



An Appraisal of the Extent of Business Interruption Insurance Coverage in the Context of the Covid-19 Pandemic

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Abstract

Business interruption insurance covers against losses caused by an interference or interruption of business as a result of circumstances out of the hands of the policyholders, such as natural disasters, particularly fires, earthquakes, floods, or epidemic illnesses. As it is known, during the first wave of the COVID-19 pandemic, many businesses were forced to shut down operations except for online sales, caused by both the severe restrictions of the governments and also contagiousness of the virus. The business owners who could not operate for a long time and incurred a serious loss of earnings appealed to their insurers who provided coverage for business interruption losses depending on agreements that were signed before the pandemic. However, most of these applications were refused by insurers on the grounds that business interruption insurance policies provide coverage only for business interruption losses caused by physical damage. Accordingly, the extent of the business interruption insurance coverage, as well as the meaning and scope of the term “physical damage,” has been intensively discussed both in doctrine and also in court decisions after restrictions of the pandemic were lifted. On the other hand, it is a known fact that in many policies used in practice, the parties can add “extension” or “exclusion clauses” into the agreement.

This study aims to both determine the coverage possible to be included in business interruption insurance policies, by considering the general insurance terms and conditions frequently used in practice, and also to solve the matter of whether it is possible to indemnify the losses related to business interruption caused by the restrictions and interferences of the COVID-19 pandemic.

Keywords

Business Interruption Insurance, Business Interruption Loss, Physical Damage, COVID-19 Pandemic, Extent of Business Interruption Insurance Coverage, Disease Clauses, Denial/Prevention Of Access Clauses, Public Authority Clauses, Hybrid Clauses

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Extended Summary

The novel coronavirus, which was first identified in Wuhan, China, on December 1, 2019, subsequently spread to the entire world in a very short time. Following the cases reported in Europe, North America, and the Asia-Pacific region, the World Health Organization declared the virus as a pandemic on March 11, 2020.¹ Since the first day the virus began to spread, the pandemic affected many people in different ways, with nearly seven million people having died globally.² However, the losses caused by the coronavirus pandemic are not limited to health problems and deaths. As it is known, almost every country took a series of similar precautions and restrictions to decrease the losses which could arise from the virus. In this context, although the continuity of some exceptional services which have life-sustaining importance was maintained, especially during the periods when the spread of virus accelerated dramatically, some severe precautions were taken by the governments to decrease the speed of the pandemic. In the frame of these restrictions, legal regulations which set forth the long-term closure of most sectors began to be implemented all over the world.³ Because of these restrictions, such sectors as tourism, transportation, aviation, education, automotive, and catering were unable to operate for many months. Accordingly, many entrepreneurs appealed to their insurers for the loss of revenue caused by the COVID-19 restrictions, referring to their previously signed insurance which provides coverage for business interruption losses. Business interruption insurance could be identified as an insurance agreement which provides coverage to policyholders against losses which are caused by the interference or interruption of business as a result of many factors outside of the hands of the policyholder, such as natural disasters, particularly fires, earthquakes, floods, or epidemic illnesses. However, it is important to emphasize that since nearly all of the business interruption policies provide coverage for losses which are the direct results of “physical damage,” most applications failed to be upheld. Contrary to popular belief, the coverage provided by business interruption insurance is very limited. Because of this, there have been many discussions related to the possibility of payment from insurance companies based on

¹ Paul E. Traynor, ‘The “Business Interruption” Insurance Coverage Conundrum: COVID-19 Presents a Challenge’ (2020-2021) 19 (1) DePaul Business & Commercial Law Journal, 65, 68.

² For detailed information see <<https://covid19.who.int/?mapFilter=deaths>> Date of Access 25 October 2022.

³ For more expanded explanations, see also, Diane P. Horn and Baird Webel, *Business Interruption Insurance and COVID-19* (1st edn, Congressional Research Service 2021) 1 ff; Traynor (n1) 66 – 67; Jackson Wolf Vogel, ‘Pardon the Interruption: Obstacles to a Successful COVID-19 Business Interruption Claim’ (2021) 21 (3) Wake Forest Journal of Business and Intellectual Property Law, 251, 252 ff; Erik S. Knutsen, ‘The COVID-19 Pandemic and Insurance Coverage for Business Interruption in Canada’ (2021) 46 (2) Queen’s Law Journal (QLJ) 431, 432 ff; Christopher C. French, ‘Federal Courts’ Recalcitrance in Refusing to Certify State Law COVID-19 Business Interruption Insurance Issues’ (2021-2022) 100, Texas Law Review Online, 152, 153; Samim Ünan, ‘En Üst Derecedeki İngiliz Mahkemesi’nin Covid-19 Nedeniyle Meydana Gelen İş Durması Zararları Hakkında Verdiği 15 Ocak 2021 Tarihli Test Case Kararı (Financial Conduct Authority v. Arch and Others)’, in Bülent Sözer and Sezer İlgin (eds) 2020 *Sonrasında Deniz Ticareti ve Sigorta Hukuku: Olası Sorunlar*, (Vedat Kitapçılık 2021) 135 ff.

losses caused by COVID-19, with many lawsuits having been filed since the early days of the pandemic.⁴

In standard business interruption policies which do not contain any extension clause (non-damage clauses), the main issue related to business interruption losses caused by COVID-19 restrictions is the determination of the meaning of the term “physical damage.” As it is known, most business interruption policies used frequently in practice include some clauses which extend the scope of coverage. Determining the meaning of these clauses has a vital importance to decide whether compensation of the losses related to COVID-19 restrictions is possible or not, regardless of whether these losses can be qualified as physical damage. On the other hand, it is a known fact that in many policies used in practice, the parties can add “extension” or “exclusion clauses” into the agreement.

This study aims to examine the extent of the coverage business interruption policies were responsible for as it relates to losses which arose from the COVID-19 pandemic and the subsequent restrictions, both in light of the court decisions and the general terms and conditions frequently used in practice in the insurance industry. At this point, it is also so important to emphasize that when deciding the extent of a business interruption policy, the wording of the policy is of vital importance; in many policies used in practice, the parties can add “extension” or “exclusion clauses” into the agreement. Because of this, we also aim to examine “disease,” “denial/prevention of access,” “hybrid,” and “virus exclusion clauses.”

I. Business Interruption Insurance in General

A. Definition

Entrepreneurs are always exposed to varying serious risks as a result of the insured premises or equipment used to operate the business, and also people who are employed to carry out the business. The losses related to business usually arise from physical damage to the premises at which the work is carried out or the bodily injuries of the workers who operate the business. On the other hand, it is always in the realm of possibility that there could be losses of revenue which arise from an interruption at the insured premises different than physical damage to the location

⁴ In the early days of the COVID-19 pandemic, a “Covid-19 Coverage Litigation Tracker” was established by the Pennsylvania University Faculty of Law. According to this tracker, the number of lawsuits regarding business interruption coverage resulting from COVID-19 was 2,348 as of September 26, 2022. <<https://cclt.law.upenn.edu/>> Date of Access 10 October 2022. For detailed explanations see also, Christopher C. French, ‘Forum Shopping COVID-19 Business Interruption Insurance Claims’ (2020) University of Illinois Law Review Online, 187, 188: Similarly, in United States, in very short period, so many lawsuits related to business interruption policies have been filed. The Author says, “as of January 16, 2022, insureds have filed 2,111 COVID-19 related insurance claims in the United States courts” and especially emphasizes that the majority of cases have been resolved on behalf of the insurance companies. Mason Medeiros, ‘Physical Losses, Invisible Damages: Finding Coverage for Business Interruption Insurance Claims Sustained during the COVID-19 Pandemic’ (2022) 23 (2) Minnesota Journal of Law, Science and Technology 631, 646.

or equipment. Thus, it is possible to say that business interruption insurance, which sprung nearly 200 years ago,⁵ was invented to cover entrepreneurs' rental income for the first time.⁶ This is compared to property insurance, which began much earlier than business interruption insurance and only provides coverage for physical damage to the insured premises and does not cover the loss of revenue or rental income. Over time, then, it was thought that business interruption insurance could satisfy the needs of providing coverage for revenue loss which is not connected to the physical damage of property. While this kind of insurance was initially known as "use and occupancy insurance,"⁷ in the 1930s, the term "business interruption insurance" began to be used more widely.⁸ In the 1980s, the Insurances Service Office (ISO) began to use the term "business income insurance" to describe a new type of business interruption insurance.⁹ Although, in practice, business interruption insurance agreements are signed under different names and in different policy forms, the most common and widespread types of this insurance are "gross earnings" and "business income insurance."¹⁰

In the frame of these explanations, business interruption insurance could be identified as an insurance agreement which provides coverage to policyholders against losses which are caused by the interference or interruption of business as a result of many factors outside of the hands of the policyholder, such as natural disasters, particularly fires, earthquakes, floods, or epidemic illnesses.¹¹ This means that with business interruption insurance, there is an aim to return the insured individual to the position they were before the occurrence of the insured risks.¹²

⁵ Christopher C. French, 'The Aftermath of Catastrophes: Valuing Business Interruption Insurance Losses' (2014) 30 (2) Georgia State University Law Review 461,469.

⁶ French, *The Aftermath of Catastrophes* (n5) 469. For a historical perspective of business interruption insurance see, David A. Borghesi, 'Business Interruption Insurance-A Business Perspective' (1993) 17 (3) Nova Law Review 1147,1148 ff; Traynor, (n1) 77

⁷ French, *The Aftermath of Catastrophes* (n5) 469; Borghesi, (n6) 1148; Traynor, (n1) 77. See also, Clyde M. Kahler, 'Business Interruption Insurance' (1932) 161 *Annals of the American Academy of Political and Social Science* 77, 77: In this context, the author says that the "business interruption insurance" is used to refer to "rental insurance," "leasehold insurance," "use and occupancy insurance," and "profits and commissions insurance" collectively.

⁸ See also, Traynor, (n1) 78; French, *The Aftermath of Catastrophes* (n5) 469.

⁹ French, *The Aftermath of Catastrophes* (n5) 469.

¹⁰ See also, Borghesi, (n6) 1150; French, *The Aftermath of Catastrophes* (n5) 469; Robert E. Schultz and Edward C. Bardwell, '*Property Insurance*' (1st edn, Rinehart & Co. 1959) 340; George W. Clarke, 'Problem Claims under Business Interruption Policies' (1957) American Bar Association. Section of Insurance, Negligence and Compensation Law Proceedings 89, 89.

¹¹ For other definitions and qualifications of business interruption insurance see also, Schultz and Bardwell (n10) 354; Horn and Webel (n3) 2; see also Borghesi (n6) 1148; Paul M. Hummer, 'Basics of Business Interruption Insurance: The Ins and Outs of Tricky Coverage' (2002) 69 (3) *Defense Counsel Journal* 307, 307; Alan G. Miller, 'Business Interruption Insurance, A Legal Primer' (1975) 24 (4) *Drake Law Review* 799, 799; Clark Schirle, 'Time Element Coverages in Business Interruption Insurance' (2007) 37 (1) *The Brief* 32, 32; Medeiros (n4) 641 ff; Paul McHugh, 'Business Interruption Insurance in the Time of COVID-19: Who Should Foot the Bill?' (2021)29 (2) *Journal of Law and Policy* 491, 492; Gürses Ö, 'The Supreme Court on Business Interruption Insurance and COVID-19: Financial Conduct Authority v Arch Insurance (UK) Ltd [2021] UKSC 1' *King's Law Journal* (2021) 32 (1) 71, 72 ff.

¹² For purposes of business interruption insurance, see, French, 'Forum Shopping COVID-19 Business Interruption Insurance Claims' (n4) 188; Damian Gylmn and Toby Rogers, *Riley on Business Interruption Insurance* (11th edn, Sweet&Maxwell 2021) xi and 3; Medeiros (n4) 631 ff.

For special forms (especially for "contingent business interruption insurance") and qualifications of this insurance see also, Schultz and Bardwell (n10) 383 ff. See also, Horn and Webel (n3) 2; Schirle (n11) 37.

B. Extent of the Coverage

To define the extent of coverage provided by business interruption insurance, the meaning of the terms “business interruption losses” and “business interruption” should first be clarified. Accordingly, “business interruption” could be defined as the “cessation of the services operated at insured premises for a specific period completely or partially.”¹³ In this context, “business interruption losses” means the losses which arise from the cessation or interference of a business which is operated at the premises defined in the contract and in terms of the indicated in the insurance policy.¹⁴

Business interruption insurance has progressed rapidly since it first emerged. During this time, the number and types of the coverages provided with business interruption insurance have also developed.¹⁵ It is also important to highlight that business interruption coverage is usually implemented as a distinct part of property allrisks insurance¹⁶ and by this way in a unique property allrisks insurance policy, not only physical damages which are direct result of risks counted in the policy, but also [revenue] losses¹⁷ which arise from the interruption of the regular business flow.¹⁸ On the other hand, another point to emphasize about business interruption insurance is that, in practice, business interruption policies usually ensure coverage only for the losses that arise from “business interruption” caused by physical damages.¹⁹ In other words, if there are no physical damages which interrupt the normal flow of business, it will not be possible to indemnify the loss of revenue caused by business interruption²⁰.

¹³ Schultz and Bardwell (n10) 354; Horn and Webel (n3) 2. Explanations about the salient elements of the insurance contract providing business interruption coverage, see, Miller (n11) 800.

¹⁴ For more expanded explanations about “business interruption” and “business interruption loss” see, Schultz and Bardwell (n10) 332 ff; Hummer (n11) 311. For the meaning of the term “loss” related to business interruption insurance and for different court decisions which defines this term, see also, Traynor (n1) 79 ff; Schirle (n11) 34. For a specific evaluation about types of covid-19 based business interruption losses, see, Knutsen (n3) 434. About the meaning and calculation of loss, see, Gylmn and Rogers (n12) 8 ff.

¹⁵ For a detailed evaluation of the extent of business interruption coverage see, Schultz and Bardwell (n10) 333 ff; Vogel (n3) 253 ff; Hummer (n11) 307; Miller (n11) 806 ff.

¹⁶ Horn and Webel (n3) 2: In the frame of these explanations, the Author similarly says that “Business interruption (BI) insurance can be an add-on to a property insurance policy, or a stand-alone policy, covering loss of income, contingent business interruption, and possibly losses due to actions by civil authorities.” See also, Traynor (n1) 78.

¹⁷ For a sample “gross profit” definition in a sample business interruption gross earning insurance policy which provides coverage for loss on gross profit based upon business interruption, see also, <<https://macafeeandedwards.com/pdf/commercial/property/Business%20Interruption-Gross%20Earnings.pdf>> Date of Access 25 October 2022. As it is defined in policy, gross profit means the amount which is acquired by deduction of expenditures counted in the policy from the incomes counted in the policy (Definitions, Para.1). On the other hand, items of “expenditures” and “incomes” are included comprehensively in the policies used in practice. See also, Schultz and Bardwell (n10) 339 ff; Gylmn and Rogers (n12)11 and 72 ff.

¹⁸ See also, Borghesi (n6)1151; McHugh (n11) 492.

¹⁹ About criteria – fundamentals of business interruption insurance coverage, see, Borghesi (n6) 1151; Traynor (n1) 78; Vogel (n3) 253; Hummer (n11) 307; Miller (n11) 800; Clarke (n10) 89 ff; Gylmn and Rogers (n12) 53 ff; Julian Plaza, ‘No End in Sight: Business Interruption Insurance Claims in New York after the Second COVID-19 Surge’ (2022) 47 (3) Journal of Corporation Law, 817, 822 ff.

²⁰ Traynor (n1) 78; Miller (n11) 800; Schirle (n11) 32; Knutsen (n3) 432 and 435; Gylmn and Rogers (n12) 55; Medeiros (n4) 642; McHugh (n11) 492; Gürses (n11) 72 ff.

In light of these explanations, the term of “business interruption” is usually understood in practice as the “cessation or interference occurred by physical damages at the insured premises or equipments resulted from the risks listed in the policy,” while “loss of business interruption” should be understood as limited to “the losses that follow the physical damage of insured premises or equipment.”²¹

On the other hand, as can be seen in common practice, some clauses which extend the scope of coverage can be added to business interruption policies under the title of “public authorities, civil authorities, prevention of access, or disease clauses.” In addition, policies can include exclusion clauses related to the risks such as disease, virus, terror, and more.²²

In this context, it is necessary to take into consideration the precise wordings of policies to determine “whether the policy covers the losses of business interruption or not” and if it includes business interruption coverage, to determine the extent of business interruption coverage, if any. Since business interruption coverage is included in a property allrisks insurance policy with many other risks like machine breakdown, fires, earthquakes, and floods, it is also so important to assess the coverage of each separately and within their own clauses. In addition, “both the exclusion clauses and the clauses extends the coverage must be taken into consideration.”²³

²¹ For a sample policy, see also, <<https://www.allianz.co.uk/content/dam/onemarketing/azuk/allianzco/uk/broker/docs/policy-wording/FR0076-business-interruption-all-risks-income-from-300717-updates-010418.pdf>> Date of Access 25 October 2022. In this policy, under the title of “Definitions,” the term “business interruption” is defined as: “Loss resulting from interruption of or interference with the Business carried on by the Insured at the Premises in consequence of an Event to property used by the Insured at the Premises for the purpose of the Business.” According to this policy, the term of “event” which is used to define “business interruption” means, “Accidental loss or destruction of or damage to property used by the Insured at the Premises for the purpose of the Business.” In this way, although it is not said explicitly in the definition of “business interruption,” it should be emphasized that the term “event” which is used to define “business interruption” is restricted the coverage under the terms “Accidental loss or destruction of or damage to property.” In this way, most of the policies used in practice define the term “business interruption” as limited to “physical damage” or “property damage.”

For another similar policy, see also: <<https://axaxl.com/-/media/axaxl/files/pdfs/china/20162en.pdf>> Date of Access 26 October 2022: (“.....*Subject to all other terms of this Policy, loss resulting from interruption of or interference with the Insured’s Business in consequence of physical loss or physical damage of the type insured by this Policy at the property described below which is within the Territorial Limits shall be deemed to be loss resulting from Damage to Property Insured used by the Insured at the Premises...*”)

²² For a sample policy in which business interruption loss based upon volcanic eruption and hydrometeorological risk are excluded, see also <<https://macafeeandwards.com/pdf/commercial/property/Business%20Interruption-Gross%20Earnings.pdf>> Date of Access 25 October 2022: (“..... *The actual loss sustained, resulting from the parallelization or slowing down of the operations of his business, as a consequence of the fulfilment of Fire and/or Lightning or Additional Perils contracted in sections I and/or II covering direct damage, excepting earthquake, volcanic eruption and Hydro Meteorological Perils, up to the sum insured indicated on the Policy face...*”).

For such an on-point evaluation about the effect of virus exclusion clauses on business interruption coverage see, Knutsen (n3) 440: the Author says that, “If the claim is for business interruption losses because the virus contaminated the property through infected employees or customers, and the business suffered income suspension due to that, then it probably is the case that the loss or damage resulted from a “virus” and coverage for the loss would be excluded.” On the other hand, the Author especially emphasizes that, “in the case where a civil authority restricted access to property, it could be argued that it is the government order restricting access, and not a virus, that caused the loss to the policyholder.” In the second situation, a virus exclusion clause will not prevent the indemnity of COVID-19 related losses. For more explanations on effects of virus exclusion clauses see, Medeiros (n4) 648 – 649. On the other hand, although some courts have attempted to ignore the virus exclusions in policies, it is a known fact that most of the courts reject the policyholders’ demands for indemnity on the ground of the unambiguous terms of these exclusions. For more explanations, see Mchugh (n11) 497.

²³ See, Hummer (n11) ff; Horn and Webel (n3) 2: As the Author alleged in the correct way, “although many policyholders who had purchased business interruption insurance submitted claims to their insurers, insurers were largely reluctant to cover COVID-related losses since particularly as many business interruption policies expressly exclude coverage for viruses and so they asserted COVID-19 pandemic are not covered.”

II. Assessment Related to Loss of Revenue Caused by Restrictions of Covid - 19 Pandemic

A. Determination of the Problem

After the World Health Organization declared COVID-19 as a pandemic on March 11, 2020, strict measures were taken by many governments all over the world (including Turkey) to prevent the rapid spreading of the virus. In this context, nearly all of the governments interfered with the daily lives of their citizens through their administrative regulations which set forth a series of precautions and restrictions.²⁴ For example, most governments, “forbade the foreign passengers entering into their countries from all border gates,” “closed nearly all of the businesses like restaurants, hotels, bars etc. except the takeaway services,” and during the periods of rapid spreading of the virus, governments ordered lockdown and travel prohibitions for both inner and intercity, except in limited circumstances.²⁵ These restrictions, were moderated to determine whether the spreading of the virus decreased and continued for years in various intensities. It is important to highlight that even the businesses which were not closed, like hotels and restaurants, since the first day of the restrictions, it was not possible for these businesses to operate except through online sales and home delivery services. For example, although there was no regulation for the mandatory closure for hotels in Turkey,²⁶ there was a serious decrease in the number of hotel customers. In turn, the income of hotels decreased dramatically because of both fear of the contagiousness of the virus and the travel prohibitions which were in place. During these periods, the entrepreneurs who were not able to operate their services because of restrictions appealed to their insurer based on the insurance agreements. However, most of these applications have been refused by insurance companies since the losses of business interruption were not related to a physical damage, which means it was not covered by the policies. Likewise, policyholders filed lawsuits against the insurance companies with the aim of compensating their business interruption losses.

In this context, to decide whether policyholders which were not able to operate their businesses because of COVID-19 restrictions have the chance to receive compensation for their losses from the insurance companies, it is necessary to first define the scope

²⁴ For general explanations about effects of covid-19 over daily lives of people and insurance market, see, Horn and Webel (n3) 1; Medeiros (n4) 634 ff; Plaza (n19) 819 ff.

²⁵ See also, Horn and Webel (n3) 1 ff.

²⁶ For a sample regulation ordered by the Governorship of Istanbul which explicitly sets forth that the hotels in Turkey are not subject to COVID-19 restrictions see, <http://www.istanbul.gov.tr/kurumlar/istanbul.gov.tr/PDF/il_Hifzissihha_Mecelis_Karari_No_114.pdf> Date of Access 14 November 2022. Similarly, the author also notes about increases in online sales during the COVID-19 pandemic and especially underlines the necessity for taking into consideration the increase of online sales. For detailed information about calculation of loss, see also, Gylmn and Rogers (n12) 71 ff.

of each relevant insurance policy.²⁷ As stated above, in practice, business interruption coverage is provided as a part of property allrisks insurance agreements and this agreement usually includes provisions which set forth that the policy includes only the business interruption losses occurred as a result of physical damage. In fact, the ground which allows insurance companies to refute policyholders' applications are based upon this reason, which is the key issue of these suits. Within this context, although there is no doubt that the COVID-19 restrictions prevented the operations of many businesses, the insurance companies alleged that business interruption losses were not covered by the policies since revenue losses caused by the virus anywhere not related to physical damage of the insured premises or equipment. In this way, they refused the compensation demands because of lack of "physical damage."

These developments led to an eventual discussion over the meaning and scope of "physical damages" in insurance law. Many policyholders alleged that, "These losses could be qualified as physical damage." However, they also asserted that "even if the business interruption losses were not accepted as a physical damage by the court, the clauses in the business interruption policies like 'public authorities clause,' 'prevention of access clause,' 'denial of access,' or 'disease clauses' could make the indemnity of COVID-19 losses possible."

In the frame of these explanations, to determine whether it is possible or not to indemnify the loss of revenue caused by COVID-19 restrictions, the policy wording is of vital importance. In this context, the meaning of "physical damage" will first be defined, before the clauses which extend the scope of insurance coverage are elucidated in following sections.²⁸

B. Extent of "Physical damage"

In insurance law, "property / physical damage"²⁹ refers to the damage which occurs as a result of loss of the advantages provided through the utilization of a property or a right.³⁰ In this context, this refers not only the damages which are visible or have tactility, but also to such damages as: "loss of customers, losing the utilization possibility of mobiles or immobiles," and "damages caused by cessation

²⁷ Borghesi (n6)1152: In the frame of these explanations, the author emphasizes that "coverage would be dictated by the specifics of the insurance policy" and on the other hand, "since larger businesses usually have a stronger negotiating position, they have chance to work with insurance companies directly or through insurance brokers and can have manuscript policies which offer broader coverage." However, in practice, smaller businesses have insurance policies directly from the sales team of an insurance company or through independent insurance agents, which are usually standard forms issued by insurance companies and provide more limited coverage.

²⁸ Most of the courts examined the lawsuits related to business interruption insurance in two different perspectives: the courts at first, enquired "whether the loss of the use is physical damage or not" and as a second point the effect of virus exclusion clause. For more information see, Medeiros (n4) 647 ff.

²⁹ See, Serkan Ergüne, *Olumsuz Zarar* (1st edn, Beta 2008) 34. For detailed information about the term "damage" and "physical damage" in English Law, see, Gylmn and Rogers (n12)180; Medeiros (n4) 651.

³⁰ Samim Ünán, *İsteğe Bağlı Genel Sorumluluk Sigortasında Riziko* (1st edn, Beta 1998) 78.

of the production.”³¹ Within the context of business interruption agreements, the meaning of physical damage has been discussed intensively, and although courts have occasionally given inconsistent verdicts related to this issue, it must be highlighted that there are many decisions which have interpreted the scope of these terms in a wide manner. For example, a decision which was held by American Federal District Court has been given great importance in the context of “the meaning of physical damage.” In this lawsuit, the Court examined whether “the existence of the bacteria E.coli found in the well used to procure the water of insured house” qualified as a physical damage or not. The Court’s final ruling set forth that: “*While the bacteria allegedly made the house uninhabitable, there is a genuine issue of fact whether the functionality of the Plaintiffs’ property was nearly eliminated or destroyed, or whether their property was made useless or uninhabitable.*”³² In a similar way, there are other decisions held by American courts which set forth that ammonia,³³ carbon dioxide,³⁴ or smoke,³⁵ which surrounded the insured property and was difficult to remove, would make the insured property useless and unreliable, and so “it is possible to admit there is a ‘physical damage’ even if there is no physical alteration at the insured property.”³⁶

Another important decision which can provide guidance for the issue of whether losses related to COVID-19 constitute physical damage was also provided by the American (West) District Court in the recent past.³⁷ The Plaintiffs in this case were: Studio 417, Inc. (“Studio 417”), Grand Street Dining, LLC (“Grand Street”), GSD Lenexa, LLC (“GSD”), Trezomare Operating Company, LLC (“Trezomare”), and V’s Restaurant, Inc. (“V’s Restaurant”) (collectively, the “Plaintiffs”). As explained in the decision: “Studio 417 operates hair salons in the Springfield, Missouri, metropolitan area. Grand Street, GSD, Trezomare, and V’s Restaurant own and operate full-service dining restaurants in the Kansas City metropolitan area.” It was emphasized that all of the Plaintiffs had serious loss of revenue because of a business interruption caused by COVID-19 restrictions.

³¹ Ünán, (n30) 78. For a detailed evaluation about the scope of “direct physical loss or damage” see, also Knutsen (n3) 439.

³² *Motorists Mut. Ins. Co. v. Hardinger*, 131 F. App’x 823, 826-27 (3d Cir. 2005). To see full text, <<https://casetext.com/case/travco-insurance-company-v-ward/analysis?citingPage=1&sort=relevance>> Date of Access 10 October 2022. For other similar court decisions and detailed explanations about physical damage, see also, McHugh (n11) 495 ff.

³³ *Gregory Packaging, Inc. v. Travelers Prop. Cas. Co. of Am.*, No. 2:12-cv-04418, 2014 WL 6675934, at *6 (D.N.J. Nov. 25, 2014). To see full text, <<https://casetext.com/case/gregory-packaging/analysis?sort=relevance&citingPage=1>> Date of Access 11 December 2022.

³⁴ *Matzner v. Seaco Ins. Co.*, No. 96-0498-B, 1998 WL 566658, at *3 (Mass. Super. Aug. 12, 1998). For full-text, see, <<https://casetext.com/case/matzner-v-seaco-insurance-company>> Date of Access 11 December 2022.

³⁵ *Oregon Shakespeare Festival Ass’n v. Great Am. Ins. Co.*, No. 1:15-cv-01932-CL, 2016 WL 3267247, at *7-8 (D. Or. June 7, 2016). For full text, <<https://casetext.com/case/nue-llc-v-or-mut-ins-co-1>> Date of Access 10 December 2022.

³⁶ For different court decisions and detailed information see also, Vogel (n3) 256.

³⁷ *Studio 417, Inc., et al. vs The Cincinnati Insurance Company*. In The United States District Court For The Western District Of Missouri Southern Division, Case No. 20-cv-03127-SRB. For full-text, <<https://casetext.com/case/studio-417-inc-v-cincinnati-ins-co>> Date of Access 11 November 2022.

About this decision and another similar ones, see, Vogel (n3) 257; Medeiros (n4) 648 ff.

The policies which are the subject of these decisions include the same wording and all of these policies are “property all risks policies” which provide “Building and Personal Property Coverage” and “Business Income (and Extra Expense)” coverage. On the other hand, the policies also include a specific clause which excludes the indemnity demands based on virus.³⁸ These policies, which also ensure coverage for loss of business income, include the clause which states that it would “pay for the actual loss of ‘Business Income’ . . . due to the necessary ‘suspension’ of your ‘operations’ during the ‘period of restoration.’ The suspension must be caused by direct ‘loss’ to property at a ‘premises’ caused by or resulting from any covered cause of loss.”³⁹ According to this clause, it is agreed in the policies that the insurer would ensure business income coverage as long as the loss of income was caused by or resulted from a direct loss or damage to the insured premises.⁴⁰ Another important point about these insurance policies is there are no provisions which define what is meant by “physical loss” or “physical damage.”

The Plaintiffs’ main argument is the “existence of physical damage” although there is no physical alteration. In this way, they alleged that, “*it is likely that customers, employees, and/or other visitors to the insured properties were infected with COVID-19 and thereby infected the insured properties with the virus*” and so that “*COVID-19 “is a physical substance,” that it “live[s] on” and is “active on inert physical surfaces,” and is “emitted into the air.”*” The Plaintiffs further alleged that the presence of COVID-19 “renders physical property in their vicinity unsafe and unusable,” and that they “were forced to suspend or reduce business at their covered premises.” According to these allegations, “*the presence of COVID-19 and the Closure Orders caused a direct physical loss or direct physical damage to their premises by denying use of and damaging the covered property, and by causing a necessary suspension of operations during a period of restoration.*” In response to this, the insurance companies asserted that the policies provide coverage only for business interruption damages related to the physical damage of insured premises. On the other hand, according to a Defendant Insurer, “*Direct physical loss requires actual, tangible, permanent, physical alteration of property.*” They further state that “*the Policies provide property insurance coverage, and “are designed to indemnify*

³⁸ See also, Horn and Webel (n3) : As the Authors especially emphasize “Viruses and infectious diseases are generally not designated perils in a standard policy, although all-risks coverage might include COVID-19”; Traynor (n1) 87. About all risks and specified-named perils coverage and detailed information related to all risks insurance see, Gylmn and Rogers (n12) 19 ff; Plaza (n19) 821.

³⁹ For detailed information, see, explanations under the title of “Background”, *Studio 417, Inc., et al. vs The Cincinnati Insurance Company*, In The United States District Court For The Western District Of Missouri Southern Division, Case No. 20-cv-03127-SRB.

⁴⁰ As will be mentioned in the next chapters, these policies also include civil authority and any other clauses. For a wide extended analysis of this decision, see, Vogel (n3) 263 ff.

*loss or damage to property, such as in the case of a fire or storm but on the contrary the Plaintiffs' claimed covid-19 does not damage property; it hurts people.”*⁴¹

In the context of these claims, the Court grounded its decision on the main principles of interpretation.⁴² According to the Court, “*Policy terms are given the meaning which would be attached by an ordinary person of average understanding if purchasing insurance.*” As a result of this principle, if there is hesitation about the meaning of a clause or a term in policy, these clauses or terms must be interpreted on behalf of the policyholder and when these terms or clauses are interpreted, the lexical meaning⁴³ of the term must be taken into consideration. In this context, the Court reached the conclusion that “physical alteration is not necessary to admit existence of a physical damage,”⁴⁴ and “*if the insured premises is useless and uninhabitable, even absence of a physical alteration, a physical loss may occur when the property is uninhabitable or unusable for its intended purpose.*”⁴⁵ In other words, the Court accepted the Plaintiffs’ allegations. In this decision, The Court also emphasized that the term “loss” is different from “damage,” which makes it distinct from structural damages.⁴⁶

On the other hand, it is necessary to underline that the decision of “*Studio 417, Inc., et al. vs The Cincinnati Insurance Company*” is not the only decision in which the issue of whether the business interruption losses caused by COVID-19 constitute a physical damage or not. This issue has also been discussed, with several lawsuits filed, in the United Kingdom since the first periods of the pandemic. Within this context, it will be beneficial to examine a similar decision which was held by United Kingdom Supreme Court. In the lawsuit filed by FCA (“*Financial Conduct*

⁴¹ For detailed information, see, explanations under the title of “Discussion: A. Plaintiffs Have Adequately Alleged a Direct “Physical Loss” Under the Policies”, *Studio 417, Inc., et al. vs The Cincinnati Insurance Company*, In The United States District Court For The Western District Of Missouri Southern Division, Case No. 20-cv-03127-SRB.

⁴² See also, Hummer (n11) 307-314: The Author especially highlights the importance of interpretation of the terms, language, coverage and exclusions of policy. In the same direction, see, Knutsen (n3) 438. For a detailed assessment related to interpretation of policy language before covid-19 pandemia, see, French, *The Aftermath of Catastrophes* (n5) 472 ff.

⁴³ In this context the Court refers to the definitions of the terms “physical” and “loss” in The Merriam-Webster Dictionary. According to this dictionary, the term “physical” is defined as “having material existence: perceptible especially through the senses;” “loss” is defined in such a wide manner, as “the act of losing possession” and “deprivation.” For a critique of the courts which used dictionary definitions to determine the meaning of some insurance terms: See, Knutsen (n3) 439-440: Although some courts similarly think that dictionaries may be helpful to determine the meaning of some terms, the author alleges that dictionary use is highly problematic. Because, according to the author, firstly, a “dictionary is a separate document and not stapled to the insurance policy. On the other hand, a dictionary is for non-insurance purposes and people do not talk or think in the same terms as the dictionary.”

⁴⁴ The Court based its decision, which says physical alteration is not necessary to admit the existence of a physical damage, on a few outdated decisions. One of these old-dated decisions is “*Mehl v. The Travelers Home & Marine Ins. Co., Case No. 16-CV-1325-CDP (E.D. Mo. May 2, 2018)*.” In this case, the Plaintiff, who had to leave his house because of spider invasion, appealed to the insurer based upon the insurance agreement they concluded before. However, the insurer rejected this application on the grounds that there was not any physical damage.

⁴⁵ Horn and Weibel (n3) 1 ff: According to the authors, although property insurance policies stipulate direct physical loss or damage to tangible property in principle, if a business becomes physically contaminated and uninhabitable because of coronavirus, this could be a basis to claim physical loss.

⁴⁶ See also, Knutsen (n3) 439: Similarly, the author especially emphasizes that after contamination with COVID-19, although the insured property still stands, during the contamination period, the property is dangerous and the policyholder loses the use of property.

Authority”) on behalf of policyholders, the Supreme Court examined eight different insurance policies which include business interruption coverage, and finally arriving at a conclusion in support of the policyholders’ from different perspectives.⁴⁷ The Court especially emphasized that business interruption insurance is an extension of property insurance going back to when this kind of insurance coverage was first implemented⁴⁸ and decided that in the presence of clauses which extends the scope of insurance coverage, the insurer has to pay indemnity for the business interruption losses caused by COVID-19, even if there is no physical alteration.⁴⁹

Related to business interruption losses which occurred as a result of COVID-19, another important decision is “*Tkc London Ltd. v Allianz Insurance Plc*,” which was held by the High Court of England on October 15, 2020.⁵⁰ In this case, the High Court decided on behalf of the insurance company, different than the decision of the FCA Test Case.⁵¹ As it is understood from the ruling, the Plaintiff is TKC London Ltd., which operates a cafe-restaurant in London. Before the coronavirus pandemic, Defendant Allianz Insurance Plc issued a “commercial select” policy on behalf of TKC London. In the policy, there is also a section related to business interruption losses under the title of “business interruption all risks estimated revenue (Business Interruption Section).” Although TKC London has appealed the Insurance Company to indemnify the business interruption losses related to COVID-19 restrictions, the insurance company rejected this request, since the policy provides coverage only for business interruption losses which occur as result of physical damages.

In this decision, the Court also referred to the FCA Test Case and pointed out an important difference between the policies subject to these two lawsuits. According to this, while the policy issued by the defendant Allianz Insurance includes standard business interruption coverage, the policies subject to the FCA Test Case include such

⁴⁷ This judgment began on June 6, 2020 and was determined by the United Kingdom High Court on September 15, 2020. After that, parties appealed to United Kingdom Supreme Court directly against this decision, which was concluded on January 15, 2021. For detailed information see also, Ünán, Financial Conduct Authority v. Arch and Others (n3) 138. See also, Gürses (n11) 72.

⁴⁸ “.....The reference to “damage” is inapposite to business interruption cover which does not depend on physical damage to insured property such as the cover with which these appeals are concerned. It reflects the fact that the historical evolution of business interruption cover was as an extension to property damage insurance. It was held by the court below, and is now common ground, that for the purposes of the business interruption cover which is the subject of these appeals, the term “damage” should be read as referring to the insured peril.....” (*The Financial Conduct Authority and others v Arch Insurance and others- United Kingdom Supreme Court Judgment, para 257*). For the full text of this decision, see <<https://www.supremecourt.uk/cases/docs/ukse-2020-0177-judgment.pdf>> Date of Access 11 December 2022.

⁴⁹ For a detailed appraisal of this decision, see, Ünán, Financial Conduct Authority v. Arch and Others (n3) 135-185.

⁵⁰ *Tkc London Ltd. v Allianz Insurance Plc*, In The High Court Of Justice Claim No CL-2020-000219 Business And Property Courts Of England And Walescommercial Court (QBD), 15 October 2020.

⁵¹ *The Financial Conduct Authority (FCA) vs. Arch Insurance and others*”, 16.10.2020, FL-2020-000018, (in the High Court Of Justice Business And Property Courts Commercial Court (QBD) Financial List Financial Markets Test Case)

clauses as disease or prevention of access clauses.⁵² In this context, the Court examined the policy wording meticulously and determined that there is not any clause which provides coverage for business interruption losses caused by COVID-19 restrictions in the policy. They examined the term “event” used in the policy to describe the terms “business interruption”⁵³ and “business interruption loss.” In the frame of these explanations, it must be especially underlined that in this lawsuit the Court did not pay attention to the Plaintiffs’ allegation related to the possible broader interpretation of coverages and terms.⁵⁴

C. Assessment in the frame of “Extension Clauses”

In standard business interruption policies which do not contain any extension clause (non-damage clauses), the main issue related to business interruption losses caused by COVID-19 restrictions is the determination of the meaning of the term “physical damage.” As it is known, most business interruption policies used frequently in practice include some clauses which extend the scope of coverage. Determining the meaning of these clauses has a vital importance to decide whether compensation of the losses related to COVID-19 restrictions is possible or not, regardless of whether these losses can be qualified as physical damage. In the lawsuits filed recently related to this issue, courts examined these kinds of clauses meticulously and took into consideration the meaning of such extension clauses to reach a conclusion. Thus, in *“The Financial Conduct Authority (FCA) vs. Arch Insurance and others,”* in which all of these extension clauses were examined at a broad scope, an important part of the decision was allocated to this matter.⁵⁵ At first, the Court decided in a similar

⁵² The Court explained this with these sentences: “...In the recent *Financial List* test case, *The Financial Conduct Authority v Arch Insurance (UK) Ltd and others*[2] (“the FCA test case”), the court was asked to “construe a number of wordings which contain non-damage ‘extensions’ to the ‘standard’ Business Interruption cover provided by the relevant insurers .. to which the FCA refers as ‘disease clauses’”[3]. The Policy relied on by TKC in the present case does not contain any such ‘disease clause’ extension. Although the sums at stake in the present action are, by the standards of the Commercial Court, comparatively modest, the Policy is largely in Allianz’s standard form of policy wording. The decision in the present case may therefore be of consequence for other potential claimants.....” (Para 3)

⁵³ As it is understood from the decision, according to the policy, “business interruption” is defined as, “Loss resulting from interruption of or interference with the Business carried on by the Insured at the Premises in consequence of an event to property used by the Insured at the Premises for the purpose of the Business.” Although it is not obvious from this definition of business interruption that property damages is necessary for business interruption coverage, it can be understood easily when this definition is read with the definition of “event.” This is because the policy defines “event” as, “Accidental loss or destruction of or damage to property used by the Insured at the Premises for the purpose of the Business...” For comprehensive explanations related to the policy in TKC London case, see also para 11 ff.

In the frame of these definitions, the Court submitted the pleas of the defendant which exactly says that, an “event” for the purpose of business interruption section of this policy can include at least one of these situations: “loss of property,” “destruction of property,” or/ and “damage to property,” and so, “definition of an “Event” is referring to physical matters, and that the word “loss” in this context is therefore referring to physical loss – that is, some commercially harmful change in the physical state of the property concerned.” (Para 26)

⁵⁴ The Plaintiff TKC asserted that, “the court should seek to construe the Policy so far as possible to provide cover against all of the risks faced by the insured, and should not give it a narrow or technical construction.” The Plaintiff also added an allegation which is similar to the assertion in the FCA Test case. As it is expressed by TKC, “If Allianz wished to exclude certain risks, it was open to them to do so clearly and expressly. If they did not do so, then there should be a practical presumption that “all risks” were indeed covered.” (Para 59-60)

⁵⁵ For full text, see, <<https://www.supremecourt.uk/cases/docs/uksc-2020-0177-judgment.pdf>> Date of Access 10 October 2022.

fashion as the former decisions that the business interruption losses which resulted from COVID-19 could not be qualified as “physical damage” and then examined the effect of extension clauses to the insurers’ obligation of indemnity by looking at the extension clauses in the sample policies.⁵⁶

The Court classified these clauses into three different groups, as “disease clauses,” “prevention / denial of access clauses,” and “trend clauses,” and discussed all of these separately and comprehensively.⁵⁷

1. Disease Clauses

In the decision of “*The Financial Conduct Authority (FCA) vs. Arch Insurance and others*,” the first extension clause examined by the Supreme Court is “disease clause” which extends the scope of business interruption coverage by providing coverage for the business interruption losses which occurred as result of an infectious disease.⁵⁸

As can be understood from the whole extent of the decision, the Court examined all eight policies separately and reached different results for each policy by taking into consideration wording of each one.⁵⁹ In the end, the Court primarily determined that if a policy includes a disease clause, in principal, it also covers losses of business interruption caused by an infectious disease, and the insurer will be under obligation to indemnity, even if there is no physical damage.

In this context, the Court first examined the disease clause of policy titled RSA3. According to the explanations of the Court, the first part of this policy does in fact include a standard business interruption coverage that only covers losses which arise from physical loss or destruction of or damage to properties. However, a series of extension clauses which constitute business interruption coverage regardless of the existence of physical damage to the insured premises are added into the second part of the policy. One of these clauses is the “Notifiable Disease Clause.” This clause exactly sets forth that, “*insurer provide indemnity for the business interruption losses*

⁵⁶ At the first section of the decision, the Court emphasized that the main matter of this case is the clauses which extend the coverage and then examined these clauses under four different titles: “disease clauses,” “hybrid clauses,” “prevention of access clauses,” and “trend clauses.” See also, Gürses (n11) 73.

⁵⁷ For detailed information about extension clauses in business interruption insurance see, Gylmn and Rogers (n12) 100 ff. See also, Gürses (n11) 74 ff.

⁵⁸ Just before disease clauses in the policies subject matter of the lawsuit, the disease clause is defined as, a clause “*which, in general, provide cover for business interruption losses resulting from the occurrence of a notifiable disease, such as COVID-19, at or within a specified distance of the business premises*” (Para 4,i). For a detailed appraisal about disease clauses, in the frame of United Kingdom Supreme Court’s this decision dated 15.01.2021 - Test Case (FCA V. Arch and others), see also, Ünan, Financial Conduct Authority v. Arch and Others (n3)139 ff.

⁵⁹ See also, Borghesi (n6) 1151: the author similarly says, “With respect to a covered peril, each policy must be viewed for its specific language.” In the same direction see, Knutsen (n3) 438. For a critique to courts about this issue, See also, Christopher C. French, ‘Federal Courts’ Recalcitrance in Refusing to Certify State Law COVID-19 Business Interruption Insurance Issues’ (2021-2022) 100 Texas Law Review Online, 100, 152,154: The author alleges that the policy language has never been interpreted in the context of a pandemic by any state supreme court and “the meaning of policy language in the COVID-19 context presents novel law questions.”

arise from “occurrence of a Notifiable Disease (as defined below) at the Premises or attributable to food or drink supplied from the Premises” or “occurrence of a Notifiable Disease within a radius of 25 miles of the Premises.”⁶⁰

The first inference of the Court is that since the coronavirus has the ability to spread rapidly throughout wide areas, like cholera, plague, typhus, yellow fever and SARS it could be qualified as a “notifiable disease.”⁶¹ Notwithstanding, according to the Court, although disease clauses provide coverage for business interruption losses regardless of physical damages to the insured premises in principal, the other clauses and the whole wording of the policy must be taken into consideration accurately. For example, the disease clause of RSA3 stipulates “occurrence of a Notifiable Disease within a radius of 25 miles of the Premises.” So in the frame of this policy, the existence of a notifiable disease will not be sufficient to cover the business interruption losses which occurred as result of this disease; the distance condition (“the condition of 25 miles”) must also be met. In other words, according to the Court, if the notifiable disease either occurs out of the insured premises or out of the bounds written in policy (in this policy “25 miles”), the policyholder cannot claim indemnity for business interruption losses caused by the disease.⁶²

Another important point that should be highlighted is that the Court has interpreted the term “notifiable disease” written in RSA3 in such a wide manner and on behalf of policyholders. Within this context, the Court carried out an evaluation in the frame of the definition of “notifiable disease” which says, “Notifiable Disease shall mean illness sustained by any person resulting from any human infectious or human contagious disease...” In the end, the Court decided that “*it is not necessary for the*

⁶⁰ The whole of the clause is that: “We shall indemnify You in respect of interruption or interference with the Business during the Indemnity Period following:

a. any

i. occurrence of a Notifiable Disease (as defined below) at the Premises or attributable to food or drink supplied from the Premises;

ii. discovery of an organism at the Premises likely to result in the occurrence of a Notifiable Disease;

iii. occurrence of a Notifiable Disease within a radius of 25 miles of the Premises

.....”

According to the policy the term “notifiable disease” means “Notifiable Disease shall mean illness sustained by any person resulting from:

i. food or drink poisoning; or

ii. any human infectious or human contagious disease excluding Acquired Immune Deficiency Syndrome (AIDS) or an AIDS related condition an outbreak of which the competent local authority has stipulated shall be notified to them.”

⁶¹ In this context the Court, refers to the provisions in Regulation dated 2010, and since this is an open-ended regulation, it decided that COVID-19 can be admitted as a notifiable disease. (Para 57: “...The court noted that the list of notifiable diseases in Schedule 1 to the 2010 Regulations includes diseases such as cholera, plague, typhus, yellow fever and SARS which are capable of spreading rapidly and widely. The list is also open-ended in that if at any time a new disease emerges as a threat to public health, it may be added to the list, as COVID-19 has been.....”) To see this Regulation the Court refers to in the decision, see, <<https://www.gov.uk/guidance/notifiable-diseases-and-causative-organisms-how-to-report>> Date of Access 10 September 2021.

For a detailed explanation about 2002 SARS outbreak and its lasting effects on business interruption insurance, see Mchugh (n11) ff.

⁶² “...On the correct interpretation of all the relevant clauses, they cover only relevant effects of cases of COVID-19 that occur at or within a specified radius of the insured premises. They do not cover effects of cases of COVID-19 that occur outside that geographical area....” (“UKSC - The Financial Conduct Authority v Arch Insurance and others” para 95)

person concerned to have been diagnosed as having the disease or to have manifested symptoms of illness.” On the other hand, according to the Court “it is sufficient that the person should in fact have contracted the disease, whether or not the disease is symptomatic or has been diagnosed.”⁶³

2. Prevention / Denial of Access Clauses and Hybrid Clauses

The other extension clauses examined related to losses following the COVID-19 restrictions in the FCA Test Case are the “prevention /denial of access” and “hybrid” clauses. The Court discussed these clauses under the same section and defined both of them to be roughly in the entry section. According to this, while “prevention of access clauses”⁶⁴ generally aim the indemnity of the business interruption losses caused by intervention of public authorities,⁶⁵ “hybrid” clauses include both the elements of disease clauses and prevention of access clauses.⁶⁶

The Court examined different many policies which are issued by different insurance companies under the section of “Prevention of Access Clauses and Hybrid Clauses.” In this context, a very important point the Court emphasized was the “legal characteristic of the restrictions which make implementation of prevention of access clauses possible.” The Supreme Court detected the meaning of the expression “restrictions imposed” and reached a different conclusion in part from the view of High Court. As the Court stated frankly, “*restrictions imposed*” by a public authority would be understood as ordinarily meaning mandatory measures “imposed” by the authority pursuant to its statutory or other legal powers.” On the other hand, the Court also emphasized that, “although “*Imposed*” connotes compulsion and

⁶³ For comprehensive information see also, ‘UKSC - The Financial Conduct Authority v Arch Insurance and others’ para 53.

⁶⁴ It is important to underline that in the policies used in practice, different terms to state “prevention of access” could be preferred. For example, “public authorities clauses,” denial of access,” “Non-damage denial of access,” and “Action of competent authorities” are often used instead of the term of prevention of access in practice.

The author states that when determining the effect of civil authority clauses, the language of the policy has a crucial importance and “the scope of civil authority coverage will typically fall along what will activate the coverage (direct physical loss, loss of use, loss of access, etc.) and how long losses will be covered.” For more information see, Plaza (n19) 830.

For different practice tendencies of business interruption insurance for losses caused by COVID-19 restrictions in the USA, see also, Horn and Webel (n3) 2 ff.

⁶⁵ Thus, the prevention of access clause is defined as “clauses which, in general, provide coverage for business interruption losses resulting from public authority intervention preventing or hindering access to, or use of, the business premises” by the Supreme Court in FCA Case. (Para.4(ii)). See also, Horn and Webel (n3) 2; Schirle (n11) 38

⁶⁶ UKSC- The Financial Conduct Authority v Arch Insurance and others para 4(iii).

For a detailed appraisal about Prevention / Denial of Access Clauses and Hybrid Clauses, in the frame of UKSC’s decision dated 15.01.2021 - Test Case (FCA V. Arch and others), see also, Ünán, Financial Conduct Authority v. Arch and Others (n3)141 ff; Gürses (n11) 75 ff.

*a public authority exercises compulsion through the use of such Powers, it is not necessary that a restriction always have the force of law before it can fall within this description.*⁶⁷

The second point the Court discussed related to prevention of access clause is the meaning and scope of the term “inability to use” which is used extensively with prevention of access clauses. As stated by the Court, the public authority or prevention / denial of access clauses used in most of the policies do not cover all business interruption losses caused by “restrictions imposed” by a public authority following occurrence of a notifiable disease. Since most of these clauses also stipulate “inability to use,” the insurer will be responsible for indemnity only when the interruption arose from the policyholder’s “inability to use” the business premises due to these restrictions or interventions.⁶⁸ Related to the term “inability to use,” the Court decided that the wording of the clause does not require there to be a complete inability to use the premises for all purposes.⁶⁹

The starting point of the Court was to define the meaning of the term “inability to use,” which is the wording of the public authority clause of one of the policies which is examined by the Court and is also written in nearly all of the policies used in practice. The public authority clause of this policy says exactly that: “*Your inability to use the insured premises due to restrictions imposed by a public authority during the period of insurance following:.....b. an occurrence of any human infectious or human contagious disease, an outbreak of which must be notified to the local authority...*” Related to the term “inability to use”, the first finding of the Court is that, in the frame of the wordings of the policy it is not necessary to “be a complete inability to use the premises for all purposes”⁷⁰ and “the requirement is satisfied either if the policyholder is unable to use the premises for a discrete part of its business activities or if it is unable to use a discrete part of its premises for its business activities.”⁷¹ In other words, the Court presumes in both of these situations there is a complete inability of use and explains these exactly like that: “*In the first situation, there is*

⁶⁷ See, *UKSC- The Financial Conduct Authority v Arch Insurance and others* para 116. The Supreme Court also exemplifies this view. According to the Court, “a public health officer who discovers vermin on inspection of a restaurant may issue an immediate instruction to close the restaurant, although the legal order to do so may only follow later. All concerned would expect such an instruction to be complied with forthwith, regardless of legalities, and would regard the ‘restriction’ as being ‘imposed’ there and then.” (Para 118)

The Court justifies this decision in a differeny way. On the one hand, the Supreme Court recognized the justification of a defendant which says “there would be greater certainty in the operation of the clause if “restrictions imposed” were required in every case to have the force of law.” On the other hand, the court underlined that “*the test in interpreting the words used is how they would be understood by a reasonable person and we do not consider that a reasonable policyholder would understand the word “imposed”, without more, as making cover conditional on the existence or immediate prospect of a valid legal basis for the restriction*” (para121). In short, the Court came to this conclusion within the context of “the principle of interpreting the terms with respect the understood of a reasonable person.”

⁶⁸ See, *UKSC- The Financial Conduct Authority vs Arch Insurance and others*, para 129 ff.

⁶⁹ For detailed explanations and sample court decisions about condition of “complete cessation,” see also, Schirle (n11) 36 ff.

⁷⁰ See, *UKSC - The Financial Conduct Authority v Arch Insurance and others* para 136.

⁷¹ *UKSC- The Financial Conduct Authority v Arch Insurance and others* para 137.

*a complete inability to carry on a discrete business activity. In the second situation, there is a complete inability to use a discrete part of the business premises.*⁷² The Court also exemplifies both of these situations and uses the Plaintiff FCA's example to explain the first issue.⁷³ The main subject of this example is a book shop "which is required to close with the loss of all its walk-in customer business." However, during this period it was possible to use the premises for telephone orders. The FCA also stated that most income of this book shop comes from walk-in customers, which represents 80% of its total income. In this way, the Court uses this bookshop example to concretize the hypothesis of "complete inability of carrying on a discrete business activity." On the other hand, according to this assumption, it is important to emphasize that the insurer will be responsible for only the losses related to absence of walk-in customers to the bookshop.⁷⁴ On the other hand, the Court also exemplifies the second issue with these sentences: "*it is not possible to use a discrete part of the business premises with a department store, which had to close all parts of the store except its pharmacy, would potentially be a case of inability to use a discrete part of its business premises.*" In the frame of these explanations, it is possible to say that the Court admitted that the term of "inability to use of the premises" does not have exactly the same meaning with "hindrance or disruption to normal use."⁷⁵ Likewise, the "inability to use" the business premises may manifest itself as a policyholder's inability to use either the whole or a discrete part of its premises for either the whole or a discrete part of its business activities.⁷⁶ Finally, the Court interpreted the term "interruption," which is written nearly all of the prevention of access/denial of access clauses, in a similar way. According to the Court, "interruption" means not only "a complete cessation of the policyholder's business or activities," but "interference or disruption" can also qualify as interruption.⁷⁷

III. Conclusion and an Appraisal under Turkish Law

Business interruption coverage is usually implemented as a distinct part of property insurance which covers against risks, and, in practice, business interruption policies usually ensure coverage only for the losses which arise from "business interruption" caused by physical damages. In other words, if there is not a physical damage underlying the business interruption, it will not be possible to indemnify

⁷² UKSC - *The Financial Conduct Authority v Arch Insurance and others* para 137.

⁷³ UKSC - *The Financial Conduct Authority v Arch Insurance and others* para 138.

⁷⁴ "...If, for example, a restaurant which also offers a takeaway service decides to close down the whole business it could only claim in relation to the restaurant part of the business. Equally, if there was a travel agent whose business was 50% walk-in customers, 25% internet sales and 25% telephone sales, it could only claim in relation to the loss of walk-in business, even though all parts of the business may have been depressed by the effects of COVID-19 and the governmental measures taken..." See, UKSC - *The Financial Conduct Authority v Arch Insurance and others* para 141.

⁷⁵ UKSC - *The Financial Conduct Authority v Arch Insurance and others* para 142.

⁷⁶ UKSC - *The Financial Conduct Authority v Arch Insurance and others* para 145.

⁷⁷ UKSC - *The Financial Conduct Authority v Arch Insurance and others* para 157.

the loss of revenue caused by business interruption. As a consequence of this, in most lawsuits, Plaintiffs' demands for business interruption insurance indemnity based upon COVID-19 have been rejected by the courts, as there is lack a of physical damage (caused by coronavirus) on the insured premises. However, it is important to emphasize that after the COVID-19 pandemic, the number of court decisions which admit the existence of physical damage related to the virus increased considerably, when compared to the term just before pandemic. In this context, some courts have decided that *“if the insured premises is useless and uninhabitable, even absence of a physical alteration, a physical loss may occur when the property is uninhabitable or unusable for its intended purpose.”* On the other hand, the tendency of the courts differs if business interruption policies also include an extension clause which expands the insurance coverage. Even if some courts did not accept that COVID-19 could constitute physical damage on insured premises, if the policy includes an extension clause (for example, a disease or public authorities clause), the losses which arose from COVID-19 must be indemnified by the insurer, with no need for there to be physical damage to the insured premises. At this point, *“The Financial Conduct Authority and others vs Arch Insurance and Others”* decision of the United Kingdom Supreme Court, dated January 15, 2021, is of particular importance. The Court examined all policies related to the lawsuit separately and reached different results for each policy, taking into consideration the wording of each one. However, the Court primarily determined that if a policy includes a disease clause, in principal it also covers losses of business interruption caused by an infectious disease and the insurer will be under obligation to indemnity even if there is no physical damage. Similarly, the Court also decided on behalf of policyholders' with respect to public authorities / prevention of access / denial of access clauses, by taking into consideration of the wording of each clause.

If some exceptional court decisions which qualified virus-based contamination of insured premises as physical damage are laid aside, the first point to emphasize in Turkish Law is that it is not possible to mention “physical damage” on insured premises which arose as a direct result of COVID-19. As it is known, in Turkey, where business interruption coverage is not so common in practice and usually provided in fire insurance policies, the term “physical damage” is understood as damage related to the physical alteration of the insured location. Because of this, in our opinion, taking into consideration the insurance practice of Turkey and decisions held by Turkish courts up to now, it is hard to say that the abovementioned court decisions, which determined that COVID-19 could cause physical damage to the

insured premises, would also be effectual for Turkish Law.⁷⁸ In this regard, the key point to determine whether business interruption losses caused by COVID-19 can be indemnified or not is the precise language of the policy. Because of this, as a first step, it is important to examine the exclusion and extension clauses written in policy with accuracy. For example, although in each concrete case the wording of the policy and clauses may be different, the existence of a virus exclusion clause will usually be a disadvantage for policyholders who demand insurance indemnity based on COVID-19.⁷⁹ On the contrary, if the policy includes an extension clause, such as a disease or public authorities clause, the result will be different. Disease or public authorities clauses usually include expressions which set that the “insurer is under obligation of payment independently of physical damage on insured premises.” On the other hand, it must be taken into consideration that disease or public authorities clauses do not always contain similarly explicit expressions like this. Accordingly, it has crucial importance to examine and interpret the exact wording of these extension clauses. In this context, an important point to emphasize related to the interpretation of the policy wordings is the principle of “*Contra Proferentem*.” According to this principle, the wording of policies or clauses must be interpreted on behalf of the weaker party. In other words, insurance agreements should benefit the policyholder.⁸⁰ At this point, it important to highlight that the principle of *contra proferentem* is only applied if there is a serious necessity, since the policy wording is not always explicit and the interpretation must be compatible with the main principle of insurance law.

⁷⁸ In Turkey, there are still no high court decision which debates whether COVID-19 contamination causes physical damage or not. However, for an Insurance Arbitration Commission decision related to COVID-19-based business interruption loss, see, Insurance Arbitration Commission, 2021/51816, 21.5.2021.

In this lawsuit, the Commission did not debate the matter of physical damage, since the prevention of access clause in the policy includes an expression which says explicitly “the insurer has to pay indently of physical damage on insured premises.” The main matter the Commission examined in this lawsuit is the legal qualification of business interruption coverage in the policy. The Commission qualified the policy subject to this lawsuit as a parametric insurance. For full text of the decision see, <<https://www.lexpera.com.tr/ictihat/sigorta-tahkim-komisyonu/hk-k-no-2021-51816-k-tarihi-21-5-2021>> Date of Access 21 December 2022.

⁷⁹ For a different interpretation of virus exclusion clauses see, United States District Court Middle District of Florida Orlando Division, Urogynecology Specialist of Florida LLC, vs. Sentinel Insurance Company, Ltd Case No.: 6:20-cv-1174-Orl-22EJK. To see full text of decision, see, <<https://btlaw.com/-/media/files/blog/urogynecology-v-sentinel.ashx>> Date of Access 21 November 2022: In this decision, the Court interpreted the virus exclusion clause, which says the insurer will not pay for the losses which appear as a result of the presence, growth, proliferation, spread, or any activity of “fungi,” “wet rot,” dry rot, bacteria, or virus,” in a different way. The Court decided: “[A] pandemic is a loss distinct from a virus.” *The Endorsement as a whole, by its plain meaning, is intended to apply when “fungi”, wet rot, dry rot, bacteria and virus are physically present on the property itself. To extend the Endorsement to include mere contemplation of, or presence somewhere in the world of, COVID-19, goes beyond the scope of the Policy. Plaintiff’s loss was caused by the pandemic, the Governor’s Orders, and mandated capacity restrictions. Plaintiff’s loss was never due to COVID-19 being present on its premises. Plaintiff testified that it was not aware of COVID-19 ever was present on the Property and certainly the Property was never shut down, because of it. To extend this Endorsement beyond Plaintiff’s Property is to extend the Endorsement beyond the scope of the Policy. “[I]nsurance carriers are aware of the risk of pandemics as a peril, regularly exclude them with clear and distinct language, but ... these Defendant Insurers failed to do so here.... Moreover, even when not specifically excluding ‘pandemic,’ carriers regularly utilize words like suspected, threatened, and fear of to expand virus exclusions beyond actual viruses present on covered property.”....*” On the other hand, the Court also stated that “the policy is ambiguous and should be construed in favor of coverage.” For explanations about this decision, see also, Mchugh (n11) 497-498.

⁸⁰ It must be highlighted that this principle is set forth in Turkish Code of Obligations. According to Art. 23 of TCO, titled “Interpretation,” “If the provisions of standardized terms are not explicit or comprehensible and have more than one meaning, this provision must be interpreted against the one who drafts the documents and on behalf of the other party.”

In this context, when interpreted the wording of policies, besides ensuring the benefit of the policyholder / weak party of an insurance agreement, it must also be taken into consideration that insurance serves an important economic and social function. Because of this, insurance companies must be strong economically to protect the indemnity rights of all policyholders.

In the frame of these explanations, to determine whether a business interruption policy provides coverage for COVID-19-related business interruption losses, it is not possible to determine the common principles which can be applied to every concrete insurance policy. On the contrary, it must be kept in mind that each policy used in practice must be examined meticulously. In other words, without examining the policy wording in each case, it is not easy to decide whether the policy covers business interruption losses caused by coronavirus.

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Bibliyografya/Bibliography

Borghesi DA, 'Business Interruption Insurance-A Business Perspective' (1993) 17 (3) Nova Law Review 1147-1166.

Clarke GW, 'Problem Claims under Business Interruption Policies' (1957) American Bar Association. Section of Insurance, Negligence and Compensation Law. Proceedings 89-102.

Ergüne S, *Olumsuz Zarar* (1st edn, Beta 2008)

French CC, 'Federal Courts' Recalcitrance in Refusing to Certify State Law COVID-19 Business Interruption Insurance Issues' (2021-2022) 100, Texas Law Review Online 152-161.

French CC, 'The Aftermath of Catastrophes: Valuing Business Interruption Insurance Losses' (2014) 30 (2) Georgia State University Law Review 461-520.

Horn DP and Webel B, *Business Interruption Insurance and COVID-19* (1st edn, Congressional Research Service 2021).

French CC, 'Forum Shopping COVID-19 Business Interruption Insurance Claims' (2020) University of Illinois Law Review Online 187-202.

Gylln D and Rogers T, *Riley on Business Interruption Insurance* (11th edn, Sweet&Maxwell 2021)

Gürses Ö, 'The Supreme Court on Business Interruption Insurance and COVID-19: Financial Conduct Authority v Arch Insurance (UK) Ltd [2021] UKSC 1' King's Law Journal (2021) 32 (1) 71-83.

Hummer PM, 'Basics of Business Interruption Insurance: The Ins and Outs of Tricky Coverage' (2002) 69 (3) Defense Counsel Journal 307-314.

- Kahler CM, 'Business Interruption Insurance' (1932) 161 Annals of the American Academy of Political and Social Science 77-84.
- Knutsen ES, 'The COVID-19 Pandemic and Insurance Coverage for Business Interruption in Canada' (2021) 46 (2) Queen's Law Journal (QLJ) 431-444.
- McHugh P, 'Business Interruption Insurance in the Time of COVID-19: Who Should Foot the Bill?' (2021) 29 (2) Journal of Law and Policy 491-521.
- Miller AG, 'Business Interruption Insurance, A Legal Primer' (1975) 24 (4) Drake Law Review 799-808.
- Medeiros M, 'Physical Losses, Invisible Damages: Finding Coverage for Business Interruption Insurance Claims Sustained during the COVID-19 Pandemic' (2022) 23 (2) Minnesota Journal of Law, Science and Technology 631-670.
- Plaza J, 'No End in Sight: Business Interruption Insurance Claims in New York after the Second COVID-19 Surge' (2022) 47 (3) Journal of Corporation Law 817-842.
- Schirle C, 'Time Element Coverages in Business Interruption Insurance' (2007) 37 (1) The Brief 32-42.
- Schultz RE and Bardwell EC, '*Property Insurance*' (1st edn, Rinehart & Co. 1959).
- Traynor PE, 'The "Business Interruption" Insurance Coverage Conundrum: COVID-19 Presents a Challenge' (2020-2021) 19 (1) DePaul Business & Commercial Law Journal 65-96.
- Ünan S, 'En Üst Derecedeki İngiliz Mahkemesi'nin Covid-19 Nedeniyle Meydana Gelen İş Durması Zararları Hakkında Verdiği 15 Ocak 2021 Tarihli Test Case Kararı (Financial Conduct Authority v. Arch and Others)', in Bülent Sözer and Sezer Ilgın (eds), *2020 Sonrasında Deniz Ticareti ve Sigorta Hukuku: Olası Sorunlar*, (Vedat Kitapçılık 2021) 135-185.
- Ünan S, *İsteğe Bağlı Genel Sorumluluk Sigortasında Riziko* (1st edn, Beta 1998).
- Vogel JW, 'Pardon the Interruption: Obstacles to a Successful COVID-19 Business Interruption Claim' (2021) 21 (3) Wake Forest Journal of Business and Intellectual Property Law 251-271.

Judgments

- United States Court of Appeals, 'Motorists Mut. Ins. Co. v. Hardinger', 131 F. App'x 823, 826-27 (3d Cir. 2005).
- United States District Court for the District of New Jersey, 'Gregory Packaging, Inc. v. Travelers Prop. Cas. Co. of Am.', No. 2:12- cv-04418, 2014 WL 6675934, at *6 , 25.11.2014.
- Superior Court of Massachusetts, 'Matzner v. Seaco Ins. Co.', No. 96-0498-B, 1998 WL 566658, at *3, 12.08.1998.
- United States District Court for the District of Oregon, Medford Division, 'Oregon Shakespeare Festival Ass'n v. Great Am. Ins. Co.', No. 1:15-cv- 01932-CL, 2016 WL 3267247, at *7-8, 07.06.2016).
- United States District Court For The Western District Of Missouri Southern Division, 'Studio 417, Inc., et al. vs The Cincinnati Insurance Company', Case No. 20-cv-03127-SRB, 12.08.2020.
- High Court of Justice Business And Property Courts Of England And Wales Commercial Court (Qbd), 'Tkc London Ltd. v Allianz Insurance Plc', Claim No CL-2020-000219, 15.10.2020.
- High Court of Justice Business And Property Courts Commercial Court (QBD) Financial List Financial Markets Test Case, 'The Financial Conduct Authority (FCA) vs. Arch Insurance and others', FL-2020-000018, 16.10.2020.

United Kingdom Supreme Court (UKSC), ‘The Financial Conduct Authority (FCA) vs. Arch Insurance and others’, [2020] EWHC 2448 (Comm) 15.01.2021.

United States District Court Middle District of Florida Orlando Division, ‘Urogynecology Specialist of Florida LLC, vs. Sentinel Insurance Company Ltd.’, Case No.: 6:20-cv-1174-Orl-22EJK, 24.09.2020.

Turkish Insurance Arbitration Commission, 2021/51816, 21.05.2021.

Online Sources

<<https://covid19.who.int/?mapFilter=deaths>> Date of Access 25 October 2022

<<https://cclt.law.upenn.edu/>> Date of Access 10 October 2022

<<https://macafeeandedwards.com/pdf/commercial/property/Business%20Interruption-Gross%20Earnings.pdf>> Date of Access 25 October 2022

<<https://www.allianz.co.uk/content/dam/onemarketing/azuk/allianzcouk/broker/docs/policy-wording/FR0076-business-interruption-all-risks-income-from-300717-updates-010418.pdf>> Date of Access 25 October 2022.

<<https://axaxl.com/-/media/axaxl/files/pdfs/china/20162en.pdf>> Date of Access 26 October 2022.

<<https://macafeeandedwards.com/pdf/commercial/property/Business%20Interruption-Gross%20Earnings.pdf>> Date of Access 25 October 2022.

<http://www.istanbul.gov.tr/kurumlar/istanbul.gov.tr/PDF/il_Hifzissihha_Meclis_Karari_No_114.pdf> Date of Access 14 November 2022.

<https://casetext.com/case/travco-insurance-company-vward/analysis?citingPage=1&sort=relevance> Date of Access 10 October 2022.

<<https://casetext.com/case/gregory-packaging/analysis?sort=relevance&citingPage=1>> Date of Access 11 December 2022.

<<https://casetext.com/case/matzner-v-seaco-insurance-company>> Date of Access 11 December 2022.

<<https://casetext.com/case/nue-llc-v-or-mut-ins-co-1>> Date of Access 10 December 2022.

<<https://casetext.com/case/studio-417-inc-v-cincinnati-ins-co>> Date of Access 11 November 2022.

<<https://www.supremecourt.uk/cases/docs/uksc-2020-0177-judgment.pdf>> Date of Access 11 December 2022.

<<https://www.supremecourt.uk/cases/docs/uksc-2020-0177-judgment.pdf>> Date of Access 10 October 2022.

<<https://www.gov.uk/guidance/notifiable-diseases-and-causative-organisms-how-to-report>> Date of Access 10 September 2021.

<<https://www.lexpera.com.tr/ictihat/sigorta-tahkim-komisyonu/hk-k-no-2021-51816-k-tarihi-21-5-2021>> Date of Access 21 December 2022.

<<https://btlaw.com/-/media/files/blog/urogynecology-v-sentinel.ashx>> Date of Access 21 November 2022.

