LOYENS LOEFF

LEGAL & TAX

COVID-19 and insurance in our home markets; **our high level pointers**

June 2020

LOYENS LOEFF

COVID-19 and insurance in our home markets; **our high level pointers**

I COVID-19 and insurances in our home markets

1. The COVID-19 pandemic is having a significant and immediate effect on many businesses in different industries. Businesses may be facing disruptions, delays and financial difficulties. This is an entirely new and unprecedented situation which raises various questions in relation to possible insurance coverage.
2. This document is drafted from the perspective of all our home markets: the Netherlands, Belgium, Luxembourg and Switzerland.
3. Currently in all our home markets, first steps are being taken to ease the lockdowns, however damages have been suffered and the 'new normal' is for most companies far from normal.
4. We will address the insurances that first come to mind in relation to COVID-19 and the relevant obligations under these insurances. Such obligations can even exist in case there is no coverage for corona-related damages (such as changes in the risk of the business due to other commercial activities or vacancy of the business premises which have to be notified to the insurer). More specifically, our high-level pointers will address the following topics:
   - Coverage clauses under the most common insurances;
   - Obligations in case of a possible covered loss; and
   - Changes in the risk of the business or vacancy of the business premises.

II Coverage under insurances

5. Whether damages in relation to COVID-19 are covered depends on the terms and conditions of the specific insurance that was taken out. We will address several insurances that may be triggered by the COVID-19-crisis, and their typical coverage clauses.

Business interruption insurance

6. For many companies the business is interrupted in one way or another due to COVID-19. Companies may have taken out a business interruption insurance, either as part of their property/fire insurance, or via a separate policy.
7. Most commonly, the business interruption insurance covers a loss of income[1] during the policy period as a result of (direct) loss of or damage to the (physical) risk objects (such as an office building, factory or machinery). Further, most policies require the loss of or damage to the physical object having been caused by certain perils/ events that are specifically mentioned in the policy, *e.g.* fire, water, vandalism, theft. However in most cases there is not a named peril triggered by COVID-19.

1 Typically the reduction in gross profit (after deduction of any savings).

8. Some business interruption policies do explicitly cover loss of income due to an ‘epidemic’, and/or a ‘pandemic’. Also if that is the case, there may be discussions on the interpretation of terminology used in the policy. For example, if the policy covers loss caused by an ‘epidemic’, the insurer may argue that COVID-19 is a ‘pandemic’ and therefore not covered. This is for example the current general position of the Swiss Insurance Association. However, such interpretation is disputed and there does not seem to be any case law on the subject.
9. Some policies provide all risk cover or coverage for business interruption due to any reasons beyond the control of the insured (being the covered peril/event).
10. Also, some policies exclude the risk of influenza, with insurers arguing that the loss is therefore excluded. However, COVID-19 is generally not considered as influenza. Further, it can well be argued that an exclusion of the risk ‘contamination’ does not lead to the lapse of coverage as most of these exclusions are only meant to exclude classic environmental contaminations.
11. Insurers may further argue that a business interruption policy requires physical damage and that COVID-19 does not lead to such physical damage to the risk object. Insureds may claim that it does attach to the property actively and may survive on surfaces which can only be cleaned by taking costly disinfection measures, and that business premises should remain closed in order to mitigate the risk of the premises becoming contaminated with COVID-19.
12. Finally, there may be an extension for loss resulting from an impossibility to access the building or for an interruption due to measures taken by the military or civil authorities, irrespective of any physical damage to the covered property. As a result, losses resulting from a decision of the government to force closure of the premises may well be covered.
13. For the above reasons, it is worthwhile to thoroughly review the specific language of the relevant insurance policy in order to avoid drawing premature conclusions.
14. In both the US and the UK, legal proceedings have been announced by insureds claiming coverage under their business interruption insurance due to COVID-19. In the UK the Financial Conduct Authority has launched a test case in which it asks the court to consider 17 policy wordings sold by 16 insurers. In France, recently an insurance claim of a restaurant under its business liability insurance was awarded in summary proceedings due to the enforced closure of the establishment. The insurer has announced an appeal. Claims in more countries are to be expected.

Business liability insurance

15. Business liability insurances generally cover liability of the insured for loss or damage incurred by any third party.[2] Loss or damages is mostly defined as entailing property damage and bodily injury.
16. For example, a company may face a claim of a customer or other third party alleging that he/she contracted COVID-19 due to the company’s behavior. The main question will be whether the company is liable. However, if a claim is pursued, also if it is ultimately determined that the company is not liable, defense costs incurred by the company are likely to be insured.
17. In case a company faces a claim for not being able to comply with its contractual obligations, for example timely delivery of goods, such claim will in most cases not be covered, as most business liability insurances do not cover pure financial loss (and therefore the related defense costs are also not covered). This could be different in case additional coverage for pure financial loss was taken out.

Event or cancellation insurance

18. Many companies in the business of organizing conferences, sport competitions, concerts or other events have to cancel these events as a precaution or due to governmental orders. This will lead to damages, constituting amongst others: (i) costs that were already made for organizing the event, (ii) additional costs in relation to cancelling the event and (iii) loss of profits.
19. There are different kinds of event insurances covering different risks/damages. For example, some event insurances do not automatically include cancellation coverage. Such coverage has to be taken out separately.

2 Of course this is again subject to the terms and conditions of the policy.

20. Further, the insurances differ regarding the reasons for cancellation which are covered. Sometimes, damages as a result of pandemics are explicitly excluded. On the other hand, some companies have a specific epidemic/pandemic insurance. In addition, some policies may have a condition that there is only coverage in case the government has ordered cancellation of the event, for which reason damages as a result of cancelling the event for precaution may not be covered.
21. It will therefore depend on the specific event or cancellation insurance that was taken out by the company whether its damages due to cancellation are covered.

Goods in transit insurance

22. Due to COVID-19, the transport of goods may be delayed or goods may be refused at arrival. Most insurances require physical damage to the goods transported. Such physical damage will in most situations not exist.[3] However, goods in transit insurances may cover damages due to delay without physical damage, as long as the damage was uncertain at the moment of transportation.

Trade credit insurance

23. COVID-19 already has a massive economic impact, which economic impact is likely to become even bigger. It is very likely that many customers and clients will not, or not timely, pay their bills. Most trade credit insurance cover non-payment or delay in payment by customers and clients, irrespective of the reason for such non-payment.
24. Insurers seem to be reluctant in issuing new trade credit insurances and seem to be lowering the insured limits.
25. The Dutch government is preparing a credit guarantee package of 12 billion euros to ensure the trade credit insurances are still provided for by insurers.
26. In Belgium, the Government and Assuralia[4] agreed that the Belgian State will reinsure a part of the risks insured by insurers based in Belgium; the Belgian State will thus cover a part of the future claims. The insurers on the other hand agreed to keep intact as far as possible the credit limits applicable before COVID-19 (i.e. the limits as applied on 1 January 2020) and use the same rating process with the same risk parameters. This agreement has to be approved by the European Commission.
27. In Switzerland such specific package is not available, however the risk of non-payment of trade receivables from Swiss debtors is mitigated by the liquidity program implemented by the Swiss Government. With support from the Swiss Confederation, recognized guarantee organizations can provide guarantees for bank credits. This option is being extended and facilitated as a measure to mitigate the consequences of COVID-19. When applying for such a federal guarantee, certain minimum requirements must be met.
28. In Luxembourg exporters can enter into specific credit insurance schemes for their investments, as set up by the Office du Ducroire (ODL, a public institution designed to support Luxembourg exporters). This institution has adopted specific measures in order to strengthen its support to Luxembourg companies, such as (i) the increase of the maximum amount of the guarantee under the insurance policy, (ii) the flexibilisation of the conditions to “bank loans insurance” designed for Luxembourg exporters, and, (iii), reducing the period between the claim and payment by the insurer in order for companies to be compensated more quickly and reducing the reimbursement delay.

Sick leave insurance

29. In case of sickness of an employee, in all home markets, the employer has to continue paying the salary for a certain period of time (depending on the labour law in the specific home market). This obligation is commonly covered by sick leave insurances (if the employee remains sick after the expiration of a limited amount of ‘waiting days’). Incapacity to work resulting from an epidemic or pandemic is generally not excluded from coverage under sick leave insurances.

---

3 This could be different if there is a reason to believe that the transported goods have been contaminated with COVID-19.

4 This is the Belgian federation that represents almost all insurance companies active on the Belgian market.

30. However, in general, an employee not being able to work as a precaution for infection is not covered. We have not seen a discussion yet about whether loss as a result of an employee not being able to work due to the employee staying at home precautionary is covered, which could well be argued if such precautionary measures could prevent other employees from becoming ill (which would lead to the insurer having to provide coverage for their sick leave). So far, the insurers have taken the view that losses due to an employee staying at home precautionary are not covered.

III Obligations in case of possible (covered) event

31. When an insured is aware or ought to be aware of a possible covered loss, the insured has to notify the insurer as soon as possible, and in any event within the terms mentioned in the insurance agreement. The insured has to provide all information necessary in order for the insurer to assess coverage.
32. In case an insured breaches such obligation, the insurer may reduce its payment under the insurance with the damage it suffered due to such breach. In some cases, coverage fully lapses in the event of a breach of an obligation by the insured, for example in case of a fraudulent breach.
33. It is therefore important that, in case of a possible covered loss, the insurer is notified as soon as possible. In case an insurance broker is involved, the notification can in most cases be done through the broker. Otherwise, the insurer has to be notified directly.
34. Further, the insured is obliged to take all measures that may reasonably be required to prevent or limit the damages resulting from a covered loss. The insurer may reduce its payment under the insurance with the damage suffered by it in case an insured breached such obligation.
35. On the other hand, the insurer has to cover costs arising from (i) the measures requested by the insurer to prevent or limit the consequences of the covered risk, (ii) the urgent and reasonable measures taken by the insured on its own initiative to prevent or limit the consequences of a covered loss in the event of imminent danger, and, (iii) as soon as the loss occurs, to prevent or limit its consequences. These measures must have been taken with reasonable care. The insurer has to cover these costs even if the measures have been unsuccessful and even if they exceed the insured amount. The insured therefore needs the list all costs and expenses incurred in relation to a possible covered event.
36. After the risk has materialized, an insured must in principle refrain from behavior which could harm the rights of the insurer, such as accepting liability, without prior consent of the insurer.

IV Change in risks of the business and vacancy of the business premises

37. Some companies may engage in other activities due to COVID-19, such as using the premises for other business activities; for example making disinfection materials instead of the products they normally produce. Other companies may extend their activities; such as restaurants starting a delivery service. At other premises there may not be any people at all due to COVID-19, which may cause an extra risk for damages under certain policies.
38. Almost all insurances only provide coverage for the insured acting in its ‘insured capacity’, being the capacity in which the insured normally acts (such as: exploiting a restaurant).
39. In addition, in the Netherlands and Switzerland, most policies also require the insured to notify the insurer of a change in the covered risk (also if this does not lead to a different insured capacity). The extension of, or a switch to other, commercial activities, employees working from home or vacating business premises because no activities can be performed there, can, depending on the specific circumstances, be considered a change in the insured capacity and/or a change in the risk.
40. The insured has to inform the insurer (in most cases through the broker) of these changes within a reasonable period, which period may be specified in the policy. Not notifying the insurer may lead to a lapse of cover. Most policies provide the insurer with the right to adjust the premium or the terms of the policy, or cancellation thereof. The change of risk due to vacancy of a building can in most cases be resolved by taking extra precautionary measures, like extra fire alarms. In any case, it is of importance to start a dialogue with the broker or insurer in case of a change of business activities.

41. In Belgium, except for life, health and credit insurance policies, the insured has a legal obligation to inform the insurer of a significant and sustainable increased chance of the materialization of the covered loss due to new circumstances since the conclusion of the insurance agreement. The increase of the risk must be communicated as soon as possible. A violation of this obligation may result in a reduced coverage of the insurer, or, in the event of fraud, no coverage at all.
42. In Luxembourg, the insured as well has a legal obligation to notify the insurer in the event where the risk covered under the insurance policy increases or changes in any way. In the event where a claim occurs and the insured has not notified the insurer about this change of risk, the insurer can reduce the amount of the insurance payment. These rules are only valid for non-life insurance policies and are usually also stated in the general terms and conditions of the policy.
43. In the home markets there are different views announced by the insurers as to what has to be considered a change in risk.
44. In Belgium, Assuralia has announced for the civil liability insurance that damage caused during deliveries by restaurants falls under the scope of restaurants' insurances, for which there is no need for a notification of a change in risk by restaurants now engaging in delivery services.
45. The Dutch Association of Insurers[5] on the other hand has announced that take away is automatically insured under restaurants' insurances, whereas, in contrast thereto, deliveries are considered to be an increase of the risk for which insurers may not automatically provide coverage.
46. It is therefore good to notify the insurer of all potential changes in risk, except for the ones explicitly accepted by the insurers in the relevant home market.[6]
47. For some companies there will not be an increase of the insured risk, but rather a decrease due to COVID-19. For example in case goods were insured that were not transported after all.
48. In the Netherlands an insured has the right of a premium refund in case the insurer was, not, or partly not, at risk.
49. In Belgium, some insurance policies – *e.g.* workers' accident insurance and civil liability – automatically take into account the reduction of the risks due to the reduction or shut down of activities of the insured. Further, except for life insurance and health insurance policies, in Belgium it is always possible for an insured to ask for a reduction of the premium in the event of a *significant* and *sustainable* decreased chance of the materialization of the covered loss.
50. In Luxembourg, the insured has a legal right to notify the insurer in the event where the risk decreases or disappears. In such a case, the insurer must reduce the amount of the premium proportionally to the diminution of the risk. Where both parties cannot agree on the new amount of the premium, the insured has a right to terminate the contract. These rules are only valid for non-life insurance policies and are usually also stated in the general terms and conditions of the policy.

---

5 This is the Dutch federation that represents almost all insurance companies active on the Dutch market.

6 In Belgium, Assuralia also communicated that for healthcare workers there is an extension under their professional liability insurance for acts posed outside their normal competences or specialty or teleconsultations. Further, regarding the extension of the risk, in Belgium construction sites insured under a CAR-insurance will enjoy an extension of the construction-assembly-test period if this period ends between 15 March 2020 and 31 May 2020 until the provisional acceptance/commissioning of the project or 30 June 2020. In the other home markets such changes or extensions need to be discussed with the insurers.

Contacts

The Netherlands

Merel van Asch
Attorney at law

T +31 10 224 61 60
E merel.van.asch@loyensloeff.com

Rens Markus
Attorney at law

T +31 10 224 64 50
E rens.markus@loyensloeff.com

Luxembourg

Charles Cahoua
Attorney at law

T +352 466 230 319
E charles.cahoua@loyensloeff.com

Michael Schweiger
Attorney at law

T +352 466 230 520
E michael.schweiger@loyensloeff.com

Belgium

Wannes Buelens
Attorney at law

T +32 2 773 23 72
E wannes.buelens@loyensloeff.com

Switzerland

Gilles Pitschen
Attorney at law

T +41 43 434 67 44
E gilles.pitschen@loyensloeff.com