

Insights

IS COVID-19 A CATASTROPHE?

Feb 25, 2022

The Federal Court of Australia on 21 February 2022 handed down judgments in the appeals of a number of test cases in which one of the issues in contention was whether the COVID-19 pandemic in Australia was a “catastrophe” such that insureds could recover under an indemnity for loss either (1) “*resulting from or caused by any lawfully constituted authority in connection with or for the purpose of retarding any conflagration or other catastrophe*” or (2) “*in consequence of... the action of a civil authority during a conflagration or other catastrophe for the purpose of retarding same*”. A copy of the first test case judgment can be found [here](#) and the second test case judgment [here](#).

The Insureds in each case argued that the authorities’ response to the outbreak of COVID-19 in Australia was for the purpose of retarding the catastrophe that was the COVID-19 pandemic.

These were insurance cases but could they impact interpretation of the word catastrophe in reinsurance treaties?

Although many reinsurance contracts reinsure in respect of losses arising from an “event”, some property catastrophe treaties set their limits and retentions by reference to the sum of losses arising from or caused by one “catastrophe”. As a result, cedants reinsured by such treaties are entitled to seek to aggregate all of their losses that arise from one “catastrophe”. In many cases this will have the same practical outcome as an “event” wording, for example a hurricane is a catastrophe and an event - all covered losses resulting from the hurricane would be capable of aggregation under both an event or a catastrophe wording. However, in the context of business interruption or contingency losses arising from COVID-19, can such losses be said to be caused by a “catastrophe” by reference to which cedants can aggregate their COVID-19 losses? At the very start of the pandemic we explored the difficulties of calling COVID-19 or the pandemic an “event” [here](#).

There is no English law authority on the meaning of a “catastrophe” and the question has been troubling reinsurers and cedants alike, and in some instances, has already led to the commencement of arbitration.

The insurers in both sets of test cases before the Australian Federal Court had sought to cross-appeal first instance findings that (in the first test case) “*while the incidence of COVID-19 in Australia may not have been as physically great as it was globally, it nonetheless reached the level*

of a catastrophe, if only as a consequence of the way in which the Federal, State and Territory authorities approached and responded to it" and (in the second test case) "on the evidence, the catastrophe of the COVID-19 pandemic started in Australia by no later than 20 March 2020 when Australia closed its borders to all non-citizens and residents". Ultimately, the Federal Court decided the case on other grounds and did not consider it necessary to determine either cross-appeal. However, the Federal Court expressed the following views:

1. In the first test case, the Federal Court found that the first instance judge had made no errors in determining that there was an "***incipient domestic catastrophe***" at the relevant time on account of the incidence of COVID-19 in Australia. By an incipient catastrophe, the Court meant that "*a catastrophe may exist by reason of the nature of the response to something that was not otherwise a catastrophe*"; and
2. In the second test case, the Federal Court explained:

"A number of parties submitted that it was not necessary that in order for an event to be characterised as a catastrophe it must involve an element of suddenness. That submission sits quite uncomfortably with the... dictionary definitions and those matters which might ordinarily be regarded as catastrophes: volcanic eruption, substantial explosion, earthquake, conflagration, tidal wave, a major deadly gas leak from a factory, cyclone, or hurricane. These examples support the necessity for a catastrophe to be sudden or, at the very least, for it to have a commencement which is relatively certain in time and tend to eschew the inclusion of a state of affairs which emerges relatively slowly or progressively over time.

Given the foregoing, the occurrence of a widespread outbreak of a disease, even if it amounts to a pandemic, does not necessarily fall within the concept of a "catastrophe" for the purposes of cl 9.1.2.5...

... It follows that whether the expression "other catastrophe" is construed only in the context of cl 9.1.2.5 or, as would be appropriate, in the context of the whole of the policy, it did not extend to cover the consequences of a disease pandemic. The expression "catastrophe" requires the sudden onset of a physical event of substantial magnitude which results in widespread destruction or loss of life and necessitates physical action to retard it."

Although these cases are not binding on English courts or arbitral tribunals, they may give reinsurers and cedants cause to reconsider whether a "catastrophe" in the reinsurance context could be fairly construed as a single global pandemic (and therefore allowing cedants with "catastrophe" wordings to aggregate their global COVID-19 losses), or whether the word cannot be ascribed such a broad meaning. While the first test case decision gives *some* basis for argument that each jurisdiction experiencing an outbreak of COVID-19 faced its own catastrophe in respect of which there were differing responses causing different types and degrees of loss, the second test case

raises some doubt as to whether the pandemic can be considered a “catastrophe” at all absent the sudden onset of a physical event.

Both cases ultimately highlight the importance of considering the word “catastrophe” in the context of the policy as a whole. These cases are therefore unlikely to be the last times the word “catastrophe” is debated before a court or tribunal in the context of COVID-19.

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