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## **In France and Germany, two first court decisions on Business Interruption insurance and Covid-19 are shaking up the insurance industry**



*The French and German courts have recently ruled in two decisions that the closures of a hotel (in Germany) and a restaurant (in France) due to the Covid-19 pandemic could be covered by business interruption insurance. These two court rulings are interesting in that they could presumably result in a lower risk of insurance intermediaries being sued for negligence on the part of their clients.*

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**In Germany, the Regional Court of Mannheim decided in its ruling of 29 April 2020 (Case No. 11 O 66/20) that damages resulting from a business closure initiated by the hotel operator himself could be covered by business interruption insurance.**

In this case, the hotel operator had taken out Business Interruption insurance, and **closed down his establishment on his own initiative**, without an official order having been issued against his business. Indeed, the continuation of the business was no longer economically viable following a series of decisions prohibiting the accommodation of tourists. **Nevertheless, the insurance policy covered the event that the competent authority closed down the insured business** due to notifiable diseases or pathogens **listed in the Infection Protection Act (IfSG).**

The court came to the conclusion that: "It is undisputed that bookings of business trips in the plaintiff's hotels are currently still possible. Nevertheless, the current situation is such that this restriction of hotel operations has the effect of a *de facto* closure. (...) The effects of this official order therefore have implications such as the closure of a hotel in a specific individual case for disinfection or to contain a disease outbreak in that hotel alone. The sense and purpose of the regulation to cushion interruptions of operations by official measures due to the IfSG argues in favour of subsuming such *de facto* closures under this clause “.

Moreover, the judge states that the coronavirus is "a notifiable disease and pathogen" in the sense of §§ 6 and 7 IfSG, although it is not explicitly mentioned in the IfSG.

Therefore, although no official order has been issued against the hotel operator, the decisions taken by the public authorities to combat the COVID-19 pandemic are considered as *de facto* official closures. **According to the judges, the insurance policy must be interpreted as meaning that these indirect effects of official decisions are also covered.**

**Therefore, the concept of 'de facto business closure' includes not only targeted direct closures of a hotel, but also administrative orders which have an indirect effect on the activities of the hotel.**



## **In France, the Paris Commercial Court ruled on Axa France's refusal to indemnify the Business Interruption suffered by a restaurant owner**

This decision of the Paris Commercial Court, dated Friday, May 22, is unfavourable to the French insurer and could constitute a milestone. **Indeed, the court ordered that the restaurant owner be indemnified for business interruption without damage suffered in one of its four establishments over a period of two months. Axa will appeal the decision.**

Since his establishments have been closed since the decree of 14 March 2020, the restaurant owner decided to sue Axa France before the Paris Commercial Court in mid-April.

Indeed, Axa refused to indemnify its client: "We cannot depart from the very principle of the insurability of a risk which is based on mutualisation and contingency. In the case of a pandemic, because of its systemic and global nature, it prevents any mutualisation since the entire population is affected at the same time. Moreover, when a government makes a decision to close businesses, restaurants and stores, we cannot talk about a hazard.

For the restaurateur, the distinction between a closure measure taken "by the police or the health and safety services" and "by the Minister of Solidarity and Health" to justify the fact that it would not be an administrative closure "as referred to in (the) contract is not justified "before a court".

The interim order of May 22, 2020 seems to contradict the arguments put forward by Axa. **The court rejects the debate on whether a pandemic is insurable or not. "This debate, as interesting as it may be and on which opinions differ, does not concern us".** It considers that Axa "does not rely on any legal provision of public order mentioning the uninsurable nature of a consequence of a pandemic". **It is therefore incumbent on Axa to conventionally exclude this risk.** However, this pandemic risk is not excluded from the signed insurance policy".

As regards the administrative closure of the establishment, here again the court challenges Axa France's arguments: "Axa France IARD claims that the application of the administrative closure clause must be triggered by the prior occurrence of an insured event in respect of the business interruption. This assertion is not supported by any contractual reference. (...) Thus, this fanciful allegation will be rejected", the magistrates said.