Business Interruption Litigation in France

Presentation to Financial Markets Law Committee
(Insurance and Pensions Scoping Forum)

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Pop quiz

- Under the French Code des assurances (CA), an exclusion from coverage for fortuitous losses must not only be written in "*caractères très apparents*" but must also be "*formelle et limitée*" (CA arts. L112-4 al. 2 and L113-1 al. 1).

- When an insurance policy covers losses from business interruption (BI) resulting from

  "temporary total or partial closure by administrative order decided as a consequence of a contagious disease, a murder, a suicide, an epidemic or a [food] poisoning"

 does the following exclusion pass that test?

  "at the date of the closure decision at least one other establishment, of any sort in any line of business, has been closed, in the same *département*, by administrative order, for an identical cause »

  « à la date de la décision de fermeture, au moins un autre établissement quelle que soit sa nature et son activité, fait l'objet, sur le même territoire départemental que celui de l'établissement assuré, d'une mesure de fermeture administrative, pour une cause identique »

- Hint: This and similar wordings have been the subject of extensive litigation in France.

Initial assessments

- FFA (April 2020): "Virtually all business insurances (business interruption, supply chain interruption, event cancellation, non-delivery, etc.) exclude epidemics. Indeed, because of its duration and its scope, an epidemic can impact all lines of business and have an impact on general business activity, thus making its consequences uninsurable."

- Autorité de Contrôle Prudentiel et de Résolution (ACPR) *état des lieux* 23.06.2020:

  - About 50% of businesses (1.1M policyholders, GWP €354M) have BI coverage but review of sample policy wordings from 21 carriers (126 standard form, 94 bespoke) shows that 93% require physical damage (such as fire or flooding), 3% have no physical damage requirement or pandemic exclusion and 4% have language which is "uncertain".

  - Insurers are invited "to revise for the future the drafting of all ambiguous contract clauses and to specify the general architecture of the contracts so as to inform policyholders clearly of the exact scope of their coverages."

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Initiatives

- Ex gratia payments (April 2020)

  - Crédit Mutuel-CIC "*prime de relance*" based on turnover (max. €20K, average €7K) with BI policy (even if no coverage) up to €200M

  - Crédit Agricole up to €200M

  - MMA "*indemnité de crise sanitaire*" of €1.5K to €10K based on turnover (in addition to any coverage)

- Creation of a government task force including legislators, key insurers and reinsurers and trade groups to report by early June on a backstop mechanism to permit coverage of high-impact risks to business turnover and continuity "at a reasonable cost for business and with government control" (not including current COVID-19 pandemic) (April 2020).

- French insurers report total contributions of €2.6B: solidarity fund €400M; "collective measures" €400M (rent cancellation, coverage despite non-payment of premium, extension of coverage of equipment used remotely); other measures €1.8B (including ex gratia payments).

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Key code provisions

- Exclusion from coverage for fortuitous losses must be written in "very apparent characters"

  CA art. L112-4 al. 2: "*Les clauses des polices édictant des nullités, des déchéances ou des exclusions ne sont valables que si elles sont mentionnées en caractères très apparents.*"

- Exclusion must be "*formelle et limitée*"

  CA art. L113-1: "*Les pertes et les dommages occasionnés par des cas fortuits ou causés par la faute de l'assuré sont à la charge de l'assureur, sauf exclusion formelle et limitée contenue dans la police.*

  Toutefois, l'assureur ne répond pas des pertes et dommages provenant d'une faute intentionnelle ou dolosive de l'assuré."

  meaning that the exclusion

  - must not be subject to interpretation
  - must refer to specific criteria and limited hypotheses and not negate coverage ("*vider la garantie de sa substance*").

- General contract principles in Code civil (CC):

  - "*Toute clause qui prive de sa substance l'obligation essentielle du débiteur est réputée non écrite.*" CC art. 1170
  - "*Dans un contrat d'adhesion, toute clause non négociable, déterminée à l'avance par l'une des parties, qui crée un déséquillibre significatif entre les droits et obligations des parties au contrat est réputée non écrite.*" CC art. 1171

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CA Bordeaux 7.06.2021 n° 20/04363 (Sobargest c AXA France)

In appeal from TC Bordeaux 12.10.2020, rejecting claim of restaurant owner, CA held that exclusion is "*formelle et limitée*" because:

- Description of other establishment being closed "of any sort in any line of business" is clear and generally understood

- Reference to an "identical cause" is not ambiguous

- No interpretation is necessary; the exclusion is clear, precise and limited and does not result in no coverage, so will be given effect

- Restaurant owner should be aware of the risk of localised epidemics and the extent of coverage when epidemic extends beyond its establishment, and that there was no coverage of general epidemics

- AXA's proposed amendment for renewal (prompted by reinsurers) does not change evaluation of the initial clause

- AXA complied with obligations to provide clear documentation to policyholder

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CA Toulouse 29.06.2021 n° 20/02301 (Sarran c AXA France)

- In appeal from TC Toulouse 18.08.2020, dismissing claim of restaurant owner, CA held that exclusion is not "*formelle et limitée*" because:

  - Description of other establishment being closed uses general terms so that the insured cannot know what is the scope of the exclusion.

  - Reference to an "identical cause" is not precise.

  - Cross-reference to coverage clause induces uncertainty.

  - It is unclear to the policyholder that BI coverage for epidemic would fail if there were other nearby victims thereof.

  - Since interpretation is necessary the exclusion is not clear, precise and limited so will be inapplicable.

  - AXA's argument that underwriting did not take account of this risk is irrelevant.

- Remedy: expert to assess covered loss, AXA to pay €3K initial advance on expenses and €3K in legal fees

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New wording

- New wording proposed by AXA:

  The insurer guarantees to the insured the payment of an indemnity corresponding to the business loss resulting, during the covered period:

  - from the decrease in turnover caused by the interruption or reduction of the insured's business [or]

  - from supplemental operating costs

  which are the direct consequence of insured material damages to the insured assets and resulting from the insured events.

  L'assureur garantit à l'assurée le paiement d'une indemnité correspondant à la perte d'exploitation résultant, pendant la période d'indemnisation :

  - *de la baisse du chiffre d'affaires causée par l'interruption ou la réduction de l'activité de l'assuré,*

  - *de l'engagement de frais supplémentaires d'exploitation,*

  qui sont la conséquence directe des dommages matériels assurés atteignant les biens assurés et résultant des événements assurés.

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State of play

- AXA

  - Cases lost: at least 36 courts of first instance (TC), three CA cases:

    - Aix-en-Provence 25.02.2021: expert to evaluate, €50K advance payment, legal costs €10.5K

    - Rennes 16.06.2021: expert to evaluate, €60K advance payment, legal costs €5K

    - Toulouse 29.06.2021 (cited above): expert to evaluate, AXA to pay €3K initial advance on expenses and €3K in legal fees

  - Cases won: a handful including TC Bordeaux & CA Bordeaux (cited above)

  - Proposed settlement offers (10.06.2021) to be accepted prior to 30.09.2021: for 15% of restaurant turnover (excluding delivery, online sales and take-away) from 14.03.2020-29.10.2020 (subject to policy limits), with different approach for restaurants with 2019 turnover >€2M (estimated total for AXA: €300M)

- BI insurers also include Allianz, Generali, MMA and others

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Questions?

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