

Briefing Note**12 March 2020****The COVID-19 Virus and Business Interruption Insurance Claims –
Guidance from *New World Harbourview Hotel Co Ltd & Ors v Ace Insurance Ltd & Ors*****Introduction**

The COVID-19 virus has extended its reach across the world impacting business in all sectors of the economy. As companies look to their insurers, this article discusses the application of business interruption (“BI”) insurance and particularly whether BI insurers are obliged to indemnify losses resulting from the COVID-19 virus and, if so, how the amount of that indemnity may be calculated.

The Obligation to Indemnify

The first step in bringing a claim for business interruption is to establish the insurers’ liability to indemnify the cover holder for its losses resulting from the interference to, or interruption of, the business. In most BI insurance policies, that will require the cover holder to establish that a peril or risk insured by the policy has caused an interruption to the cover holder’s business.

In the context of the COVID-19 virus, that insured peril would be an infectious or contagious disease that triggered the obligation to indemnify the insured. The cover holder should also look to see if it has cover for prevention of access and/or loss of attraction which, subject to the policy wording, might trigger the obligation to indemnify losses resulting from an outbreak of the virus.

The policy review, with assistance from the insurance broker or legal counsel, is important. That is because the financial loss resulting from an interruption to the business will not be covered unless the cover holder can establish that the interruption was caused, in whole or in part, by an insured risk.

The Amount of the Indemnity

The second step in bringing a claim for business interruption is to establish that amount of the indemnity that the insurer is liable to pay to the cover holder for its loss. The method of calculating the amount of the indemnity is usually set out in the policy’s basis of loss settlement clause. It can vary from policy to policy. For example, the amount of the indemnity may be calculated by reference to: (i) loss of gross profit or to debt repayment and standing charges only; (ii) incurred over a 3, 6, 12, or 24 months indemnity period; and (iii) subject to a time excess that may vary from nil to 90 days.

The calculation of the amount of the indemnity for loss resulting from the interruption to the business is complex. That calculation is usually undertaken by a forensic accountant working under instruction from legal counsel by reference to the financial statements produced by the cover holder. That calculation will be further complicated if the policy wording is unclear or in dispute, as was the case in *New World Harbourview Hotel Co Ltd & Ors v Ace Insurance Ltd & Ors* (“New World v Ace”).

New World Harbourview Hotel Co Ltd & Ors v Ace Insurance Ltd & Ors

In *New World v Ace*, the Hong Kong Court of First Instance (in [2010] HKCFI 327), Court of Appeal (in [2010] HKCA 285) and the Court of Final Appeal (in [2012] HKCFA 21) were required to determine the insurer’s liability to indemnify the cover holder, and the amount of that indemnity, pursuant to the following clause:

“This Policy is extended to insure actual loss sustained by the Insured, resulting from a Reduction in Revenue and increase in Cost of Working as a result of murder, suicide, infectious or contagious disease, food or drink poisoning or contamination, and closure by a competent authority due to vermin or pests all occurring on the Premises of the Insured or of notifiable human infectious or contagious disease occurring within 25 miles of the Premises”.

The Justices found that the SARS outbreak constituted a “notifiable human infectious or contagious disease occurring within 25 miles of the Premises” that triggered liability to indemnify. The Justices then had to determine the amount of that indemnity by reference to: (i) the start of the indemnity period; (ii) the end of the indemnity period; and (ii) the cover holder’s normal levels of income.

In determining the period of loss, the Courts were asked to identify the date when SARS became a notifiable human infectious or contagious disease, that being the date when cover was triggered. The cover holder, in seeking to extend the indemnity period and increase the amount of the indemnity, argued for the earlier date when hospitals were requested to voluntarily notify the Hong Kong administration of pneumonia-like cases. The insurer argued for the later date when the Hong Kong administration made it mandatory for SARS cases to be notified to the administration. Proceeding on the agreed fact that notification became mandatory only on the later date, all three levels of the judiciary agreed that the date of loss shall be deemed to commence on the later date.

The lower Courts were also asked to determine the date when the indemnity period ended. The relevant policy provision provided that the “*LOSS PERIOD means the period during which the Revenue of the Insured Business has been affected in consequence of Damage from the date of loss to the resumption of the business and thence 180 days*”.

In circumstances in which the cover holder was able to continue trading throughout the SARS outbreak, albeit at a significantly lower turnover, the lower Courts held that the words “*resumption of business*” were rendered redundant and should be ignored. The words were not be interpreted as “*resumption of usual business conditions*”. Proceeding on that basis, the indemnity period was limited to 180 days from the date of mandatory notification.

The final issue to determine was the cover holder's standard revenue against which the financial loss incurred during the indemnity period was to be calculated. The policy defined standard revenue as "*the Revenue realized during the twelve months immediately preceding the date of the Damage appropriately adjusted where the loss period exceeds twelve months*". The issue was whether the twelve months immediately preceding the damage included or excluded that period when the business first experienced the negative effects of SARS but before the start date on which notification of SARS cases became mandatory. Both the Court of First Instance and the Court of Appeal found that the relevant provision was unambiguous in mandating that standard turnover was to be referenced against that twelve months period ending immediately before the notification of SARS cases became mandatory, that being the date when the obligation to indemnify, and the loss period, was triggered.

Summary

Insurance cover is available for business interruption resulting from infectious diseases such as COVID-19 and may be available for the consequences of that disease, such as prevention of access and loss of attraction. The amounts of the indemnity will vary but can be substantial, even on the most restrictive policy terms. Cover holders are advised to consult with their insurance brokers, legal counsel and accountants to determine whether an insurance recovery is available and in what amount.

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