COVID-19 & Insurance: Coverage Issues in a Pandemic World

Introduction

It has been only two months since the World Health Organization declared the COVID-19 outbreak a pandemic, but the world has probably seen only a fraction of the likely long-lasting economic and social impacts of the pandemic. Whilst various social distancing and lockdown restrictions imposed across the world have slowed down the rate of outbreaks, myriad financial losses to both corporate entities and individuals have already skyrocketed. Many affected persons are likely to turn to and eagerly expect their existing insurance coverage to defray some or all of these losses.

However, as discussed in this Update, there may well be potentially difficult coverage issues under some of such existing (and pre COVID-19) commercial insurance policies.

Loss of Profit/Revenue and Business Interruption

Most commercial insurance claims are likely to be made in respect of business interruption losses for the absence/drop in revenue suffered by businesses as a result of disruption from government-imposed lockdowns or the Singapore "circuit breaker".

There are a few potential problems that policyholders may face in making claims.

First, whilst some bespoke policies may expressly cover scenarios resulting from closure of business ordered by a governmental authority, many of the more common wordings for business interruption coverage (which tend to form part of a wider all-risks property cover) are drafted such that cover is triggered only if the insured’s property is physically damaged due to certain specified perils such as fire or floods.

This issue is already being played out in the UK, where the Bermuda-headquartered Hiscox Ltd has denied business interruption claims for "general measures taken by the UK government" in response to the pandemic, and the Financial Conduct Authority has just announced in May 2020 its intention to obtain court declarations to resolve uncertainty over business interruption cover. It will be interesting to see how the English courts decide on this issue as this may have an impact on how policies under Singapore law should be interpreted. Likewise, in the USA, a number of business owners in Louisiana and California have mounted an argument that the presence of the SARS-CoV-2 virus in or around their business premises amounts to "physical damage" of their property. This novel argument is yet untested in the Singapore courts.
Insurance & Reinsurance

Other policies may include extensions of cover for business interruption that result from closure of the policyholder’s property due to a governmental order. Some extensions could be premised on physical damage to a neighbouring property. Policyholders will need to consider whether their business interruption cover is clear enough to include, for example, the government-mandated closure of non-essential services during Singapore’s circuit-breaker.

Secondly, a number of business interruption coverage clauses have since the Severe Acute Respiratory Syndrome (SARS) outbreak in 2003 expressly drafted exclusions that specify SARS. Policyholders will need to assess whether similar exclusions are present in their policies and if so, whether such exclusion could be broadly interpreted enough to apply to the COVID-19 pandemic on their own facts and circumstances.

Thirdly, policyholders may also find themselves in potentially difficult situations relating to endorsements that may have actually been purchased to cover COVID-19 type losses. Some Lloyd’s underwriters have been sued for not covering COVID-19 business interruption losses under endorsements purchased specifically in response to the 2014 Ebola outbreak, because COVID-19 was not a specifically-named disease in the endorsements. In Singapore, a similar dispute’s outcome may ultimately depend on an examination of parties’ objective intention based on the available documentary evidence at the time of purchase of such endorsement and the commercial objective of the policy.

Event Cancellation

Event cancellation insurance is likely to be another commonly looked-to cover especially in light of the various business closures under the circuit-breaker measures imposed pursuant to the COVID-19 (Temporary Measures) Act 2020. Much will depend on the wording of the specific cover. Some policies expressly cover event cancellation as a result of outbreaks of communicable diseases or threats of the same that warrant closure of the venue by governmental authorities, which would seem applicable to the current circumstances. Conversely, some policies exclude communicable diseases and/or limit cover to scenarios such as natural disasters, war, terrorism or riots.

It is not uncommon for some event cancellation policy conditions to require mitigation of the loss. Depending on the ascertained objective intention of parties in relation to such clauses, this could mean that cover may not be triggered and/or reduced if the event could have been rescheduled and/or conducted via “tele-commuting” means.

In addition, the claim may not be covered if the event is not cancelled, but merely postponed to a later date. For example, it appears that some of the policies insuring the Tokyo Olympics do not specifically cover postponement and if so, it is likely that the insurers of these policies may find their exposure significantly reduced given that the Olympics is merely postponed to 2021.
Insurance & Reinsurance

Credit Insurance

Credit insurance policies typically are drafted to protect a financial institution or trade creditor from defaults or other types of non-performance by the borrower/debtor. Usually, such policies respond to indemnify the insured when there is a failure to make a payment under a loan facility/purchase agreement within a pre-set buffer period. Broadly speaking, such failure of payment does not need to be linked to a specific insured peril and will be beneficial to the insured since there is no need to prove that such default in payment is caused by, for example, a lockdown order or business closure order.

That said, potential areas of dispute remain. For example, many credit insurance policies do not provide cover when there is an outstanding “genuine dispute”. Some debtors (and depending on their specific industry) may dispute the obligation to pay on the basis that the pandemic constitutes a force majeure. The credit insurer may take the position that there is an outstanding dispute as a result – this specific issue is yet to be tested in the Singapore courts.

It should also be borne in mind that most credit insurance policies impose strict/short notification requirements of a default as a condition precedent to cover and/or also require pre-emptive notification of circumstances that may reasonably give rise to a default by the debtor. Businesses should consider their reporting structures especially in light of the ongoing work-from-home measures that are expected to continue even after the end of Singapore’s circuit-breaker, as it is important to ensure that key information continues to reach the individuals responsible for maintaining the business’ credit risk protections.

Public Liability

For those businesses with publicly accessible and frequented premises, members of the public could potentially mount claims against them (e.g. alleging that they were infected with COVID-19 at such a location and that such an infection occurred as a result of the business’ negligent acts/omissions in allowing for the spread of the virus). There have been recent reports of various cruise ship passengers suing the operators for alleged negligence in failing to have proper screening protocols and continuing to operate despite the knowledge of prior and increasing infections. Similar arguments may be raised in other business settings, although the establishment of causation could be tricky. Typically, commercial general liability policies may be drafted to cover public liability claims relating to bodily injury or illness to third parties. Apart from policies that have specifically excluded pathogens and/or infectious/communicable diseases, policyholders will need to assess whether their specific policies cover such public liability claims.

Management Liability

With the likely long-standing and fluid nature of the COVID-19 pandemic, directors and officers must be ready to move and adapt quickly to fast-changing government-imposed restrictions and constraints. Amongst other things, it is likely that businesses’ contingency and business continuity plans will be
Insurance & Reinsurance

tested. Where there are clear failures in the management response, a company’s investors could question whether the directors and officers of the company failed to prepare and/or react to the pandemic adequately and in so doing had breached their fiduciary duties to the company.

D&O policies typically are triggered when there is an allegation that the director or officer has committed "wrongful acts", and these policies usually contain fairly narrowly drafted exclusions (if any at all) relating to claims relating to bodily injury/illnesses. Nonetheless, policyholders will need to consider the specific terms of their policies, including the definition of a "wrongful act" in determining whether any or all potential claims in relation to alleged mismanagement of the company’s response to the pandemic are covered under their D&O policies.

Conclusion

The COVID-19 pandemic and its economic and social impacts continue to expand daily and it will not be surprising if it defies businesses’ usual contingency and risk management plans. The above discussion points have captured some of the key pitfalls which should be borne in mind for parties who are considering a claim under their existing insurance program. Rajah & Tann Singapore LLP’s Insurance & Reinsurance team has unparalleled experience and is well-placed to provide specific advice on each business’ unique facts and circumstances and potential COVID-19 policy coverage issues.

If you have any queries or wish to discuss an insurance-cover related issue further, please feel free to contact a member of our team below and we will be happy to assist further.

Visit our COVID-19 Resource Centre for views from our lawyers across the region on common issues and legal implications brought about by COVID-19. For specific inquiries, please reach out to your relationship partner or send an email to our COVID-19 Legal Team.
Contacts

Simon Goh
Head, Insurance & Reinsurance
T +65 6232 0645
simon.goh@rajahtann.com

Elaine Tay
Partner, Insurance & Reinsurance
T +65 6232 0673
elaine.tay@rajahtann.com

Wang Ying Shuang
Partner, Insurance & Reinsurance
T +65 6232 0365
ying.shuang.wang@rajahtann.com

Benjamin Teo
Partner, Insurance & Reinsurance
T +65 6232 0366
benjamin.teo@rajahtann.com

Please feel free to also contact Knowledge and Risk Management at eOASIS@rajahtann.com
Our Regional Contacts

RAJAH & TANN | Singapore
---
Rajah & Tann Singapore LLP
T +65 6535 3600
sg.rajahtannasia.com

R&T SOK & HENG | Cambodia
---
R&T Sok & Heng Law Office
T +855 23 963 112 / 113
F +855 23 963 116
kh.rajahtannasia.com

RAJAH & TANN | Malaysia
---
Christopher & Lee Ong
T +60 3 2273 1919
F +60 3 2273 8310
www.christopherleeong.com

RAJAH & TANN | Myanmar
---
Rajah & Tann Myanmar Company Limited
T +95 1 9345 343 / +95 1 9345 346
F +95 1 9345 348
mm.rajahtannasia.com

RAJAHT & TANN 立杰上海
---
Chinese Representative Office
Rajah & Tann Singapore LLP
T +86 21 6120 8818
F +86 21 6120 8820
cn.rajahtannasia.com

ASSEGAF HAMZAH & PARTNERS | Indonesia
---
Assegaf Hamzah & Partners
Jakarta Office
T +62 21 2555 7800
F +62 21 2555 7899

Surabaya Office
T +62 31 5116 4550
F +62 31 5116 4560
www.ahp.co.id

RAJAH & TANN | Lao PDR
---
Rajah & Tann (Laos) Co., Ltd.
T +856 21 454 239
F +856 21 285 261
la.rajahtannasia.com

RAJAH & TANN | Thailand
---
R&T Asia (Thailand) Limited
T +66 2 656 1991
F +66 2 656 0833
th.rajahtannasia.com

RAJAH & TANN | Philippines
---
Gatmaytan Yap Patacsl
Gutierrez & Protacio (C&G Law)
T +63 2 8894 0377 to 79 / +63 2 8894 4931 to 32
F +63 2 8552 1977 to 78
www.cagatlaw.com

RAJAH & TANN LCT LAWYERS | Vietnam
---
Rajah & Tann LCT Lawyers
Ho Chi Minh City Office
T +84 28 3821 2382 / +84 28 3821 2673
F +84 28 3520 8206

Hanoi Office
T +84 24 3267 6127
F +84 24 3267 6128
www.rajahtannlct.com

Rajah & Tann Asia is a network of legal practices based in South-East Asia. Member firms are independently constituted and regulated in accordance with relevant local legal requirements. Services provided by a member firm are governed by the terms of engagement between the member firm and the client.

This Update is solely intended to provide general information and does not provide any advice or create any relationship, whether legally binding or otherwise. Rajah & Tann Asia and its member firms do not accept, and fully disclaim, responsibility for any loss or damage which may result from accessing or relying on this Update.
Our Regional Presence

Rajah & Tann Singapore LLP is one of the largest full-service law firms in Singapore, providing high quality advice to an impressive list of clients. We place strong emphasis on promptness, accessibility and reliability in dealing with clients. At the same time, the firm strives towards a practical yet creative approach in dealing with business and commercial problems. As the Singapore member firm of the Lex Mundi Network, we are able to offer access to excellent legal expertise in more than 100 countries.

Rajah & Tann Singapore LLP is part of Rajah & Tann Asia, a network of local law firms in Singapore, Cambodia, China, Indonesia, Lao PDR, Malaysia, Myanmar, the Philippines, Thailand and Vietnam. Our Asian network also includes regional desks focused on Brunei, Japan and South Asia.

The contents of this Update are owned by Rajah & Tann Singapore LLP and subject to copyright protection under the laws of Singapore and, through international treaties, other countries. No part of this Update may be reproduced, licensed, sold, published, transmitted, modified, adapted, publicly displayed, broadcast (including storage in any medium by electronic means whether or not transiently for any purpose save as permitted herein) without the prior written permission of Rajah & Tann Singapore LLP.

Please note also that whilst the information in this Update is correct to the best of our knowledge and belief at the time of writing, it is only intended to provide a general guide to the subject matter and should not be treated as a substitute for specific professional advice for any particular course of action as such information may not suit your specific business and operational requirements. It is to your advantage to seek legal advice for your specific situation. In this regard, you may call the lawyer you normally deal with in Rajah & Tann Singapore LLP or email Knowledge & Risk Management at eOASIS@rajahtann.com.