

UK and France - Approaches to Business Interruption Insurance and Covid-19

Business Interruption (“BI”) (or Operating Loss) insurance has come under scrutiny following a barrage of claims relating to the Coronavirus pandemic (“Covid-19”). The overwhelming consensus is that Covid-19 will not be covered where the BI cover relies on physical damage to a property. However, where there is ambiguity, interpretation at a higher level is required as disputes increase between insurers and their insureds.

In the UK, the FCA announced on 01 May 2020 that they would be seeking an expedited court declaration to attempt to resolve contractual uncertainty in BI cover. A hearing was listed for 8 days at the end of July (20-23 & 27-30) in the High Court before Lord Justice Flaux and Mr Justice Butcher. This will secure a legally binding decision for those eight insurers who are party to the case. It will also provide persuasive guidance for others with similar wordings and claims. In France, the regulator, l’Autorité de Contrôle Prudentiel et de Résolution (ACPR) launched its own review on 06 May 2020, but will not be providing a test case, despite saying that where insurers do not interpret the contract in favour of the policyholder, if the contract is ambiguous, only a judge may interpret the wording.

Analysis to date

The FCA approached 56 insurers and reviewed over 500 relevant policies establishing 17 policy wordings as samples which were considered to be representative of the key arguable issues that could be in dispute. Eight insurers out of a list of 16 who underwrite policies in at least one of the representative sample wordings have been asked to assist by participating in the test case. Chris Woolard, while interim CEO of the FCA, in an Inside FCA podcast, stated that around 90% of BI policies would not provide cover for the pandemic. This is because basic wordings, which are most prevalent, require physical loss or damage to the property caused by an insured peril such as fire or flood.

Similarly, the ACPR said that it would, ‘*draw up an inventory of the main contracts distributed on the French market as part of its prudential supervision and monitoring of commercial practices*’. It announced on 23 June 2020 that it had analysed 220 wordings from 21 representative insurance companies. This covered 1,134,690 policies with BI cover. Their overwhelming conclusion, as established in the UK, was that the majority (93.3%) of policies will not provide cover for Covid-19, because it cannot be construed as physical property damage or because it has been specifically excluded.

Only 2.6% of the French market’s policies were found to provide unambiguous cover for Covid-19. Cover is ambiguous in 4.1% of the policies. The ACPR in the first instance have asked insurers to review these wordings and in future clearly inform policyholders of the exact scope of their coverage. The ACPR has criticised insurers for having inadequate information systems. Insurers must ensure that their systems provide them with a precise view of the scope of the cover provided especially in respect of older wordings and when underwriting has been delegated. Insurers are advised to review their delegated authorities and to improve their audits.

Whilst they will not be seeking a test case, the ACPR have said that they will monitor those insurers who have policies which provide cover to ensure that they respond to claims properly and without undue delay.

According to the ACPR, the total premiums collected for BI cover in 2019 was just €354 Million out of a total of €5 Billion for property damage claims across the board.

BPCE, Maaf, AXA France and Generali France have declared that they have written policies which provide cover for claims arising from the current pandemic.

BI Claims in the Courts

We currently wait with bated breath for the outcome of the FCA test case in the UK. Separately, the Hiscox Action Group claim for £40 million rumbles on, with the action group having recently

commenced arbitration as they refuse to wait for the outcome of the test case, despite Hiscox being a named party.

Meanwhile in France, AXA, who have been named by the FCA as an insurer who uses at least one of the policy wordings in their test case representative sample, settled what has become known as the Paris Test Case. In this case, French restaurant owner, Stephane Manigold, took AXA to the Paris Commercial Court over its refusal to respond to his claim under his BI policy. His BI cover included an administrative closure clause. These sorts of clauses should protect a business owner against losses caused by government decree or action ordering the closure of a business. Manigold's four restaurants had been forced to shut for two months during the lockdown and he incurred operational losses. AXA argued that a pandemic is uninsurable. The court rejected this and found in Manigold's favour, stating that the circumstances of a pandemic had not been expressly excluded. AXA was ordered to pay two months' worth of revenue for one of Manigold's restaurants at €45,000. AXA had said that it would appeal, however, it now appears that a settlement has been agreed to cover all of Manigold's restaurants, the details of which have not been published. AXA has also now said that it plans to meet the majority of claims brought by restaurant owners with similar wordings in their policies.

Other test cases in Lyon, Bordeaux and Annecy against AXA and Credit Mutuel Assurances were less successful for Insureds seeking urgent interim relief. The judges ruled that the clauses involved were ambiguous and must be interpreted by judges with regard to the particular circumstances of each claim. Examples of exclusion clauses which the Court found ambiguous were:

- A clause providing cover for administrative closure caused by an epidemic but excluding claims when, at the date of the order for closure, at least one other establishment in the same area is subject to an administrative closure measure, for an identical cause. In this instance, the ambiguity is the contradiction between an insuring clause referring to an epidemic (which a dictionary defines as a disease contaminating a large number of people) whilst the exclusion excludes collective administrative closures. AXA argued that an epidemic can apply to just one establishment.
- A clause excluding losses caused by "*insects, rodents, fungus, mould, parasites and microorganisms*". The judge will have to decide whether the loss has been caused by a microorganism or by the administrative order (especially in the absence of evidence that the establishment was itself contaminated).

However, on 17 July 2020, the Nanterre Commercial Court considered unambiguous a clause providing cover for losses resulting from "*the direct consequence of the temporary closure of the insured establishment by the municipal or prefectural authorities following the following events only: murder, suicide, contagious disease, epidemic, food poisoning or poisoning*". The court ordered the insurer Albingia to pay €450,000 as interim payment and ordered an expert report to assess the insured's operating losses. Albingia unsuccessfully argued that the hotels were not technically ordered to fully close (as the hotels offered accommodation to hospital staff) and that the closure was ordered by ministerial decree and not by municipal or prefectural authorities. Given Albingia's decision to defend the claim, it is not clear whether the ACPR reviewed this particular wording. This case post-ACPR review suggest that claims against Insurers will continue.

Conclusion

The conclusion to be drawn from both the French and British analyses of BI policies, to date anyway, is that the majority of wordings may not cover losses arising from claims arising from the pandemic. A minority of wordings will need to be considered in a higher court and the regulators are keen to have some uniformity in the industry-wide response. When the judicial analysis comes to an end, in both jurisdictions, insurers will be expected, at the very least, to ensure that the scope of the cover is clear to their insureds.

Insurers in the UK and France are being encouraged to treat their customers fairly and deal with claims promptly. The pandemic is going to have costs consequences for insurers and insureds alike, but the

regulators are trying to reduce the legal costs that might be incurred by both by allowing some definitive judicial guidance to emerge.

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Date: July 2020

Applicable Law: UK (England and Wales)

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