

A photograph of an offshore wind farm with several white wind turbines on blue ocean under a clear sky. A dark grey semi-transparent banner is overlaid across the middle of the image.

# Property and Energy Week Report

Singapore, August 2024

Kennedys

# Property and Energy Week Report

Representatives from Kennedys' global market leading Property, Energy and Construction team were delighted to host our recent 'Property and Energy Week' in Singapore in conjunction with attendance at the 2024 Asia Power Forum conference.

We had numerous, very engaging, client meetings, hosted a very well attended market lunch, and held (and spoke at) several client seminars and gatherings over the week.

A number of themes and issues came across clearly from our discussions with claims managers and underwriters over the week, in terms of both current concerns and opportunities, many of which were aligned with the APF conference themes of transition and the need for and benefits of cooperation. This brief report aims to provide a useful snapshot of these issues, along with a series of observations and market feedback from the conference.

Overall, what really stood out during the APF conference and our various events during the week, was the real engagement of participating stakeholders from across the Asia Pacific market, and beyond from the Middle East and London, in the opportunities which are available in the region and the importance of cooperation and partnership to make the most of these.

We look forward to continuing to support our insurer and reinsurer clients while they pursue these opportunities, and please reach out to any of the Kennedys team if you would like to discuss any of the topics covered in this report.



**Mark Errington**

Partner, Singapore

t: +65 6436 4317

m: +65 8333 4100

e: [Mark.Errington@kennedyslaw.com](mailto:Mark.Errington@kennedyslaw.com)

# Issues in the spotlight

## The application of LEG3/06

One question which came up repeatedly in discussions with underwriters was whether current market design exclusions are fit for purpose, in particular in light of recent decisions in courts in two different US States on the question of “damage” and the application of LEG3/06.

The judgment in *South Capitol Bridgebuilders v Lexington (SCB)* in particular has given rise to some concerns across the industry, given that the outcome was very different from what could have been expected had the case been heard before the English courts.

In SCB, the Court (in the District of Columbia) had to consider a claim which arose out of poorly vibrated concrete having been poured into piers and abutments during the construction of a bridge, resulting in voids in the concrete and impacting the structural integrity of the bridge. Significant portions of the support structures needed to be replaced, and the insured sought an indemnity from insurers for the rectification costs. The Court had to consider whether physical damage had occurred (in order for cover to be triggered) and (if it had) whether (as Lexington argued) LEG3/06 applied to exclude the costs claimed.

The Court noted the absence of a definition of damage in the policy, and instead referenced a dictionary definition (which included the term “bad effect”) and concluded that the absence of the intended weightbearing capacity was a ‘bad effect’ on the bridge as a whole. Furthermore, the court went on to conclude that LEG3/06 was “egregiously ambiguous” and construed the clause in favour of the insured.

An English court would almost certainly have determined that the requisite physical damage had not occurred, given there had been no adverse physical change, and that the concrete was simply defective from the moment that it was formed.

Furthermore, principles of contractual interpretation in the US differ significantly. The test for ambiguity in various US States turns on whether a clause is susceptible to different reasonable interpretations, with one resulting in cover and the other an exclusion, in which event the court will construe in favour of cover. In contrast, the English courts will typically look to exhaust other principles of construction before concluding that a clause is ambiguous (contra proferentem being a rule of ‘if not last, very late resort’). A more detailed discussion of the decision in SCB and its relevance may be [found here](#).

The SCB decision and the subsequent failed application for summary judgment in *Archer Western v Ace*, a case with very similar facts, may be something of a concern where US business is being written - where it may be prudent to now include definitions for ‘physical damage’ and ‘defects’ in policies. However, in a broader sense, both highlighted the ‘jurisdictional risk’ that is inherent when clauses developed (for example) in the London insurance market with English law in mind, may lead to unexpected results when tested in other jurisdictions and under other schemes of law.

While the London Engineering Group are considering a recommended definition for ‘damage’, these recent decisions also underline the broader importance of wordings and clauses being fit for purpose, in the context of the applicable law and jurisdiction.



In 2024, the Asia Power Forum’s keynote speech by Lord Alok Sharma reiterated the existential importance of net zero and the disproportionate burden that both climate change and the energy transition have on different countries. However, it also provided a strong message of hope. Real progress is being made and advances in technology combined with a broad global consensus on the need for cleaner power mean we have reason for optimism.

Key regional generators spoke about their changing asset mix, the challenges of grid stability and ensuring energy security and how they are looking to insurers to support their businesses. Numerous experts gave tangible guidance on how necessity is pushing the boundaries of technological innovation and a panel discussion offered valuable insights from various participants in the claims process.

### Nathan McLellan

Vice President, First Party Claims - Asia Pacific, Liberty Specialty Markets



# Issues in the spotlight

## Jurisdictional risk

This issue of jurisdictional risk was a further point of discussion with insurers over the week at an 'Asia focused' conference. Jurisdictions across the region, made up of civil and common law regimes, have vastly differing laws and regulations in the insurance and reinsurance sphere.

A number of questions were raised on how best to combat weaknesses and inconsistencies that have crept into many policy wordings, despite some improvement in overall terms in the recent hard market.

Certainty in policy application is of course often aspired to but frequently remains elusive, with the recent range of contrasting decisions in COVID-19 litigation across the globe revealing how underwriters' subjective intent is not necessarily reflected in decisions, when courts construe policy terms objectively following global catastrophes.

Recoveries do not always get the focus they deserve – despite the positive impact they can have on insurers' balance sheets.

## Successful subrogated recoveries

A further point of discussion, at and following the APF conference, was how parties could work together from an early stage to achieve successful subrogated recoveries for their mutual benefit.

This was an issue highlighted by Jonathan O'Riordan of Liberty Specialty Markets at the conference and provoked some very positive discussions among stakeholders in the market.

Recoveries do not always get the focus they deserve (despite the positive impact they can have on insurers' balance sheets) however we have seen a clear increase in focus from insurers who are interested in 'getting something back' from responsible third parties when losses inevitably happen.

This does of course link directly back to wordings, and to underwriters and brokers giving due consideration to limit the scope of any waiver of subrogation clauses and, where fully fronted facultative reinsurance business is concerned, to ensure that suitable 'control of subrogation' clauses are included in the reinsurance wordings.



The 2024 conference has been justifiably praised for its contribution to the discourse about the energy transition and how all involved in the power and energy segment can support each other in furtherance of a more sustainable future.

### Nathan McLellan

Vice President, First Party Claims - Asia Pacific, Liberty Specialty Markets



Kennedys consistently provide us with clear practical advice that facilitates complex Energy and Construction claim resolution.

### David Wilson

Global Head of Energy Claims, Allianz Global Corporate & Specialty

# Asia Power Forum key themes



## The energy transition

A clear theme of the conference was the energy transition and the opportunities and challenges it presents politically, technically, and from both an insurance and financing standpoint.

Whilst hailing international commitments and the significant growth of renewables in certain jurisdictions, Lord Sharma's keynote address laid out the scale of further investment required to meet the ambition and targets set by UN Climate Change Conferences, including COP26, and the future challenges yet to be addressed.

If we are to meet the global targets, which the scientific and political communities agree are vital in managing climate change, it was emphasized that a global approach is needed. In relation to Asia, representing around half of global power consumption, it was stressed that cross-border initiatives and finance for developing countries will be critical. The involvement of the private sector is therefore a necessity and there must be clear focus on the mechanisms by which the private sector can identify opportunities for investment and innovation in the energy transition.



## The challenges of transition

The challenges for power producers in Asia were outlined by Carlos Aboitiz. Whilst pointing to existing and planned future investment in renewables, Mr Aboitiz discussed the challenges, financial and practical, of moving from an existing heavily non-renewable base with many years of useful production ahead of it towards technology offering significant capital investment.

The example of the Philippines archipelago highlighted the need for investment and innovation not just in energy production but also in broader infrastructure and resilience across energy supply chains.

Whilst echoing the need for a new and ambitious approach to cross-border investment, Mr Aboitiz also made clear that whilst a rapid transition may be desirable, ultimately ambition alone is not enough to drive the pace of change.



## To Insure or not to Insure? Insuring old and new technologies

A number of the conference speakers addressed the fact that insuring emerging technologies was a necessity, despite the challenges of pushing boundaries with increasingly large blades and floating platforms in offshore wind and the learning curve in rolling out floating solar.

Whilst insurers will have inherent concerns when it comes to new technologies, it was suggested that there is a balance to be found between addressing those risks (by way of exclusions and premium pricing) yet encouraging the shift towards clean technology and innovation. Engaging with those technologies without taking on unmanageable levels of risk or paralysing the energy transition will not always be an easy journey.



## Engagement and cooperation for mutual benefit following losses

Away from the energy transition, conference delegates had an engaging insight into both the complexities of a large claim and the importance of considering subrogated recoveries.

As far as recoveries are concerned, cooperation is centrally important, and it is vital to consider the evidential and contractual position at an early stage. When an incident occurs it is vital to take the opportunity to capture evidence that may be needed to pursue recovery proceedings whilst all parties are engaged.

Crucially, there is increasing awareness that recoveries will very often work to the financial benefit of both power generation companies and their insurers.



I really valued the opportunity to hear a range of client perspectives on the challenges of the energy transition.

**David Wilson**

Global Head of Energy Claims,  
Allianz Global Corporate & Specialty







# Key property and energy contacts

## Singapore



**Mark Errington**  
Partner, Singapore  
t: +65 6436 4317  
e: Mark.Errington@kennedyslaw.com



**Steven Graham**  
Senior Associate, Singapore  
t: +65 6436 4301  
e: Steven.Graham@kennedyslaw.com



**Cheng Hui Chua**  
Associate, Singapore  
t: +65 6436 4389  
e: ChengHui.Chua@kennedyslaw.com



**Claudia Lui**  
Associate, Singapore  
t: +65 6436 4302  
e: Claudia.Lui@kennedyslaw.com



**Harish Rai**  
Legal Executive, Singapore  
t: +65 6436 4379  
e: Harish.Rai@kennedyslaw.com

## Australia



**Matt Andrews**  
Partner, Sydney  
t: +61 2 8215 5934  
e: Matt.Andrews@kennedyslaw.com



**Jonathan Wyatt**  
Partner, Perth  
t: +61 8 6147 4372  
e: Jonathan.Wyatt@kennedyslaw.com



**Stephanie Cook**  
Partner, Brisbane  
t: +61 7 3724 9033  
e: Stephanie.Cook@kennedyslaw.com



**Paul Graham**  
Special Counsel, Perth  
t: +61 8 6147 4379  
e: Paul.Graham@kennedyslaw.com



**Mairead Cusack**  
Special Counsel, Sydney  
t: +61 2 8366 0789  
e: Mairead.Cusack@kennedyslaw.com



**Jonathon Lees**  
Special Counsel, Sydney  
t: +61 2 8215 5967  
e: Jonathon.Lees@kennedyslaw.com

## United Kingdom



**Patrick Foss**  
Partner, London  
t: +44 20 7667 9820  
e: Patrick.Foss@kennedyslaw.com



**Tom Stapleton**  
Partner, London  
t: +44 20 7667 9289  
e: Tom.Stapleton@kennedyslaw.com



**Mike Wells**  
Partner, London  
t: +44 20 7667 9322  
e: Mike.Wells@kennedyslaw.com



**Russell Wright**  
Partner, London  
t: +44 20 7667 9565  
e: Russell.Wright@kennedyslaw.com



**Felicity Ingram**  
Partner, London  
t: +44 20 7667 9226  
e: Felicity.Ingram@kennedyslaw.com



**Iain Corbett**  
Partner, London  
t: +44 20 7667 9065  
e: Iain.Corbett@kennedyslaw.com

## Middle East

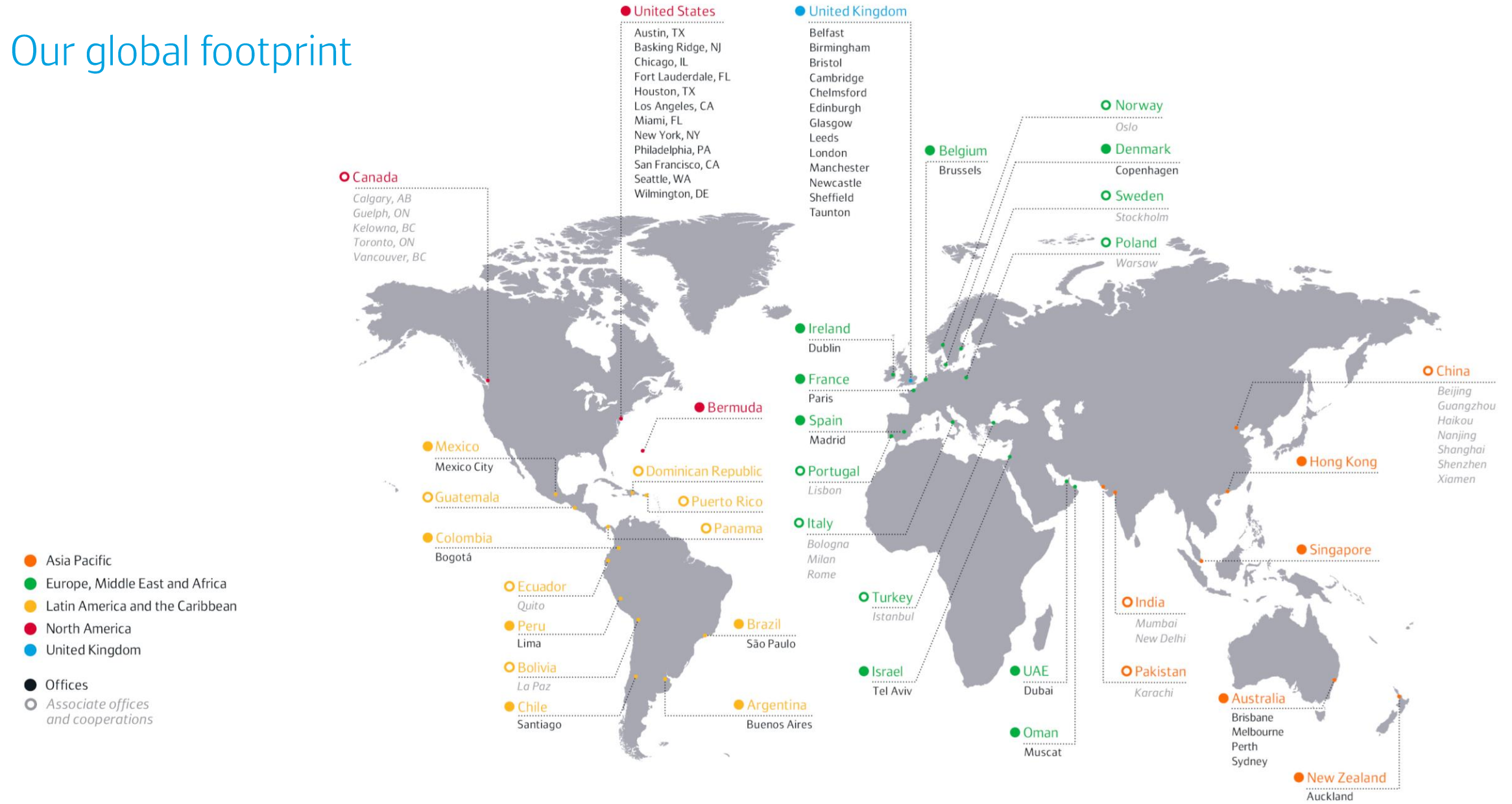


**Peter Ellingham**  
Partner, Dubai  
t: +971 4 350 3610  
e: Peter.Ellingham@kennedyslaw.com



**Mehdi Seadon**  
Partner, Dubai  
t: +971 4 350 3624  
e: Mehdi.Seadon@kennedyslaw.com

# Our global footprint





# Kennedys

 Kennedys

 KennedysLaw

 KennedysLaw

Kennedys is a global law firm operating as a group of entities owned, controlled or operated by way of joint venture with Kennedys Law LLP. For more information about Kennedys' global legal business please see [kennedyslaw.com/regulatory](https://www.kennedyslaw.com/regulatory)

[kennedyslaw.com](https://www.kennedyslaw.com)