Neutral Citation Number: [2024] EWHC 253 (Comm) Rev 2

Case Nos: CL-2023-000132 & CL-2023-000159 & CL-2023-000494

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (KBD)

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 09/02/2024

Before :
MR JUSTICE FOXTON
- -

Case No: CL-2023-000494

Between :

UNIPOLSAI ASSICURAZIONI SPA (substituted as Claimant for UNIPOLRE DESIGNATED ACTIVITY COMPANY, IRELAND)	**Claimant**
– and –	
COVÉA INSURANCE PLC	**Defendant**

- -
- -

Aidan Christie KC and **Jocelin Gale** (instructed by **DWF Law LLP**) for **UnipoleRe**
Alistair Schaff KC and **Simon Kerr** (instructed by **Slaughter and May**) for **Covéa**

AND

Case No: CL-2023-000132 and CL-2023-000159

Between :

MARKEL INTERNATIONAL INSURANCE COMPANY LIMITED	**Claimant**
– and –	
GENERAL REINSURANCE AG	**Defendant**

- -
- -

Rebecca Sabben-Clare KC (instructed by **CMS Cameron McKenna Nabarro Olswang LLP**) for **Markel**
Dominic Kendrick KC and **Rebecca Jacobs** (instructed by **DLA Piper UK LLP**) for **General Reinsurance**

Hearing dates: 11 and 12 January 2024
Draft Judgment Circulated: 30 January 2024
- -

Approved Judgment

This judgment was handed down remotely at 10.00am on 09 February 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

.....

THE HONOURABLE MR JUSTICE FOXTON

The Honourable Mr Justice Foxton:

A INTRODUCTION

A1 The appeals

1. This judgment is given in two appeals brought under s.69 of the Arbitration Act 1996:

    i. The appeal by the Claimant formerly UnipolRe Designated Activity Company (**"UnipolRe"**) against a Partial Final Arbitration Award of 24 July 2023 (**"the Covéa Award"**) determining issues of principle regarding the treatment of claims by Covéa under a Property Catastrophe Excess of Loss Reinsurance ("**the Covéa Reinsurance**") for indemnity against business interruption losses caused by the Covid-19 pandemic.

    ii. The appeal by Markel International Insurance Company Limited (**"Markel"**) and cross-appeal by General Reinsurance AG (**"General Reinsurance"**) against a Partial Final Arbitration Award of 27 January 2023 (**"the Markel Award"**) determining issues of principle regarding the treatment of claims by Markel under a Property Catastrophe Excess of Loss Reinsurance ("**the Markel Reinsurance**") for indemnity against business interruption losses caused by the Covid-19 pandemic.

2. In very broad terms, the appeals raise the following issues:

    i. First, whether the Covid-19 losses for which Covéa and Markel sought indemnity under, respectively, the Covéa and Markel Reinsurances, arose out of and were directly occasioned by one catastrophe on the proper construction of the Reinsurances. Both the Covéa and Markel Awards found that they did.

    ii. Second, whether the effect of the respective "Hours Clauses" in the Covéa and Markel Reinsurances, which confined the right to indemnity to "individual losses" within a set period, had the effect that the reinsurances only responded to payments in respect of the closure of the insured's premises during the stipulated period. The Covéa Award found that this was not the effect of the "Hours Clause" in the Covéa Reinsurance. The Markel Award found that this was the effect of the "Hours Clause" in the Markel Reinsurance.

3. The losing parties appealed against those findings. Markel and General Reinsurance consented to both parties having permission to appeal on the point on which they had lost (as recorded in a Consent Order dated 21 March 2023). I granted UnipolRe permission to appeal on 25 October 2023 and, after holding a directions hearing in both cases, I ordered that the hearings should be heard before the same judge on consecutive days, with the parties to both appeals having access to and the ability to make submissions on the materials deployed in the other appeal.

4. These remain separate appeals, and the conduct of the arbitral references and (to a lesser extent) the arguments on the appeal differed to some extent. However, the substantial

overlap between the issues and the matters relevant to their determination has led me to conclude that I should produce a single judgment resolving both appeals, recognising as appropriate within that judgment the differences between them. While the Markel Award came first in time, the appeal against the Covéa Award involves a single applicant, against an award in which the issues are canvassed at somewhat greater length. For that reason, I have reversed the chronological order of the appeals in this judgment.

A2 Section 69 of the Arbitration Act 1996

5. The following principles were common ground in both appeals as to the proper approach of the court to a s.69 application (and, to the extent that they were not, I find that these are the applicable principles):

   i. As s.69(1) makes clear, the issue of law must be one "arising out of an award made in the proceedings".

   ii. Where a tribunal's experience assists it in determining a question of law, "the court will accord some deference to the tribunal's decision" (*Silverburn Shipping (IOM) Ltd v Ark Shipping Co LLC (The Arctic)* [2019] EWHC 376 (Comm), [20]).

   iii. Where the arbitral tribunal's decision is one of mixed fact and law, the court cannot interfere unless it is shown that the arbitral tribunal either erred in law or reached a conclusion on the facts which no reasonable person, applying the relevant law, could have reached. It is not enough that the court would or might not itself have reached the same conclusion (*Sylvia Shipping Co Ltd v Progress Bulk Carriers Ltd (The Sylvia)* [2010] EWHC 542 (Comm), [54]). In short, it must be shown that the conclusion reached by the arbitral tribunal is "necessarily inconsistent" with the correct application of the relevant legal principle.

   iv. Provided the substance of the point of law remains the same as that for which permission to appeal has been granted (or consented to), the court will permit minor refinements to the formulation of the issue at the hearing which involve no prejudice to the respondent (*Cottonex Anstalt v Patriot Spinning Mills Ltd* [2014] EWHC 236 (Comm), [20]).

   v. The only admissible documents on the appeal are documents which are referred to in the award and which the court needs to read to determine the issue of law arising out of the award: ibid, [27].

   vi. A respondent to an appeal under s.69 of the 1996 Act can seek to uphold the award on grounds not expressed in the award only where those grounds are based on a point or points of law (*CTI Group Inc v Transclear SA (The Mary Nour)* (No 2) [2008] 1 Lloyd's Rep 250, [13]).

A3 The background to the Covéa Award

6. The following summary is taken from the Covéa Award, and paragraph references are to the award.

7. Covéa provided cover to policyholders engaged in the business of running nurseries and childcare facilities, including under a standard NurseryCare Policy wording ([5]). The NurseryCare Policy "covered the wide miscellany of risks that are commonly found in commercial cover written by a property department"[28], including cover for "business interruption caused by a peril other than physical damage to insured property" [35]), referred to by the Covéa tribunal as "non-property damage business interruption".

8. So far as the development of the Covid-19 pandemic is concerned, the tribunal was provided with "a detailed agreed chronology" ([17]) which revealed "[a] growing sense of crisis during the second half of February 2020 leading to an explosion of cases within the UK during the first half of March 2020" ([18]).

9. "By 16 March, the date of the Prime Minister's broadcast and his advice to avoid non-essential social contact and travel, to work from home and to avoid all social venues, the number of cases along with the predicted rate of exponential increase in infections were threatening to overwhelm the NHS and to lead to many thousands of deaths" ([18]).

10. "By March 2020, the Covid-19 pandemic had swiftly developed into a disaster engulfing the whole of the UK" ([18]).

11. It was not until 2 March 2020 that the UK recorded its first death of an individual who had tested positive for Covid-19 and not until 5 March 2020 that Covid-19 was made a "notifiable disease" ([20]).

12. On 18 March 2020, SAGE concluded that the evidence "now supports implementing school closures at a national level as soon as practicable to prevent NHS intensive care capacity being exceeded" ([21]).

13. The UK Government's instruction to close all schools, colleges and early years facilities in England with effect from Friday 20 March was issued on 18 March 2020 ([21]) and endorsed in law by the Health Protection (Coronavirus, Restrictions) (England) Regulations on 26 March 2020 ([21]). I shall refer to the order of 18 March 2020 as **the 18 March Closure Order.**

14. On 16 April 2020, those restrictions were renewed for a further three weeks ([22]).

15. On 1 June 2020, the phased reopening of schools, colleges and nurseries began in England ([22]).

16. "On 23 June 2020, the Prime Minister announced the lifting of all restrictions with effect from 4 July (effectively ending the first lockdown)" ([22]).

17. By 8 June 2023, Covéa's paid losses under nursery care policies amounted to £69.3m plus £3.2m in loss adjuster's fees, and Covéa sought indemnity for those losses under the Covéa Reinsurance ([5]).

18. UnipolRe raised two objections of principle to payment ([6]) which I have outlined at [2] above.

19. Those issues of principle were determined by an arbitral tribunal chaired by Michael Crane KC and comprising lawyers with great experience of reinsurance law and the reinsurance industry ([4]).

20. In addition to the detailed agreed chronology, both parties called expert evidence on market practice and understanding relevant to the questions of construction before the tribunal ([23]).

21. Covéa's principal case was that "the outbreak of cases of Covid-19 in the UK in the period immediately preceding the closure of schools and nurseries on 20 March 2020 was a catastrophe", alternatively that the various government orders or decisions constituted one catastrophe ([39] and [8]) (that case having been introduced by an amendment following the decision of Mr Justice Butcher as to what constituted an "occurrence" in the direct business interruption insurance policies he considered in *Stonegate Pub Company Limited v MS Amlin* [2022] EWHC 2548 (Comm), [70]).

22. The tribunal found that "if the idea of a 'sudden disaster' is inherent in the meaning of catastrophe" then "the exponential increase in Covid-19 infections in the UK during the first three weeks of March 2020 did amount to a disaster of sudden onset such as to qualify as a catastrophe" ([49]), and that "the outbreak of Covid-19 disease in the UK during the few weeks preceding the schools and nurseries closure instruction ... amounted to a large-scale national disaster of sudden onset that may accurately be described as a catastrophe" ([54]).

23. The Covéa tribunal held that the various instructions to close schools and nurseries issued by the UK and national governments "cannot be regarded as one or more catastrophes, at least not if they are to be viewed separately from the underlying pandemic to which they were a response" ([74]).

24. Construing the "Hours Clause", the Covéa tribunal held that the reference to an "individual loss" in that clause meant "a loss sustained by an original insured which occurs as and when a covered peril strikes or affects insured premises or property" ([95]).

A4 The background to the Markel Award

25. The following summary is taken from the Markel Award, and paragraph references are to that award.

26. Markel wrote a large book of direct insurance of nurseries and childcare facilities which included business interruption cover ([2]), including direct insurance written on the

"Social Welfare Combined" wording and on the "Towergate" wording ([11]). The losses covered by the Social Welfare Combined wording included "closure or restriction in the use of the premises due to the order or advice of the competent local authority as a result of … an occurrence of an infectious disease" ([12]). The losses covered by the Towergate wording included extensions for business interruption caused by "access to or use of the Premises being prevented or hindered by (a) physical loss or damage to property in the Vicinity of the Premises …. [and] any action of Government or Police or Local Authority due to an emergency which could endanger life or neighbouring property" and "any occurrence of a Notifiable Disease … at Your Premises … which causes restrictions on the use of Your Premises on the order or advice of the competent local authority" ([13]).

27. There was no agreed statement of facts and no expert evidence in the Markel arbitration. The Markel tribunal recorded that on 18 March 2020, the UK Government had announced a decision that "schools, nurseries and such-like childcare facilities would close from the end of Friday 20 March 2020" ([1]), and that following the 18 March 2020 Closure Order, Markel had suffered "a tsunami of claims notifications of business interruption losses" ([11]).

28. Markel's paid losses by the time of its statement of claim were £23,620,466, and Markel sought indemnity for those losses under the Markel Reinsurance ([14]). (I am told that by the start of the hearing, the figure was in excess of £31m.) General Reinsurance wrote a 35% line on the reinsurance.

29. General Reinsurance put forward two reasons why the Markel Reinsurance did not respond to those losses ([3]) which I have outlined at [2] above.

30. Those issues were determined by an arbitral tribunal chaired by Professor Sir Bernard Rix and comprising lawyers with great experience of reinsurance law and the reinsurance industry ([6]-[10]).

31. Markel originally contended that "all of the losses arise from the occurrence of cases of Covid-19 within the United Kingdom, or from any one such case" ([22]). However, following Mr Justice Butcher's decision in *Stonegate*, it amended its case to contend that "all of the losses arise from the UK Government's decision on 18 March 2020 that all nurseries and early learning centres must close with effect from the end of 20 March 2020 … That decision, and therefore all of the losses, arose from the occurrence of cases of Covid-19 within the United Kingdom by 18 March 2020, or from any one such case" ([23]).

32. On 20 October 2022, Markel's solicitors confirmed that:

> "in the light of the *Stonegate* judgment, the Claimant will not advance arguments at the forthcoming hearing in support of an analysis that the relevant 'Event' was any given case of COVID-19 or cases of COVID-19 generally" ([26]).

33. The Markel tribunal concluded on balance "that the order relied on by Markel may be described as a catastrophe, both in general and for the purposes of this treaty" ([40],

[55]), noting "the order cannot be viewed separately from the pandemic which demanded (however controversially) its response" ([55]).

34. On the second issue, Markel submitted that the Hours Clause was "concerned with the duration of the catastrophe and causation within the specified hours, but not with the duration of losses" ([33]), and that the words in the Hours Clause "the duration and extent of any 'Event' referred to the duration and extent of the catastrophe, for instance a hurricane, which causes loss", such that the closing words of the clause ("no individual loss from whatever insured peril, which occur outside these periods or areas, shall be included in that 'Event'") "should be read as referring to a 'peril which occurs outside those periods', not to a loss which does so" ([34]).

35. Construing the "Hours Clause", the Markel tribunal said that it was "natural to think that business interruption losses occur day by day" ([58]), albeit the issue was thrown into "greater uncertainty" by General Reinsurance's acceptance that business interruption resulting from physical damage "is not only caused but also occurs and is sustained on Day 1" ([58]). The tribunal held that the closing words of the clause were "not … dealing with causation but with the occurrence of a particular loss" and that the "subject-matter of an 'Event', its duration and extent, and its occurrence, are all referenced to losses, not perils" ([62]).

B THE APPLICABLE LEGAL PRINCIPLES

B1 The approach to construing the Reinsurances

B1(1) General principles of construction

36. I have set out the pertinent clauses from the two Reinsurances in Appendix 1. The following principles as to how the construction of those clauses should be approached were common ground:

    i. "The core principle [of construction] is that an insurance policy, like any other contract, must be interpreted objectively by asking what a reasonable person, with all the background knowledge which would reasonably have been available to the parties when they entered into the contract, would have understood the language of the contract to mean" (*The FCA Test Case* [2021] UKSC 1, [47]).

    ii. "Evidence about what the parties subjectively intended or understood the contract to mean is not relevant to the court's task" (ibid).

    iii. I was also referred to the summary of the general principles of construction in the judgment of Flaux LJ and Mr Justice Butcher in the Divisional Court decision in *The FCA Test Case* [2020] EWHC 2448 (Comm), [62]-[70].

37. In the Markel appeal, Ms Sabben-Clare KC placed particular emphasis on Lord Hodge's statement in *Wood v Capita Insurance Services Ltd* [2017] UKSC 24, [12], which emphasised the need for an "iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences."

The construction of aggregation clauses

38. I was also referred to various cases discussing the approach to the construction of aggregation clauses in insurance and reinsurance contracts, including the following:

    i. In *Mann and Holt v Lexington Insurance Co* [2001] 1 Lloyd's Rep 1, Waller LJ stated that the aggregating concept in that case ("occurrence") had to "take its meaning finally from the surrounding terms of the policy including the object being sought to be achieved by the retrocession".

    ii. Aggregation clauses are to be construed "in a balanced fashion without a predisposition towards a narrow or a broad interpretation": *Stonegate*, [80] citing *Spire Healthcare Ltd v Royal and Sun Alliance Insurance Ltd* [2022] EWCA Civ 17, [19].

39. The parties advanced conflicting arguments as to the perspective from which the application of the aggregation clause was to be approached.

    i. The reinsurers referred to following statement by Lord Toulson (in the context of direct insurance) in *AIG v Woodman* [2017] UKSC 18, [25]:

> "There was some debate about whether the question of the application of the aggregation clause was to be viewed from the perspective of the investors or the solicitors. The answer is that the application of the clause is to be judged not by looking at the transactions exclusively from the viewpoint of one party or another party, but objectively taking the transactions in the round".

    That quotation, however, was comparing the perspectives of the many investors, who had each paid money into the trusts under separate transactions, and the solicitors, who were the trustees and who had wrongly disbursed from all of those trusts (and, to that extent, were the "hub" with a link to each claiming investor). Lord Toulson was not addressing the position as between the insured and the insurer.

    ii. The reinsureds referred to the statement of Mr Justice Butcher in *Stonegate*, [84], that "in considering whether there has been a relevant 'occurrence' 'the matter is to be scrutinised from the point of view of an informed observer placed in the position of the insured'". That was also the conclusion reached by Mr Justice Rix in *Kuwait Airways Corporation v Kuwait Insurance Co SAK* [[1996] 1 Lloyd's Rep 664, 686.

40. To the extent it matters, I agree that the approach stated by Mr Justice Butcher is the appropriate one in this context, albeit in the reinsurance context, this is likely to be less significant than in a direct insurance.

B1(2) The admissible materials

41. All parties accepted that, in accordance with *Investors Compensation Scheme v West Bromwich Building Society* [1998] 1 WLR 896, 912-13, I should seek to ascertain the meaning which the Reinsurances "would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract (save for the parties' previous negotiations and their declarations of subjective intent)."

42. As I explain below, the Reinsurers placed emphasis on materials said to show the origins of the word "catastrophe" in the Reinsurances, in the form of:

    i. A section from Butler & Merkin's *Reinsurance Law* (2022, Looseleaf) tracing the development of the catastrophe reinsurance excess of loss line of business from what were believed to be its origins in the aftermath of the San Francisco earthquake of 1906, through to the LPO 98 and LIRMA wordings.

    ii. An extract from RJ Kiln, *Reinsurance in Practice* (4th, 2001), 178 (a reinsurance text written by a leading Lloyd's reinsurance underwriter from the 1960s to the early 1980s).

43. It is accepted, rightly, that Mr Kiln's evidence as to his own intentions in drafting "his baby" are not admissible (*Blackwell v Gerling* [2008] Lloyd's Rep. IR 529, [20]); *Lehman Brothers Finance AG (In Liquidation) v Klaus Tschira Stiftung GmbH* [2019] EWHC 379 (Ch), [165]-[166]). However, there was a dispute as to the admissibility of the remainder of this material.

44. I accept that, in broad terms and with appropriate regard for the limitations on the weight which can be placed on it, the history of a particular market wording, and the events which led to its introduction and modification, do form part of the admissible factual matrix, at least where the contract was entered into by market participants and the materials are reasonably available to the parties (whether they chose to avail themselves of them or not). There is strong academic support for a difference of approach between the admissibility of material of this kind when construing market standard forms on the one hand, and bespoke contracts on the other (see Professor Louise Gullifer KC (Hon), "Interpretation of Market Standard Form Contracts" (2021) JBL 227, 236-238). A number of decisions of the English courts have had regard to material of this kind when resolving disputed issues of constriction. The Reinsurers referred the court to a number of such decisions, including:

    i. *Netherlands v Deutsche Bank AG* [2019] EWCA Civ 771, [11] and [56] and *Re Lehman Brothers International (Europe) (in administration*) [2016] EWHC 2417 (Ch), [28], in which reference was made to ISDA Guides to the ISDA Master Agreement. To these can be added: *The Joint Administrators of Lehman Brothers International (Europe) v Lehman Brothers Finance SA* [2013] EWCA Civ 188, [57]-[60]; *Lehman Brothers Special Financing Inc. v National Power Corporation, Power Sector Assets and Liabilities Management Corp* [2018] EWHC 487 (Comm) and *Swiss Marine Corp Ltd v OW Supply and Trading A/S* [2015] EWHC 1571 (Comm), in all of which the court had regard to what the

User's Guide had said about the purpose of changes made to the 1992 ISDA Master Agreement form in the 2002 version.

ii. *Global Maritime Investments Ltd v STX Pan Ocean Co Lt*d [2012] EWHC 2339 (Comm), [14], in which Christopher Clarke J, when interpreting a clause in a charterparty drafted by the Documentary Committee of The Baltic and International Maritime Council, took into account a circular issued by the Committee explaining the thinking behind the clause.

iii. *Charter Re Insurance Co Ltd v Fagan* [1997] AC 313, in which Mr Justice Mance undertook a detailed review of the market history of the UNL clause in arriving at his conclusion as to the meaning of the words "actually paid". In the House of Lords, (1996) 5 Re LR 411, 419-420, Lord Hoffmann approved Mr Justice Mance's judgment (Staughton LJ having found the material of "no assistance": [1996] 1 Lloyd's Rep 261, 270). Lord Hoffmann also placed emphasis on the market history of the UNL clause in his judgment, albeit as filtered through decisions of the courts (as was also the position in *Insurance Company of Africa v SCOR* [1985] 1 Lloyd's Rep. 312 in relation to the "follow the settlements" clause).

45. For the purposes of an appeal under s.69 of the Arbitration Act 1996, it seems to me that the existence and content of materials of this kind ought ordinarily to be apparent from the award or the documents referred to in the award. That requirement is satisfied in respect of both awards in this case in relation to Mr Kiln's book. The position is less clear in respect of the account given in *Butler & Merkin*, but footnote 1 to the Covéa Award appears to be a reference to the *Butler & Merkin* text, and no distinction was drawn between the two awards in this respect on the appeals.

C THE CONTEXT

C1 The market history

46. Both UnipolRe and General Reinsurance placed reliance on what they said was the market background to the use of the expression "one catastrophe" in property catastrophe excess of loss reinsurance wordings as derived from *Butler & Merkin's Reinsurance Law* and RJ Kiln's *Reinsurance in Practice.*

C1(1) The origins of LPO 98

47. *Butler & Merkin* (at [C-0294]-[C-0295]) explain the origins of the Lloyd's market physical damage excess of loss wording "LPO 98" as follows:

> "Where property excess of loss covers are concerned the main function of the 'any one event' provision is to serve as an aggregating factor. … [T]he question therefore resolves itself into one of determining what can be said to constitute an 'event', within the terms of the reinsurance treaty, to permit the aggregation of losses for the purpose of claiming against the reinsurer. However, while the matter is obviously one of considerable importance, the forms of wording most

commonly used up to 1963 simply provided coverage for all losses resulting from 'any one event'. The uncertainty surrounding the permitted aggregation under such policies came to a head in the severe winter of 1962/1963 in the British Isles, when reinsureds were faced with a large number of water damage claims arising as a result of burst water pipes following the thaw. In these circumstances reinsureds argued against their reinsurers that the severe weather conditions constituted either one or, bearing in mind the partial thaw that took place in January 1963, two 'events', thereby entitling them to aggregate together all water damage losses as well as any other weather-related losses for the purpose of claims on excess of loss catastrophe covers. Reinsurers for their part resisted these claims on the basis that bad weather constituted a state of affairs rather than an 'event' so that a broad aggregation of losses was not permissible. Eventually, all claims were compromised, but the need for some form of standardised wording was recognised. Ultimately, as a result of the work of various market committees, a standard form of wording - LPO 98 - which contained a standard 'hours' clause, came to be widely used. The clause was not universally accepted, but formed the basis for most of the alternative wordings adopted by reinsurers. The essence of the clause as originally drafted was to provide for the aggregation of 'loss occurrences' arising out of and directly occasioned by 'one catastrophe'. 'Loss occurrences' were defined in terms of losses occurring within specified periods of time, which were seventy-two hours for listed phenomena and 168 hours for all other catastrophes. It will be noted that the word 'event' was abandoned in favour of the word "catastrophe" to make it clear that the intention was to cover happenings that were short, sharp and devastating; this indeed was historically the correct analysis of catastrophe covers, which are commonly believed to have originated after the San Francisco earthquake of 1906. In the result, then, all losses occurring within the relevant periods of hours and stemming from one catastrophe were to be aggregated …."

C1(2) The LPO 98 wording

48. Article 6 of the revised wording – in the version before me, entitled "(RJK (B) Lloyd's – August 1969 Physical Damage Excess Loss Wording" – provided:

> "Definition of Loss Occurrence.
>
> The words 'loss occurrence' shall mean all individual losses arising out of and directly occasioned by one catastrophe. However, the duration and extent of any 'loss occurrence' so defined shall be limited to:-
>
> (a) 72 consecutive hours as regards a hurricane, a typhoon, windstorm, rainstorm, hailstorm and/or tornado
>
> (b) 72 consecutive hours as regards earthquake, seaquake, tidal wave and/or volcanic eruption.
>
> (c) 72 consecutive hours and within the limits of one City, Town or Village as regards riots, civil commotions and malicious damage

(d) 72 consecutive hours as regards any 'loss occurrence' which includes individual loss or losses from any of the perils mentioned in (a), (b) and (c) above

(e) 168 consecutive hours for any 'loss occurrence' of whatsoever nature which does not include individual loss or losses from any of the perils mentioned in (a), (b) and (c) above

and no individual loss from whatever Insured peril, which occurs outside these periods or areas, shall be included in that 'loss occurrence'".

49. The initials "RJK" in the title are a reference to Mr Robert Kiln, a member of the Lloyd's market working party which produced the LPO 98 wording. In *Reinsurance in Practice*, Mr Kiln described the definition of "loss occurrence" as "one of the most difficult and contentious clauses in any catastrophe wording". Mr Kiln offered his own views as to the meaning of this wording (which he described as "my baby", stating "I was largely instrumental in drawing up this wording in the 1960s"), but observed:

> "It will be interesting to see in the years ahead if arbitrators and the Courts interpret the words in the way in which they were intended."

50. When discussing the background to the wording, Mr Kiln referred to issues which had arisen in the reinsurance market during the 1950s and 1960s as to whether losses arising from certain phenomena – for example a warm air front which generated a number of tornados, bush fires during a particularly dry summer, an exceptionally cold winter in the US which led to a greater level of motor claims and the cold winter in the UK in 1962/63 – could be aggregated for the purposes of claiming under property excess of loss reinsurance. Mr Kiln stated that in the revised wording drawn up against this background, the working party had used the words "occasioned by one catastrophe":

> "because we felt it was more specific. It implied a violent happening which in itself caused damage. The word 'event' we felt might have applied to something which might have been the cause of a catastrophe rather than the catastrophe or disaster itself."

C1(3) The subsequent market history

51. *Butler & Merkin* explain the subsequent history of the LPO 98 wording:

> "The hope that LPO 98 would remove the possibility of disputes over claims as had occurred in 1963 was dashed in the aftermath of the unusually hard winter of 1978/1979, which again witnessed a large number of water damage claims against reinsureds. While it had been difficult for reinsureds to argue in 1962/1963 that the severe weather constituted an 'event' for the purposes of a catastrophe cover, it became even more tenuous to allege that severe weather was a 'catastrophe' within the meaning of the new wording. Undaunted, reinsureds advanced the alternative theory that, because they had suffered catastrophic losses as a result of the weather, the event which had caused those losses - the cold winter - could

itself correctly be described as a 'catastrophe'. This line of argument neatly reversed the process actually called for by the clause: instead of having to identify a catastrophe out of which losses had arisen for the purpose of aggregating those losses, it was being suggested that the totality of the losses was itself a catastrophe. Apart from this fundamental analytical flaw in the argument in favour of reinsureds, it suffered from the weakness that the losses incurred by reinsureds had not threatened their solvency - irrespective of reinsurance cover - and thus could scarcely be described as catastrophic. Moreover, the causative requirement that losses had to be 'directly occasioned' by the catastrophe was hardly met by the cold weather; the direct cause was clearly the thaw, but it is by no means clear that a natural phenomenon which is regarded as beneficial by the community as a whole can be taken to be a catastrophe for reinsurance purposes. However, despite these important considerations, the reinsurers chose to pay. The reaction to all this, compounded by heavy losses in the North American continent, was the introduction of the LPO 98 Amended Hours Clause, which accepted that winter losses were recoverable and provided aggregate extension cover to deal with such losses. Soon afterwards, the wording of LPO 98 as amended was referred to a London market committee for its consideration, and the committee produced in the place of LPO 98 two new articles, based broadly on the old wording. These articles were themselves subsequently revised by the now current LIRMA property catastrophe excess of loss clauses, which read as follows:

> 'For the purposes of this Agreement a loss occurrence shall consist of all individual insured losses which are the direct and immediate result of the sudden violent physical operation of one and the same manifestation of an original insured peril and occur during a loss period of 72 consecutive hours as regards any:
>
> (a) hurricane, typhoon, windstorm, rainstorm, hailstorm or tornado;
>
> (b) earthquake, seaquake, tidal wave or volcanic eruption;
>
> (c) fire;
>
> (d) riot or civil commotion which occurs within the limits of one city, town or village; or
>
> (e) 168 hours as regards all other insured perils.
>
> Provided that if any such aforementioned operation and physical manifestation shall directly and immediately result in the physical manifestation of another original insured peril or perils, then all individual insured losses which directly and immediately result therefrom and occur during the same loss period of 168 consecutive hours or 72 consecutive hours where any of the perils mentioned in (a) (b) (c) and (d) are involved shall be deemed to constitute a single loss occurrence. The reinsured may choose the date and time when the appropriate loss period commences provided that no such period shall commence earlier than the time of the

> first recorded individual insured loss to which this Agreement applied resulting from the operation and manifestation of an original insured peril as aforesaid and if the operation of such a peril shall last longer than the appropriate loss period then the reinsured may apply further appropriate loss periods in respect of the continued operation of that peril provided none of those additional periods shall overlap.'

The effect of this wording is to define a 'loss occurrence' as the aggregate of all individual losses insured by the reinsured and occurring within a period of either 72 or 168 consecutive hours, as the case may be. Thus, in the case of an earthquake, the loss occurrence is damage to all properties in a specified geographical location occurring within a period of 72 consecutive hours. The wording gives the reinsured the right to decide when a loss period is to commence, but the earliest date that may be adopted is the date at which the first individual loss has become manifest. The wording also makes it clear that catastrophe cover is concerned with sudden violent events that cause damage over a period of time, rather than protracted events more accurately described as a state of affairs, such as cold weather. Where a violent event takes place over a prolonged period, such as a hurricane, the "hours" clause has the effect of dividing the resulting individual losses caused into a series of loss occurrences each of which constitutes an aggregating factor. The problem of consequential physical damage is specifically addressed in the clause. The type of problem that could arise is where a natural event, such as an earthquake or a typhoon, causes damage to electrical cable and results in a fire. The second paragraph of the clause specifies that such direct and immediate consequential loss falling within the same period is to be treated as part of the original loss occurrence. Indirect consequential losses, for example where electricity cables are blown down following a storm and a fire results at a later date when an attempt is made to restore the electricity supply, will be excluded from the reinsurance cover on normal causation grounds."

C1(4) What conclusions can be drawn from this material?

52. The market debates discussed in *Butler & Merkin* and *Kiln* reflect one of the dividing lines in the types of reinsurance protection available. As noted in the fourth edition of *Kiln*, 429-430:

> "When a Reassured wishes to protect his insurance account or his reinsurance account, he has basically three options:
>
> (a) To take out a quota share reinsurance on his business. To do this, he pays a pro rata share of his premiums and receives a pro rata share of premiums and receives a pro rata share of all claims and expenses.
>
> (b) To take out an aggregate reinsurance to protect his business from a series of losses. This costs much less premium.
>
> (c) To take out an excess of loss contract to pay him if he suffers either a large individual loss or a series of losses arising out of some contingency. The

> contingency being a catastrophe, an accident an event or whatever. For this the premium he pays is much less than the quota share and much less than the aggregate premium (for a comparable limit and deductible). The Reassured has a choice and gets what he paid for."

53. The distinction between types two and three is often easier to identify conceptually than to demarcate in practice. A similar debate emerged regarding the treatment of asbestosis claims under catastrophe excess of loss reinsurance policies in the liability (or casualty) market in the early 1980s, which was the subject of discussion in two "White Papers" written by reinsurance underwriters at Lloyd's in September and December 1981 and which are printed as an appendix to the third edition of *Kiln*. The papers are titled "Discussion Document on Loss Occurrence Definitions in Respect of Reinsurance Contracts Covering Casualty Business" and ""Occurrence Coverage on Excess of Loss Contracts Covering Casualty Business. The second of those White Papers distinguished between "each and every loss" reinsurance contracts and "stop loss" or "aggregate loss" contracts, noting that with a Global Cover (which covered "almost all classes of business"):

> "Almost any claim that the Reinsured is liable to pay will fall into the orbit of such a cover, the manner and extent to which more than one individual claim can be added together is specifically defined and this can only be done in those cases where individual claims all form part of 'a loss' or 'a catastrophe' as defined in the reinsurance contracts. Excess of Loss recoveries can only be made from underwriters in respect of such 'loss' or 'catastrophe'.
>
> Underwriters and Reassureds have over the years always been very careful to draw the vital distinction between 'a loss', i.e. 'a catastrophe' or 'a disaster' in reinsurance terms and 'catastrophic losses' or 'disastrous losses' as used in normal conversation or as they may appear in reviewing a year's trading results. Many circumstances and continuing conditions and even a series of related losses may result in a period of unprofitable trading in our Industry and this may cause individuals to refer to such circumstances and conditions as being 'catastrophic' or 'disastrous'. However, the fact that losses in an industry or in a section of an industry turn out to be much heavier than anticipated when the business was originally written does not mean that such losses can be automatically added together and considered as an Excess of Loss recovery under Global covers or LMX general covers".

54. The paper later observes:

> "To try to argue otherwise would be to turn all 'each and every loss contracts' into 'stop loss covers'".

55. I accept that the history of Article 6 of LPO 98 serves as an important reminder of the difference between a series of losses which can be linked at some level and which are catastrophic in their effect on the reinsured, and losses caused by a catastrophe properly so called. However, I am not persuaded that the materials before the court provide a basis for giving the word "catastrophe" in a property catastrophe excess of loss

reinsurance any meaning other than that which it would bear on the application of ordinary principles of construction in the context in which it appears.

56. First, the material referred to was produced at a considerable remove, chronologically and textually, from the writing of the Covéa and Markel Reinsurances. We are told that the LPO 98 wording produced in the late 1960s was itself twice amended, first through the LPO 98 Amended Hours Clause and then by a London market committee which produced two new articles. Those articles were "themselves subsequently revised" by the LIRMA property catastrophe excess of loss clause which provided:

> "a loss occurrence shall consist of all individual insured losses which are the direct and immediate result of the sudden violent physical operation of one and the same manifestations of the individual insured peril".

However, a different wording again was used in the Covéa and Markel Reinsurances, with no reference to "immediate result" or "sudden violent physical operation". The connection between the wording in issue on these appeals, and the market debate of the 1960s discussed in *Butler & Merkin* and *Kiln*, is simply too tenuous for those materials to be used not simply to assist in identifying in some broad sense the commercial purpose of a provision of this kind, but to ascribe textual limits not apparent from the ordinary meaning of the word in its contractual context to the operation of the word "catastrophe".

57. Second, knowing the target at which the change in wording discussed in *Butler & Merkin* and *Kiln* was aimed – to address the argument that all losses from a severe winter could be aggregated for the purpose of collecting under an excess of loss reinsurance protection, or (per *Reinsurance in Practice*, 78) the argument that it was possible to aggregate by reference to "something which might have been the cause of a catastrophe rather than the catastrophe or disaster itself" – does not of itself tell you where the line of permissible aggregation is to be drawn in a very different context such as the present. As explained at [105]-[109] below, the conclusions of the Covéa and Markel tribunals do not depend on embracing the broad approach to an aggregating factor which sections of the reinsurance market sought to embrace following the cold winters of 1962/63 and 1978/79 or by reference to something which is not the direct cause of the individual losses in issue.

58. Finally, as I explain at [59]-[63] below, there were also significant changes in the content of the books of direct business in respect of which property catastrophe excess of loss reinsurance was purchased. Mr Kiln himself recognised that "it is impossible to envisage all the forms future catastrophes will take" (*Reinsurance in Practice*, 175). The mere fact that, in the 1960s and 1970s, a reinsured's property account may not have included non-damage perils, with the result that a reinsurer providing (or indeed drafting) catastrophe excess of loss reinsurance for such an account would not have expected losses which impacted the cover to occur without physical damage to the original insured's property does not mean that the wording used in the reinsurance would not extend to such losses as a matter of its ordinary meaning. There is a distinction between the meaning of words in context, and their expected field of practical application from time-to-time, and market reinsurance wordings which are used for lengthy periods

against a background of developments in the relevant book of business of the reinsured are, in a sense, "always speaking" in the manner of statutes (cf *R v Ireland* [1998] AC 147, 158-59).

C2 The contractual context

C2(1) Introduction

59. It was common ground in both appeals that direct business written in an insurer's property account now gives protection against business interruption even when that interruption is not consequential upon damage to the insured's property – the so-called "non-damage BI" cover. Examples of non-damage BI cover offered as part of property damage and business interruption cover include:

    i. Denial or prevention of access cover of the kind in issue here and in *Stonegate*, where restrictions imposed by a public authority for one of a number of specific reasons, or damage to nearby property belonging to someone else, prevent or hinder the insured from using their (undamaged) premises, including "Notifiable Disease" cover where the restriction is imposed to control the transmission of a disease satisfying certain legal requirements.

    ii. Loss of attraction cover, where property damage to nearby premises reduces the footfall to (and consequently the profits generated by) the insured's (undamaged) premises.[1]

C2(2) The Covéa Award

60. There were a number of detailed findings about these non-damage extensions in the Covéa Award, the tribunal finding that:

    i. "Non-property damage business interruption cover has been a common feature of many combined property/business interruption policies since about the beginning of the 21st century[2] and is now invariably written by property underwriters alongside the property damage risk, both as business interruption cover consequential upon damage to property and, under an extension, as cover for pure business interruption caused by perils other than damage to property" ([26(ii)]).

    ii. "By the time the Reinsurance was bound at the end of 2019, any competent and experienced catastrophe excess of loss underwriter reinsuring a UK property book would or should have known that the business reinsured might well include both

[1] A lengthy list of extensions for non-damage business interruption can be found in *Riley on Business Interruption Insurance* (2021, 11th edn) chapter 3.

[2] Although not part of the record in these appeals, and therefore of no relevance for present purposes, the findings made by the Covéa tribunal are wholly consistent with discussions of the prevalence of non-damage business interruption cover which formed part of extensions to property insurance at the time of the IRA's attack on the Arndale Centre in Manchester on 15 June 1996: see for example Tony Dowding, "Post Business Interruption – Rude Interruption" Post Magazine 8 August 1996 referring to "denial of access" and "loss of attraction" extensions, the former being said to be "relatively common", the latter "not particularly common". Non-property business interruption wordings can also be bound in the World Policy Guide in 1994 WPG 1884, June 67-74.

business interruption cover consequential upon physical damage to an insured property and cover for interruption of the business carried on at an insured property from a peril other than physical damage to the property" ([26(iii)]).

iii. "The unchallenged evidence … was that since the end of the last century it has become commonplace for the business written in property departments to include cover for business interruption from causes other than physical damage to property. Consequently, any experienced reinsurer underwriting the Reinsurance would know or ought to have known that the 'Class' of business written in Covéa's Property Department and classified as 'Household and Commercial' could, and probably would, include cover for non-property damage business interruption as well as for business interruption consequent upon property damage" ([59]).

61. These findings are important given the terms of the Covéa Reinsurance as summarised in Appendix 1:

i. The Class of business was defined by reference to that "written within the Reinsured's Property Department and classified as Household and Commercial and all business classified by the Reinsured as Contractors' All Risks and Engineering All Risks including Motor Own Damage".

ii. Covéa was "the sole judge as to what is classified as 'Household' Business, 'Commercial' business and 'Contractors' All Risks and 'Engineering' All Risks business" (and there was no suggestion that the direct insurances which gave rise to its claims for indemnity were not properly so classified).

iii. The premium payable to UnipolRe was to be calculated by reference to the "gross premiums of the Reinsured in respect of business coming within the Class (excluding Motor) written during the Period" (which would include any premium in respect of non-damage BI cover written in the relevant department).

C2(3) The Markel Award

62. The treatment of this issue was briefer in the Markel Award, but this appears to have been because there was broad consensus as to the position (as there was before me, General Reinsurance accepting that "in recent years direct insurances have extended protections to insureds so that they can in some instances recover business interruption losses … without physical damage.") The Markel tribunal found as follows:

> "Business interruption business is typically written either as part of or as an extension to property business. Under such business interruption business there is no need for physical damage to property" ([44]).

63. Once again, this finding is important given the terms of the Markel Reinsurance as summarised in Appendix 1:

i. The CLASS OF BUSINESS applied to "all business written on behalf of the Reinsured as detailed below:

- All Material Damage and Business Interruption business, being Fire, Allied Perils and All Risks business written by Markel (UK) Ltd…"

(i.e. "Business Interruption business" was itself identified as a class of business to which the Markel Reinsurance applied).

ii. It was expressly noted that the cover afforded by the Markel Reinsurance, and the basis on which the premium payable under the Markel Reinsurance would be adjusted, extended to "incidental exposures in addition to those defined as coming within the scope of the account", not to exceed 5% of overall exposures.

iii. The premium was to be calculated by reference to Markel's "finally adjusted Nett Premium Income accounted for during the period from 1 January 2020 to 31 December 2020, both days inclusive, on their last three open years of Account, in respect of the business hereby reinsured."

D DID THE INDIVIDUAL LOSSES IN RESPECT OF WHICH THE CLAIM FOR INDEMNITY IS MADE ARISE OUT OF AND WERE THEY DIRECTLY OCCASIONED BY "ONE CATASTROPHE"?

D1 The arguments in summary

64. UnipolRe and General Reinsurance advanced a number of similar arguments as to why there had been no catastrophe for the purposes of the Covéa and Markel Reinsurances respectively, although presented in different "batting orders". I have approached the points in the following order:

i. It is inherent in the meaning of the word "catastrophe" that it is something which had caused or can cause physical damage to property.

ii. A "catastrophe" requires a sudden and violent event or happening.

iii. A "catastrophe" is a species of "occurrence" or "event", and must satisfy the "unities" of time, place and way which occurrences or events must ordinarily satisfy, applying *Axa Reinsurance (UK) Ltd v Field* [1996] 1 WLR 1026.

65. In addition, General Reinsurance advances a further argument, reflecting the matters found to constitute the catastrophe in the Markel Award, namely that the 18 March 2020 Closure Order could not constitute a catastrophe, being simply "a sensible order to mitigate further damage".

D2 Discussion

66. It was not suggested by any of the parties that the word "catastrophe" had acquired a settled and particular meaning in the reinsurance market, and neither the Covéa nor Markel Awards found that it had. Indeed, it was common ground in the Covéa arbitration

that "there is not a common market-wide understanding or definition of what constitutes a catastrophe" (Covéa Award, [26(i)], [51]).

D2(1) Dictionary definitions

67. In those circumstances, I accept that a useful starting point in seeking to establish the meaning of the word as used in ordinary speech are the definitions given in dictionaries.

68. Markel and UnipolRe placed reliance on the definition to be found in the full *Oxford English Dictionary* ("**OED"**). This explains the etymology of the word "catastrophe" as follows:

> " < Greek καταστροφή overturning, sudden turn, conclusion, < κατα-στρέφειν to overturn, etc., < κατά down + στρέφειν to turn".

It then offers the following usages (excluding one obsolete usage of obvious irrelevance):

> "1 The change or revolution which produces the conclusion or final event of a dramatic piece' (Johnson); the dénouement".
>
> 2(a) A final event; a conclusion generally unhappy' (Johnson); a disastrous end, finish-up, conclusion, upshot; overthrow, ruin, calamitous fate."
>
> 3(a) An event producing a subversion of the order or system of things.
>
> 3(b) *esp*. in Geology. A sudden and violent change in the physical order of things, such as a sudden upheaval, depression, or convulsion affecting the earth's surface, and the living beings upon it, by which some have supposed that the successive geological periods were suddenly brought to an end. (Cf. cataclysm n., catastrophism n.)
>
> 4 A sudden disaster, wide-spread, very fatal, or signal. (In the application of exaggerated language to misfortunes it is used very loosely.)"

69. I was also referred to the *Shorter Oxford Dictionary* (**"SOED"**) which contains the following definitions:

> "1. The dénouement of a play, esp a tragedy; the final resolution of a novel etc.
>
> 2. A disastrous conclusion; overthrow, ruin, calamitous date …
>
> 3. A revolutionary event … (An event causing) a sudden upheaval or discontinuity in the stratigraphic record.
>
> 4 A sudden or widespread or noteworthy disaster; an extreme misfortune".

70. I accept that both definitions embrace usages which refer to sudden events. However, they also show that the ordinary use of the word is not always so confined, with both

dictionaries offering meanings which do not require "suddenness" (OED 1, 2(a) and 3(a) and SOED 1 and 2, with 3 and 4 including, but not being confined to, matters with the characteristic of suddenness). Many of the definitions emphasise the existence of a significant break with the position up to that point (OED 1, 3(a) and 3(b); SOED 2, 3 and 4), and something which is seriously adverse in its nature or effects (OED 2(a) and 4; SOED 4). The final usage offered in the SOED embraces all of these themes, and significantly offers "sudden or widespread or noteworthy" as alternatives. Further, the definitions offered include those appropriate to particular contexts (literary analysis or geology) which would have to be applied with care in other contexts.

71. In considering which meaning is the most appropriate in the present context, it is helpful to consider the three aspects of the meaning of the word "catastrophe" which the appellants argue applied here, but which it is said the Covéa and Markel tribunals erred in law in failing to recognise.

D2(2) Must a catastrophe be something which causes or can cause physical damage?

72. Neither UnipolRe nor General Reinsurance sought to argue that, as a matter of everyday usage, the word "catastrophe" is confined to things which cause, or can cause, physical damage, and I am quite sure that they were right to do so. Nor could it be argued that, in the reinsurance market, the term "catastrophe" is so understood, there being frequent usages of the term in other areas of business. I have already referred to the use of the expression in the context of casualty reinsurance discussed in the White Paper at [53]-[54]. Ms Sabben-Clare KC referred to reported authorities dealing with catastrophe XL reinsurance cover for PA business (considered in *Sphere Drake v Euro International Underwriting* [2003]1 LRIR 525, especially at [5]-[7]) and liability reinsurance (*AstraZeneca Insurance Co Ltd v XL Insurance* [2013] EWHC 349, [1]). To these might be added the reinsurance of professional indemnity risks (*Standard Life Assurance Ltd v Oak Dedicated Ltd* [2008] EWHC 222 (Comm), [17]).

73. Both appellants essentially relied upon the same points to argue that such a requirement was inherent in the reference to "one catastrophe" in the Reinsurances, nonetheless.

74. First, what was said to be the origin of the property catastrophe excess of loss class of business, which was said to go back to San Francisco earthquake in 1906, and the origin of the LPO 98 wording following the physical damage claims brought following the severe winter of 1962/63. However, for the reasons set out at [55]-[58] above, I am not persuaded that the fact that non-damage business interruption does not appear to have been written when the LPO 98 wording was formulated (with the result that claims emanating from that class of direct business would not have been expected when that wording was formulated) confines the meaning of the word "catastrophe" in a market excess of loss reinsurance wording.

75. By contrast, I agree with both the Covéa and Markel tribunals that the established market practice by the time the Reinsurances were written (as summarised at [60] and [62] above), and the terms of the two Reinsurances (as summarised at [61] and [63]) above, provide strong support for the tribunals' rejection of this supposed limitation in the nature of a catastrophe for the purposes of the respective Reinsurances. In particular:

i. The conclusions of the Covéa tribunal that:

a) "as the nature of business written in a property department changes so too may the nature of the catastrophe that is capable of causing losses to such business and giving rise, in consequence, to claims under its catastrophe reinsurance" (Covéa Award, [51]);

b) "as the nature of the risks typically covered in a property book of business developed and expanded over time the nature of a catastrophe capable of causing multiple loss to such businesses could also in principle change" ([59]) and;

c) "given the changes in the nature of the risks typically covered by a property insurer since LPO 98 was introduced in the 1960s, it makes commercial sense for an excess of loss catastrophe reinsurer of such business to respond to catastrophes that affect and operate upon insured property, not by causing physical damage, but by hindering or preventing access to property" which was "apt for inclusion" within the deliberately wide ambit of the "Hours Clause" ([64]).

ii. The conclusion of the Markel tribunal that, having regard to the class of business reinsured, and the fact that non-damage business interruption insurance was "typically" written as part of property business, coverage for losses caused by catastrophes which did not cause or were not capable of causing physical damage was not "in principle inimical to a catastrophe occurring" for the purposes of "this category of reinsurance" (Markel Award, [45]).

76. Second, the description of the reinsurances as "Property Catastrophe Excess of Loss Reinsurance Contracts". However, in addition to the wide terms of the reinsurances as set out at [61] and [63] above, both arbitral tribunals were right to note that the claims for business interruption consequential upon loss of access to the insured's property *do* involve an interference with the original insured's premises, such that reinsurance cover for losses arising from such denial of access is apt for inclusion within the scope of "Property Catastrophe Excess of Loss" reinsurance: see the Covéa Award, [58] and [64]; and the Markel Award, [44]. Indeed, many property theorists would regard the right to use property as a key component of the "bundle of rights" which the concept of property can be regarded as comprising (AM Honoré, *Making Laws Bind* (1987), 161-192) and some argue it is the defining right (Professor JE Penner, 'The 'Bundle of Rights' Picture of Property' 43 UCLA Law Review 711-820, 758).

77. That argument does not apply as forcefully to a form of non-damage business interruption cover not in issue in this case – Loss of Attraction cover – but even there, the impact of the peril on the original insured's property is an essential feature of any claim for indemnity and, for my part, the reasoning both tribunals adopted in relation to Denial of Access cover in this particular respect seems equally applicable.

78. Third, the fact that those perils which are specifically identified in the two "Hours Clauses" are of such a nature as to be capable of causing physical damage, it being

suggested that this gives rise to a contractual *genus* into which all catastrophes must fall. Both tribunals rejected this argument for essentially the same reasons, with which I am in full agreement. After listing those various perils, both "Hours Clauses" state:

> "any [Loss Occurrence/Event] of whatsoever nature that does not include individual loss or losses".

from the perils identified in (i), (ii), (iii) or (v) or (a) to (d) (respectively) of the "Hours Clause".

79. Mr Christie KC and Mr Kendrick KC both pointed to contexts in which the use of the word "whatsoever" following a list of specified items did not, as a matter of construction, preclude the *ejusdem generis* rule of construction (so as to require other matters not specifically identified but embraced within the closing words to be of the same "kind" or "genus" as those specifically identified). In *BOC Group v Centeon LLC* [1999] 1 All ER (Comm) 970, for example, Evans LJ noted that:

> "[T]he meaning of general words, even 'whatsoever', may be limited by the context in which they appear. They may be used to refer to a class or category, a genus (or what Mr Pollock called a tribe) of which some but not necessarily all the members are identified in the clause."

80. In this case, however, I agree with the Covéa and Markel tribunals that the words "of whatsoever nature" are clearly intended to extend beyond unidentified members of the same "nature" as those specifically mentioned, the word "nature" being a particularly powerful indictor in this regard. As the Covéa tribunal notes, the various listed perils were "not attempting to create a class or genus but is simply ascribing hours to specific, well known catastrophes" (Covéa Award, [63]).

81. There are two further arguments which featured in this context.

82. First, Mr Christie KC pointed to clause 18 in Covéa Reinsurance, extending the Covéa Reinsurance to include "direct loss and damage arising from the action or actions taken when complying with an order of a duly constituted Civil Authority at the time of and only during a conflagration, flood or similar insured peril, and only when necessary for the purposes of restricting the loss or damage of other property from the respective insured peril, subject however, to the terms and conditions of this Contract." He argued that this suggested that, absent such an extension, there would be no coverage for losses resulting from denial of access by government order. As to this:

    i. Clause 18 appears to be directed to cases where the civil authority deliberately destroys property to protect against a peril such as a flood or fire - for example "flood diversions" which deliberately direct water to areas where less damage will be done, the destruction of buildings to create fire-breaks (as in the Great Fire of London) etc.

ii. One can well understand why the parties to the Covéa Reinsurance may have wanted to make it clear beyond doubt that loss and damage caused in this rather unusual way was covered.

iii. However, the argument that the incorporation of a very specialist "extension" to cover into a reinsurance provides a basis for "reading down" the remainder of the reinsurance is not a particularly attractive one – the client whose broker had "obtained" such an extension would be disappointed to learn that the remainder of their cover was narrower than if they had not.

iv. Many insurance and reinsurance contracts are assembled from a patchwork of pre-existing provisions drafted independently of each other, and that requires some care when seeking to determine the ambit of one "pre-packaged" provision from notionally "additional" cover provided by another.

I am not ultimately persuaded that this provision (which is to be found on page 13 of the Covéa Reinsurance wording) provides any real insight into the meaning of the word "catastrophe".

83. Finally, both tribunals referred by way of subsidiary reasoning to the presence of Exclusions within the respective Reinsurances which suggested that non-damage business interruption was otherwise covered.

84. Taking the Covéa Award first:

i. The Covéa Transmission Exclusion excluded cover for physical damage to electricity transmission equipment save that which was on or within 300m (or 1000 feet) of an insured structure.

ii. The exclusion applied to physical loss or damage and "all business interruption, consequential loss, and/or other contingent losses related to transmission and distribution lines, other than contingent property damage/business interruption losses … arising from loss and/or damage to lines of third parties" (the section from "other than" being a carve-out from the exclusion).

iii. The Covéa tribunal noted the carve out "contemplates cover for loss sustained by an insured in the event of damage to third party transmission or distribution lines within 300 metres of an insured property" and hence "when the insured property has sustained no physical damage" (Covéa Award, [67]).

85. I have not found the Covéa Transmission Exclusion particularly informative, both because it is (as the Covéa tribunal observed) "convoluted and obscure" (Covéa Award, [67]), and because it contemplates the operation of a peril which has caused and is capable of causing physical damage, albeit to the property of a third-party rather than the original insured.

86. Turning to the Markel Award, the tribunal referred to:

i. The Markel Terrorism Exclusion which excluded loss caused by "any act or preparation in respect of action or threat of action" including threats of violence to persons or endangering of life or which creates a risk to the health or safety of the public or a section of it, and loss from "any action in controlling, preventing, suppressing, retaliating against or responding to any act or terrorism". I agree with the Markel tribunal that these words exclude, amongst other matters, loss which might not have been caused by physical damage (e.g. the closure of a building due to a threat to release a noxious gas). I accept that is capable of providing support for Markel's argument (as the Markel Award found, [48]). However, the ubiquity of terrorism exclusions, and their all-encompassing nature, makes the argument something of a makeweight.

ii. The Markel Transmission Exclusion, which contemplates cover where there has been no damage to the original insured's property in two scenarios: where the equipment is damaged "on or within one mile of the insured's premises" and "public utilities extension and/or suppliers' extension and/or contingent business interruption coverage … provided not part of a transmitter's or distributor's policy" (the Markel Award, [49]). I have not found these write-backs particularly informative, it being possible to read the clause as assuming the occurrence of a peril which has, or could, cause physical damage to property, albeit not the original insured's property.

87. For all of these reasons, I agree with the conclusions of both the Covéa and Markel tribunals that the word "catastrophe" in both Reinsurances is not limited to those which cause or are capable of causing physical damage.

D2(3) Does a "catastrophe" require a sudden and violent event or happening?

88. Reinsurers' argument that there is such a requirement rests on:

i. The statements in *Butler & Merkin* that catastrophes are to be "short, sharp and devastating" ([47]) and in *Kiln* that he had in mind "a violent happening which in itself caused damage" ([50]).

ii. The dictionary definition in the OED, 3(b) and 4, and the SOED 4 (and, for violence, OED 3(b) alone).

89. It was not always clear in the course of argument whether the requirement of suddenness was intended to refer only to the emergence of the catastrophe, or its duration, although Mr Christie KC's submissions argued for the former.

90. I have dealt with the historic materials at [47] to [58] above, and would note that neither uses the word "sudden", save for the *Butler & Merkin* discussion of the LIRMA wording in which the word "sudden" appears. I have addressed the dictionary definitions, which offer meanings which involve sudden happenings but are not limited to such meanings, at [67]-[71] above.

91. Turning to the wordings:

i. Both refer to riot, civil commotion and malicious damage, which can be, but need not necessarily be, "sudden" in their inception (although I accept that they will be violent): riots and civil commotion can build up over time, and while there may many cases where there is a point of "boiling over", I am not persuaded this need always be the case, nor need they be short in their duration.

ii. Both wordings refer to floods (the Covéa Reinsurance to "flood howsoever caused"). These can incept suddenly and violently – a "flash flood", the bursting of a dam and so forth – but they can also build up over time, following on from exceptional periods of heavy rain which cause rising levels in bodies of water (cf. the biblical flood in Genesis, chapters 6 to 9 invoked by the Markel tribunal at Markel Award, [41]). They can subsist for long periods.

iii. The "Hours Clause" in the Covéa Reinsurance encompasses "collapse caused by weight of snow or water damage from burst pipes or melted snow", which would once again seem to encompass happenings which are not necessarily sudden in their inception or short in their duration, nor violent.

92. Further, identifying whether a happening is "sudden" will not always be a straightforward task, which suggests that some caution is required before treating this as an inherent but unspoken requirement for a catastrophe. Strong winds may build over time (even ignoring more extreme causation hypotheses, such as Edward Norton Lorenz's fabled butterfly whose flapping of its wings in Brazil brings a tornado into being in Texas, *Presentation before the American Association for the Advancement of Science*, 29 December 1972).

93. The difficulties of importing a requirement of "suddenness" into the definition are also apparent in the approach taken in the two cases. The Markel tribunal held that there was no requirement of suddenness (Markel Award, [41]), while the Covéa tribunal held that, if there was such a requirement, it was met by "the exponential increase in Covid-19 infections in the UK during the first three weeks of March 2020", with 14 days elapsing between the first death from a person with Covid to the Prime Minister's "stay at home" broadcast of 16 March 2020 (Covéa Award, [49]). Mr Kendrick KC did not shy away from the submission that, on this part of his case, the issue of whether or not there had been a catastrophe depended on the issue of whether or not the rate of increase "fell just short of sudden", saying "it's a stark submission, but it's right in law".

94. Mr Kendrick KC suggested that violence was required in the sense of "a drastic physical change which would strike so forcibly the ear and eye of any onlooker that it is liable to stay in his memory or her memory forever." It is not entirely clear what this requirement of "violence" is intended to add to those of "suddenness" and the ability to cause physical damage, but in any event, neither the dictionary definitions nor the words of the Reinsurances suggest that a catastrophe must satisfy this requirement.

95. I accept, however, that the radical discontinuity with what went before which is inherent in OED meaning 3(a) and SOED meaning 3, and which appealed to the Markel tribunal, contemplates the ability to distinguish between the period when the catastrophe is in existence and when it is not. This can be seen as an aspect of the distinction (discussed

under the next heading) between something which is coherent, particular and readily identifiable, and a collection of things or a continuing state of affairs. The more diffuse and extended the matter alleged to amount to a catastrophe is in the manner in which it arises, the period of its existence and the circumstances in which it ceases to be, the more difficult it may be to establish the coherent, particular and identifiable character which a catastrophe will have.

96. It is in addressing that issue, when answering the question "was the outbreak of COVID-19 a 'conflagration or other catastrophe'?", that Derrington and Colvin JJ in the judgment of the Full Federal Court of Australia in *Swiss Re International Se v LCA Marrickville Pty Limited* [2021] FCA 1206, [355] observed:

> "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 above 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.*"

(emphasis added).

97. For these reasons, I reject the appellants' argument that a catastrophe must necessarily be "sudden" in onset, or short in duration, or that it must be "violent". Even if I had accepted that argument, it would not have provided a basis for challenging the Covéa Award in which the arbitral tribunal found that any requirement of "suddenness" was satisfied. There was no suggestion that this conclusion was "necessarily inconsistent" with the correct application of the relevant legal test, nor could that submission have realistically been advanced.

D2(4) Is a catastrophe a species of event or occurrence which must satisfy the Axa v Field unities?

98. UnipolRe and General Reinsurance also argue that a catastrophe has to be something which satisfies the unities of an "event" as set out by Lord Mustill in *Axa v Field* [1996] 1 WLR 1026, 1035:

> "In ordinary speech, an event is something which happens at a particular time, at a particular place, in a particular way. I believe that this is how the Court of Appeal understood the word. A cause is to my mind something altogether less constricted. It can be a continuing state of affairs; it can be the absence of something happening. Equally, the word "originating" was in my view consciously chosen to open up the widest possible search for a unifying factor in the history of the losses which it is sought to aggregate. To my mind the one expression has a much wider connotation than the other."

99. UnipolRe relies on the use of the phrase "Loss Occurrence", which it notes has been held to have the same meaning as "Event" (*Kuwait Airways Corporation v Kuwait Insurance Co SAK* [1996] 1 Lloyd's Rep 664, 686).

100. This argument is in some ways both the easiest and most difficult of the issues raised on this part of the appeals.

101. The easy answer is that neither the Covéa Reinsurance nor the Markel Reinsurance uses the words "Loss Occurrence" or "Event" (as the case may be) as a standalone term, but as a defined term whose meaning is set out in the "Hours Clause". I am unable to accept the argument of definitional determinism, to the effect that the shorthand selected itself informs the meaning of the word beyond what appears in its associated definition.

102. Further, in the case of both Reinsurances, there are factors which point strongly away from anything but the most generous application of two of Lord Mustill's three unities:

    i. Both Reinsurances include a "two risk" warranty which requires the catastrophe comprise losses covered by at least two different policies of insurance before the Reinsurance can be engaged. That suggests the catastrophe has a potentially wide field of impact.

    ii. The Covéa Reinsurance contemplates that something can have a duration exceeding 504 hours, and still be a catastrophe, and the only geographic limit imposed is a very broad one, for riot etc, of "one country" (and therefore the entirety of the United Kingdom).

    iii. The Markel Reinsurance also contemplates that something can have a duration exceeding 504 hours, and still be a catastrophe, and the only geographic limit imposed is a relatively broad one, for riot etc, of "one City, Town or Village". In the case of London, the city proper is reporting as having an area of 1,572 km^2, the urban area 1,738 km^2 and the metropolitan area 8,382 km^2.

    iv. It was common ground that bush fires would constitute a catastrophe, and yet, as the Covéa tribunal notes, "the notorious Australian bush fires developed in a variety of locations over weeks, if not months" (Covéa Award, [47]).

    v. Finally, as Lord Briggs noted in his judgment in *The Financial Conduct Authority v Arch Insurance (UK)* ltd [2021] UKSC 1, [323]: "a hurricane, a storm or a flood … may take place over a substantial period of time, and over an area which changes over time".

103. The more difficult question is how to distinguish between a catastrophe properly so-called, which is an appropriate basis for aggregating individual losses when seeking indemnity under a property catastrophe excess of loss policy, and a series of discrete losses which share some common point of ancestry, but the adverse effects of which so far as a direct insurer is concerned are properly the subject of stop-loss protection (cf [52]-[53]). As Sir Jeremy Cooke observed in *Simmonds v Gammell* [2016] EWHC 2515

(Comm), [29], the "unities" are merely an aid to determining whether a series of losses involve such a degree of unity as to satisfy the contractual aggregation requirement.

104. It is not necessary, for the purposes of disposing of these appeals, to provide a definition of catastrophe which can demarcate these distinct scenarios for all purposes, even assuming it is possible to do so. The answer is likely to be heavily dependent on the commercial and contractual context in which it arises. However, in the context under consideration here, I am satisfied of the following:

    i. The catastrophe must be something capable of directly causing individual losses, because that is what both "Hours Clauses" require. That requirement of itself is likely in most if not all foreseeable scenarios to exclude attempts to aggregate by reference to what are often described in aggregation disputes as "states of affairs".

    ii. The catastrophe must be something which, in the context of terms of the Reinsurances in which the term appears, can fairly be regarded as a coherent, particular and readily identifiable happening, with an existence, identity and "catastrophic character" which arise from more than the mere fact that it causes substantial losses.

    iii. To that extent, it ought to be possible, in a broad sense, to identify when the catastrophe comes into existence and ceases to be, even if an attempt at a precise temporal delineation would offer scope for legitimate debate and dispute.

    iv. A catastrophe will involve an adverse change on a significant scale from that which preceded it.

D3 Conclusion

D3(1) The Covéa Award

105. The Covéa tribunal recorded the "explosion of cases" from the second half of February to the middle of March, the Prime Minister's broadcast and the closure order (Covéa Award, [18]). In the "Award and Disposition" they found that:

> "the outbreak of Covid-19 in the United Kingdom, reflected in an exponential increase in the number of infections during a period up to and including 18 March 2020, was a 'catastrophe' within the meaning of Condition 2(1)."

106. Having rejected UnipolRe's legal arguments at [72] to [102] above, there is no basis on which it can be said that this answer is "necessarily inconsistent" with the proper interpretation of the word "catastrophe" in the Covéa Reinsurance, indeed quite the contrary:

    i. There has been no suggestion that the catastrophe so identified did not directly occasion the original losses in respect of which indemnity is sought (Covéa Award, [43], [58], [100]-[102]).

ii. In the context of the Covéa Reinsurance, the "outbreak" described by the Covéa tribunal can fairly be regarded as a coherent and discrete happening, with an existence, identity and "catastrophic character" which arise independently of the fact that it causes substantial losses. As the Covéa tribunal noted, "during this relatively short period, the Covid-19 outbreak assumed a certain coherence in its development and effect and gave rise to a profound subversion of the order of life within the UK" ([49]).

iii. The Covéa tribunal identified the relatively short period within which the catastrophe came into existence.

iv. The Covéa tribunal noted the (undisputed) wholesale disruption to our national life which the outbreak occasioned (Covéa Award, [18], [20], [21] and [74]).

D3(2) The Markel Award

107. In considering the Markel Award, it is important to note the background to the manner in which the catastrophe argument came to be formulated:

i. In *Financial Conduct Authority v Arch (UK) Ltd* [2021] UKSC 1, [69], in the context of claims under direct insurance policies, the majority of the Supreme Court held that neither a particular disease or an "outbreak of disease" constituted an occurrence, stating:

> "A disease that spreads is not something that occurs at a particular time and place and in a particular way: it occurs at a multiplicity of different times and places and may occur in different ways involving differing symptoms of greater or less severity. Nor for that matter could an 'outbreak' of disease be regarded as one occurrence, unless the individual cases of disease described as an "outbreak" have a sufficient degree of unity in relation to time, locality and cause. If several members of a household were all infected with Covid-19 when a carrier of the disease visited their home on a particular day, that might arguably be described as one occurrence. But the same could not be said of the contraction of the disease by different individuals on different days in different towns and from different sources. Still less could it be said that all the cases of Covid-19 in England (or in the United Kingdom or throughout the world) which had arisen by any given date in March 2020 constituted one occurrence. On any reasonable or realistic view, those cases comprised thousands of separate occurrences of Covid-19. Some of those occurrences of the disease may have been within a radius of 25 miles of the insured premises whereas others undoubtedly will not have been. The interpretation which makes best sense of the clause, in our view, is to regard each case of illness sustained by an individual as a separate occurrence. On this basis there is no difficulty in principle and unlikely in most instances to be difficulty in practice in determining whether a particular occurrence was within or outside the specified geographical area."

ii. In *Stonegate Pub Company v MS Amlin Corporate Member Limited* [2022] EWHC 2548 (Comm), [179] again in the context of direct insurance, Mr Justice Butcher held that the decision at the COBR meeting on 16 March 2020 to advise the public to avoid pubs, restaurants and clubs was an occurrence:

> "In the present case, I regard the decision taken at the COBRA meeting on 16 March 2020 that the public should be advised to avoid pubs, restaurants and clubs as being an occurrence. It satisfied the unities. There is, to my mind, nothing in the context of the Policy which indicates that such a decision cannot count as an occurrence. Judging the matter from the perspective of an informed observer in the position of the insured, it is to be regarded as a single occurrence."

He also concluded that the "number of measures and announcements" in the period from 16 to 26 March 2020 were "a number of occurrences in quick succession" ([185-[186]).

iii. That led Markel to change its case in the arbitration to advance a primary case that the 18 March 2020 Closure Order was the relevant catastrophe. However, it is clear that the case was advanced on the basis that "the order took flavour from its background which was the catastrophe of COVID" (Markel Award, [31]), describing the 18 March 2020 Closure Order as a "catastrophe-induced law" ([32]), and Markel advanced an alternative case that it could "invoke the background of Covid as giving colour and support to the notion that the order was a catastrophe" ([52]).

iv. The Markel tribunal do not appear to have shared Markel's concerns as to the effect which the *FCA* decision in the Supreme Court that the "outbreak" of Covid 19 in the UK was not an occurrence might have on the argument that it did constitute a catastrophe for the purposes of the Markel Reinsurance. Given the nature of the Markel Reinsurance, and the language in it, I can understand the tribunal's perspective.

v. However, the Markel tribunal did accept Markel's alternative argument that the "order as necessitated by the pandemic was to be regarded as a catastrophe", approving the observation of Allsop CJ in *Star Entertainment Group Ltd v Chubb Insurance Australia Ltd* [2021] FCA 907, [202] that "the pandemic and the response thereto could not be disentangled" ([55]).

108. There has been no suggestion that the finding made by the Markel tribunal was not open to them on the basis of the case advanced at the hearing. What is said is that the 18 March 2020 Closure Order itself, being intended to ameliorate or mitigate the position, cannot be a catastrophe. The Covéa tribunal had suggested that the various Government measures "cannot be regarded as one or more catastrophes, *at least not if they are to be viewed separately from the underlying pandemic to which they were a response* …" because they were "rational and considered measures taken in the public interest ….." (Covéa Award, [74]). However, importantly they went on to say the following at [75]:

> "The various governments' advice and instructions to close schools and nurseries during the period 18 to 20 March may only be viewed as incidents in an overall catastrophe if they are regarded as essentially indivisible from the underlying catastrophe to which they were a response."

The Covéa tribunal then inserted a footnote stating "a submission accepted by the court at first instance in *Star Entertainment Group Limited v Chubb Insurance Australia* [2021] FCA 907 at para 202": i.e. the very passage cited and adopted in the Markel Award.

109. In these circumstances, it is not necessary to explore the issue of whether a government order in isolation could ever be a catastrophe and in what circumstances. The Markel tribunal found that the 18 March 2020 Closure Order was "inseparably linked to the emergency of a devastating pandemic", had "consequences which in their different ways are as bad or almost as bad as the disease" and "cannot be viewed separately from the pandemic which demanded … its response". Their conclusion that, so viewed, the 18 March 2020 Closure Order was a catastrophe for the purposes of the Markel Reinsurance, was the result of an evaluative exercise, and is a conclusion the Markel tribunal could "properly" reach (cf Sir Jeremy Cooke's approach in *Simmonds v Gammell* [2016] EWHC 2515 (Comm), [37]). That conclusion discloses no error of law and is not "necessarily inconsistent" with the proper interpretation of the word "catastrophe" in the Markel Reinsurance:

i. There has been no suggestion that the catastrophe so identified did not directly occasion the original losses in respect of which indemnity is sought (Markel Award, [24]).

ii. In the context of the Markel Reinsurance, the 18 March 2020 Closure Order and the "emergency of a devastating pandemic" with which it was "inseparably linked" can fairly be regarded as a coherent and discrete happening, with an existence, identity and "catastrophic character" which arise independently of the fact that it causes substantial losses.

iii. The Markel tribunal identified March 2020 as the time when "the pandemic was gathering force around the world" and in which the principal response to the pandemic in the UK occurred ([1]).

iv. The Markel tribunal noted the "subversion of the ordinary or natural course of things", the "grave infringement of personal liberty" and the adverse consequences which the order and emergency with which it was inextricably linked occasioned ([55]).

v. Finally, I would note that the view adopted by the Markel tribunal is consistent with the view of Mr Justice Jacobs, in a difference insurance context, in *Gatwick Investment Limited v Liberty Mutual Insurance Europe SE* [2024] EWHC 124 (Comm). [443]

> "The CJRS or furlough scheme cannot be regarded as wholly separate and divorced from the restrictions which were introduced in consequence of the widespread prevalence of Covid-19. On the contrary, it is clear that they were very closely connected."

D3(3) The appeals

110. For these reasons, the appeals against the conclusions of the Covéa and Markel Awards that there had been a catastrophe for the purposes of the relevant Reinsurances are dismissed.

E THE HOURS CLAUSES

E1 The arguments in summary

111. UnipolRe and General Reinsurance contend that even if there has been a catastrophe for the purposes of the Covéa and Markel Reinsurances respectively, only business interruption during the 168 hours stipulated by the relevant section of the "Hours Clause" can be relied upon for the purposes of seeking an indemnity under the relevant Reinsurance.

112. Markel contends that the "Hours Clause" periods were concerned with the duration of the *catastrophe* that causes the individual losses, not the *individual losses* themselves, and in the alternative supports Covéa's submission that the date of an individual loss for the purposes of the "Hours Clause" is the date when the original insured was first denied access to the insured premises.

E2 The position where business interruption losses are suffered as a result of damage to insured property

113. In what might be regarded as a conventional scenario, where an insured peril damages commercial property such as a hotel, which then endures a period of interruption to its business while it is repaired, it is accepted that, for the purposes of a property catastrophe excess of loss reinsurance, the entire loss which the hotel owner recovers under the direct insurance is treated, for the purposes of any temporal limitations in the reinsurance, as having occurred on the day of the property damage. This was common ground in both the arbitrations.

114. The Covéa Award, [26(iv)] recorded that:

> "[A]lthough UnipolRe disputed that the approach was correct in principle, Mr Coates' evidence was not disputed that in cases of business interruption consequential upon physical damage to property from a catastrophe, market practice was and is to treat the business interruption loss as occurring simultaneously with the material damage".

115. UnipolRe argued that this was "driven by pragmatic considerations and wrong in principle" ([86]), but noted that in such a case, there was undoubtedly physical damage when the peril hit, on which the business interruption was "parasitic" ([87]).

116. In the Markel arbitration, General Reinsurance accepted in its Defence (Markel Award, [50]) that:

> "In the ordinary case of a catastrophe, (e.g. a hurricane) the entire physical damage and BI losses occur on the same day. The duration of the subsequent BI period is a function of and is controlled by the severity of the physical damage. Accordingly even if the physical damage were never to be repaired, the BI loss could still be estimated and assessed from the physical damage which had taken place. In the more usual situation where repairs do occur, the BI loss can be quantified more precisely from the actual experience."

117. The Markel tribunal appears to have been sceptical as to whether that approach had a principled, as opposed to pragmatic, justification ([58], [60], [65]-[66]).

118. Both Mr Christie KC and Mr Kendrick KC sought to identify a principled distinction between the market's approach to what I shall refer to as "damage business interruption" and that which they contended was required for "non-damage business interruption".

119. Mr Kendrick KC's approach is reflected in the passage from the General Reinsurance defence which I have set out at [116] above, which effectively treats the damage business interruption claim as the unfolding of the consequences of physical damage which occurred on "day 1". By contrast, he argues that there is no "day 1 damage" controlling the subsequent business interruption in a non-damage business interruption claim, and that the parties are (in effect) in a "wait and see" situation, with the order precluding access taking effect "from day to day", and the business being interrupted on the same "day by day" basis.

120. I am not persuaded that a clear line can be drawn between damage and non-damage business interruption as Mr Kendrick KC suggests:

    i. Even with pure physical damage, the consequences of the initial "strike" by the insured peril may continue to manifest after the loss occurrence period. UnipolRe gave the examples of an "earthquake that damages a dam, where the damage worsens over time eventually leading to its collapse in consequence of the initial structural damage" and "where a flood damages the foundations of a home, causing it to collapse in stages both before and after the end of the relevant Loss Occurrence period" (Covéa Award, [98]). Those continuing manifestations may be contingent on what happens after the loss occurrence period – e.g. how quickly mitigation steps can be taken to prevent further damage; whether a damaged building later falls on a previously undamaged outbuilding may depend on wind direction etc. It is not difficult to conceive of contingencies occurring outside the loss occurrence period which will influence the extent of physical damage which would not break the chain of causation with the original "strike".

ii. The extent of damage business interruption will depend on how quickly the physical damage can be repaired, which may depend on such "post-strike" contingencies as the length of supply chains, changes in building regulations, how far the ordinary incidents of weather impact the progress of repairs etc. While in some cases, the requisite link with the original "strike" may not exist, it is easy to conceive of cases where the contingencies influencing the period of repair are wholly foreseeable.

iii. There are forms of non-damage business interruption cover – for example denial of access resulting from damage to adjoining property such as an access road or the unsafe state of a neighbouring building – where the extent of the business interruption will depend on essentially the same issues as in a claim for damage business interruption – how long it takes to repair the other road or the other property. Indeed that is true of Loss of Attraction cover, where the business interruption loss will depend on how long it takes to rebuild the "attraction".

iv. The inability to use premises through "denial of access" (for whatever cause) can readily be regarded as something inherently and immediately detrimental to the user of those premises, just as damage to the premises would be, and therefore as comparable with damage to the property.

121. Further, Mr Kendrick KC's "wait and see" and "day by day" analysis does not sit easily with Mr Justice Butcher's analysis of the effect of the various closure orders in *Stonegate Pub Company Ltd v MS Amlin Corporate Member Ltd* [2022] EWHC 2548 (Comm) and *Various Eateries Trading Ltd v Allianz Insurance Plc* [2022] EWHC 2549 (Comm), which treat the closure orders as having an immediate impact on the insured property analogous to physical damage to a building.

122. In *Stonegate*, Mr Justice Butcher identified the forced closure as a "trigger" with continuous effect, rather than involving a series of day-by-day triggers:

> "[69] I should, however, clarify that I do not accept Stonegate's case that there would have been multiple 'triggers' in the case of an Insured Location which once closed stayed closed but where the closure was enforced by the reiteration, continuation or renewal of regulations which were, materially, to the same effect. The 'trigger' is the enforced closure and, in my view, there will be one such 'trigger' unless and until the Location opens and is then closed again.
>
> …
>
> [73] I should also add that, in keeping with the submission of Allianz in the VE Action, I consider that the number of Covered Events would be the number of occasions on which there were materially different restrictions imposed or advised by government or a relevant agency which prevented or hindered the use of or access to 'Insured Locations'. Steps taken or advice given by Government or a relevant agency which merely repeated or renewed an

existing prevention or hindrance of access would, in my view, form part of one set of 'actions or advice' and thus constitute one Covered Event."

123. Mr Justice Butcher's analysis to similar effect in *Various Eateries Trading Limited v Allianz Insurance Plc* [2022] EWHC 2549 (Comm) which he had set out in *Greggs plc v Zurich Insurance plc* [2022] EWHC 2545 (Comm), [86] was approved by the Court of Appeal: [2024] EWCA Civ 10, [84].

124. In *Various Eateries*, Mr Justice Butcher also rejected the argument that the effect of the words "Prevention of Access – Non Damage during the Period of Insurance" was that only losses suffered during the Period of Insurance could be recovered, and that if access was prevented by an order during the period of insurance, the continuing operation of which was that restaurants were required to remain closed until sometime after the end of the period of insurance, December 2020, only losses incurred up to the end of the period of insurance could be recovered:

> "[67] … In my view the correct construction of the Policy is that there is a Covered Event when, in the case of Enforced Closure, there is an enforced closure of an Insured Location within the Period of Insurance, ie, if the closure takes place within the Period of Insurance. There could then be recovery for the resulting interruption and interference with the business, and the extent of that interruption or interference would depend on how long the closure lasted, irrespective of whether the whole period of such closure was within or after the Period of Insurance. Similarly in relation to Prevention of Access, if there are actions or advice which have, within the Period of Insurance, the effect of preventing or hindering the use of or access to Insured Locations, then there is cover for any resulting interruption or interference, and the extent of that interruption or interference would depend on how long the prevention or hindrance lasted, and the Clause does not require any period of such prevention or hindrance after the Period of Insurance to be disregarded.
>
> …
>
> [69] I consider that the construction for which Allianz contends would produce uncommercial and unintended consequences. It would mean, for example, that if an Insured Location were the subject of enforced closure on the last day of the Period of Insurance, and remained closed for a week, the only cover under the Policy would be for the consequence of the first day of closure. While on Allianz's contention, the remainder of the period of closure would fall within the next policy year, it would be quite possible, indeed probable, that insurers for the next year would exclude cover for an already subsisting closure / prevention or hindrance. .. More generally, Allianz's construction would mean that these two Insuring Clauses provided cover in a markedly different manner from how other Insuring Clauses would cover similar situations. For example, if there were a fire at an Insured Location during the Period of Insurance, and it led to the closure of an Insured Location for a significant period beyond the end of the Period of

> Insurance, then the entirety of that closure, up to the end of the MIP, would be relevant interruption or interference. But on Allianz's case, if there was an enforced closure for health reasons before the end of the Period of Insurance, no part of the closure after the end of the Period of Insurance would be relevant interruption or interference. I consider that to be paradoxical, and reinforces me in my view as to how the two Insuring Clauses would reasonably be understood."

125. That conclusion was upheld by the Court of Appeal at [92]-[93], who observed in the latter paragraph:

> "The function of the Insuring Clauses is to identify the Covered Events under the policy. The relevant Covered Event is a Prevention of Access or an enforced closure occurring during the Period of Insurance, that is to say between 29th September 2019 and 28th September 2020. A prevention or enforced closure occurring on 1st September 2020 is such a Covered Event because it occurs during the Period of Insurance. Accordingly VE is entitled to recover the Business Interruption Loss proximately caused by that Covered Event, even if that loss extends beyond the Period of Insurance, subject only to the longstop that the Maximum Indemnity Period in the policy schedule is 12 (or in the case of some restaurants, 24) months."

126. Relying on this analysis does not involve interpreting the aggregation provisions in the Reinsurances on the flawed premise that they are intended to operate in the same manner as those in the direct insurance (cf *Axa Reinsurance (UK) Ltd v Field* [1996] 1 WQLR 1026, 1034). The reference to "individual losses" in both Reinsurances naturally directs attention to the position at the level of the original insured, and the Markel tribunal's overriding consideration – that "it is natural to think that business interruption losses occur day by day" (Markel Award, [58]) – is also concerned with the nature of such losses at the position of the original insured.

127. Finally on this issue, I should also note that it is possible to conceive of denial of access losses which would involve no realistic "wait and see" element in the sense on which Mr Kendrick KC relies – for example a ban on accessing land contaminated by radiation or chemicals. Gruinard Island was the subject of an exclusion order from 1942 to 1990. It is not clear whether these are said to require a different analysis. As this example demonstrates, the "wait and see" and "day by day" aspects of Mr Kendrick KC's argument may conflict in cases in which the next "decision" is to be taken at some fixed interval sometime in the future.

128. This all suggests that the distinction which Mr Kendrick KC seeks to draw between the treatment of damage and non-damage business interruption is significantly overstated, and, on the contrary, that there are strong similarities between the two.

129. Mr Christie KC suggests that different insured perils are involved when considering claims for damage and non-damage business interruption. Relying on *FCA v Arch* [2021] UKSC 1, [215], Mr Christie KC submitting that in cases of damage business interruption "the insured peril is the damage to the property". He submitted that this

provided a reason for distinguishing between damage and non-damage business interruption.

130. In considering this submission, it is helpful to set out *Arch*, [215] in its surrounding context:

> "214 [T]he hybrid and prevention of access clauses specify more than one condition which must be satisfied in order to establish that business interruption loss has been caused by an insured peril. Furthermore, the structure of these clauses is that the elements of the clause are required to operate in a causal sequence. A good example is the public authority clause in Hiscox 1–3 (set out more fully at para 111 above), which covers financial losses " resulting solely and directly from an interruption to your activities caused by … your inability to use the insured premises due to restrictions imposed by a public authority during the period of insurance following … an occurrence of any human infectious or human contagious disease, an outbreak of which must be notified to the local authority" (our emphasis).
>
> 215 The first of these causal links—between financial losses and an interruption to the policyholder's activities—is of less significance than the others. That is because, although the FCA has suggested otherwise, we think it clear that the interruption is not part of the description of the insured peril. The concept of business interruption in insurance of this kind was in our view correctly analysed by Mr Simon Salzedo QC in his submissions on behalf of Argenta. It is a description of the type of loss or damage covered by the policy, in the same way as the type of loss or damage covered by, for example, a buildings insurance policy is physical destruction or damage. Thus, in a buildings insurance policy, unless the policy otherwise provides, the insurer is liable for the contractual measure of (i) destruction of or physical damage to the insured buildings, which is (ii) proximately caused by (iii) a peril insured against under the policy (such as fire, storm etc). In business interruption insurance an interruption to the policyholder's business or activities is the counterpart of the first of these elements. It describes the nature of the harm to the policyholder's interest in the subject matter of the insurance for which an indemnity is given if it is proximately caused by an insured peril."
>
> 216. In the Hiscox clause quoted above the first causal link is therefore concerned with the pecuniary measure of the interruption caused by an insured peril. Nevertheless, the peril covered by the clause is itself a composite one comprising elements that are required to occur in a causal sequence in order to give rise to a right of indemnity. Setting out the elements of the insured peril in their correct causal sequence, they are: (A) an occurrence of a notifiable disease, which causes (B) restrictions imposed by a public authority, which cause (C) an inability to use the insured premises, which causes (D) an interruption to the policyholder's activities that is the sole and direct cause of financial loss. Counsel for Hiscox in their submissions on

> this issue usefully represented the structure of the clause in a symbolic form as A→B→C→D, where each arrow represents a causal connection."

131. I accept that a necessary element in a claim for damage business interruption is that the business interruption results from physical damage itself caused by an insured peril. However, that is also true of some forms of non-damage business interruption claims (see [120]) and it is not of itself particularly informative. If it matters (and I am not persuaded that this does provide a principled basis for any difference in treatment on its own, in any event), I do not read *Arch*, [215] as suggesting that damage to property is the insured peril to which damage business interruption cover responds. At [215], the Supreme Court is equating the interruption to the policyholder's activities in a non-damage business interruption claim with the "destruction of or physical damage" in the Court's three stage "insured peril > proximate cause > physical damage" sequence. The implication of the Supreme Court's analysis is that the proper sequence for non-damage business interruption of the kind they were considering was "insured peril > proximate cause > business interruption". It is of interest, however, that the Supreme Court identify the "correct causal sequence" for one type of pure business interruption claim as follows:

> "(A) an occurrence of a notifiable disease, which causes (B) restrictions imposed by a public authority, which cause (C) an inability to use the insured premises, which causes (D) an interruption to the policyholder's activities that is the sole and direct cause of financial loss."

132. In this analysis, the impact on the insured's ability to use their premises is seen as an anterior and separate stage from the interruption to their activities, and in many ways can be said to approximate to the damage business interruption sequence of:

> "(A) a hurricane which causes (B) physical damage to the insured premises, which causes (C) an inability to use the insured premises, which causes (D) an interruption to the policyholder's activities that is the sole and direct cause of financial loss."

E3 Is the "Hours Clause" in the Markel Reinsurance concerned with the duration of the catastrophe or the duration of the individual losses?

133. As will be apparent from Appendix 1, there are differences in the formulation of the "Hours Clauses" in the Covéa and Markel Reinsurances which may explain why this argument was run in the Markel arbitration only. In short, Ms Sabben-Clare KC contends that the periods in the "Hours Clause" are concerned with identifying the duration of the catastrophe, and that all individual losses directly caused by the operation of the catastrophe during that period can then be aggregated, regardless of the date of the individual loss. Ms Sabben-Clare KC accepted that it would be rare that any difference would result from this being the correct interpretation, as against her alternative case that it was the date when the individual loss began which was relevant. However, one situation in which it might make a difference would be if an order such as the 18 March 2020 Closure Order had provided for staggered nursery closures, some commencing within and some outside the 168 hour period.

134. The "Hours Clause" in the Markel Reinsurance offers something for both sides on this issue:

i. The introductory words of the "Hours Clause" – "the duration and extent of any 'Event' so defined shall be limited to" – is more consistent with the view that it is the timing of the individual losses which matter, because that is the leading element of the definition recited in the preceding sentence.

ii. Ms Sabben-Clare KC's strongest point is the words "the Reinsured may choose the date and time when any such period of consecutive hours commences, and, *if any catastrophe is of greater duration than the above period*, the Reinsured may divide that catastrophe into two or more 'Events'" (emphasis added). However, these words can readily be read as referring to the individual losses caused by one catastrophe.

iii. Ms Sabben-Clare KC also relies on the words of the Limits clause, noting that if the word "Event" is replaced with its definition, the limits "GBP 10,000,000 any one loss and/or series of losses arising out of all individual losses arising out of, and directly occasioned by one catastrophe up to a further GBP 10,00,000 any one loss and/or series of losses arising out of all individual losses arising out of, and directly occasioned by one catastrophe," the clause becomes something of a mess. I agree that is not particularly felicitous drafting, but I do not find it particularly surprising when a lengthier definition elsewhere in the Markel Reinsurance is set out instead of the defined term. In any event, I do not see how this point assists in the interpretation of the relevant part of the "Hours Clause".

iv. By contrast, I agree with the Markel tribunal that the words "no individual loss from whatever peril, which occurs outside these periods or areas, shall be included in that 'Event'" "brook no misunderstanding" (Markel Award, [62]). This is clearly a reference to the date of occurrence of the individual loss not the catastrophe, and the words "included in that 'Event'" make it impossible to read this phrase as Ms Sabben-Clare KC submitted it should be read:

> "No individual loss from whatever Insured Peril, which Insured Peril occurs outside these periods or areas shall be included in that 'Event'".

v. The fact that Insured Perils operating outside of the relevant period or area cannot be included in an Event is a statement of the utterly obvious, whereas a similar statement about individual losses from an Insured Peril is not. Further, the word "included" contemplates the identification of smaller elements for the purpose making up an Event. That points very strongly to the individual losses which, when they arise out of and are directly occasioned by one catastrophe, make up an Event.

E4 When does an individual loss occur for the purposes of an "Hours Clause"?

E4(1) The conflicting views

135. The Covéa tribunal concluded that an "individual loss … occurs" for the purpose of the "Hours Clause" when the nurseries were closed on 20 March 2020, even though the business interruption continued until the nurseries were allowed to re-open when the first lockdown restrictions were lifted (Covéa Award, [102]), that being when "the insured first sustains indemnifiable business interruption loss within a nominated 168-hour period", with loss which the insured continues to sustain afterwards being aggregated with the loss sustained during the 168 hour period ([104(2)]).

136. By contrast the Markel tribunal took the view that the original insured's business interruption losses occur "day by day" (Markel Award, [58]) and that only those losses which occurred (on that construction) during the 168 hour period can be recovered ([68]).

E4(2) The operation of business interruption cover

137. Before exploring these competing analyses further, it is helpful to set out how business interruption losses are assessed under direct insurance policies.

138. Business interruption insurance provides cover during the period which it takes the business to return to normal trading (i.e. the level of trading which would have prevailed but for the operation of the insured peril), subject to a "Maximum Indemnity Period" which will provide a cut-off. There was a three-month cut-off in the Covéa NurseryCare Policy (Covéa Award, [92]). As UnipolRe and General Reinsurance noted when seeking to address the argument, there can be substantially longer Maximum Indemnity Periods, for example 36 months is not uncommon.

139. One of the leading texts, *Riley on Business Interruption Insurance* (11th, 2021), [7.3] explains the position as follows:

> "In the specimen UK business interruption specifications included in the appendices, the definition of the indemnity period reads: '[t]he period beginning with the occurrence of the Incident and ending not later than the Maximum Indemnity Period thereafter during which the results of the Business shall be affected in consequence thereof" and is completed by a definition of the maximum indemnity period which simply states the number of months selected. This dual definition is an example of the careful drafting which applies throughout the specification to express the exact intention of the insurers.
>
> It is important to note that the indemnity period does not necessarily end when a business is rehabilitated to the point of being able to resume normal trading activities. Subject to the maximum limit selected and stated in the definition the indemnity period continues until the results of the business are restored to normal (i.e. the results are those that would have been generated but for the incident), which may be many months after the physical damage to buildings, machinery and stock has been made good. Whilst there is no definition of the term 'results', this should be taken to mean financial results and thus encompass not just the turnover of the business, but also its costs. Therefore, if the business continues to incur additional expenditure by way of increase in cost of working once turnover

> returns to pre-incident levels, then the indemnity period will extend as long as that expenditure is being incurred, subject to application of the maximum indemnity period. It is also conceivable that the costs of a business may be reduced, e.g. if a more efficient production process is introduced following an incident. Again, the results of the business are continuing to be affected and thus the indemnity period is extended.
>
> It should further be noted that, should an incident cause an interruption to the business, the indemnity period is not necessarily the same as the maximum period selected and specified in the policy wording. It is the period, measured from the date of the incident up to the point when the results of the business are no longer affected by the incident, subject to this period not exceeding the insured maximum number of months … For example, in the case of an insurance with a maximum indemnity period of 12 months, if an incident should occur and cause an interference with the business for 15 weeks the indemnity period will be 15 weeks."

140. Further, within the relevant indemnity period (i.e. the actual recovery period, or, if shorter, the Maximum Indemnity period), the amount of the indemnity is not calculated on a "day-by-day" basis at the direct policy level, but across the period, with claims for increased cost of working, and credits for saved expenses. *Riley*, [1.12], offers the following hypothetical calculation for a business interruption settlement on a policy with a 12-month indemnity period:

Description	£
Financial year preceding fire	
Turnover	1,000,000
Purchases net of stock movement	(360,000)
Gross Profit (equating to a rate of 64%)	**640,000**
Expenses	
Production Wages	(400,000)
Overheads	(160,000)
Total Expenses	(560,000)
Anticipated Net Profit	**80,000**
12 months following fire	
Actual Turnover - 40% reduction from prior year	600,000
Purchases net of stock movement	(216,000)
Actual Gross Profit	**384,000**
Expenses	
Production Wages	(300,000)
Overheads	(100,000)
Increased costs to minimise reduction in turnover	(50,000)
Total Expenses	(450,000)
Net loss before settlement	**(66,000)**
Business Interruption settlement	
Reduction in Turnover (£1m less £600k)	400,000
Loss of gross profit at 64%	**256,000**
Increase in cost of working	50,000
Less savings	
Production Wages (£400k less £300k)	(100,000)
Overheads (£160k less £100k)	(60,000)
Business Interruption settlement	**146,000**

141. There is usually provision for adjustment of the trend of the business which is the subject of the Business Interruption claim. As the Supreme Court explained in *Financial Conduct Authority v Arch (Insurance) UK Ltd* [2021] UKSC 1, [253]-[254]:

> "The standard method used in business interruption insurance to quantify the sum payable under the policy takes an earlier period of trading for comparison purposes. In most wordings this is the calendar year preceding the operation of the insured peril. A 'standard turnover' or 'standard revenue' is derived from the turnover of the business in this period. This figure is then compared with the actual turnover or revenue during the indemnity period. The results of the business in the comparator period are also used to derive a percentage of turnover that represents gross profit. The rate of gross profit is then applied to the reduction in turnover to calculate the recoverable loss. Increase in the cost of working during the indemnity period is also typically covered.
>
> Whilst the basic comparison between the turnover of the business in the prior period and in the indemnity period will produce a rough quantification of the lost revenue, there may be specific reasons why a higher or lower figure would be expected for the indemnity period apart from the operation of the insured peril. For example, the general trend in the business may be such as to make it likely that there would have been increased or decreased turnover during the indemnity period in any case compared with the previous year. Equally, there may be specific reasons why the turnover during the prior year was depressed, such as a strike that affected the business, or why it would be expected to have been depressed anyway during the indemnity period, such as a scheduled strike. The purpose of the trends clause is to provide for adjustments to be made to reflect 'trends' or 'circumstances' such as these. The aim is to achieve a more accurate figure for the insured loss than would be achieved merely by a comparison with the prior period and to seek to arrive at a figure which, consistently with the indemnity principle, is as representative of the true loss as is possible. The adjustment may work in favour of either the policyholder or the insurer, but it is meant to be in the interests of both."

142. It will be apparent from the above that the amount paid to settle an individual business interruption loss can reflect a combination of credits and debits over a certain period, and that there may be considerable variation over time before you arrive at the final amount. This is very far-removed from a "day by day" calculation which UnipolRe's and General Reinsurance's arguments appear to assume. It is also clear that the assessment of a Business Interruption loss at the direct insurance level involves looking at the net effect over a particular period, not the aggregation of a series of daily losses (which answers Mr Christie KC's point that Covéa's case involves a "double aggregation").

E4(3) Other terms of the Reinsurances

143. There are various other provisions of the Reinsurances which are of relevance when considering the meaning of the words "individual loss which occurs".

144. Taking the Covéa Reinsurance first, there are two provisions concerned with the timing of losses:

i. The Reinstatement Provision provided "Losses hereunder are applied chronologically by date of loss." In the case of pure business interruption losses, it is difficult to see how this provision is to operate if there are separate losses day by day (or even hour by hour).

ii. The Extended Expiration provision addresses the position where the Reinsurance expires or terminates "while a Loss Occurrence is in progress", providing that in such a scenario, UnipolRe are liable "as if the entire loss or damage had occurred prior to the expiration or termination of this Contract provided that no part of that Loss Occurrence is claimed against any renewal or replacement of this Contract." Ms Sabben-Clare KC placed some reliance on a similar clause in the Markel Insurance, suggesting that the clause meant that "if our period of seven days was ongoing at the time the reinsurance expired …. the whole of the business interruption loss …. Comes into play when it otherwise wouldn't". However, the clause does no more than ensure the same treatment applies as in a case where the relevant occurrences all occur within the contract period. I do not accept that the effect of the clause would free claims from the operation of the "Hours Clause" (whatever that might be), to the extent it would have operated if the entire loss had occurred during the policy period. I do accept Ms Sabben-Clare KC's wider point, that it would be surprising if the Reinsurances responded to physical damage suffered after the expiration date and consequential business interruption caused by a hurricane which had commenced before and continued to operate after that date, but not business interruption loss which continued after the expiration date, caused by a result of denial of access resulting from physical damage to neighbouring property which was complete before the expiration date.

145. There are also clauses which address how the quantification or assessment of losses at the insurance level impact on the reinsurance: the Ultimate Net Loss clause, with the allocation of loss adjustment expenses, litigation costs and the application of salvage and recoveries, and the "follow the settlements" clause. On UnipolRe and General Reinsurance's case, business interruption losses and associated expenses and credits paid by the reinsured have to be unpicked at the reinsurance level to distinguish between expenses and credits referable to interruption during the relevant "Hours" period, and that referable to any subsequent period. While this is an aspect of a more general issue where a settlement or loss at the reinsured level reflects both losses which are reinsured and those which are not, it does present that difficulty in a particularly acute form.

146. There are similar provisions in the Markel Reinsurance. Mr Kendrick KC accepted that when dealing with a non-damage business interruption loss which ran over a number of days, the LOSS DATE ORDER clause would fall to be applied by reference to the date "the loss first occurred". That concession (which I am satisfied was rightly made) is of some significance, because it involves accepting that, for one purpose at least, a non-damage business interruption loss at the reinsured level is treated as a single loss occurring on the date it started for the purposes of the Markel Reinsurance. Similar issues arise on the ULTIMATE NETT LOSS and LOSS SETTLEMENTS CLAUSE.

E4(4) Analysis

147. It was common ground in both appeals that the references in the two "Hours Clauses" to "individual losses" mean the loss sustained by the original insured. That is significant, because it points the enquiry in the direction of the direct insurance. Further, as the Covéa tribunal noted, the "Hours Clause" defines "the extent and duration of a 'Loss Occurrence'" (or in the Markel Reinsurance, "the duration and extent of any 'Event'"), not the duration of an "individual loss" (Covéa Award, [91]).

148. As the Covéa tribunal found ([96]), and as was common ground before the Markel arbitration, when considering damage business interruption, the individual loss occurs when the insured peril damaged the insured premises. I agree with the Covéa tribunal that this supports an analysis which treats an individual loss as occurring "when a covered peril strikes or affects insured premises or property" ([95]), and that when the insured peril which strikes the premises is the loss of the ability to use it (whether through damage to other property or premises or a closure order), the individual loss occurs at the same point.

    i. That reflects the position at the direct level, to which the words "individual loss" naturally direct attention and, as the Covéa tribunal noted at Covéa Award, [97], "there is nothing in the Reinsurance wording to support an apportionment of an 'individual loss'".

    ii. Not only am I not persuaded that there is any sufficient basis to distinguish between the treatment of damage business interruption, business interruption following damage to other property owned by another and "pure" business interruption losses in this regard, but there are obvious parallels between the impairment of the rights of those entitled to property resulting from damage and that resulting from the inability to use the property: [120].

    iii. That analysis is consistent with the approach of Mr Justice Butcher in *Stonegate* and *Various Eateries* and the Court of Appeal in the latter case ([121]-[125]) and the Supreme Court in *FCA v Arch* [131]-[132]). It is also consistent with the reasons which the Markel tribunal gave for concluding that catastrophes which were not capable of causing physical damage were covered by the Markel Reinsurance (Markel Award, [44]):

        > "In a sense, the prevention of access is a physical thing, where the property is closed".

        (although they did go on to say, "but that is not the point").

    iv. This construction better coheres with the provisions dealing with the timing of the individual losses in the Reinsurances: [144] and [146].

    v. It avoids the uncommercial consequences of the "day-by-day" construction as outlined at [138]-[142] and [145]-[146] above and [150]-[151] below, and in that respect derives some limited support from the provisions of the Reinsurances quoted at [145]-[146] above.

149. The Markel tribunal reached a different view, principally because they concluded "it is natural to think that business interruption occurs day by day" (Markel Award, [58]). However, that approach seems to focus on the third stage of the sequence set out at [131]-[132] above, rather than the second which closely approximates to the moment when the peril "strikes" in damage business interruption cover, and it does not readily accommodate with the manner in which business interruption losses under direct insurance policies are assessed (see [138]-[142]).

150. Mr Christie KC identified what were said to be a number of practical difficulties with the construction which appealed to the Covéa tribunal and to me:

i. First, he posited the example of a closure order being made in respect of premises where the occupier was on holiday at the time when the closure order took effect (e.g. a cotton factory during "Whit week"), such that there was no impact on the business until the factory reopened.

ii. However, the interference with the owner's right to use the factory occurs when the order comes into effect, whatever use the owner wishes to make of the factory at that point in time. Lord Halsbury's celebrated observation in *The Mediana* [1900] AC 113, 117 is in point:

> "Supposing a person took away a chair out of my room and kept it for twelve months, could anybody say you had a right to diminish the damages by shewing that I did not usually sit in that chair, or that there were plenty of other chairs in the room? The proposition so nakedly stated appears to me to be absurd."

This was effectively the point made by the Covéa tribunal (Covéa Award, [96]).

iii. The "Whit week" closure would no doubt be factored into the calculation of loss during the indemnity period (as would the reverse position, where the first week involved the most profitable contract of the year).

iv. The same issue could equally arise when there is physical damage during a period of holiday.

v. Indeed, this argument rather points to the difficulties of UnipolRe's construction, confining cover to the position over 7 days, when profits, costs and savings are likely to be "lumpy" in their effect, rather than play themselves out on a linear basis over time. What is to happen, for example, where the insured premises experience an initial saving in costs over the first seven days (for example because the bulk of children were not due to return for another week after the date the closure order came into force), but a significant net loss over the indemnity period as a whole? On UnipolRe's approach, it is not clear whether this precludes an indemnity under the Reinsurance in respect of that claim, nor what the position would be in the reverse cases, where the adverse effects on the insured business are "front-loaded".

vi. This is also true of the provisions in the Covéa and Markel Reinsurances allowing a "Loss Occurrence" or catastrophe which is "greater than the above periods" to be divided into two or more "Loss Occurrences" or "Events": it would involve "slicing and dicing" what, at the direct insurance level, is a net loss arrived at taking account of debits and credits over the indemnity period into account, so as to place constituent parts of that calculation into separate periods.

151. Second, he posited the example of a (for example) retail premises undergoing repairs scheduled to last many months when a closure order took effect which allowed workers to attend at the premises, but not customers. He suggested that no business interruption "loss occurrence" could occur until the premises re-opened, and that it would make no sense for there to be a different result if "the direct insured's business was interrupted, however fleetingly, when the restriction on access was first imposed." However, I do not accept the correctness of Mr Christie KC's premise, to which the points made in the preceding paragraph are equally apposite.

152. Finally, Markel relied upon a number of cases which held, in the case of damage business interruption insurance, that the insured's cause of action against the insurer for business interruption "accrues when the business is first interrupted": *Carraig v Great Lakes* [2021] NIQB 63, [17] and *Globe Church Incorporated v Allianz Australia Insurance* [2019] NSWCA 27, [130]-[132]. I agree with the Covéa tribunal that these cases are not "germane to the issue it had to decide", albeit they are consistent with the decision which they, and I, have reached (Covéa Award, [103]).

E4(5) Conclusion

153. For these reasons:

i. I dismiss UnipolRe's appeal against the conclusion of the Covéa tribunal on the issue of "one catastrophe" and as to the operation of the "Hours Clause" in the Covéa Reinsurance.

ii. I allow Markel's appeal against the conclusion of the Markel tribunal as to the operation of the "Hours Clause" in the Markel Reinsurance.

iii. I dismiss General Reinsurance's cross-appeal against the conclusion of the Markel tribunal on the issue of "one catastrophe".

154. I would like to conclude by thanking all counsel for the high quality of their written and oral submissions.

APPENDIX ONE

THE TERMS OF THE COVÉA AND MARKEL REINSURANCES

The Covéa Reinsurance

1. The TYPE entry stated:

"PROPERTY CATASTROPHE EXCESS OF LOSS REINSURANCE CONTRACT."

2. The CLASS entry provided:

> "This Contract shall indemnify the Reinsured in respect of all business written within the Reinsured's Property Department and classified as Household and Commercial and all business classified by the Reinsured as Contractors' All Risks and Engineering All Risks including Motor Own Damage."

3. The TERRITORIAL SCOPE of the Covéa Reinsurance was:

> "losses occurring in the United Kingdom of Great Britain and Northern Ireland (including the Channel Islands and the Isle of Man), including incidental extensions thereto."

4. The Limits of cover were as follows:

	"Limit(s)	Deductible(s)
Layer 1	GBP 20,000.000 in excess of	GBP 10,000,000
Layer 2	GBP 40,000,000 in excess of	GBP 30,000,000
Layer 3	GBP 80,000,000 in excess of	GBP 70,000,000

Ultimate Net Loss each and every Loss Occurrence, inclusive of costs"

5. There were the following Reinstatement Provisions:

> "In the event of loss or losses occurring under this Contract, it is hereby mutually agreed to reinstate this Contract to its full amount from the time of such loss or losses until the expiry of this Contract. However, limited to the number of reinstatements and at an additional premium as follows:
>
> Layer 1 Two full reinstatements, one at 100% additional premium as to time but pro rata as to amount reinstated and one at nil additional premium.
>
> Layer 2 Two full reinstatements at 100% additional premium as to time but pro rata as to amount reinstated.
>
> Layer 3 One full reinstatement at 100% additional premium as to time but pro rate as to amount reinstated.
>
> Such additional premium shall be paid by the Reinsured when any loss or losses arising hereunder are settled …
>
> Losses hereunder are applied chronologically by date of loss. Notwithstanding the foregoing, the Reinsured may make collections in respect of losses which fall due

for recovery on a settled basis, which may ultimately not be recoverable hereon when all losses are considered in chronological order."

6. The PREMIUM provisions provided for Deposit Premiums, which were to be adjusted to an amount equal to:

"Layer 1 2.098%

Layer 2 1.389%

Layer 3 1.159%

applied to [Covéa's] Premium Income" subject to certain minimum payments.

7. "Premium Income" was defined as follows:

"The term 'Premium Income' shall be understood to mean gross premiums of the Reinsureds in respect of business coming within the Class (excluding Motor) written during the Period less cancellations and return premiums, all commissions, profit commissions, deductions and allowances under the original business, cessations to Flood Re and premiums given off by way of reinsurance which inures to the benefit of the Reinsurers hereon."

8. There was an "EXPRESS WARRANTY" that "two or more risks insured by the Reinsured to be involved in one Loss Occurrence before recovery hereunder."

9. Special Condition (ii) provided:

"The Reinsured shall be the sole judge of what is classified as 'Household' Business, 'Commercial' business and 'Contractors' All Risks and 'Engineering' All Risks business."

10. Condition 1 provided:

"Reinsuring Condition

In consideration of the payment of the premium and subject to the terms and conditions of this Contract, the Reinsurers agree to indemnify the Reinsured up to the Limit(s) in excess of the Deductible(s) on account of each and every Loss Occurrence, which the Reinsured may sustain under the business specified in Class of Business, as stated in the Risk Details during the Period [of the Covéa Reinsurance] …"

11. Condition 2 contained the following definition of "Loss Occurrence":

"1) The term 'Loss Occurrence' shall mean all individual losses arising out of and directly occasioned by one catastrophe.

2) The duration and extent of any 'Loss Occurrence' so defined shall be limited to:

(i) 120 consecutive hours as regards hurricane, typhoon, windstorm, rainstorm, hailstorm or tornado

(ii) 72 consecutive hours as regards earthquake, seaquake, tidal wave or volcanic eruption

(iii) 72 consecutive hours and within the limits of one country as regards riot, civil commotion or malicious damage

(iv) 120 consecutive hours as regards any 'Loss Occurrence' which includes individual loss or losses from a combination of any of the insured peril mentioned in paragraphs (i), (ii) or (iii) above. However, it is understood that within the period of consecutive hours the Reinsured shall treat as constituting a Loss Occurrence all individual losses occurring during a period of

- 120 consecutive hours as regards the insured perils referred to in paragraph (i) above; and
- 72 consecutive hours as regards the insured perils referred to in (ii) and (iii) above.

(v) 504 consecutive hours as regards flood howsoever caused

(vi) 504 consecutive hours as regards flood in combination with any of the insured peril mentioned in paragraphs (i), (ii) or (iii) above. However, it is understood that within the period of consecutive hours the Reinsured shall treat as constituting a Loss Occurrence all individual losses occurring during a period of

- 120 consecutive hours as regards the insured perils referred to in paragraph (i) above; and
- 72 consecutive hours as regards the insured perils referred to in (ii) and (iii) above; and
- 504 consecutive hours as regards the insured peril referred to in paragraph (v) above.

vii) 168 consecutive hours for any Loss Occurrence of whatsoever nature which does not include individual loss or losses from any of the insured perils mentioned in any of the paragraphs (i), (ii), (iii) or (v) above

and no individual loss from whatever insured period, which occurs outside these periods or areas, shall be included in that 'Loss Occurrence'.

3) Notwithstanding 1) and 2) above:

(a) Loss or losses resulting from fire, directly resulting from any of the insured perils mentioned in 2)(i), 2)(ii), 2)(iii) or 2(v) above constituting one Loss Occurrence, shall be included in full for the purposes of the calculation of the Loss Occurrence notwithstanding the applicable period of consecutive hours being thereby exceeded, subject however to a maximum period of 168 consecutive hours not being exceeded and provided such fire or fires shall have commenced during the applicable period of consecutive hours elected by the Reinsured.

(b) The Reinsured shall have the option to deem any one 'Loss Occurrence' to be the aggregate of all such individual losses within the Territorial Scope (regardless of locality) involving an insured peril referred to in 2)(i), 2)(iii) or 2)(v) above, or 504 hours as regards collapse caused by weight of snow or water damage from burst pipes or melted snow as insured perils, or a continuation of such insured perils, which occur within the specified period of consecutive hours corresponding to such insured perils.

However, within the period of consecutive hours selected by the Reinsured, involving a combination of the insured perils referred to above, the Reinsured shall only be permitted to aggregate loss or losses up to;

- 120 consecutive hours as regards 2)(i) above;
- 72 consecutive hours as regards 2)(iii) above;
- 504 consecutive hours as regards 2)(v) above; and
- 504 consecutive hours as regards collapse caused by weight of snow or water damage from burst pipes or melted snow.

(c) The Reinsured shall have the option to deem any one 'Loss Occurrence' to be the aggregate of all such individual losses within the Territorial Scope (regardless of locality) involving an insured peril referred to in 2)(ii)) above, or 2(ii) or 2)(v) above (always provided that such insured perils are a direct or indirect consequence of 2(ii), which occur during the specified period of consecutive hours corresponding to such insured perils.

However, within the period of consecutive hours selected by the Reinsured, involving a combination of the insured perils referred to above, the Reinsured shall only be permitted to aggregate loss or losses up to;

- 72 consecutive hours as regards 2)(ii) above;

- 72 consecutive hours as regards 2)(iii) above; and
- 504 consecutive hours as regards 2)(v) above.

4) In all cases under this Condition 2 – Definition of Loss Occurrence …

3. the Reinsured may choose the date and time when any such period of consecutive hours commences and the date and time when it ends, subject always to the maximum period of consecutive hours set out hereinbefore;

4. in the event that the Loss Occurrence exhausts the full extent of the reinsurance cover purchased by the Reinsured for each Loss Occurrence in place at the time of the Loss Occurrence, or the maximum period of consecutive hours permissible is exceeded, the Reinsured may divide the Loss Occurrence into two or more Loss Occurrences, provided that:

(i) there is no overlap in time between two such Loss Occurrences which involve the same insured peril or combination of insured perils; and

(ii) no Loss Occurrence commences earlier than the date and time of the happening of the first recorded individual loss to the Reinsured which forms part of that Loss Occurrence…"

12. Condition 3, Extended Expiration, provides:

> "If this Contract should expire or be terminated while a Loss Occurrence is in progress, it is understood and agreed that, subject to the other terms and conditions of this Contract, the Reinsurers hereon are responsible as if the entire loss or damage had occurred prior to the expiration or termination of the Contract provided that no part of that Loss Occurrence is claimed against any renewal or replacement of this Contract."

13. Condition 6 defined he term "Ultimate Net Loss" as follows:

> "The term 'Ultimate Net Loss' shall mean the sum actually paid by the Reinsured in respect of any Loss Occurrence including in-house assessors fees and/or other salaried officials or employees diverted from their normal duties, all legal costs and expenses of litigation, if any, and all other loss expenses of the Reinsured …
>
> All salvages, recoveries or payments recovered or received subsequent to any loss settlement hereunder shall be applied as if recovered or received prior to the aforesaid settlement and all necessary adjustments shall be made by the parties hereto. Nothing in this Condition shall be construed to mean that losses under this

> Reinsurance are not recoverable until the Reinsured's Ultimate Net Loss has been ascertained … .

14. Condition 11 provides:

> "All loss settlements made by the Reinsured, provided same are within the terms and conditions of the original policies in respect of business covered hereunder and within the terms and conditions of this Contract, shall be unconditionally binding upon the Reinsurers and amounts falling to the share of the Reinsurers shall be payable by the Reinsurers within 15 days upon receipt of such evidence of the amounts being paid being provided by the Reinsured …."

15. Condition 18 provides:

> "Destruction by Civil Authority
>
> This Contract is extended to include direct loss and damage arising from the action or actions taken when complying with an order of a duly constituted Civil Authority at the time of and only during a conflagration, flood or similar insured peril, and only when necessary for the purposes of restricting the loss or damage of other property from the respective insured peril, subject however, to the terms and conditions of this Contract."

16. Finally, Appendix 1 contained various exclusions:

    i) Exclusion (f):

    > "Transmission and Distribution Line Exclusion Clause (300m)
    >
    > All above ground transmission and distribution lines, including wire, cables, poles, pylons, standards, towers or other supporting structures and any equipment of any type which may be attendant to such installations of any description for the purpose of transmission or distribution of electrical power, telephone or telegraph signals, and all communication signals whether audio or visual.
    >
    > This exclusion applies to all equipment other than that which is on or within 300 metres (or 1000 feet) of an insured structure.
    >
    > This exclusion applies to both physical loss or damage to the equipment and all business interruption, consequential loss and/or other contingent losses related to transmission and distribution lines, other than contingent property damage/business interruption losses (including expenses), arising from loss and/or damage to lines of third parties."
    >
    > ("**the Covéa Transmission Exclusion"**).

    ii) Exclusion (g), which "excludes loss, damage, destruction, distortion, erasure, unavailability, corruption or alteration of ELECTRONIC DATA", but with a write-back

"in the event that physical loss or damage:

(i) to property insured under any of the Reinsured's original policies and/or contracts in force under this Contract from an insured peril results from any of [the excluded] matters …. Or

(ii) causes loss of or damage to Electronic Data;

this Contract will cover such loss or damage and consequential loss therefrom."

The Markel Reinsurance

17. The TYPE entry stated:

PROPERTY CATASTROPHE EXCESS OF LOSS REINSURANCE CONTRACT.

18. The CLASS OF BUSINESS was described as

"All business written on behalf of the Reinsured as detailed below:

- All Material Damage and Business Interruption business, being Fire, Allied Perils and All Risks business written by Markel (UK) Ltd.;

- Property business written under the Equine and Livestock Binders; - Property business written by Markel International Deutschland;

- Property business, including property risks covered under Contractor's All Risks business, written by EC Insurance Company Limited (ECICL/ECIC); and as detailed in the Reinsured's 2020 Property Reinsurance Placing Information, seen and noted by Reinsurers hereon.

'All business' shall be understood to include all policies and/or contracts of insurance and/or reinsurance including certificates and business accepted under Lineslips, Covers and Binding Authorities (hereinafter referred to as 'Facilities') and shall embrace all declarations made thereon. Where certain business allocated to this account includes incidental exposures in addition to those defined as coming within the scope of the account, it is agreed that this Reinsurance extends to cover such additional exposures provided that the whole premium for such business has been credited to the account protected hereunder. For the above purposes, incidental shall be defined as no greater than 5.00% of overall exposures."

19. Two exclusions featured in the argument:

i) "Loss, damage, cost, or expense directly or indirectly caused by, contributed to by, resulting from, or arising out of or in connection with any act of terrorism, as defined herein, regardless of any other cause or event contributing concurrently or in any other sequence to the loss. An act of terrorism includes any act, or preparation in respect of action, or threat of action designed to influence the government de jure or de facto of any nation or any political division thereof, or in pursuit of political,

religious, ideological, or similar purposes to intimidate the public or a section of the public of any nation by any person or group(s) of persons whether acting alone or on behalf of or in connection with any organisation(s) or government(s) de jure or de facto, and which: (i) involves violence against one or more persons; or (ii) involves damage to property; or (iii) endangers life other than that of the person committing the action; or (iv) creates a risk to health or safety of the public or a section of the public; or (v) is designed to interfere with or to disrupt an electronic system. This Reinsurance also excludes loss, damage, cost, or expense directly or indirectly caused by, contributed to by, resulting from, or arising out of or in connection with any action in controlling, preventing, suppressing, retaliating against, or responding to any act of terrorism.

Notwithstanding the above and subject otherwise to the terms, conditions, and limitations of this Reinsurance, this Reinsurance will pay actual loss or damage (but not related cost or expense) caused by any act of terrorism provided such act is not directly or indirectly caused by, contributed to by, resulting from, or arising out of or in connection with biological, chemical, or nuclear pollution or contamination in respect of: a) personal lines; and b) commercial lines (up to a maximum amount of GBP5,000,000 per Event. Furthermore, in respect of terrorism losses occurring in Great Britain (being England, Wales and Scotland), in the event of an occurrence giving rise to a loss or losses payable by the Reinsured not being certified by the relevant authority of Her Majesty's government to have been an "Act of Terrorism" and the Reinsured obtaining a Tribunal ruling confirming the relevant authority's noncertification and solely by reason thereof the Reinsured is unable to recover such loss or losses in whole or in part from Pool Reinsurance Company Limited, the Reinsurers accept that this terrorism exclusion does not apply to such loss or losses."

(**the Markel Terrorism Exclusion**).

ii) "All losses in respect of overhead transmission and distribution lines and their supporting structures other than those on or within one statute mile of an insured premises. It is understood and agreed that public utilities extension and/or suppliers' extension and/or contingent business interruption coverages are not subject to this exclusion, provided that these are not part of a transmitter's or distributor's policy and/or contract"

(**the Markel Transmission Exclusion**).

20. The TERRITORIAL SCOPE was:

"In respect of business written by Markel (UK) and by EC Insurance Company Limited (ECICL/ ECIC) only Losses occurring in the United Kingdom of Great Britain and Northern Ireland including the Channel Islands and the Isle of Man, and incidental exposures overseas. In respect of business written by Markel (UK) under the Equine and Livestock Binders only Losses occurring in the United Kingdom of Great Britain and Northern Ireland including the Channel Islands and the Isle of Man and the Netherlands, and incidental exposures overseas. In respect of business

written by Markel International Deutschland only Losses occurring in Germany, Austria, Switzerland and Luxembourg and incidental exposures overseas. LIMITS (FOR 100%): To pay that part of each Ultimate Nett Loss to the Reinsured in excess of GBP10,000,000 any one loss and/or series of losses arising out of one Event. Up to a further GBP10,000,000 any one loss and/or series of losses arising out of one Event."

21. There was a REINSTATEMENT PROVISION as follows:

> "In the event of a loss or losses being paid under this Reinsurance, it is agreed to reinstate this Reinsurance up to 1 full reinstatement of the limit of indemnity (as expressed in the "Limits") from the time of commencement of the occurrence of such loss or losses until the expiry of this Reinsurance on payment of an additional premium by the Reinsured, calculated at pro-rata of 100% of the finally adjusted premium, when any loss or losses (or part thereof) requiring such reinstatement hereunder are settled. Nevertheless, Reinsurers shall never be liable for more than the limit of indemnity, as expressed in the "Limits", nor for more than GBP20,000,000 in all hereunder. For the purpose of the foregoing; (a) The term "pro-rata" shall mean pro-rata only as to the fraction of the limit of indemnity hereby reinstated. (b) The finally adjusted premium hereon shall be computed in accordance with the "Premium". (c) If any loss settlement requiring payment of reinstatement premium is made prior to the relevant finally adjusted premium being computed, then the reinstatement premium shall be provisionally calculated on the latest adjusted premium or the Deposit Premium, if no adjustment has been made and subsequently adjusted if, and as necessary."

22. The PREMIUM clause provided:

> "The premium payable hereunder shall be calculated at the rate of 1.7535% applied to Reinsured's finally adjusted Nett Premium Income accounted for during the period from 1 January 2020 to 31 December 2020, both days inclusive, on their last three open years of Account, in respect of the business hereby reinsured. Adjustment to be made as soon as possible after 28 February 2021. Furthermore, a Minimum and Deposit Premium of GBP192,000 shall be payable in two equal instalments, in account, on 1 March 2020 and 1 September 2020. For the purposes of the foregoing adjustment(s), original premiums in currencies other than Pounds Sterling shall be converted into Pounds Sterling at the rates of exchange as used in the books of the Reinsured. The term "Nett Premium Income" shall mean gross premiums less all commissions, brokerage, discounts, profit commissions, taxes if any, cancellations, returns of premiums and less premiums given off by way of reinsurance, recoveries under which inure to the benefit of Reinsurers hereon."

23. The TWO RISK CONDITION made it "a condition of this Reinsurance that no claim will be paid hereunder unless two or more risks are involved in the same Event."

24. The HOURS CLAUSE provided:

> "The words 'Event' shall mean all individual losses arising out of, and directly occasioned by one catastrophe. However, the duration and extent of any "Event" so defined shall be limited to:
>
> (a) 168 consecutive hours as regards a hurricane, typhoon, windstorm, rainstorm, hailstorm and/or tornado,
>
> (b) 72 consecutive hours as regards earthquake, seaquake, tidal wave and/or volcanic eruption,
>
> (c) 72 consecutive hours and within the limits of one City, Town or Village as regards riots, civil commotion and malicious damage,
>
> (d) 504 consecutive hours as regards flood,
>
> (e) 72 consecutive hours as regards any "Event" which includes individual losses or losses any of the perils mentioned in (a), (b) and (c) above,
>
> (f) 168 consecutive hours for any "Event" of whatsoever nature that does not include individual loss or losses from any perils mentioned in (a), (b), (c) and (d) above, and no individual loss from whatever Insured peril, which occurs outside these periods or areas, shall be included in that 'Event'.
>
> The Reinsured may choose the date and time when any such period of consecutive hours commences and, if any catastrophe is of greater duration than the above periods, the Reinsured may divide that catastrophe into two or more 'Events', provided that no two periods overlap and provided no such period commences earlier than the date and time of the first recorded individual loss to the Reinsured in respect of the catastrophe in question ..."

25. The LOSS DATE ORDER clause provided:

> "It is agreed that for all purposes hereunder losses shall be considered in chronological loss date order of occurrence but this shall not preclude the Reinsured from making provisional collections hereunder in respect of claims which may ultimately not be recoverable hereon"

26. The ULTIMATE NETT LOSS CLAUSE provided:

> "The term 'Ultimate Nett Loss' shall mean the sum actually paid or agreed to be paid by the Reinsured in settlement of losses or liability after making deductions for all recoveries, all salvages, and all claims payable under other reinsurances, whether collected or not, and shall include all costs and expenses forming part of loss settlements as more fully detailed in the Loss Settlements Clause. All salvages, recoveries or payments recovered or received subsequent to a loss settlement under this Reinsurance shall be applied as if recovered or received prior to the aforesaid settlement and all necessary adjustments shall be made by the parties hereto. Provided always that nothing in this Clause shall be construed to mean that losses

under this Reinsurance are not recoverable until the Reinsured's Ultimate Nett Loss has been ascertained. Notwithstanding anything contained herein to the contrary, it is agreed that underlying recoveries on other excess of loss reinsurances (as far as applicable) are for the sole benefit of the Reinsured and shall not be taken into account in computing the Ultimate Nett Loss nor in any way prejudice the Reinsured's right of recovery hereunder."

27. The EXTENDED EXPIRATION clause provided:

> "If this Reinsurance should expire whilst any loss covered hereunder is in progress it is agreed that, subject to the other terms and conditions of this Reinsurance, the Reinsurers hereon shall be liable for their share of the entire loss or damage as if the entire loss or damage had occurred prior to the expiration of this Reinsurance, provided that no part of that loss is claimed against any renewal of this Reinsurance."

28. The "LOSS SETTLEMENTS CLAUSE (including compromise)" clause provided:

> "All loss payments and settlements (including compromise settlements) made by the Reinsured, save those outside the terms of this Reinsurance, shall be binding upon the Reinsurers to the extent of their share hereunder. All expenses (excluding salaries of all employees and office expenses of the Reinsured) incurred by the Reinsured (a) in the investigation, defence and settlement of claims or suits or in connection with any salvage or subrogation when attributable to a loss covered hereunder ("Loss Adjustment Expenses"), and (b) in declaratory judgment or similar actions to determine coverage specifically under the business reinsured for a loss actually or allegedly covered hereunder or for rescission or voidance of the business reinsured hereunder ("Declaratory Judgment Expenses"), shall form part of such loss settlements."