



Business Interruption disputes in the COVID 19 context

November 5th 2020

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Agenda

- **Global context**
- **BI Context**
- **Markets**
- **Exposure**
- **Food for thoughts**

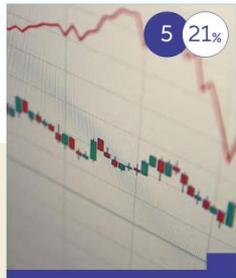


Context : unforeseen risk

ALLIANZ RISK BAROMETER
Released on January 2020

WILLIS: MOST DANGEROUS RISKS TO INSURERS IN 2020
Released on March 2020

THE MOST IMPORTANT GLOBAL BUSINESS RISKS FOR 2020



2019: 23% (5)
Market developments
(e.g. volatility, intensified competition/new entrants, M&A, market stagnation, market fluctuation)



2019: 19% (6)
Fire, explosion



2019: 13% (8)
Climate change
/increasing volatility of weather



2019: 13% (9)
Loss of reputation or brand value



2019: 19% (7)
New technologies
(e.g. impact of Artificial Intelligence, autonomous vehicles, 3D printing, Internet of Things, nanotechnology, blockchain)



NEW
Macroeconomic developments
(e.g. monetary policies, austerity programs, commodity price increase, deflation, inflation)

Top 10 Most Dangerous Risks Facing Insurers (2020, 2019, 2018)

2020		2019		2018	
1	Cybersecurity and cybercrime	1	Strategic direction and opportunities missed	1	Cybersecurity and cybercrime
2	Disruptive Technology	2	Cybersecurity and cybercrime	2	IT/systems and tech gap
3	Pricing and product line profit	3	Pricing and product line profit	3	Strategic direction and opportunities missed
4	Legislative and regulatory	4	IT/systems and tech gap	4	Pricing and product line profit
5	IT/systems and tech gap	5	Competition	5	Runaway frequency or severity of claims
6	Interest rate change	6	Legislative and regulatory	6	Disruptive Technology
7	Competition	7	Talent and employee relations	7	Customer needs not served by traditional approaches
8	Natural catastrophe	8	Reputation/ rating downgrade	8	Emerging Risks
9	Climate change	9	Business operations failure	9	Competition
10	Emerging Risks	10	Customer needs not served by traditional approaches	10	Underwriting

Source: Willis Towers Watson online survey of 101 insurance executives from Dec. 18, 2019 to Jan. 19, 2020
<https://www.willistowerswatson.com/en-US/Insights/2020/02/2020-most-dangerous-risks-to-insurers>

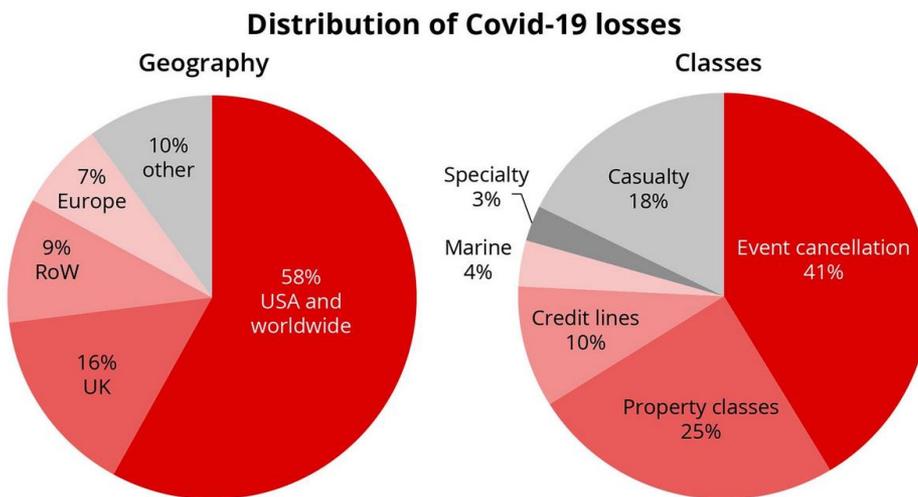
Risk categories assigned by Carrier Management





Cost for insurance industry

- Insurance cost of COVID 19 estimates, ranging from a low-end \$30bn to close to \$100bn.
- As at Oct 2020 WW reported losses and IBNR : \$24.8bn in H1*
* Peristrat Report
- Lines and Regions affected (ex. Lloyd's)



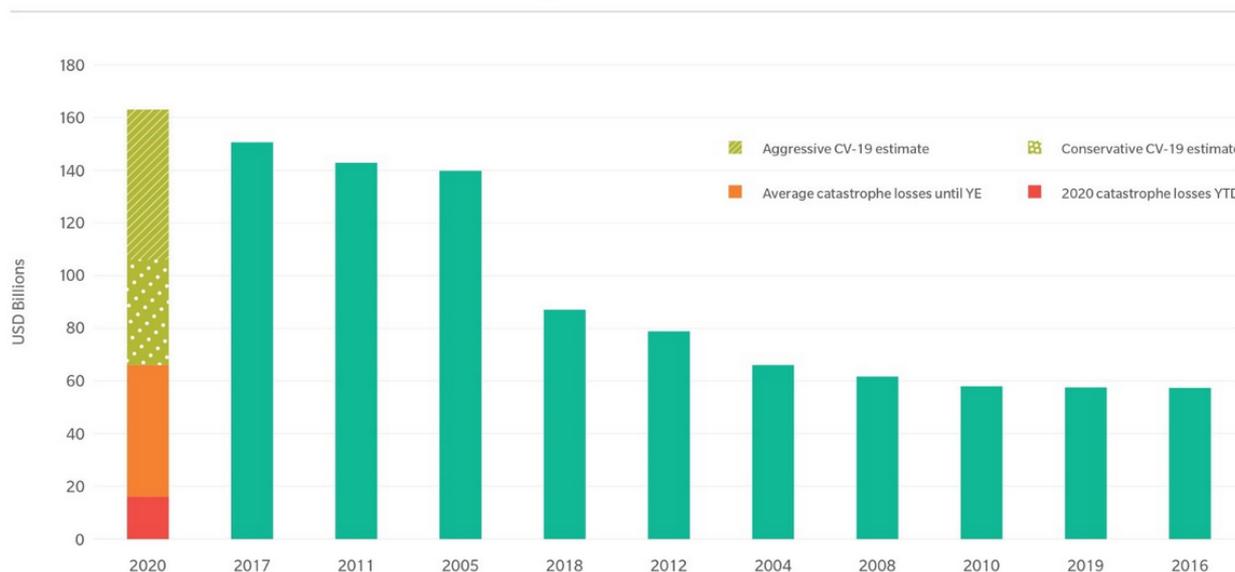
Source: Lloyd's



Cost for insurance industry

- Combined with other significant events, 2020 could be one of most expensive insurance year.

TOP 10 LARGEST INSURED LOSS YEARS AND PROJECTIONS FOR 2020



Source: Guy Carpenter, Swiss Re, Lloyd's of London, BofA Securities, Dowling & Partners

Source : Insurance Journal June 2020



Context : Business interruption





Context : Business Interruption

- Standard BI cover is designed to **compensate** an insured for the **financial impact** of the **interruption/interference** to his business as a result of **physical damage to insured property**
- Standard is commonly triggered if there is physical damage to the property which excludes pandemic
- *« We will pay for the actual loss of business income you sustain due to the necessary suspension of your “operations” during the period of “restoration.” The suspension must be caused by the direct physical loss, damage, or destruction to **insured property**. The loss or damage must be caused by or result from a **covered cause of loss** ».*



Context : Business Interruption

- 95% of BI policies will not cover BI caused by COVID-19
- Very few products dedicated to pandemics were available
 - Ex : Pathogen RX Marsh/Munich re/Metabiota: parametric insurance
- Remaining 5% of BI policies have limited coverage or extensions at high costs



Regulator's approach

- French ACPR study (June 2020)
 - **93 % of BI Policies don't cover pandemics**
 - 3% respond
 - 4% of policies are “unclear”

- UK FCA : **90 % of policies won't cover BI**

- USA : Office of the Insurance Commissioner of the State of Washington :
 - **2%** of BI policies would respond
 - **17%** would give limited coverage through optional endorsements



Regulator's approach

- **Policyholder defense VS solvency**
- **EIOPA Statement April 1st 2020**
 - “Consider the interests of consumers and exercise flexibility in how they are treated, where reasonable and practicable. “
- **IAIS Release May 7th 2020**
 - “IAIS cautions against initiatives seeking to require insurers to **retroactively** cover Covid-19 related losses, such as business interruption, that are **specifically excluded** in existing insurance contracts » « The **costs of claims** against losses have **not been built into the premiums** » « Requiring insurers to cover such claims could create **material solvency risks** (...) could ultimately **threaten policyholder protection** and financial stability “



UK/ FCA Test Case

- UK « Insurance industry getting hammered »
 - At least 5 US class actions against Lloyd's and other UK insurers

- FCA Test Case
 - **Court proceeding in front of London High Court**
 - **Purpose** : provide clarity in relation to how certain « unclear » business interruption policies and wordings should be interpreted and whether they cover losses arising from the COVID 19 pandemic.
 - **8 insurers**
 - **17 then 21 wordings impacting, in particular (though not solely), SMEs.**
 - **370 000 insureds**
 - **Exposure evaluated between £ 3,7 billion and £ 9,3 billion**



UK/ FCA Test Case

- ❑ Judgment released on 15 September 2020
 - ❑ Mostly in favor of FCA's arguments and policyholders
 - ❑ 3 groups of provisions
 - ❑ **Denial of access** : clauses designed to cover local events and not general policy or national measures, therefore depending on terms, **most of them should not cover**.
 - ❑ **Disease clauses** : **The response from the Court is generally positive for insured businesses**. The Court decided that many of the policies that included cover for diseases **should respond** to the Covid-19 outbreak
 - ❑ **Hybrid clauses** : most of them should cover
- ❑ Judgment is likely to be appealed



UK/FCA Test Case

- Generally positive for policyholders
 - FCA has underlined that brokers were not responsible for an insurance wording which was not bespoke
- However,
 - Non covered policyholders may “turn guns over brokers”
 - Second wave is there. New lockdown could create more damages



France

- First lawsuits were initiated.
 - Several claims reported against insurers
 - Insurance Agents are frequently involved/named in legal proceedings against insurers
 - Interim relief decisions/preliminary hearings – with contractory outcomes
 - Final judgements are emerging
 - “Agent was not in breach of duty in failing to provide specific advice on the BI clause”

Trib. Com. Bourg en Bresse 24 Aout 2020



Europe

□ Ireland

- few circumstances notified. Class action on against FBD

□ Switzerland

- “Gastro” cases submitted to Ombudsman

□ Germany

- “Bavarian arrangement”



Exposure

- **Demand and needs :**
 - was the failure to advise FULLY on the standard BI cover negligent?
 - was the failure to advise on extension/stand alone pandemic cover negligent?
 - Test of negligence?

- **Causation** : will claimants be able to prove they would have act differently? Would they have paid the additional premium?

- Establish **tangible Loss**



French Case

- **General principle** : unclear provisions of standardised contracts are interpreted in favour of the policyholders (against the party who has proposed or drafted the clause, contra proferentem)
- French Law Art L113-1 Code des Assurance : Exclusion clauses must be **limited in scope** and **not open to interpretation (exclusions limitées et formelles)**
- **Contract** : “Are excluded : operating losses, when, **at the date of the decision to close down**, at least **one other establishment**, whatever its nature and activity, is subject, **on the same departmental territory** as that of the establishment being insured, to a closure measure admitted for the same reason.”

Valid clause as per *Trib. Com. Bourg en Bresse 24 Aout 2020*



Food for thoughts

- Contract clarity issues are central
- POG
- Risk Management dimension: a new approach to insurance advice?
- Cyber/Fraud



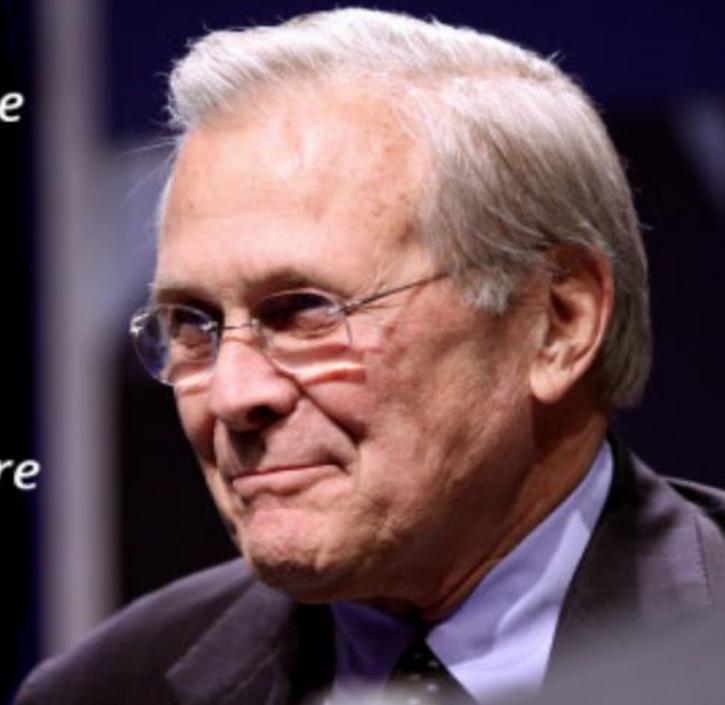
Q&A

There are known knowns; there are things we know that we know.

There are known unknowns; that is to say, there are things that we now know we don't know.

But there are also unknown unknowns – there are things we do not know we don't know.

-Donald Rumsfeld



□ Thank you for your attention