BUSINESS INTERRUPTION REPORT

JANUARY 2023

GLOBAL INSURANCE LAW CONNECT

CONTENTS

INTRODUCTION

As we emerge from the pandemic and adjust to a new normal, businesses and insurers have spent the last two years looking at how to recoup the losses they have experienced. Business interruption insurance has been the front line of that battle globally, with legal challenge and debate on both sides. However as 2023 unfolds, it is possible that we may turn a corner and both parties will find a way to leave behind the disputes of the past and move to a brighter future for this much-troubled class of insurance.

In March 2020, globally most businesses started to feel the pain of the pandemic as governments put in measures to contain the spread of Covid-19. Many of these businesses would have had a business interruption (BI) policy in place to protect themselves in the event of an unexpected closure. However, over the last three years, the responses to the mass forced lockdowns (from the insurance industry, governments and the courts) have varied significantly in each jurisdiction.

In most countries prior to the pandemic, BI insurance was, and in many countries still is, sold as an addition to property or all risk/multi-risk policies, which would broadly come into effect if there was material damage to the property. In rare cases, some BI policies expressly cover losses in cases where the damage is caused by restrictions imposed on a business by the authorities in cases of infectious diseases. However, as the pandemic began to have an impact, unprecedented numbers of businesses globally started to look at their cover to explore whether they could make claims for the enforced shut down they were experiencing.

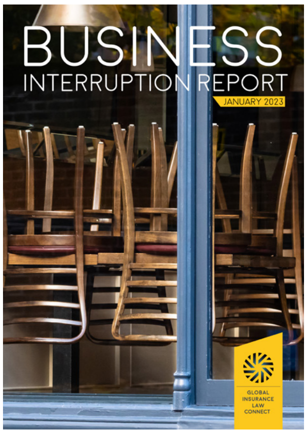
While in some countries there was a unanimous view that temporary or involuntary closure was not covered by the current BI policy in others there was, and still is, some debate around the issue. This matter quickly became a challenge for insurers, regulators and governments as they tried to navigate through this unprecedented time.

But this has brought, over the long term, an unexpected positive. Across the world, while claims have generated negative press, they have also made many businesses newly aware of the need for the right BI cover. In some markets, double-digit growth is expected in the year ahead, and in many places, it seems that BI insurance could see a period of growth and stability (particularly in more traditional areas of coverage) as the market embraces a new wave of covid-responsive policies that either clearly exclude or include pandemic cover. However, there will still be a need for pandemic cover by some clients and it remains to be seen what appetite insurers have for such cover and at what cost.

As we enter a new year, Global Insurance Law Connect has recently asked 19 members around the world to provide an analysis of their local market as it now stands. The results, which are very encouraging, are presented in our first ever global report on business interruption insurance, highlighting the differences in approach across 19 countries and four continents.

Best wishes

Gillian Davidson
Global Insurance Law Connect – Chair



This document does not present a complete or comprehensive statement of the law, nor does it constitute legal advice. It is intended only to highlight issues that may be of interest to customers of Global Insurance Law Connect. Specialist legal advice should always be sought in any particular case.

Designed and produced by Doublelix Ltd.
www.doublelix.com

DEMAND FOR BUSINESS INSURANCE: APPETITE GROWS, BUT INSURERS ARE INCREASINGLY CAUTIOUS

In most countries, business interruption insurance is sold as an add-on to either property or multi-risk/all-risk policies. However, there are exceptions, such as the UK, where it is also sold as a standalone policy which covers notifiable diseases.

According to our members, since the outbreak of the pandemic there has been a noticeable growth in demand for BI coverage, globally. Brazil, in particular, has seen an increase in the number of insurers offering BI coverage.

In China, to strengthen the financial support for the businesses affected by the Covid-19 pandemic, the China Banking and Insurance Regulatory Commission (CBIRC) issued Notice of the General Office of the CBIRC on Further Improving Financial Services for Enterprises in Difficult Sectors Affected by COVID-19. It stipulates that insurance companies should further increase the coverage within BI policies, commercial property policies, and other forms of policies to mitigate risks and losses enterprises may encounter due to the pandemic.

According to the CBIRC report, insurers have launched 68 BI insurance policies since the pandemic outbreak. Most Covid-related BI policies are offered stand-alone, while the prices of conventional BI policies remain the same. Furthermore, the conventional BI polices could not cover losses from the Covid restrictions, and the specialised BI policies offered could only cover a limited amount. Despite more BI policies being introduced in the context of the Covid-19 pandemic, the purchasing rate remains relatively low (in total accounting for less than 5% of the Chinese insurance market).

While there is significant increasing demand across the world for BI cover, insurers have also become more cautious about the risks they are willing to take on. Giorgio Grasso, partner at BTG Legal in Italy, commented: “There is more demand for BI cover. Economic trends mean that companies have wider and more vulnerable supply chains than ever before, which leaves them open to interruptions in new and more complex ways, but carriers seem to be cautious about extending their capacity.”

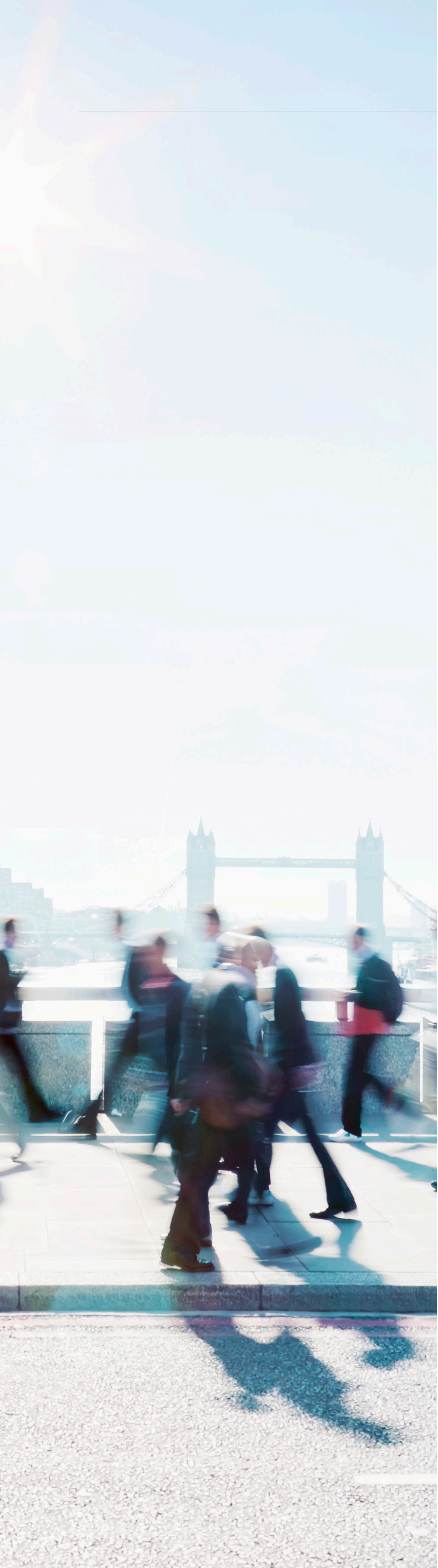
> “THERE IS MORE DEMAND FOR BI COVER. ECONOMIC TRENDS MEAN THAT COMPANIES HAVE WIDER AND MORE VULNERABLE SUPPLY CHAINS THAN EVER BEFORE, WHICH LEAVES THEM OPEN TO INTERRUPTIONS IN NEW AND MORE COMPLEX WAYS, BUT CARRIERS SEEM TO BE CAUTIOUS ABOUT EXTENDING THEIR CAPACITY.”
>
> GIORGIO GRASSO, PARTNER, BTG LEGAL, ITALY

In terms of demand, New Zealand was an outlier as it was generally insurer practice to exclude infectious disease from BI cover. Rob Coltman, partner at Duncan Cotterill in New Zealand, commented: "This exclusion came into effect a number of years before Covid following the avian and swine flu pandemics, which impacted the region."

Robert Byrd, partner at Byrd & Associates in France, commented: “Insured companies have noted an unprecedented hardening of negotiations with insurers. Insurers have tended to increase premia, add exclusions and limit their coverage. Thus, pandemics, as well as cyber risks, are frequently now excluded from multi-line insurance policies. In addition, some companies bound by old policies have been required to sign endorsements to exclude coverage for pandemic-related risks for future losses.”

Justus Könkkölä, partner at Socrates in Finland, commented: "Similarly, in Finland BI cover is still available but some insurers have sharpened their terms and conditions to clearly exclude pandemic related interruptions and non-local circumstances."

> “INSURED COMPANIES HAVE NOTED AN UNPRECEDENTED HARDENING OF NEGOTIATIONS WITH INSURERS. INSURERS HAVE TENDED TO INCREASE PREMIA, ADD EXCLUSIONS AND LIMIT THEIR COVERAGE. THUS, PANDEMICS, AS WELL AS CYBER RISKS, ARE FREQUENTLY NOW EXCLUDED FROM MULTI-LINE INSURANCE POLICIES. IN ADDITION, SOME COMPANIES BOUND BY OLD POLICIES HAVE BEEN REQUIRED TO SIGN ENDORSEMENTS TO EXCLUDE COVERAGE FOR PANDEMIC-RELATED RISKS FOR FUTURE LOSSES.”
>
> ROBERT BYRD, PARTNER, BYRD & ASSOCIATES, FRANCE



CLAIMS: BUSINESSES CONTINUE TO SEEK COMPENSATION

With the pandemic being a 'once in a lifetime' event, it was inevitable that there was going to be a debate between insurers and policyholders as to whether or not claims could be made for unexpected, forced closure of businesses.

Currently, the number claims paid out across the world remains relatively low and there are several factors why this is the case.

In Australia, a small number of claims have been paid out by insurers since the pandemic began, typically submitted by companies seeking recovery under specific covers (for example, event cancellation). However, insurers have contested a number of claims, and these have led to litigation. A similar situation has been played out in the UK, US, France and Spain. As Mark Doepel, partner at Sparke Helmore Lawyers in Australia, pointed out: "Claim numbers have been low, although this is attributed to claimants adopting a "wait and see" approach pending the BI test cases rather than decreasing demand."

Norway has also seen a relatively low number of claims for business interruption but there have been large payouts for sickness absence cover. This led to some insurers stopping the sale of the product. Those that did reintroduce it increased the excess. Joachim Mikkelborg Skjelsbæk, partner at Advokatfirmaet RIISA in Norway, commented: "The Norwegian government introduced relatively good support schemes for businesses. That was sufficient for a number of businesses and meant that they did not need to make a claim on their policy."

In some markets, including Brazil, Denmark and Italy, it was unanimously accepted by insurers and policyholders business interruption due to Covid-19 or lockdowns were not covered under standard policies and and therefore there have been no claims or judicial disputes as yet. However, as the outcome of litigation becomes clearer across other markets it may influence businesses in those countries to make claims. While there have not been disputes, it has led to a rise in the purchase of non-damage BI insurance, which would come into effect in the event of another pandemic.

> "THE NORWEGIAN GOVERNMENT INTRODUCED RELATIVELY GOOD SUPPORT SCHEMES FOR BUSINESSES. THAT WAS SUFFICIENT FOR A NUMBER OF BUSINESSES AND MEANT THAT THEY DID NOT NEED TO MAKE A CLAIM ON THEIR POLICY."
>
> JOACHIM MIKKELBORG SKJELSBAEK, PARTNER, ADVOKATFIRMAET RIISA, NORWAY

CONFLICTS OVER PAST CLAIMS: A GAME OF TWO HALVES

The pandemic and ensuing lockdowns led to a significant amount of uncertainty for businesses. They looked to insurers, regulators and governments to support them during these unprecedented times and help recover financial losses that they had suffered.

It is worth studying the differences between how regulators and governments in different countries have dealt with these legal proceedings:

UNITED KINGDOM

After the first lockdown, the UK faced a deluge of claims. Policyholders stated that they were eligible for payouts due to their policies being covered by an occurrence of a notifiable disease at or within a specified distance of the business' premises and from public authority intervention limiting use of business premises. The insurers disagreed as they said that these policies were written to only cover local outbreaks.

The Financial Conduct Authority (FCA) stepped in due to the sheer volume of claims and the urgency to get payments to policyholders. The Financial Markets Test Case Scheme was put in place and the FCA argued that the pandemic should be covered by BI policies. In January 2021, the UK Supreme Court found in favour of the policyholders. However, claims are still being pursued as there is ongoing debate as to whether the one policy limit applies, or businesses are eligible for multiple claims.

GERMANY

In Germany, too, there have been numerous court cases on business shutdown insurance in the past three years. After the insurers had initially refused coverage in many cases, consensual solutions with supposedly low payments by the insurers (e.g. 15% of the loss of turnover, so-called Bavarian solution) were reached in many cases in 2020. As some policyholders did not agree with this, they tried to enforce their claims in court. However, at the beginning of 2022, the Federal Supreme Court ruled that, at least with the vast majority of insurance conditions, insurance coverage was not given. As a result, most of the policyholders' lawsuits were unsuccessful.

FINLAND

In Finland, interruption insurance cases have particularly concerned the restaurant and catering industry and a certain local insurer whose policy wording favoured the insureds. More than a hundred companies in the restaurant industry have sued this insurance company for epidemic compensation during the pandemic. The amount of claimed compensation could be up to hundreds of millions of euros. The trials are still pending.

AUSTRALIA

The first test case in Australia concerned policy exclusion wording, which cited an outdated Quarantine Act. The NSW Court of Appeal ruled against the insurers, with leave to appeal refused by the High Court in June 2021. The second test case, held in the Federal Court, involved ten claim disputes related to proximity of an outbreak to a business, and the impact of various exclusionary policy clauses and government pandemic orders. The decision handed down was appealed in the Full Federal Court, with leave to appeal refused by the High Court on 14 October 2022. The Court largely ruled in favour of the insurers, although it was ruled that government-assisted JobKeeper subsidies could not be offset against any pay-outs. Prior to the final High Court ruling, three key insurers had collectively set aside $1bn+ in provisioning for related matters, with one since reducing its provisioning from $975m to $615m, and another expected to release most of a $179m provision.

NORWAY

In Norway, there has been one broadly covered test case for a hotel in Norefjell. Norefjell was one of about 240 hotels included in a group level Master Policy. The Master Policy included Property Cover under All Risk terms with BI cover, with a special extension written into the Master Policy covering business interruption if persons were "unable to use the hotel due to an epidemic outbreak."

The insurer's main argument was that the Master Policy only covered the outbreak that occurred at the hotel. This argument was supported by the fact that the general terms of the insurance agreement regulated BI to only apply for damages that occurred at the insured's premises, and that exceptions from this could only apply if this followed in the policy. Both the District Court and the Appeal Court ruled in the insurer's favour, stating that the extension did not make any exception from the general terms, and that there was nothing that indicated that the parties intended to make such an extension. The Judgement was appealed to the Supreme Court but declared inadmissible.

The total claims for all of the hotels covered by the Master Policy, was estimated to be approximately €180 million.

SPAIN

In the Spanish legal system, many separate judgements have arisen from claims between policyholders and insurance companies during the pandemic.

One of the latest judgements to be issued was by the Appeal Court of Granada on 21 September 2022. Prior to this, many other judgements have been issued since 2020 although all of them derived from mass risk policies (policies with general conditions proposed by insurers in which the policyholder can negotiate little). The trend followed in the courts over the past year has been to reject claims brought by policyholders in light of their mass risk policies. The last sixteen judgements have concluded that if the insurance policy does not specify pandemic coverage as a cause, it will not give rise to a claim.

However, there are several judgements pending linked to large risk policies for which we expect the outcome to be delivered in the first six months of 2023.

FRANCE

There has been much litigation concerning, in particular, the AXA multi-risk policy. The cases in the lower and appellate courts have gone both ways: some courts have ruled in favour of AXA and others in favour of the insured interpreting differently the same exclusion wording.

Four noteworthy rulings were handed down on 1 December 2022 by the Cour de Cassation concerning the interpretation of the AXA multi-risk policy. The French Supreme Court retained the validity of the contested exclusion of coverage clause, which provided that:

- The policy covers operating losses linked to an administrative closure ordered due to an epidemic or infectious disease
- EXCEPT when “on the date of the closure decision, at least one other establishment, whatever its nature and activity, is subject, in the same departmental territory as that of the insured, to an administrative closure measure for an identical reason”.

Whilst there is no *stare decisis* rule in France, these four rulings should have a strong influence on the appellate courts to which the four cases have been remanded as well as the other pending cases involving the AXA policies. However, these rulings are specific to the interpretation of AXA’s multi-risk policy and do not constitute a precedent for other disputes concerning other insurance policies.

Reportedly, the cumulative amount initially owed by AXA for business interruption in the four cases at issue was €800,000. The amount in litigation is clearly much higher in so much as there are numerous cases still pending before the trial courts as well as before the French Supreme Court involving AXA as well as other insurers.

US

The first Covid related business interruption case in the United States was brought about by a New Orleans restaurant, Cajun Conti LLC, against Lloyds of London underwriters, in April 2020. In early rounds the judge ruled in favour of the restaurant. However, the final judgement found in favour of the insurer. The restaurant lodged an appeal and, in June 2022, a Louisiana appeals court found that an all-risk property policy covered business-income interruption losses caused by COVID-19 shutdown orders. This was the first appellate win for an insured business.

There has been a deluge of cases brought about since this case in April 2020. The main argument in most cases is whether there is physical loss or damage to the policyholder’s locations (for BI coverage), or whether communicable disease coverage was triggered (for those policies with such coverage).

Contrary to many other jurisdictions, insurance regulation and any disputes must go through state courts rather than the federal courts. As there is no centralised forum to assess the claims there has been a wave of mass litigation across the US.

Currently, there have been very few payments of pandemic-related property damage BI claims in the U.S. So far, insurers have been most successful in defending the disputes but there remain cases in play, which may go in favour of businesses.

As we can see above there is little consensus globally as to whether claims for business interruption should be paid by insurers. In many jurisdictions, insurers have claimed that they would not be able to cover the costs of all the claims that have been made.

There are ongoing discussions in Europe about whether a public private partnership should be forged in the future to protect both parties from further pandemic risks. However, there is yet to be any agreement on this.

LOOKING AHEAD TO THE FUTURE

Globally, it is likely that business interruption policies will continue to be sold, potentially in greater numbers, particularly given that most small businesses are underinsured. There is still a nascent market in some countries, such as Brazil and China, but there is growing awareness of the product thanks to the pandemic.

In Brazil, according to data from the National Confederation of Insurance Companies (CNSeg), a growth of 6.6% to 14.9% (in a more optimistic scenario) is estimated for the sector in 2023, considering the new level of premia issued after the pandemic, which represented significant growth in the market.

João Marcelo dos Santos, partner at Santos Bevilaqua Advogados in Brazil commented: “Considering the low claims ratio in the sector, an increase in demand is to be expected, in line with better market conditions and new players entering in this market.

“The offering of a more diverse range of BI policies and coverages is also expected because of new product rules that opened up the development of tailor-made large risks policies by the insurers since 2020.”

The market for BI policies in China is still developing too. Li Jiao, partner at Buren in China commented: “The proportion of BI insurance in the Chinese market is relatively low, owing to the fact that most companies are either unaware of its existence or unwilling to purchase it. However, as a result of the challenges of Covid-19 and unexpected lockdowns in recent years, many businesses, particularly SMEs, have realised the importance of purchasing BI policies to cover their losses. Furthermore, many local governments encourage the sale of BI policies by providing financial incentives to assist businesses in mitigating their losses. Although the financial subsidiary provided is temporary and the policy coverage is limited, it assists more companies in understanding BI policies.”

Nearly all of GILC's members have highlighted that going forward, due to the challenges that the pandemic has thrown up, we will continue to see increased scrutiny of BI policy wordings by insurers and insureds. Insurers have strengthened their insurance policies on renewal or new policies in terms of operating losses by multiplying the exclusion clauses, or by formulating more specific coverage clauses. For example, in France in 2021, insurers reportedly pledged not to increase premia on multi-line business insurance policies. However, in 2022, the premia for multi-risk professional insurance (including business interruption) increased by 10%.

In some jurisdictions it is likely that legislative changes will also be made. In Taiwan, C.T. Chang, partner at Lee and Li Attorneys-at-Law, commented: “We believe the continued pandemic could cause legislation to change sooner or later in response to international practices.”

While the pandemic has forced both businesses and insurers to revisit their BI policies there are other threats on the horizon, which could force closure or a period of disruption to a business, such as extreme weather and cyber security breaches. Both events would fall under business interruption and there is likely to be increased demand as businesses look to mitigate damage from these events.

As always, pricing of policies will depend very much on supply and demand. However, due to events in the past year, political and economic factors are likely to add to the pressure on premia.

The sudden spike in inflation caused by the war in Ukraine and compounded by the aftermath of Covid-19 has had a direct impact on all products offered in the market, including BI policies.

Fernando Blanco Gamella, partner at Blanco y Asociados Abogados in Spain, commented: “Inflation is a critical element in the negotiations and inevitably leads to price increases.

“Until the global outlook calms down, the trend will be towards a reduction in policyholder coverage and a rise in the price of policies.”

Equally as the price of goods and services continue to increase (and there are continued supply chain issues), insureds may need to purchase increased cover with longer indemnity periods at additional cost, whilst satisfying more rigorous underwriting conditions. It is expected that industries with a higher risk of claims will continue to renew their policies, while lower-risk sectors may see a reduction in the number of policies taken out because of an increase in premia.

However, against this backdrop of high inflation, increased scrutiny on wordings and higher premia, there is far more clarity around expectations on behalf of both businesses and insurers in terms of what can be expected from a BI policy.

As it stands today, despite some short-term pressures on pricing caused by global inflation; and a few continuing cases hanging over from the pandemic – most significantly in North America – the outlook for BI insurance as a class is more positive than it has been for some years. With increased customer awareness and newly refined wordings, following the very detailed reviews of policies that insurers have been forced to undertake, BI insurance could see a period of growth and stability at last (particularly in traditional areas of coverage). The results could be beneficial to both insurers globally, and their clients, and perhaps help to rebuild relationships fractured by the stresses of the pandemic. However, there will still be a need for pandemic cover by some clients and it remains to be seen what appetite insurers have for such cover and at what cost.

GLOBAL INSURANCE LAW CONNECT

Global Insurance Law Connect is an alliance of insurance law firms spanning four continents. Inspired by client demand, we have built a formal network that delivers the right advisers in the right places and in the right way for insurance industry clients.

We are:

- Specialist: focusing only on insurance law, advising you on the business of taking risks around the world.
- Commercial: we use the strength and breadth of our formal network to help our clients reduce the time and money they spend on managing risk.
- Creative: whether you are in new or established markets, dealing with familiar or unusual issues, our lawyers have the skills and experience to deliver great outcomes

If you'd like to find out more about Global Insurance Law Connect, contact one of our member firms, or our business manager, Michaela Hickson at michaelahickson@globalinsurancelaw.com

GLOBAL INSURANCE LAW CONNECT

www.globalinsurancelaw.com