

COMMERCIAL COURT OF PARIS
COURT ORDER OF FRIDAY 05/22/2020

4. Most alternatively

If extraordinarily the Judge in chambers were to deem that AXA's coverage was applicable in this case:

- Rule that Maison Rostang is claiming compensation for operating losses until July 15, 2020, whereas the Government has announced that restaurants will be able to re-open in early June;
- Rule that the damages incurred by Maison Rostang for the period from early June 2020 to July 15, 2020 are uncertain and as such no provisional payment can be granted for that period;
- Under all circumstances, appoint an expert, whose mission will be to establish the actual operating losses in very precise terms, at the applicant's expense.

5. Under all circumstances

- Reject the claim for publication of the order to intervene submitted by Maison Rostang;
- Order Maison Rostang to pay AXA the sum of 8,000 euros under Article 700 of the French Code of Civil Proceedings, in addition to all court costs

The hearing of May 12, 2020 at 4:30 pm was held by video conference, and the minutes were established, in accordance with Article 7 of order no. 2020-304 of March 25, 2020 pertaining to the adaptation of the rules applicable to courts ruling on non-criminal matters.

Mr. Stéphane MANIGOLD, chairman of SAS (Société par actions simplifiée [simplified joint-stock company]) MAISON ROSTANG, was also present at the hearing, and his testimony was taken.

After having listened to the explanations and observations provided by counsel for the parties, we submitted our ruling to the clerk's office on **Friday May 22, 2020 at 4 pm.**

As follows,

As regards admissibility

As regards urgency,

By means of its post-hearing submission of May 13, 2020, to which AXA responded with a submission dated May 17, 2020, Maison ROSTANG has demonstrated, with a statement from its CPA as proof, that its financial situation has become extremely compromised, as currently reflected by negative cash flow of €201,413 to which will be added €45,903 on May 29, corresponding to the advance on partial furlough compensation for all staff at the company's two sites.

The defendant makes reference to Mr. MANIGOLD's personal fortune, which by the way is not firmly established; however, this fortune cannot be taken into account in our ruling, since the company Maison ROSTANG is an autonomous entity.

Lastly, the decisions of the Court of Cassation mentioned by AXA France IARD to reject the CPA's statement refer to very different situations involving substantive proceedings (willful misrepresentation, valuation of real property) where other complementary approaches should have been taken into account.

Consequently, we rule that urgency has been established.

As regards the seriousness of the objections

AXA France IARD explains the uninsurability of the pandemic risk both economically and legally. This debate, while it may be interesting and a subject where opinions diverge, is not relevant here. We must rule on the enforcement of a specific insurance policy with general and special terms and conditions and an insertion from SATEC [insurance broker], all of which are binding on the parties, without having to rule on the seriousness of objections.

a) AXA does not base its objection on any public legal provision citing the uninsurability of the consequences of a pandemic. It was therefore incumbent on AXA to expressly exclude such a risk from the policy. This pandemic risk is not in fact excluded in the contract signed by the parties.

b) AXA France IARD claims that the enforcement of the administrative closure clause must be triggered by the prior occurrence of an event covered by the operating losses provision.

This claim is not supported by any reference to the contract. The special terms and conditions (exhibit 8) and the SATEC insertion (exhibit 9) cite administrative closure as an extension of the operating losses coverage, for example “murders or suicides occurring on site.” No prerequisite is required contractually, and thus this baseless claim shall be rejected.

c-1) AXA France IARD claims that the administrative closure cited in the contract refers to a closure ordered by the prefect for the department in which the site is located, and not one ordered by the Minister of Health. Regardless of whether the order originates from the prefect or a minister, under French law, these are both administrative decisions, and there is nothing in the contract that excludes an order from the minister. This objection will also be rejected as non-serious.

c-2) AXA France also mentions that the government order of March 14, 2020 did not require the site to close, but only that it could no longer receive members of the public, and that it was authorized to **maintain** its activity for takeout and delivery. It thus claims that the restaurant was closed by decision of the business owner, who chose not to sell food for takeout.

We observe that “Le bistro d’à côté FLAUBERT” has never sold food for takeout or delivery and that therefore the creation of such an activity was not authorized. If we do however suppose that such an activity was possible, the fact that the business chose not to do so does not obviate the ban on receiving members of the public, which is fundamental for a traditional, sit-down restaurant. The margin that a takeout activity would have generated, if any, would have to be taken into account in determining the amount of coverage. The ban on receiving members of the public is in fact a total or partial administrative closure of the restaurant. This objection will also be rejected as non-serious.

Consequently, we hereby declare that this emergency proceeding submitted by Maison ROSTANG is admissible.

On the claims

On the claim for provisional payment of compensation for operating losses incurred owing to the administrative closure.

In light of the company’s financial situation and the absence of serious objections thereto, we rule that this claim for provisional payment is justified in principle.

We note that the defendant has not raised any objection at this stage as regards the guaranteed monthly margin, but has declared that the damages are uncertain for the period between June 1 and July 15, since the decision on whether restaurants can open or must remain closed is not yet known for that period. We rule that this observation is well-founded, and we will reduce the allocated payment in consequence (2.5/4).

However, we do deem it necessary for the provisional payment to be accompanied by a penalty whose amount and conditions will be stipulated hereinafter.

On the claim for appointment of an expert.

Maison ROSTANG has asked the court to appoint an expert under Article 872 of the French Code of Civil Proceedings. We note that AXA France IARD has consented to this (most alternatively). We will proceed with such an appointment under the terms set forth hereinafter.

On the additional claim for publication subject to penalty.

We note that this request was included neither in the motion nor in the delivered summons and that the provisional nature of the emergency order, lacking any authority of res judicata, is contrary in principle to any publication of the order to intervene. We therefore reject this claim.

On Article 700 of the Code of Civil Proceedings

AXA France IARD shall be ordered to pay Maison ROSTANG the sum of €5,000 under Article 700 of the Code of Civil Proceedings, in addition to court costs.

On these grounds

Judgment rendered after hearing both parties

Whereas Article 872 and 873 of the Code of Civil Proceedings

We rule this action admissible,

We order the provisional payment of €45,000 to SAS MAISON ROSTANG by SA (Société anonyme [joint-stock company]) AXA FRANCE IARD, subject to a penalty of €1,000 per day starting on the 15th day after announcement of the present order, for 60 days, after which the matter shall be reconsidered by the Court.

We name as court-appointed expert:

Mr. Emmanuel CHARRIER
5 avenue Franklin D. Roosevelt
75008 PARIS 08
Tel.: 01.44.95.16.40
Fax: 01.42.89.10.96
E-mail: emmanuel.charrier@exco.fr

Whose mission shall be as follows:

- Assess the amount of actual damages in terms of lost gross margin during the compensation period,
- Assess the amount of additional operating expenses during the compensation period,
- Request and receive all documents and exhibits which he may deem useful for his mission,

- Request all oral communication he deems necessary,
- Go to the business location if he deems this necessary,
- Conduct his mission in a strictly objective and neutral manner, in particular by informing the parties, whether orally or in writing, of the status of his assessments and opinions at each step of his mission, and then in a summary document compiling the final observations of the parties by a final date which he will set. Prior to submission of this report, he shall remind the parties, upon sending them this summary document, that he is not required to take into account any observations communicated to him after said final date as well as after the date of submission of his report.

We rule that SAS MAISON ROSTANG shall submit advance payment of €2,000 to the Clerk of this Court by June 22, 2020, in application of the provisions of Article 269 of the Code of Civil Proceedings.

We stipulate that failing payment by said date, the appointment of the expert shall be considered null and void (Article 271 of the Code of Civil Proceedings).

We stipulate that during his first meeting, which must occur within no more than two months from the date of advance payment, the expert shall, after hearing both parties, inform the overseeing judge about his chosen methodology, providing a detailed schedule of his investigations, including the date of submission of his final report, and the estimated amount of his fees and expenses. If necessary, said judge shall issue a complementary order stipulating the amount of any further advance payment, under the conditions of Article 280 of the Code of Civil Proceedings, and if applicable, the judge may extend the date for submission of the report.

We stipulate that during this first meeting, the expert shall set a deadline for any involuntary joinder of third parties, said joinder requiring all parties to the lawsuit to be heard, including the third parties.

We stipulate that if the parties do not reach an agreement amongst themselves, and unless stipulated to the contrary in the preceding paragraph, the expert's report must be submitted to the Clerk's Office within six months from submission of the aforementioned advance payment.

We stipulate that the overseeing judge shall monitor the execution of the expert's mission.

We reject the request for publication of the order.

We rule that SA AXA FRANCE IARD shall pay SAS MAISON ROSTANG the sum of €5,000 under Article 700 of the Code of Civil Proceedings,

We reject any supplemental or counter-claims

We rule that SA AXA FRANCE IARD shall pay the court costs for this case, including those to be covered by the Clerk's Office for the sum of €44.07 (including €7.13 in VAT).