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**FRENCH CASE LAW**  
**BUSINESS INTERRUPTION LOSSES & COVID**  
**HARMONIE**

Since the beginning of the global health crisis related to COVID 19 outbreak, many publications in France criticised insurers for refusing to adequately cover the losses suffered by companies as a result of the interruption of their business following the governmental measures implemented to prevent the spread of the coronavirus.

As a result, even before any detailed analysis of the various insurance policies that might apply, public opinion considered such a refusal unacceptable in these troubled and difficult times, which has led to numerous disputes before French courts.

First of all, damage insurance policies in France only very rarely cover losses that do not result from material damage to insured property.

Moreover, such insurance often refers to specific events such as fire, explosion, storm, terrorism etc. but not pandemics.

It follows that in most cases coverage does not include business interruption losses due to systemic pandemic.

In this respect, 93% of the insurance policies taken out expressly exclude from coverage any event as exceptional as pandemic and only 2.6% of the policies cover business interruption losses regardless of the cause of the loss.

Nevertheless, when insurance policies do cover business interruption losses without any material damage, contracts usually take care to limit such coverage to a few specific events, such as the administrative closure of the insured premises. However, these contracts generally exclude, more or less clearly, epidemic/pandemic risks from their cover, certainly because of the difficulty of pooling such risk.

Consequently, current litigation in this respect mainly concerns the validity of exclusion clauses in insurance contracts covering business interruption losses without material damage.

In France, exclusion clauses in insurance policies must meet the following conditions to be valid:

- Be written in French;
- Be mentioned in very conspicuous/legible characters;
- Be formal and limited : the clause must not deprive the insurance policy of its substance.

French case law also considers that any unclear or ambiguous clause shall be interpreted in favor of the insured.

The first decisions on business interruption losses because of COVID 19 have been handed down in France in the scope of AXA professional multi-risk insurance policy.

The contract stipulated that coverage includes business interruption losses resulting from the total or partial temporary closure of the insured premise, when the decision to close has been taken by a competent administrative authority and is the consequence of a contagious disease, murder, suicide, epidemic or intoxication.



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However, the following exclusion clause was also mentioned:

*"Business interruption losses are excluded when, on the date of the decision to close, at least one other premise, whatever its nature and activity, is subject to administrative closure, for the same reason, on the same territory (...)"*.

AXA obviously considered that an epidemic could be limited to a group of people and be the cause of the closure of a single entity/company.

- The first decisions on the application of this clause have been handed down in the scope of summary proceedings, where the judge stated that he does not have jurisdiction to rule on the interpretation of the exclusion clause of the contract (*Commercial Court of Lyon, 10 June 2020, n°2020R00303 (Le Bacchus / AXA France IARD, Commercial Court of Bordeaux, 23 June 2020, n°2020R00408 (Chez Aldo / AXA France IARD)*).
- Other decisions on the merits ruled that this exclusion clause was valid, which did not allow the insured to be compensated in the event of a systemic epidemic (*Commercial Court of Toulouse, 18 August 2020, n°2020J0294 (SARL Sarran / AXA France IARD), Commercial Court of Bourg-en-Bresse, 24 August 2020, n°20203659*).
- However, and very surprisingly, a judge seized in the scope of a summary proceedings considered the exclusion null and void and ordered AXA to compensate the insured for business interruption losses (*Commercial Court of Paris, 12 May 2020, n°202017022*), in other summary proceedings, a judge considered that he did not have to interpret the contract but could rule on the validity of the clause that was not according to him formal and limited and deprived the contract from its substance (*Commercial Court of Marseille, 23 July 2020, n°2020R00131 (société X. / AXA France IARD)*).
- On the merits, other commercial courts also ruled that the exclusion clause was not formal, deprived the contract of its substance and should be in any case interpreted in favor of the insured given the ambiguity of the wording (*Commercial Court of Tarascon, 24 August 2020, n°2020001786 (Société X / AXA France IARD), Commercial Court of Paris, 17 September 2020 n°2020022823, 2020022825, 2020022816, 2020022819, 2020022826, Commercial Court of Rennes, 24 September 2020, n°2020F00165*).

Other decisions relating to other insurance companies have been handed down as well and ordered the insurer to compensate the insured but only because the clause was not written in conspicuous/legible characters and was unclear. The insurance policy included a prevention of access clause but excluded coverage in case of damage caused by micro-organism (*Commercial Court of Annecy, 20 October 2020 (Les Adrets / Crédit Mutuel)*).

In conclusion, French case law gives an impression of inconsistency and disorder especially when discrepancies exist on the same clause in certain decisions and insurers must clarify the wording of their insurance policies to avoid further disputes in the future.

Finally, the French Insurance Federation suggested that an "exceptional disaster" guarantee fund is created, similar to the "natural disaster" fund, given the limited capacity of the insurance market for this kind of risk.

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