

MARINE INSURANCE: COVID-19 AND EXCLUSION CLAUSES

The U.N. has recently declared COVID-19 to be the worst crisis the world has faced since World War II. Indeed, it represents an unprecedented challenge for all sectors both from a social and economic point of view.

Unfortunately, the marine insurance sector is not unaffected and it seems that we are only at the beginning of the disruption. It is not yet certain to what extent, but an increase in the number of claims is expected due to both the direct and indirect effects of the coronavirus outbreak.

HOW IS THE MARINE INSURANCE MARKET RESPONDING?

The economic slowdown caused by the temporary closure of industries that are not considered essential will cause problems for suppliers, forcing them to withdraw from or to renegotiate sales or transport contracts. By selling fewer products than they had planned, it will inevitably lead to a significant decrease in insurance premiums.

There are some insurance companies that, in order to deal with this difficult situation, have come up with innovative solutions such as securing limited market capacity, on a voyage-by-voyage basis, to cover owners and charterers for loss of earnings and additional expenses following quarantine of ships and strategic cargoes, or closure of destination ports by authorities for situations relating to Covid-19.

Equally, in light of the Covid-19 outbreak, The Lloyd's Market Association (LMA) has recently published clauses LM5391 and LM5392.

The aim of the latter is to ensure continuity of coverage for Lloyd's (re)insureds beyond their specified renewal date if the Lloyd's market becomes, unlikely as it may be, inaccessible or if its Emergency Trading Protocol fails in light of the Covid-19 outbreak.

Clause LM5391 on the other hand constitutes a revised policy exclusion clause protecting insurers against any claim caused by or resulting from Coronavirus:

LM5391: Coronavirus Exclusion

Your Insurance Policy does not / This Insurance does not {delete as applicable} cover any claim in any way caused by or resulting from:

- a) Coronavirus disease (COVID-19);*
- b) Severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2);*
- c) any mutation or variation of SARS-CoV-2; d) any fear or threat of a), b) or c) above.*

When analysing the application of exclusion clauses in an insurance policy, it is important to take into account the relatively recent High Court decision *Crowden & Anor v QBE Insurance (Europe) Ltd*¹ where it was held that unlike exemption clauses in ordinary contracts, "The position in respect of insurance contracts is wholly distinguishable in that an exclusion clause in an insurance policy is not designed to exclude, restrict or limit a primary liability on the part of the insurer; instead, it is intended to define the risk which the insurer is prepared to accept by way of the insurance contract. Further, the exclusion clause in an insurance policy does not ordinarily operate to deprive the insured of rights which existed prior to or but for the cover afforded by the Policy".

¹ *Crowden & Anor v QBE Insurance (Europe) Ltd [2017] EWHC 2597 (Comm) (19 October 2017).*

It follows that exclusion clauses in insurance contracts are not to be interpreted *contra proferentem*. In other words, they are not to be interpreted against the party that drafted them, rather the objective is to discover what a reasonable person would have understood them to mean.

We have already seen clause LM5391 included in port and terminal insurance policy renewals. However, it is expected that its inclusion will be widespread.

We are also aware that the insurance sector has already altered the wording of the clause, extending its scope beyond the COVID-19 itself and its mutations:

General exclusion for pandemics

This (re)insurance excludes loss, damage, cost or expense caused by, resulting from, arising out of or related to, either directly or indirectly, or any action taken to hinder, defend against or respond to any Pandemic or fear or threat of a Pandemic, including but not limited to:

- a) Coronavirus Disease (COVID-19);*
- b) Severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2);*
- c) any mutation or variation of SARS-CoV-2;*

This exclusion applies regardless of any other cause or event that in any way contributes concurrently or in any sequence to the loss, damage, cost or expense, and regardless whether or not there is any declaration of an outbreak of a Pandemic by the WHO or any authorized national or international body or legal jurisdiction.

For the purpose of this exclusion, a Pandemic shall be defined as a widespread outbreak of a human infectious disease, i.e. a human-to-human spread of a virus (e.g. influenza, SARS-CoV-2) into at least three countries on two different continents.

It is therefore quite possible that we will find different models of this type of exclusion clause varying according to the insured risk. Because of the range of circumstances they may cover, the

interpretation of the wording in order to establish a causal link between the loss and the excluded risk will be more crucial than ever.

CAUSATION TRIGGERS IN EXCLUSION CLAUSES:

In order to better understand when an COVID-19 exclusion clause may come into play, it is important to analyse the causation triggers most frequently used in such exclusion clauses:

“Loss, damage, cost or expense caused by”:

The term *“caused by”* has been traditionally considered to trigger the ordinary proximate cause rule, which according to *Leyland Shipping*² the proximate cause is not the closest in time to the loss, but is the proximate in efficiency. This was the view in *Coxe v. Employers’ Liability Assurance Corporation Ltd*³, where Scrutton J said that the words *“caused by”* did not give rise to any difficulty as *“They are words which always have been construed as relating to the proximate cause”*.

“Loss, damage, cost or expense resulting from”:

In *Lloyds TSB General Insurance Holdings Ltd & Ors v. Lloyds Bank Group Insurance Company Ltd*⁴, it was held that the term *“resulting from”* implied the proximate cause. However, according to *Arnould*⁵, by reason of the contrast between the words *“resulting from”* and *“caused by”*, it is arguable that a broader test than proximate cause is to be applied.

² *Leyland Shipping Co Ltd v Norwich Union Fire Insurance Ltd* [1918] A.C. 350, 365.

³ *Coxe v. Employers’ Liability Assurance Corporation Ltd* [1916] 2 KB 629.

⁴ *Lloyds TSB General Insurance Holdings Ltd & Ors v. Lloyds Bank Group Insurance Company Ltd: Abbey National plc v. Lee & Ors* [2001] EWCA Civ 1643.

⁵ Arnould’s *Law of Marine Insurance and Average*, 16th edn, 1981, Sweet & Maxwell Ltd (Arnould 16th edn), Vol. 3 at para. 249 p. 154. Analysing the wording of the Institute Strikes Clauses (Cargo).

Under these circumstances, Dunt⁶ suggests that “*resulting from*” may be treated as opening the door to the operation of two concurrent risks. Thus, the exclusion would apply even if the immediate cause of the loss is a risk insured and the somewhat less immediate but nevertheless concurrent cause is a risk excluded.

“Loss, damage, cost or expense arising from / out of”:

In analysing the term, there are disparate opinions. In *Panamanian Oriental Steamship Corporation v. Wright*⁷, it was accepted that “*words such as arising from in an exception clause in a policy have been construed as excluding those losses proximately caused by the events mentioned*”.

However, in *Caudle v. Sharpe*⁸ “*arising out of*”, as used in the phrase “*arising out of one event*”, was held to imply a broader test of causation. Equally, in *Scott v. Copenhagen Re*⁹ a wider interpretation was given to the words “*series of losses arising from one event*”. According to this view, it covers the case where the risk excluded is a cause of the loss even where it is only one of the effective causes or factors contributing to the loss.

“Loss, damage, cost or expense directly or indirectly caused by”:

It appears to be the trigger with the broadest causation link, extending well beyond the proximately cause. However, there must still be a connection between the loss and the risks involved which must not be a mere matter of background or history.¹⁰

⁶ Marine Cargo Insurance, 2nd edn, 2016, Informa Law From Routledge, Lloyd’s Shipping Law Library, at para. 7.37 p. 204.

⁷ *Panamanian Oriental Steamship Corporation v. Wright* [1970] 2 Lloyd’s Rep. 365.

⁸ *Caudle v. Sharpe* [1995] LRLR 433 at p. 439.

⁹ *Scott v. Copenhagen Re* [2003] Lloyd’s Rep. IR 696 at [63].

¹⁰ *Spinney’s v Royal Insurance* [1980] 1 Lloyd’s Rep. 406 at pp. 441–442.



CONCLUSION:

The world economy is facing turbulent times which will have repercussions on the marine insurance market. The impact of COVID-19 will lead to an increase in certain types of claims, such as claims related to delays, errors and omission or personal injury and, a drop in premium rates due to the very possible collapse in the turnover of many policyholders.

Faced with this situation, the insurance market has responded with tailor-made exclusion clauses in order to minimise losses. Assureds and their brokers would be well advised to read such clauses carefully before agreeing to them.