as event cancellation);
- c. General liability including employers' liability, general casualty, professional negligence and D&O;
- d. Trade credit insurance; and
- e. Political risk.

Under normal circumstances, aggregation, quantum and settlements are common areas of reinsurance disputes. Each of these areas will be a potential area of dispute in COVID-19 claims.

Aggregation

- Cedants will either seek to maximise cover either by way of aggregation of claims under a unifying concept or, if it suits their deductibles and limits, through separation. In some lines, such as Life and Accident & Health, COVID-19 is clearly the direct cause of the loss and the unifying concept (although questions may arise as to whether multiple outbreaks across various countries, or perhaps even multiple waves of the disease in the same country, are still considered unified).
- In other lines, such as Property / Business Interruption, Contingency (e.g. Event Cancellation) and General Liability, COVID-19 may be the underlying cause of the loss but not the event or occurrence triggering cover. These may range from the announcement of various government orders, to perhaps the establishment of legal liability of the insured in court, and claims will therefore be difficult for an insurer to aggregate.
- Cedants with excess of loss treaties may be able to strategically use hours clauses to aggregate losses, for example by electing for their specified period of hours to commence with the UK government order dated 23 March which will then have triggered innumerable B.I. losses. These clauses may instigate disputes on notification and causation under their reinsurance due to the combination of various perils and losses through this method.

Quantum

- There may be particular difficulties adjusting quantum, for example in 'big ticket' contingency policies which may be subject to facultative reinsurance.
- Many policies with low sub-limits and reinsurance cover may be quickly exhausted if there are several waves of the virus in the same policy year. There may be conflict over whether the sub-limits should be applied cumulatively across losses suffered in a number of locations or not and this may significantly affect the quantum.



Settlements

- Insurers are coming under pressure from their customers, the press and governments to make 'ex gratia' payments to customers for COVID-19 losses. Lloyd's has indicated that it does not expect covers to be retrospectively extended, but other authorities have proposed legislation that would mandate coverage, even if such losses were specifically excluded. These proposals, which have been criticised for contravening basic principles of contract law and jeopardising the solvency of the insurance market, also render reinsurers' potential exposure unknown and uncontrollable, as such mandated payments will be difficult for reinsurers to challenge.
- There will be pressure for claims to be settled rapidly due to the precarious cashflow and solvency position of many insureds and, indeed, their insurers. Reinsurers may exercise their rights under inspection of records clauses to confirm that the settlements were reached in a 'proper and business-like' manner before indemnifying them.
- In the U.S, settlements may be made by insurers in order to avoid a plaintiff-friendly jury trial in which even a watertight coverage defence may be disregarded. However, English case law indicates that an insurer will be expected to test their defence at trial, even if they have received legal advice to the contrary, in order to recover under their reinsurance.
- There may also be conflict over whether loss adjustment expenses will be recoverable under reinsurance if there is litigation with a successful 'no coverage' outcome.

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