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COVID-19 AND BUSINESS INTERRUPTION (BI) INSURANCE CLAIMS

September 10th, 2020



The COVID-19 pandemic and the various measures to limit the disease’s spread have significantly disrupted economic activity in countries around the world, resulting in significant losses. According to OECD , the vast majority of these losses are likely to be absorbed by policyholders (unless governments or courts intervene) as only few companies have BI coverage – exposing the existence of an important protection gap for pandemic-related BI losses.

In the past four months, we have been inundated with client inquiries regarding insurance coverage and how it responds to COVID-19 induced BI losses. As the situation is so much in flux, and clients continue to face new challenges, it is very difficult to give specific advice to our clients. Furthermore, (re)insurers are also reacting to BI claims differently across countries of the sub-Saharan region.

On June 18th, 2020, the Financial Sector Conduct Authority of South Africa (FSCA) issued Communication (Ins) 34, which, in our view, is equally relevant to the insurance markets of Namibia, Lesotho, Mozambique, Zambia & Malawi, as most insurers in these markets have significant reinsurance placements in South Africa. Also, in other jurisdictions, such as Kenya, Tanzania, and Uganda, it is likely that the insurance industry will follow the same sort of interpretation of the different BI policies. The information in this article is based on the FSCA communication, unless specified otherwise.

Although there seems to be slight nuances in the BI policy wordings, they can broadly be grouped in six different categories, each with its own burdens of proof placed on policyholders:

#	Category	Short Description	Burden of Proof
1	Radius & Notification	Business interrupted as a result of a contagious disease at the premises or within a certain radius, provided local authority formally declared that a disease exists within the area and/or imposed quarantine regulations or restricted access to the area	(1) The insured’s business was interrupted by a contagious or infectious disease either at the business premises or within the radius specified in the policy; and (2) A competent authority has declared that the contagious or infectious disease exists within the specified radius of the insured’s business premises



#	Category	Short Description	Burden of Proof
2	Radius	Business interrupted because of a contagious disease at the premises or within a specified radius of the premises	A competent authority has declared that the contagious or infectious disease exists within the specified radius of the insured's business premises
3	Notifiable Disease	Business interrupted by a notifiable disease	(1) there must be a notifiable disease, and (2) which a competent authority has declared it shall be notified of
4	General Exclusion	Extension in the policy if the business is interrupted because of a contagious disease as per cat. 1&2. These insurers apply a general exclusion clause which overrides the extension if there is an infectious epidemic / pandemic disease.	Cover for COVID-19 which has been declared as a pandemic by the World Health Organization, is explicitly excluded
5	Closure or Restriction	Business interrupted by a closure or restrictions placed on the premises by the authorities because of a contagious disease occurring at the premises	The policy wording requires that there must be a contagious disease at the business premises of a policyholder
6	Closure by Order	Business interrupted by an outbreak of a notifiable disease or illness, or disease occurring at the premises of the insured, resulting in closing the business by order of a competent authority	he trigger is a COVID-19 infection at the business premises of a policyholder which resulted in the business being closed completely or partially by an order of state or government

In some cases, insurers require policyholders to provide very specific information and/or documents to prove a specific claim. Examples of such requirements are:

- Proof that a hospital, close to the insured premises, was closed due to COVID-19 or it is known that there were people treated at the hospital that were tested positive
- Confirmation from the relevant Health Authority of a confirmed COVID-19 case within a certain radius of the insured's business; and submission of medical records of someone who has been infected with COVID-19 within the radius stipulated in the policy

In this regard, the FSCA provides the following guidance to insurers:

1. Carefully consider whether the burden of proof amounts to a barrier for the policyholder to claim;
2. Consider reasonable and practical alternatives to satisfy the burden of proof; and
3. Consider obtaining the proof itself (e.g. in respect of confirmation from a Health Authority mentioned above) as opposed to placing that burden on the policyholder, especially where such information is not in the public domain and easily accessible by a policyholder.

While the FSCA acknowledges that BI claims are complex in their nature, insurers that have



policy wordings which fall under the (1) Radius and Notification, (2) Radius; and (3) Notifiable Disease categories must, when they have received all relevant documentation from a policyholder, not delay the payment of any claim provided policyholders are able to prove the requirements highlighted and discussed in paragraphs above.

There is no sound basis for the FSCA to direct insurers that have policy wordings that fall under the "General Exclusion" category to pay any BI claims.

For the categories of "Closure or Restriction" and "Closure by Order", the trigger for a valid claim is the contagious or infectious disease at the business premises of a policyholder and not the National lockdown. Therefore, unless a policyholder can prove that the insured's business was interrupted by the presence of COVID-19 at its business premises, the policyholder would have no valid claim.

CONCLUSION

The devastating human loss and economic impacts of the COVID-19 pandemic is a global catastrophe that is stretching the society and the insurance industry's capacity and resources to cope. Generally, systemic risks such as pandemics that cause large economic and societal losses are unlikely to be covered in their entirety by the global insurance industry as the total economic loss would exceed its financial resources. The insurance industry can expect to see many claims against insurers as to the meaning of the BI insurance coverage and policy wording extensions. Please contact your account manager or Risk Adviser at Minet.

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This article is not a legal advice. Each case will depend on its specific facts, circumstances, insurance policy wording, terms, and conditions and are governed by and construed in accordance with the laws of the respective countries.