Article

Aggregation of Losses under English, Cayman Islands, and Bermuda law: A COVID-19 reminder for Insurers and Reinsurers

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The longer and further that COVID-19 spreads, the more likely it is that there will be disputes as to whether or not COVID-19 related losses can be aggregated by (re)insureds for the purpose of (re)insurance claims.

Many individual COVID-19 related claims will be too small on their own to reach the attachment point of most excess of loss or catastrophe reinsurance treaties. If aggregated, however, they might well be within the scope of the excess layer or the reinsurance cover.

The aggregation question is not only of interest in the context of Property and Business Interruption Claims. It will also arise in other lines of business underwritten in Bermuda and the Cayman Islands, including, Workers' Compensation, Accident, Health, Travel, Event Cancellation, D&O Liability, Professional Liability, Medical Malpractice Liability, and Employment Liability.

The most common type of aggregation clause is one that groups losses or claims by reference to a single "*event*" or "*occurrence*"; or, in the context of liability insurance, by reference to "*similar*" or "*related*" acts or omissions.

A standard form aggregation clause in a reinsurance contract, for example, might be as follows:

- "*The term "Loss Occurrence" shall mean the sum of all individual losses directly occasioned by any one disaster, accident or loss or series of disasters, accidents or losses arising out of one event which occurs anywhere in the world*"; or
- "*All Claims arising from similar acts or omissions in a series of related matters or transactions will be regarded as one Claim*".

For COVID-19 related losses, which may have been spread across a large geographical area, and over a relatively long period of time, can it be said that they have been caused by "*one disaster, accident, or loss*", or by one "*series of disasters*" arising out of one "*event*"?

In the case of COVID-19 related liabilities, can it be said that they have all arisen from similar acts or omissions in a series of related matters or transactions?

On the one hand, it might be argued that relevant COVID-19 related losses or liabilities have been caused by one continuous disaster (whether that is the virus itself, or Governmental responses to it). On the other hand, it might be argued that COVID-19 related losses or liabilities have been caused by many separate or unrelated events or occurrences.

In resolving these questions, there is some limited guidance to be found in the English law reports[1]: at least in the context of reinsurance contracts governed by English, Bermuda or Cayman Islands law (and even, to some extent, by New York law[2]).

Since most reinsurance disputes are decided or settled in private arbitration, however, the reported case law is still relatively undeveloped (especially at an appellate level).

The resolution of the issue of aggregation, in any given case, is also highly sensitive to the facts, the specific contract wording, and the quality of the evidence and arguments deployed before the relevant Court or arbitration tribunal.

Because the issue of aggregation may stand to benefit either the (re)insured or the (re)insurer in any given case, it has been held that where the same aggregation language applies to both limits and to deductibles in the one policy, aggregation clauses "*are not to be approached with a predisposition towards either a broad or narrow interpretation*": see *AIG Ltd v Woodman* [2017] UKSC 18[3].

With COVID-19 in mind, it may be helpful for Cayman Islands and Bermuda insurers and reinsurers to remind themselves of the facts, and outcomes, of three reported English cases, by way of illustration only.

In *IF P&C Insurance Ltd v Silversea Cruises Ltd (The Silver Cloud)* [2004] Lloyd's Rep IR 217[4] an operator of luxury cruises was insured against loss of income resulting from government warnings regarding terrorism. The cover was subject to a "*per occurrence*" deductible of US$250,000. Following the World Trade Centre attacks, the US government issued a series of warnings to their citizens against travel abroad. The question arose how claims should be aggregated. Tomlinson J noted that it would be "*absurd*" to treat individual government warnings as a separate occurrence, because it would be impossible to identify the causal effect of each warning on bookings. The judge equated "*occurrence*" with "*event*" and said: "*Where there are multiple warnings arising out of a single defining event, at any rate one of the magnitude of 11 September, it seems to me to accord with common sense and what the parties' intention must have been to regard those warnings … as a single occurrence, since they all arise out of the same set of circumstances, both actual and threatened*."[5]

More recently, *Simmonds v Gammell* [2016] EWHC 2515 was a reinsurance dispute arising out of the respiratory illnesses suffered by thousands of people in New York after the World Trade Centre attacks.

The Port of New York Authority was presented with ten thousand workers' compensation claims from firefighters, police officers, clean-up and construction workers, and rescue volunteers for respiratory illnesses caused by the World Trade Centre dust.

They had alleged that the Port of New York Authority had been negligent in failing to provide protective equipment and training, to guard against these respiratory illnesses.

The reinsured was a Lloyd's syndicate and the liability insurer of the Port of New York Authority. The reinsured paid the claims of the Port of New York Authority for the compensation that the Authority had paid to the victims, and to the estates of those who had died from the illness.

The reinsured Lloyd's syndicate claimed in turn against its Reinsurers, with whom the reinsured had an excess of loss reinsurance contract. Loss was defined in the reinsurance contract wording as "*loss, damage, liability or expense or a series thereof arising from one event*."

The reinsured argued that all the respiratory claims arose from one event: the World Trade Centre attacks.

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[1] See cases as *Caudle v Sharp* [1995] LRLR 433, *KAC v KIC* [1996] 1 Lloyd's Rep 664, *Axa v Field* [1996] 1 WLR 1027, *Scott v Copenhagen Reinsurance Co UK Ltd* [2003] Lloyd's Rep 696, IF *P&C Insurance v Silversea Cruises* [2003] EWHC 473, *Aioi Nissan Dowa Insurance v Heraldglen (No.3)* [2013] EWHC 154, *Simmonds v Gammell* [2016] EWHC 2515, and *AIG Ltd v Woodman* [2017] UKSC 18.

[2] *Travelers Casualty & Surety Co. v. Certain Underwriters at Lloyd's of London*, 96 N.Y.2d 583, 760 N.E.2d 319 (2001), is the leading New York case addressing aggregation under a reinsurance contract, in which the New York Court of Appeals took into account the English case of *Axa v Field* [1996] 1 WLR 1027.

[3] Recently cited and applied in an English High Court case involving aggregation issues under a solicitors' professional liability insurance policy: *Bishop of Leeds v Dixon Coles and Gill et al* [2020] EWHC 2809 (Ch), judgment dated 28 October 2020.

[4] Upheld on appeal: *IF P & C Insurance Ltd (Publ) v Silversea Cruises Ltd & Ors* [2004] Lloyd's Rep IR 696.

[5] In the recent test case of *The Financial Conduct Authority (FCA) v Arch Insurance (UK) Ltd & Ors* [2020] EWHC 2448 (Comm), the English High Court has confirmed that the decisions of Tomlinson J and the Court of Appeal in The Silver Cloud "*turned on the factual conclusion … that it was impossible to divorce the effect of the US Government warnings (the relevant insured peril) from the effect of the 9/11 attacks (which on this hypothesis were not insured). … The case does not lay down any particular principle in relation to causation*".

The Reinsurers, on the other hand, argued that the World Trade Centre attacks were too remote to be the single event from which the respiratory illnesses arose. The Reinsurers argued that the illnesses arose from the Authority's repeated and continuing failures to provide protective equipment and training, and that, as a result, there were numerous "events".

The arbitrators, and the English High Court on appeal, found in favour of the reinsured, concluding that all the losses, claims, liability and expense, did arise from one event, being the World Trade Centre attacks. In deciding that there had been one event, the Court was guided by the familiar "four unities" test re-stated by Rix LJ in *Scott v Copenhagen* [2003] Lloyds Law Reports 696:

- Was there something that could be called an "event"?
- Did it occur before the losses sought to be aggregated?
- Was there a causative link between the event and the losses?
- Was there sufficient proximity (or the absence of remoteness) between the event and the losses?

In contrast to the two cases discussed above, however, the English High Court reached a different result on the facts in *Aioi Nissay Dowa Insurance Company Ltd v Heraldglen Ltd & Ors* [2013] EWHC 154 (Comm). The key question for the arbitration tribunal and the Court in this case was whether the losses sustained by the Defendants on ten inwards reinsurance contracts arising out of the World Trade Centre attack were caused by one or more occurrences or series of occurrences "*arising out of one event*" for the purpose of applying policy limits and deductibles in four retrocession excess of loss reinsurances written in favour of the Defendants by the Claimant. In contrast to the aggregation findings in the two cases cited above, the arbitration tribunal and the Court concluded that "*the insured losses caused by the attacks on the World Trade Centre arose out of two events and not one*".

Depending on the terms of any particular (re)insurance contract, the question for Insurers and Reinsurers, in a nutshell, will be this: are losses or liabilities caused by the COVID-19 pandemic caused by one event, one series of events, or multiple, separate events?

Only time will tell.

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