BUSINESS INTERRUPTION INSURANCE

1. **INTRODUCTION**

COVID-19 has certainly had an impact on business operations, and the potential implications of insurance coverage in this time can cause unprecedented uncertainty and anxiety. As businesses and carriers review policies for possible coverages during the coronavirus pandemic, questions fall into certain buckets of coverage:

- workers' compensation
- property damage
- event/trip Cancellation
- supply chain interruption
- business interruption
- general liability

In this article, we focus on business interruption. As businesses reach into their files to review what losses related to the pandemic may be covered, insurers are reviewing those same policies to determine what claims to expect. To say the coronavirus outbreak is paramount to a catastrophic event is an understatement, with insurers bracing for potential worldwide losses at a magnitude the industry has never seen. Both regulators and litigators will be impacted for many years to come on this singular issue.[1]

2. **BUSINESS INTERRUPTION INSURANCE**

The most direct loss felt by most businesses during the pandemic has been, and will continue to be, business interruption (BI). This interruption could be caused by an ill workforce, governmental orders, loss of suppliers, loss of customers or a combination of all of the above as a result of the pandemic and responses to COVID-19. Part of most businesses commercial property coverage, policies often require some kind of physical loss to the premises to trigger the BI coverage. This requirement has already triggered many questions about what physical loss looks like in the age of the COVID-19 pandemic.

It seems that another cancellation or postponement of an event or conference or change to a web-based event hits the news every hour. The press picked up over the weekend the twin effect of the global mobility of business on a day to day basis with the associated risk of spread of infection and the speed with which emerging information can be transmitted and plans changed. This is in contrast to the speed of transmission of both infection and information in the past.

A key and primary focus of businesses will of course be safeguarding their people. However the economic consequences of what is now a global issue cannot be ignored.

The most obvious impact is in relation to the actual cancellation or postponement of an event, whether sporting, cultural or business. This may result in contractual issues with attendees as to refunds or losses as well as contractual issues with the myriad of suppliers and contributors to events, whether in catering, equipment hire, IT personnel, facilities – the list is a long one. All affected will be looking at their contracts and considering what protections they might have in place in relation to cancellations. Whilst some contracts will deal with the situation expressly, others might contain an implied allocation of risk. This may require consideration of whether a “force majeure” or contractual frustration clause is applicable, which will involve interpretation with regard to the context and objective purpose of the clause. There may also be issues over whether any particular categories of losses are recoverable or whether some are too remote.

Other potential impacts include supply chain interruption, lack of production due to personnel staying at home, defaults on debts and contracts, and ultimate insolvency.

Will insurance play a role here? The answer is – possibly, depending of course on applicable law and wording, and insurers are beginning to report notifications.

It is generally rare for a business to be able to insure against business losses that are not consequent on some form of physical damage (see below). However businesses do frequently take out **event cancellation** insurance. This is likely in general terms to cover the necessary cancellation, postponement or curtailment of the event for external matters out of an insured’s control. However there will be various exclusions or limitations, including potential for communicable disease unless this is added back by way of additional cover. In all events it will be necessary to look very carefully at the wording – the scope of the wording, and the scope and status of any governmental guidance, advisories, or prohibitions may all be relevant to how the policy applies. Where cover does apply there may be a cover for expenses and lost profit and, not surprisingly, complex issues of quantification may arise and early analysis is essential.

If events are changed to virtual or web-based events then thought should also be given to making sure that the original **liability coverage** obtained is wide enough to encompass the change in event profile – a web-based event will present different risks that will need to be managed.

Supply chain disruption is a key risk of broader application. The reports of decreased output due to the impact within countries such as China may well have a knock-on effect throughout the supply chain. The mere fact that a business cannot source the right raw materials or components from its own suppliers, or its personnel cannot attend work, and thus suffers a drop in revenue or contractual liability due to an inability to meet its own contract requirements are unlikely to trigger a **business interruption policy**. Such policies are usually predicated on physical damage to the insured's own premises, with possible enhancements (contingent cover) for matter such as interruption due to damage to a supplier's premises. In all cases policies should be carefully reviewed for any extensions for non-damage (including disease-related) or general trade disruption business interruption cover.

If such pressures on the supply chain lead to widespread financial stress and default then **credit risk insurance** policies may be relevant. Credit risk policies will sometimes be obtained to protect traders from non-payment or failure to supply and they are usually broadly worded. However these policies can be obtained year on year without being reviewed in any detail or claims arising, and when a possible claim does arise insured sometimes undermine the cover they have procured by not being aware of the terms and conditions of the policy. Common pitfalls we see are insured failing to make an effective and prompt notification, or looking to renegotiate the debt to extend the time or change the terms without insurer consent. If there is any question of a default by the debtor, the insured would be well advised to carefully review the policy and act accordingly.

3. **CONCLUSION**

This is a unique challenge for the global community that goes well beyond businesses. Ultimately, however, if insurance is to be any part of the solution to the economic challenges it must be considered now, and not just down the track. Understanding with brokers and the legal team what cover has been obtained, how and when it may be triggered and the policy requirements so far as early engagements with insurers are concerned are the first three key steps.