What to look for in a Business Interruption Insurance Policy

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A checklist setting out the key terms that insureds should review when notifying a claim or negotiating the terms of a business interruption insurance policy.

About this checklist

This is a checklist of the key provisions to be considered when reviewing a business interruption (BI) insurance policy, whether in the context of negotiating the terms of a future policy or considering a potential notification or claim under an existing one.

BI insurance cover was considered in the Financial Conduct Authority's (FCA) BI insurance test case (see Financial Conduct Authority v Arch Insurance (UK) Ltd and others [2021] UKSC 1) and in subsequent decisions including Corbin & King Limited and others v Axa Insurance UK Plc [2022] EWHC 409 (Comm) and Stonegate Pub Company Ltd v MS Amlin Corporate Member Ltd and others [2022] EWHC 2548 (Comm). For more information on the FCA's BI insurance test case, see Practice note, COVID-19: FCA business interruption insurance test case. For information on other significant decisions relating to coverage for BI losses relating to COVID-19, see Insurers and reinsurers: COVID-19 toolkit: Legal updates relating to decisions on BI insurance.

For information on the key terms that insureds should review when notifying a claim or negotiating the terms of a directors' and officers' liability or professional indemnity insurance policy, see Checklist, What to look for in a directors' and officers' liability insurance policy and Checklist, What to look for in a professional indemnity insurance policy.

Overview of BI coverage

BI insurance is intended to cover loss of income suffered by a business where a covered peril (risk) causes loss, destruction or damage to insured property that means that the business cannot continue its normal operations. The insurance will generally cover lost profit or lost revenue and related increased costs of working.

For information on some of the principles that apply when calculating BI loss, including the scope and application of trends clauses (that is clauses which make adjustments to the calculation of gross profit to provide for the trends of the insured business), see Practice note, Insurance contract law: causation: the link between the harm and loss and the measure of indemnity.

Who is covered?

A BI policy typically provides cover for losses to a specified business or group of businesses.

Some key points to consider:

- The policy is likely to state that cover is provided for losses suffered by "the Insured". Check the definition of "Insured" to determine who is covered under the policy.
- If the definition of "Insured" includes entities, check which entities are covered. A typical BI policy will cover a named policyholder entity plus its subsidiaries. Alternatively, the policy may insure the "company", where "company" is defined as a number of specified entities within a corporate group. Check the situation regarding acquisitions and disposals of subsidiaries during the policy period. Also check whether any entities or jurisdictions are specifically excluded from cover. If they are, look to see if there are separate local policies for those entities.

Relationship with property damage insurance

BI insurance generally responds only where there has been underlying loss, destruction or damage to specified property, for example to the premises where the insured carries on its business, or the machinery or equipment it uses to do so (although there may be extensions which do not require this, such as denial of access extensions, see What is covered?). Consequently, BI insurance policies will require that the insured has in place a material damage policy covering the interest of the insured in the specified property against loss, destruction or damage by the insured perils, and the claim under such policy must be admitted by the insurer concerned before BI cover will be admitted. The clause in which this is stated is typically known as the "material damage proviso".

It is common for insurers to offer combined policies which include both property damage and BI insurance. BI coverage is included in most commercial property insurance policies. (For examples of decisions relating to the scope of BI cover dependent on property damage, see TKC London Ltd v Allianz Insurance plc [2020] EWHC 2710, considered in Legal update, COVID-19: pandemic losses not covered by BI policy with physical loss trigger (Commercial Court) and Bellini v Brit UW Limited [2023] EWHC 1545.)

What is covered?

BI coverage protects against economic loss sustained by an insured as a result of loss, destruction or damage to the insured's property by a peril not otherwise excluded from the policy.

BI insurance is either written on an all-risks basis or a specified perils basis. If cover is on an all-risks basis (which is more common), then the insured will be covered for BI losses flowing from any fortuitous cause of loss, destruction or damage to the insured property (unless excluded). If cover is on a specified perils basis, the insured will only be covered for BI losses flowing from loss, destruction or damage to the insured property caused by one of the covered perils.

The key requirements of the insuring clause will be:

- **Loss, destruction or damage**: The BI loss must be the result of (unexcluded) loss, destruction or damage to insured property or equipment caused by one of the covered perils. The definition of loss, destruction or damage may be narrow (restricted to physical damage to property) or may be broader, for example including contamination, disease infection or risk thereof. As noted in Relationship with property damage insurance, the material damage proviso will require that this loss, destruction or damage be covered separately by the insured's material damage policy (which may be part of a combined property damage and BI policy).
- **Insured property**: The loss, destruction or damage that causes the BI loss must be suffered in respect of insured property or equipment at specified premises (usually listed in a schedule to the policy).
- **Covered perils**: The loss, destruction or damage to insured property or equipment that has led to a BI must have been caused by a covered peril. Examples of perils that may be covered include fire, lightning, explosion, aircraft, flood, prevention of access by a government official or department, an outbreak of infectious disease, or a riot or civil commotion. For all-risks cover, the covered perils will include any fortuitous cause of loss that is not excluded by the terms of the policy. For an overview of the law of causation in general insurance contract law see Practice note, Insurance contract law: causation. The note explains the principle of proximate cause by reference to the findings of the Supreme Court in Financial Conduct Authority v Arch Insurance (UK) Ltd and others [2021] UKSC 1.
- **BI**: The loss, destruction or damage must cause interruption of the business carried on by the insured. What qualifies as BI is likely to include circumstances that prevent a business from operating as normal, for example, prevention of access to premises or prevention of opening premises to customers, or inability to operate industrial machinery or processes. It may also include loss of access to the business' production sources and suppliers.
- **Restoration period**: BI losses will be insured only during the period of restoration, which begins when the physical loss, destruction or damage occurs and ends when the property should, with reasonable speed, be repaired or replaced and the location made ready for normal operations to resume.

If all these requirements have been met, and provided no exclusions operate to prevent the claim, the insured will be entitled (depending on the terms of the policy) to recover either loss of profits or loss of revenue for the duration of the restoration period. Less commonly, the insured may be entitled to recover only for any increase in the cost of working.

What else is covered?

In addition to covering lost profits or revenue flowing from damage to insured property, BI policies may also cover:

– Additional expenses (expenses beyond loss of income) incurred because of the BI.

– The cost of mitigation, that is expenses incurred to reduce the BI loss.

– BI losses falling under various non-damage extensions of cover (that is cover in the absence of damage to insured property), including (for example):

  – service interruption extensions, which cover lost income caused by loss, destruction or damage to utilities relied upon by the insured business (for example, electricity, gas, water and telephone lines);

  – contingent BI extensions, which cover lost income caused by BI at the locations of the insured's supply chain partners (suppliers or customers);

  – leader property or loss of attraction extensions, which cover lost income caused by loss, destruction or damage to a third party property not owned by the insured but essential for the business operations of the insured (for example, a private car park relied upon by the insured business' customers);

  – extensions for BI caused by orders of local, civil, statutory or military authorities (the meaning of competent local authority was considered by Lord Mance in the Policyholders v China Taiping Insurance (UK) Co Ltd (10 September 2021) arbitration. For more information, see Legal update, COVID-19: arbitrator dismisses business interruption insurance claims);

  – ingress and egress or denial of access extensions, which cover lost income caused because a company cannot access its premises (for example because of insured damage in the vicinity of the insured premises or an incident occurring within a specified radius of the insured premises which prevents access). (Denial of access extensions to BI cover were considered by the Divisional Court and the Supreme Court in the FCA test case (FCA v Arch Insurance (UK) Ltd and others [2020] EWHC 2448 (Comm) and Financial Conduct Authority v Arch Insurance (UK) Ltd and others [2021] UKSC 1, respectively), by the High Court in Corbin & King Limited and others v Axa Insurance UK Plc [2022] EWHC 409 (Comm), considered in Legal update, High Court holds that COVID-19 related BI losses are covered by denial of access clause in insurance policy and Stonegate Pub Company Ltd v MS Amlin Corporate Member Ltd and others [2022] EWHC 2548 (Comm), considered in Legal update, Causation, aggregation and furlough payments considered in insurance claim for business interruption losses (High Court)).

Check whether cover under these extensions is included in addition to the main limit of liability under the policy (see How much cover is there?) or whether they will erode the limit of liability available. There may be specified sub-limits that apply in respect of each category.

How much cover is there?

As with many types of insurance, BI policies can offer one of two bases of cover:

– An "any one claim" policy provides cover up to the full policy limit for each individual claim made in the period of insurance.

– An "aggregate" policy provides cover up to the full policy limit for all claims made in the period of insurance.

Check the limit of liability and whether it is per claim or aggregate. Also check whether there are any sub-limits. If you are insuring multiple properties or locations under the same policy, make sure the policy is clear as to whether the limits of liability apply separately to each property or location, or are a single global limit.

If cover is provided on an aggregate basis, during the policy period, insurers will only pay up to the limit of indemnity regardless of the number of claims. Finally, check what deductible(s) might apply. The deductible is the amount that the insured has to pay before insurers will step in to cover the balance of the loss. As stated in What is covered?, BI losses will be insured only during the period of restoration, which begins when the physical loss, destruction or damage occurs and ends when the property should, with reasonable speed, be repaired or replaced and the location made ready for normal operations to resume.

What is the policy period?

The policy period refers to the duration of the policy. That is, the period between inception of the policy and its expiry or cancellation. The policy period of BI policies is typically one year, but multi-year policies exist.

Claims will only be covered if the relevant damage and BI occurs and is notified to insurers during the policy period or an agreed extended reporting period. If negotiating a policy, consider how long the policy period should be.

If seeking to notify a claim, check that the policy period is still active (including whether it has been extended by any endorsements) and how much time remains before it expires. Remember that you may have to act quickly to notify a claim or circumstances that may give rise to a claim – late notification can be fatal to recovery if timely notification is a condition precedent to insurers' liability (for information on conditions precedent, see Practice note, Insurance contract law: warranties and other terms).

Are there any typical exclusions?

BI insurance may exclude losses resulting from some or all of the following (by way of example):

– Fraudulent, dishonest or criminal acts by the insured.

– Insolvency of the insured.

– War or acts of terrorism.

– Computer viruses and cyber attacks. (For information on cyber insurance, see Practice note, Cyber insurance: an overview.)

However, whether any of these categories of loss is excluded will depend on the nature of the business being insured. It may be possible to bring certain types of loss back within the scope of cover by way of policy extensions.

BI insurance will also not respond to claims arising from BI that began prior to the period of insurance or that could have been notified to previous BI policies.

Policies may exclude cover for losses arising in particular jurisdictions. There may also be specific exclusions from cover that are included by way of endorsement to the policy.

The insured will also be required to mitigate its losses. It is advisable to keep a record of what has been done to mitigate loss and the costs incurred in such mitigation measures. For information on the insured's duty to mitigate insured loss and the impact this has on the measure of indemnity, see Practice note, Insurance contract law: causation: the link between the harm and loss and the measure of indemnity.

What are the notification requirements?

Check the requirements for notification:

- It will generally have to be in writing.
- Notification by email may be expressly permitted; if it is not, it is advisable to notify by email and by post.
- A time limit for notification may be specified, for example within 30 days of the policyholder – or a named person within that business – becoming aware of the damage.
- Notification may also need to include certain details to be valid: for example, details of the nature of the BI, specific dates on which the interruption began or occurred, and an estimate of potential loss.
- Requirements for notifying a claim may be different from the requirements for notifying a circumstance that could give rise to a claim (for more information on the requirement to notify circumstances that may give rise to a claim see Practice note, Professional indemnity insurance: an overview).

Check whether an address is given for the notification of claims. If a broker is to make a notification on the insured's behalf, ask that the broker ensures notification is made to the correct address (for information on duties of insurance brokers when handling claims, see Practice note, Insurance brokers: duties to clients).

The insured is likely also to be required to submit a proof of loss. It is therefore important to preserve evidence relating to the BI, for example photographs of damage, an inventory of physical losses, or evidence showing that the business' premises were at risk of contamination.

For more information on notification clauses and their interpretation, see Practice note, Insurance contract law: general principles: Making a claim under the insurance contract, see also Checklist, The making of insurance claims.

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