The Covid-19 Pandemic: Contract and Insurance Law Implications

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The spread of COVID-19 has had a global impact, with the human toll being significant, and with the the economic cost being unquantifiable. With regards to business and contractual relationships, legal liabilities owed to disruption, cancellations, or to the imposed halt of everyday life are perhaps the most notable. This article starts by examining frustration in English, US and continental contract law in relation to cases where the circumstances have changed due to unnatural events such as the ongoing COVID-19 pandemic. It then moves on to discuss the impact of Covid-19 on insurance, in particular business interruption, travel and general liability insurance. The likelihood of success of future claims, the scope of coverage, together with the meaning and interpretation of the term "force majeure" and how this will relate to exclusions from insurance coverage is discussed. Valuations methods are also considered and evaluated with a view to protect the policyholder as his business interruption policy is a contract of adhesion not having left him any room to negotiate. In addition, possible interpretations to be followed by courts in future claims and liability for catastrophic risks and methods of compensation are examined and conclusions on the role of insurance in the COVID-19 pandemic are drawn.

I. Introduction

Coronaviruses are defined by the World Health Organization (WHO) as a large family of viruses that cause illnesses ranging from the common cold to more severe diseases. In late 2019 and in early 2020 , as reported by the WHO and in the media, a "new strain" of a novel coronavirus has been identified. Accordingly, many nations have made formal declarations that a public health emergency exists. Later the situation was elevated to a pandemic.

As the 2019 Novel Coronavirus (COVID-19) continues to spread across the world, and governments and health authorities try to defeat it, its impact on commercial

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and insurance arrangements is a serious concern for businesses. Commercial companies and individual actors are looking to rely upon “force majeure” provisions both in their commercial and insurance contracts to either temporarily suspend their performance obligations under contracts and protect themselves against failures to perform what is stipulated as per the contract, as well as claim from their insurers on the basis of their insurance policies, be it general, business interruption or any other type of insurance. Individuals also having to amend or cancel their travel be it personal or professional, or those having to travel will be wondering about the scope of their travel insurance cover.

With regards to commercial contracts and contract interpretation, whether COVID-19 constitutes a “force majeure” event depends on the definition of “force majeure” in each specific contract. The more detailed the wording of the “force majeure” clause the biggest the certainty as to what is covered . Usually, “force majeure” clauses have been construed to include acts of God (e.g. earthquakes, volcanic eruption, flood or cyclone), war, strikes, embargoes, certain government actions, and abnormally bad weather. However, the description of “force majeure” can be exhaustive or non-exhaustive and where it may contain examples the list may expressly refer to “epidemics”, “pandemics” or “acts of government” or exclude events from the notion of “force majeure”.

In the context of COVID-19, one needs examine if the term “epidemics”, “pandemics”, or equivalent language constitute express examples of an “force majeure” event or whether it is excluded. If no express reference exists, a contractual party may argue that an epidemic or pandemic is an “act of God” or that it falls within the definition of “force majeure”. Government measures such as quarantines or circulation and travel restrictions, may constitute “acts of government”. Courts will usually interpret “force majeure” clauses within the context of any given specific contract.

In England, where modern contract law emerged around commercial sales as a paradigm, especially commodity sales via successive contracts, there are, comparatively speaking, strict rules allowing termination of contract for breach, to allow the multiple parties to know better where they stand so that they may then renegotiate a solution, or not. Although pure commercial impracticability or price fluctuation is itself never a trigger, however in the current COVID -19 circumstances whereby legal impossibilities or restrictions are often likely to be the demonstrable cause and where there is arguably

a link to very extreme consequences where frustration is to be established and where an extra "force majeure" or hardship clause might be included or added to the contract.

Continental law by contrast is allowing commercial impracticability, potentially triggering even court adjustment rather than termination, due to frustration and "force majeure". In the continental law jurisdictions, the case law has shown that this is possible especially during or after extreme economic dislocation, like world wars, and it is predicted that the same will occur in the case law to be developed as a result of the present pandemic, as in continental law court-triggered adjustment of the contract to the new circumstances, is allowed as per the Civil Code's general principle of good faith which exists in all continental jurisdictions. In future litigation and arbitrations, it will be interesting to see how state courts and arbitrators end up dealing with assertions of changed circumstances around the COVID-19 pandemic, as well as the original Civil Code concept of non-imputable legal impossibility of performance.

With regards to insurance contracts, cover for coronavirus-related losses and costs may be available under various commercial insurance policies, most notably, those that provide business interruption and contingent business interruption coverage. Businesses that will have gone into lockdown need ascertain whether their insurance cover includes business interruption due to a pandemic and need examine their insurance policies so as to consider possible amendment in the wording prior to upcoming renewal dates. The wording of insurance policies may differ depending on the level of cover negotiated and paid for. In addition, general liability insurance will be invoked to provide coverage against third party claims of property damage or bodily injury, where a third party claimant alleges that an individual contracted COVID-19 due to some act taken or not taken by the insured company. General liability insurance will also be used to get insurance coverage for government-mandated shutdowns and any related expenses incurred as a result.

II. Frustration in Contract Law and the Notion of Changed Circumstances

Under English law the doctrine of frustration developed out of distinct categories of mainly physical impossibility of performance. Early cases allowed an excuse from performance obligations through the insertion of an "implied condition" or a term as to the continued existence or future occurrence of a state of affairs.[1] Later on as case law, contract law itself and the doctrine of frustration evolved the true rationale for excuse from performance was attributed to and depended on the justice or equity of each case.[2] English law of contract embraces a vivid reluctance to allow discharge by frustration. Such an approach embodies also the position followed that commercial impracticability of performance cannot serve as an excuse under English law, for the latter is rigid in recognising frustration under strict criteria. Even where all obstacles might appear surpassed, a party seeking the application of the doctrine of frustration to his case may not be satisfied in his claim, and this is so in English contract law, as it emanates from the body of case law that has developed arguing that a contract cannot be frustrated by foreseen or foreseeable events, which is interpreted in that the party seeking application of the doctrine of frustration should have provided against those events.

This strict position and attitude followed by both the English law and the English courts seem to be related to the severe and strict effects that follow the occurrence and recognition of the existence of frustration, which is the automatic termination at the time of the frustrating event, without even the requirement or obligation for the party affected by the circumstances leading to frustration to give notice to the other party, who can also invoke the doctrine and in doing so may also have a windfall gain without the courts being in a position to intervene so as to adjust the parties' contractual obligations instead

of terminating them. Hence, the English law of frustration which has developed out of certain categories of impossibility of performance of the contract has been justified and supported by both the law *per se* as well as by the body of case law that has developed

[1] *Taylor v Caldwell*, [1863] 122 Eng. Rep. 309, 312 (K.B.); *Krell v Henry*, [1903] 2 K.B. 740, 746.
[2] *Davis Contractors Ltd. v Fareham Urban Dist. Council*, [1956] A.C. 696, 728 (H.L.); *Denny, Mott & Dickson, Ltd. v James B. Fraser & Co., Ltd*, [1944] A.C. 265, 275 (H.L.)

around it, on the basis of the objective of contract law to satisfy the intentions of the parties. It follows from the above that the scope of application of the doctrine of frustration under English law is very limited, and this view is further justified by the extreme nature of the consequences of finding a contract to have been frustrated.[3]

Contrary to this approach the U.S. law recognises that the judicial function is to determine whether, in case of exceptional circumstances, justice requires a departure from the general rule that a promisor bears the risk of increased difficulty. This approach of U.S. law is also depicted in the continental law jurisdictions, which have followed a different approach than that of English law and which in their majority recognise the possibility of relief in the event of extreme economic dislocation, if it follows that as an exception to the rule established in the various Civil Codes that the promisor becomes liable for damages if performance becomes impossible for any cause attributable to him, the promisor will not be liable for non-attributable performance, such as due to an act of God or another event beyond his or her control.[4] Impossibility has long been interpreted as including not only physical impossibility, but also impossibility in the light of "common sense in society". Thus, a promisor could be excused if performance of his or her obligation would incur extremely high labor or other costs.[5]

On the other hand, the "doctrine of changed circumstances" has proven more popular in providing relief where costs of performance have increased dramatically and also where the market price of the subject matter of the contract has fluctuated widely. The doctrine which was developed by many continental jurisdictions and prescribes as prerequisite the existence of a substantial change in circumstances affecting the basis of the contract. In Japan, academics and the Courts drawing on German legal theory came to recognized the doctrine of change of circumstances towards the end of World War II. Similarly, the Greek legislator, to begin with, even before many of the other continental law legislators and even before the Community legislator, has recognised the need for a

[3] L. Nottage, Changing Contract Lenses: Unexpected Supervening Events in English, New Zealand, U.S., Japanese, and International Sales Law and Practice, [2007] Indiana Journal of Global Legal Studies, 385, 387.
[4] Eg. Article 415 of the Civil Code of Japan; Article 388 of the Greek Civil Code, Article 622 of the Greek Civil Procedure Code.
[5] K. Iijima, *Recission and Adjustment of Contracts as Effects of the Doctrine of Changed Circumstances*, [1994] 35 Toritsudai Hogakkai Zasshi,127, 129.

provision protecting the weak party to a contract. For the Greek legislator, a party to a contract needs protection when the contract concluded bears consequences that are particularly intolerable to him. Thus, pursuant to the provision of article 388 of the Greek Civil Code, one of the parties is given the opportunity to not be legally bound to perform under a contract which, due to unforeseen events that may have evolved into an extremely burdensome undertaking, as circumstances have changed drastically; and as a result of the change in circumstances to be able to invoke and argue that there is frustration of the contract. This is a particular manifestation of the principle of good faith, as elaborated in Greek contract law[6] and in the body of case law developed,[7] which stresses the legislator's willingness to protect the party to a contract from irreparable harm in the event of adherence to the contract even if circumstances have changed in a drastic manner due to unforeseen events. The conditions for the application of article 388 of the Greek Civil Code are: a) the existence of a contract between the parties; b) the subsequent, unforeseen and extraordinary change of circumstances, in which, in the light of good faith and conduct, the parties supported the conclusion of the contract. It has been held that the extraordinary reasons for terminating or adjusting the contract are those which could not have taken place in the ordinary course of business, which could not be predicted in advance and which is caused by unusual and extraordinary events that result to a change of circumstances.[8] These extraordinary grounds must affect events on which both parties adhered to so as to conclude the contract.[9] The events must take place after the contract has been concluded; c) when there has been a disruption of the balance between the parties. The purpose of Greek law is the fairness of the contracts and in order to achieve this purpose the fundamental doctrine of 'pacta sunt servanda' , dictating that concluded contracts need be abided with and performed, as depicted in article 361 of the Greek Civil Code is set aside so as to enable one of the parties to frustrate the contract due to unforeseen change of circumstances that justify the frustration of the contract and the non-adherence to the doctrine of 'pacta sunt servanda'.[10]

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[6] M. Stathopoulos, *Greek Law of Torts I* , Sakkoulas 1998.
[7] Greek Supreme Court Judgment 16/1983, [1983] NoB 31.1368, Greek Supreme Court Judgment 927/1982, [1982] NoB 31.214, Greek Supreme Court Judgment 474/1976, [1976] NoB 24.1051.
[8] Greek Court Judgment ΕΠ 2/1967, [1967] ΑρχΝ 18.277; Greek Court Judgment ΕΑ 2925/1981, [1981] Αρμ 35.756; Greek Supreme Court Judgment Α.Π 1733/1986, [1986] NoB 35.1057.
[9] Greek Supreme Court Judgment Α.Π. 731/1969, [1969] NoB 18.658; Greek Court of Appeal Judgment ΕΘ 1680/1980, [1980] Αρμ35.550.
[10] M. Stathopoulos, *op. cit.* 504.

The potential for greater flexibility resulting from the doctrine of changed circumstances in principle permitting court adjustment explains its greater readiness to be applied compared to the law of frustration in England.[11] Contract law academics Atiyah and Summers had contrasted two broader "varieties of formality" in England and the U.S,, i.e. "enforcement formality" denoting the degree to which legal rules and other norms are actually translated into practice and "truth formality."denoting the degree to which a legal system identifies "true facts" to which legal rules and other legal phenomena are related, and they have suggested that all legal systems strive to recognize this to a degree, and that the trial process in English law overall exhibits more truth formality. They stated that these two varieties of formality, should help generally in bringing the law in books closer to the law in action.[12] English courts, for years reluctant to recognize a general duty of good faith in contract law or even to revive the doctrine of unconscionable bargains, exhibit this attitude too. However, there is a decline of the doctrine of frustration in recent decades as the courts trying to encourage parties to plan more carefully for contingencies and to accept the notion of commercial impracticability.[13]

English law has tended to place greater emphasis than American law on the requirements of certainty and of the sanctity of contract, even though the result of doing so might occasionally appear to be harsh to one of the parties. It seems that mitigation of such hardship should, in the view of the English courts, be achieved not by a broad doctrine of discharge, uncertain in its operation, but by express contractual provisions, or, in times of general economic dislocation (e.g. in case of war), athrough special legislative intervention. Others like Roy Goode, recognizes the sturdy nature and the overall strength of English contract law as responsiveness to business expectations, but believes that the all-or-nothing approach and limited scope for relief from commercial impracticability under the doctrine of frustration is problematic. He does not advocate for new generalized principles of good faith and substantive unconscionability into English law, but simply argues for a legitimate case for invoking a doctrine of substantive unconscionability. He supports the view that it would be inequitable for a

[11] M. Stathopoulos, *op. cit.* 504; L. Nottage *op. cit.* 390-393.
[12] L. Nottage, *op. cit.* 411.
[13] G.H.Treitel, *The Law of Contract*, Sweet & Maxwell 1995; Andrew J. Morris, *Practical Reasoning and Contract as Promise: Extending Contract-Based Criteria to Decide Excuse Cases*, (1997) 56 Cambridge L.J. 147.

party to seek to hold the other to the terms of the original bargain in the light of changed circumstances, and reasonable that the court should offer him the choice of modification. Goode appeals to continental law in support of this approach, as appropriate for meeting business expectations.[14] On the one hand English law is promoting the law in books, whilst on the other hand Japanese and U.S. law, are being more receptive to the law in action. However. It should be concluded that economic dislocation in contractual relations, in enough to justify "force majeure" and lead to renegotiation of contracts.

III. Business Interruption Insurance

Disruptive events that halt production can have severe business consequences if they are not appropriately managed. Business interruption insurance offers businesses a financial mechanism for managing their exposure to disruption risk. More specifically, business interruption insurance cover provides businesses that have suffered financial losses for not operating as a result of loss of revenue from damage to property, due to an insured peril. Usually the cover extends to provide for related additional expenses that a business has had to incur as a result of the business interruption and for other triggers, as well as crisis management expenses. Business interruption cover is obtained as a stand-alone cover or as part of a property policy.

Because damage to property is the key element of a business interruption policy, a potential issue in arising COVID-19 claims under a business interruption policy, is the way in which COVID-19 claims can be linked to 'damage to property', as this is a prerequisite for the trigger of the standard business interruption cover. Eventhough this has not yet been tested in court, however it is possible to have the COVID-19 claims linked to 'damage to property' where the business interruption as a result of the closure of the business is following an order by a public authority. In addition, the obligation to notify continues to exist notwithstanding the fact that insurers will be aware of COVID-19 and its impact worldwide.

[14] R. Goode, *Commercial Law in the Next Millenium,* Sweet & Maxwell, 1998; L. Nottage, *op. cit.*, 416.

Because commercial property damage insurance covers losses caused when property suffers "physical loss or damage" assureds will have to demonstrate that they suffered some form of physical loss or damage to their property, as defined in their policies. The way in which such wording applies to the current crisis will be the object of future litigation in court. On the one hand the insurers will try to avoid coverage and they will argue that policyholders' losses are not from physical loss or damage to property, but have non-physical causes , such as people having to stay home due to government measures. In the case of exposure to COVID-19 this threshold will require some form of abatement. Any contamination that attaches to the property, or that physically affects property so as to render it uninhabitable or unfit for its intended use, can constitute physical loss or damage. In a case such as that of a pandemic like the COVID-19 the issues to be addressed will continue to shift in terms of their interpretation and even if initially the insurers' initial stance might be unfavourable to coverage, the changing circumstances may make room to expand coverage possibilities.[15] In addition, as most business interruption policies require that the interruption is caused by loss or damage to property, therefore an issue that likely will be litigated is whether the suspected presence of the virus in a location, might constitute physical loss or damage.

Generally, business interruption policies provide that the policyholder must suspend operations because of covered peril before collecting its losses. The facts and circumstances of each individual case, and coverage often turns on the definition and interpretation of the terms and of the language of the policy as the latter is paramount. Business interruption insurance provides coverage for recovery of lost income and associated increased costs that a business incurs during a period of interruption to its operations that is caused by direct physical loss or damage. Even if at first sight such coverage would not seem to be applicable to a COVID-19 loss, if a property needs to be closed for decontamination, some policies will provide coverage. A determination of coverage will vary depending on the specific language in each policy and there may be sub-limits that apply. In addition, some policies contain exclusions for both viruses and bacteria, while other policies contain exclusions for only bacteria. Since COVID-19 is a virus and not a bacteria, coverage may depend on the language in the policy.

[15] Reed Smith LLP, Insurance Recovery for COVID-19, <https://www.reedsmith.com/en/perspectives/2020/03/insurance-recovery-for-covid19>, accessed 28 March 2020

The second type of insurance coverage provided for in most business interruption policies is "contingent" coverage, which provides coverage for indirect losses which generally applies when the business's supply chain is interrupted and, like the direct loss coverage, requires "damage" at the supplier's location that caused the interruption. As such, the definition of "damage" found in the policy will be crucial.

In addition, there are significant policy enhancements available that may expand coverage in some policies, such as: a) civil authority coverage which is triggered when a governmental body restricts access to the policyholder's property and such a provision will indicate whether, and how much, the insurer will pay for losses caused by a government action or order preventing the policyholder or its customers from accessing the property. Insurers will seek to cap these losses by placing a time limit for recovery. In addition, such coverage is rapidly changing in response to the COVID-19 pandemic and new form language is currently being drafted for future policies to address closures due to coronaviruses;[16] b) communicable or infectious disease coverage and notifiable disease coverage which provide coverage for losses caused by certain diseases without the requirement that there be physical damage to the property; c) political risk insurance which may provide business interruption coverage for certain losses that arise from the actions of foreign governments; d) event insurance coverage, which is an enhancement that provides coverage for losses arising from the cancellation or postponement of events.

IV. General Liability Insurance

General liability insurance typically provides coverage against third party claims of property damage or bodily injury. These policies might trigger coverage if a third party claimant alleges that an individual contracted COVID-19 due to some act taken or not taken by the insured company. In the current state of affairs and the COVID-19

[16] Where government actions force employees to stop work, leave the country, or relocate; FC&S Expert Coverage Interpretation, *ISO provides business interruption endorsement in response to coronavirus*, *Nuco*, 18 March 2020, < https://www.nuco.com/fcs/2020/03/18/iso-provides-business-interruption-endorsement-in-response-to-coronavirus/> accessed 29 March 2020.

pandemic an example would be claims brought against companies that were aware of the presence of COVID-19 but ignored information that could have prevented the spread.

General liability policies might also provide coverage for government-mandated shutdowns and any related expenses incurred as a result. Insurance companies might assert pollution exclusions to deny coverage under general liability policies. Depending on the policy language, however, the definition of "bodily injury" is typically broad and many pollution exclusions do not specifically reference disease or virus.

a) The Extent and Scope of Liability Coverage

Early reports on COVID-19 included mass infections on cruise ships, or in business conferences. Service providers across many industries may be faced with claims from customers and the general public that their negligence caused exposure to the virus on their premises leading to infection or even death. While some liability policies will contain fungi and bacteria exclusions, these exclusions generally are not broad enough to exclude coverage for viral infections.

In addition, physicians who treat patients without observing suggested quarantine or self-isolation protocols, or hospitals that do not maintain appropriate amounts of staffing or equipment to treat patients in distress may also be vulnerable to claims arising out of the pandemic. In these cases, medical professionals and hospitals should look to professionallLiability or errors & omissions insurance coverage for mistakes made in providing professional medical services.

b) Proving a loss as a result of the occurrence of business interruption

The assured needs prove that the loss of revenue and the cessation of business is a consequence of a covered cause or event, i.e. in the case of COVID-19 self-isolating employees, cancellation of bookings, or government-mandated closure. This proof of the cause of the interruption is also necessary for aggregation purposes. However, and depending on the exact policy wording, insureds may want to avoid the aggregation of their COVID-19 losses.

Claims for business interruption relate to immediate and direct loss to businesses income and turnover as well as other related losses such as from other insured risks, such as cancellation of events, higher operation costs, loss of attraction, liability to employees and the public, crisis management expenses. To prove the loss incurred the assured will need demonstrate previous company turnovers, as well as budgets and revenue forecasts for 2020 and subsequent years. Additional costs related with business interruption and consequential losses includes bringing in additional temporary workers or third-party contractors, claims preparation costs, contractual penalties, or public relations costs.

Business interruption losses caused by natural and unnatural disasters are enormous. In the times of COVID-19 pandemic, and in its aftermath, many businesses will resort to business interruption insurance policies, trying to recover loss of business and consequential loss of revenue. Even if we set aside the difficulties in determining coverage from COVID-19, it is accepted that an insurance policy purchased to cover business interruption losses provides little or no recovery because insurers are often reluctant to satisfy business interruption claims, as they argue that at times of disasters very few customers or clients would have patronized the business following the disaster even if the business had not been impacted. Insurers take such a position due to the nebulous wording of the loss valuation provisions buried in lengthy, complex, standard form business interruption insurance policies. Insurers might also argue that only the pre-catastrophe sales and expenses of the policyholder should be used to value the loss. Due to the nebulous wording of the loss valuation, the use of many undefined terms, and because a formula for valuing business interruption losses is not actually contained in such provisions, the courts' decisions regarding how business interruption losses should be valued are varied and inconsistent. Some courts in the U.S. have accepted the argument that the economic conditions post-catastrophe should be considered, others not, and there is a disperse approach as to which elements of a business interruption loss are recoverable. Some courts have required the policyholder to prove the amount of any business interruption loss to a reasonable degree of certainty even if such calculations are only projections.[17]

[17] C. French, *The Aftermath of Catastrophes: Valuing Business Interruption Insurance Losses*, [2014] 30 Ga. St. U. L. Rev. 461

In addition, when applying the standard valuation language to claims that arise under similar factual scenarios, the courts have reached patently inconsistent conclusions regarding which of the policyholder's ongoing expenses are recoverable. One consistency appears in the decisions, i.e. the fact that the courts are confused regarding the evidentiary standard that should apply when a policyholder is attempting to prove the amount of its business interruption loss.[18]

One school of thought, only considers the historical financial data of the policyholder when calculating business interruption losses.[19] Other courts have held that local post-catastrophe economic conditions should be considered when business interruption losses are valued.[20] Not least, courts have no guidance and threshold to apply regarding the evidentiary standard for business interruption claims. This is not surprising because a business interruption loss valuation is an inherently speculative exercise and this has caused the courts some consternation when trying to apply traditional evidentiary standards of proof to such claims.[21]

In trying to interpret and apply policy language such as the loss valuation language three well-established rules of policy interpretation are used: (1) *contra proferentem*, (2) the "reasonable expectations" doctrine, and (3) construction of the policy as a whole.

In attempting to interpret and apply the valuation provisions of business interruption insurance as no loss valuation formula is contained in the provisions, it becomes apparent that the provisions are ambiguous when applied. As per the doctrine

[18] *Ibid*, 464-468

[19] *Catlin Syndicate Ltd. v Imperial Palace of Miss., Inc.,[*2010] 600 F.3d 511, 516 (5th Cir.); *Finger Furniture Co. v Commonwealth Ins. Co.*, [2005] 404 F.3d 312, 314 (5th Cir.); *Prudential LMI Commercial Ins. Co. v Colleton Enters., Inc.*, [1992] No. 91-1757, 1992 WL 252507, (4th Cir.); *Am. Auto. Ins. Co. v Fisherman's Paradise Boats,* [1994] Inc., No. 93-2349CIVGRAHAM, 1994 WL 1720238.

[20] *Sher v Lafayette Ins. Co.*, 973 So. 2d [2007] 39, 62 (La. Ct. App; *Fireman's Fund Ins. Co. v Holland Am. Line-Westours, Inc.*, (2002) 25 Fed. App'x 602, 603 (9th Cir.); *Consol. Cos. v Lexington Ins. Co.*, No. 06-4700, [2009] U.S. Dist. LEXIS 8542, 20 (E.D. La. Jan. 23, 2009); *Berk-Cohen Assocs. v Landmark Am. Ins. Co.*, (2009), No. 07-9205, 2009 WL 2777163, (E.D. La. Aug. 27, 2009); *B.F. Carvin Constr. Co. v CNA Ins. Co.*, (2008), No. 06-7155, 2008 WL 5784516, *3 (E.D. La. July 14, 2008); *Levitz Furniture Corp. v Hous. Cas. Co.*, (1997), No. 96-1790, 1997 WL 218256, *3 (E.D. La. Apr. 28, 1997).

[21] *Polytech, Inc. v Affiliated FM Ins. Co.*, (1994), 21 F.3d 271, 276 (8th Cir. 1994); *E. Associated Coal Corp. v Aetna Cas. & Sur. Co.*, (1980) 632 F.2d 1068, 1074 (3d Cir. 1980); *Dictiomatic, Inc. v U.S. Fid. & Guar. Co.*, (1997) 958 F. Supp. 594, 603 (S.D. Fla. 1997); *Howard Stores Corp. v Foremost Ins. Co.*, (1981) 441 N.Y.S.2d 674, 676 (N.Y. Sup. Ct. 1981).

of *contra proferentem* any ambiguities in the policy language should be construed against the insurers and in favor of coverage.

As per the reasonable expectations doctrine a policy should be interpreted in such a way that even when the policy language unambiguously precludes coverage, courts will hold that coverage exists and the policyholder should receive in coverage what it objectively can reasonably expect to receive even if the insurer can point to some policy language that supports the insurer's position that the claim at issue should not be covered or coverage should be limited, as a policyholder who buys business interruption insurance reasonably can expect to receive from its insurer, for the period of interruption, the business earnings it had been receiving prior to the catastrophe. In other words, courts should not permit insurers to accept premiums for business interruption insurance, but then, when a claim is presented, pay the policyholder nothing or only a fraction of its business interruption loss, as this would render the coverage provided to the business owner under the policy fictional.[22]

In addition, the policy should be interpreted as a whole and in a way that reconciles its various provisions whilst giving effect to all of them and keeping the general purpose of the insurance in mind.

Hence, with regards to the valuation methods, using only the historical financial information ignores some of the policy language on valuation. With regards to post-catastrophe economic conditions, under the existing rules of policy interpretation, the post-catastrophe economic conditions should be considered when they favour the policyholder and ignored when they do not.

In addition, because policies are non-negotiated contracts of adhesion with standardized language drafted by insurers and are sold on a take-it-or-leave-it basis, policies should be viewed as akin to products or "things" rather than simply contracts. If seen as a product, it is defective if it fails to perform as reasonably expected by the assured and the seller, i.e. the insurer is responsible for any harm or damage caused by the product. Applied in the business interruption context, the assured expects to be paid

[22] C. French, *op. cit.*, 490.

the full amount of its loss less the deductible in the event that its business is interrupted. If the loss valuation language allows the insurer to pay nothing or less than the full amount of the loss, the policy is defective from the policyholder's perspective. Consequently, the policyholder is injured and needs be fully compensated.

It is argued that due to the fact that business interruption policies are adhesion contracts where the policyholder does not have the option to negotiate the coverage or does not know of the exact wording, as often no policy copy, hence ambiguities in it should be construed in favour of policyholders and against insurers, however such an approach can lead to constantly favouring the policyholders. It is suggested that instead of the *ad hoc* approach that currently exists, a better approach would be to use only the prior three years of the policyholder's historical financial revenue and cost data to value such losses. However, the best solution would be to be that courts use the daily loss value that already is agreed to by the policyholder and insurer annually during the policy renewal underwriting process when the policy is purchased. Under either the prior three years of the policyholder's historical financial revenue and cost data approach or under the daily loss value approach, the payment of business interruption losses would be consistent, fair, and predictable for both insurers and policyholders.

Any *ex gratia* payments are not covered and will not be able to be claimed for. In addition, insurers will also verify whether the assured has observed his ongoing duty to mitigate their losses via reasonable efforts to limit any resulting harm.

Where a business interruption policy pays a claim, a business may want to ask insurers to make payments on an interim basis, taking into account any applicable excesses or limits in indemnity. Due to the nature of viral diseases there can be waves of their impact on a business. The wording of any aggregation clauses, could affect the way in which an insured notifies a claim and the level of indemnity available to a business under a policy.

c) Exclusions

The pandemic of COVID-19 will see a rise in claims as a result of which insurers will be suffering already heavy losses and will be anticipating further losses in the foreseeable future. In such a such a hardening insurance market of this nature,

exclusions will be sought to be imposed by insurers in business interruption cover.[23] Insurers may also attempt to invoke other exclusions - such as the pollution exclusion - to avoid covering virus-related losses and claims. Hence, businesses should not assume that they are covered for a coronavirus-related loss or claim, as their policy may exclude coverage for losses or claims arising out of a "virus" or an "infectious disease."

The purpose of business interruption coverage is to protect a policyholder's expected income, which would have been earned had there been no interruption of business. However, most business interruption policies require that the interruption is caused by loss or damage to property. An issue that likely will be litigated in this context is whether the suspected presence of the virus in a location, or even the fact that the location is unsafe for its intended use given restrictions on gatherings of people in a single location, might constitute physical loss or damage.

Generally, business interruption policies provide that the policyholder must suspend operations because of covered peril before collecting its losses. The facts and circumstances of each individual case, and coverage often turns on the definition and interpretation of the terms and of the language of the policy as the latter is paramount. For example, in 2006, during the international outbreak of "bird flu," insurers began adding exclusions for loss or damage caused by or resulting from any virus that induces or is capable of inducing physical distress, illness or disease. What insurers had in mind was the SARS outbreak (caused by a different coronavirus from 2003), and some policy forms specifically name SARS as an excluded peril. In the times of COVID-19, assureds need verify if such an exclusion is in their policy and if it is broad enough to apply to their own facts and circumstances. However, even if a virus exclusion is included in the policy, laws might be passed enforcing the insurers to pay the claims arising from a pandemic even if a virus exclusion exists. As an example, one may not the law that the legislature of New Jersey USA is considering as of 16 March 2020, which, if passed, would force insurers to pay albeit the existence of virus

[23] M.Sampson; R. Lewis; M. West, *Novel Coronavirus Commercial Insurance Considerations*, Reed Smith Client Alert 2020-137, 6 February 2020) <https://www.reedsmith.com/en/perspectives/2020/02/novel-coronavirus-commercial-insurance-considerations> accessed 27 March 2020

exclusions.[24] In addition, as state regulators might want to protect the policyholders and the insurance markets more generally, such exclusions might be inoperable.

V. Travel Insurance

With most airlines cancelling flights and governments closing borders and their airspace, travel insurance is a sector well hit by the COVID-19 pandemic. Most policy features, definitions, inclusions and exclusions pertinent to COVID-19 fall into the epidemic or pandemic category. Trying to buy travel insurance now, means that it is unlikely that one will be covered for coronavirus-related medical or cancellation expenses, apart from a few exceptions. However it may still be possible for individuals to achieve coverage if their insurer offers the option of an add-on cover for cancellation for any reason. However, as the pandemic evolves and the situation is changing rapidly, policyholders are advised to check with their insurer as to their exact cover available. If Government travel advice warnings are elevated to critical and if only essential traveling is advisable, then travel insurance cover for leisure purposes will not be available. Same if there is a warning Level 4 "Do Not Travel" issued.

The way in which travel insurance policies treat epidemics and pandemics can vary widely. Some policies will exclude epidemics and pandemics altogether. Some policies will cover medical costs overseas in relation to pandemics and epidemics, but not cancellation costs or loss of bookings, whilst some will cover both medical costs overseas and cancellation costs in relation to pandemics and epidemics.

a) Travel Insurance and the "Known Events" Clause

If a travel insurance policy contains in its wording a commonly found "known events" clause, this could imply that there is no cover for coronavirus-related expenses. Most standard form policies, such as travel or other types of insurance such as home and contents insurance, have a "known events" clause, which means that if the event is already a known risk when the policy is taken out, the policyholder will not be covered. COVID-19 has now been considered a "known event" for weeks. Policies issued before

[24] New Jersey Bill A-3844 <https://www.njleg.state.nj.us/2020/Bills/A4000/3844_I1.HTM> >, accessed 29 March 2020.

the pandemic became a 'known event', might offer cover depending on the policy wording.

Cancellation of travel due to fear of contracting COVID-19 will not imply cover of the costs of cancelling, unless there has been a “do not travel” warning for the country or region to be visited after the insurance policy was issued. In addition, if a “do not travel” warning has been issued for the country or region to be visited and the policyholder decides to travel to that place, the insurance will not provide cover. It should be noted that lower-level warnings, like “reconsider your need to travel” should not be taken lightly, but do not typically carry the same effect when it comes to travel insurance.

VI. Liability for Catastrophic Risks and Methods of Compensation

Steps can be taken to limit the human impact of catastrophic natural or unnatural, such as a pandemic, disasters. However, as harm to human life and property cannot be completely avoided, the issue of compensation arises. The legal system provides a mix of public and private sector methods, albeit with limitations, for compensating victims of natural disasters.

The first method of compensation is private insurance. This method is limited by hurdles such as the unavailability of such insurance coverage due to the expense or underwriting risks, exclusion of catastrophic risks by contract, and the difficulty of handling very large numbers of claims create significant hurdles. Another method of compensation is litigation against responsible private parties, which also has its limitations such as the need for proof of negligence or the potential limits on the financial assets and insurance coverage of potential defendants. Third, there is the possibility of government generated compensation either via tort claims for negligence (subject to immunity defenses); claims under special compensation schemes established for a particular disasters; and claims based on constitutional provisions requiring

compensation for the taking of property.[25] In the case of COVID-19, the first and third methods apply.

More specifically, our exposure to the COVID-19 involves an element of widespread contamination of the public. Courts have frequently addressed contamination and have struggled with proximate causation establishment which has proven to be of the biggest barriers to tort recovery. In large scale environmental contamination cases the problem has often been identified as failing to establish a link between a disease and exposure to a substance as a causation element. By analogy, in the case of COVID-19 exposure to the virus has to be established and the issue arises on how to link and prove such exposure. In such cases courts might follow the approach of proportional recovery to all victims. In relation to COVID-19 medical monitoring claims which may arise will include the treatment of the disease and related expenses. In medical monitoring cases, a traditional common-law lump sum of monetary damages is awarded, whilst in toxic exposure cases, periodic payment of future medical surveillance expenses out of a court-supervised trust fund or similar mechanism has been often adjudicated and awarded.[26] Remedial innovation is one way to deal with the issues posed by major risks. An analogy in the case of COVID-19 would be to provide compensation for all medical and crisis management, business interruption, worker compensation and other related expenses.

In addition, similar to asbestos cases, in relation to COVID-19 which can be classified as another form of environmental contamination, the epidemiological models at the moment are frightening. Another difficulty is that there is no cure or therapy at the moment, hence no estimate of medical costs claims can be made.

In the case of COVID-19, government schemes for mass catastrophic disasters are put in place. The ABA guidelines in the USA dictate in principle 7 the provision of reasonable compensation or additional disaster assistance to individual persons affected by a major disaster for losses when public authorities determine that it is in the public interest to do so in cases where neither insurance coverage nor judicial action is likely to

[25] D. Farber, *Tort Law in the Era of Climate Change, Katrina and 9/11: Exploring Liability for Extraordinary Risks*, 2008, UC Berkeley Public Law Research Paper No. 11211125, 1.
[26] A.B. Blumenberg, *Medical Monitoring Funds: The Periodic Payment of Future Medical Surveillance Expenses in Toxic Exposure Litigation*, (1992) Vol. 43 Hastings L.J. 661; *Ayers v. Township of Jackson*, [1987] 525 A.2d 287 (N.J.).

provide reimbursement for losses to persons affected by a major disaster. Such reasonable assistance is detected where public authorities are responsible, through their action or inaction, for the disaster event or where public authorities determine that a remedy traditionally available either through the operation of the judicial system or otherwise should not be made available or should be severely curtailed. [27]

Post 9/11 a special victim's compensation fund was established, covering medical expenses, loss of earnings, loss of business or employment opportunities and non-economic loss such as physical and emotional pain. Such a legislative compensation mechanism does not exclude common law liability, as *Stanford v. Kuwait Airways Corporation*[28] and *In re September 11 Litigation*[29] have demonstrated. However, insurance for terrorism risks has also been supported by the government interventions and catastrophe liability works also as a means of risk spreading organizations, as in the case of catastrophic risks liability can allow society to tap the unmatched ability of insurers to compensate adequately.[30]

Stanford v Kuwait Airways Corporation[31] involved the hijacking of a Kuwait airlines flight. In the law suit that followed, the claimants asserted that the airline's negligence was a proximate cause of the injuries and deaths occurring aboard the flight as when the airline boarded connecting passengers in Beirut, it knew or should have known that some might be terrorists. Kuwait Airlines had a duty towards the plaintiffs, as its duty as per the court's findings was to protect passengers on connecting flights from unreasonable risks. A related issue was the foreseeability of the specific injury that occurred as there was evidence that the airline knew of the threatened attacks by Hezbollah terrorists and that terrorists were boarding flights in airports to infiltrate connecting flights. The case of *In re September 11 Litigation*[32] involved opt-outs from the compensation fund. The defendants included the airlines, airport security companies, and airport operators all of which had negligently failed their security responsibilities. The court held that the airlines and security companies owed a duty of care to victims on the ground to screen passengers and their belongings and that the

[27] ABA, *Rule of Law in Times of Major Disaster*, 2007 <http://www.abanet.org/litigation/ruleoflaw/rol_disaster.pdf> accessed 29 March 2020.
[28] *Stanford v Kuwait Airways Corporation* [1996] 89 F.3d 117 (2nd Cir.).
[29] *In re September 11 Litigation* [2003] 280 F. Supp. 2d 279.
[30] D. Farber, *op. cit.*, 14-18.
[31] Stanford v Kuwait Airways Corporation 89 F.3d 117 (2nd Cir. 1996).
[32] In re September 11 Litigation, 280 F. Supp. 2d 279.

plane crash was within the class of foreseeable hazards outcomes. The court took into account factors such as the reasonable expectations of parties and society generally, the proliferation of claims, the likelihood of unlimited or insurer-like liability, disproportionate risk and reparation allocation, and public policies affecting the expansion or limitation of new channels of liability. The rationale of the court lied in that the scope of duty to a particular class of plaintiffs depends on the relationship to such plaintiffs, whether plaintiffs were within a zone of foreseeable harm, and whether the harm was within the class of reasonably foreseeable hazards that the duty exists to prevent. In order to be considered foreseeable, the precise manner in which the harm was inflicted need not be perfectly predicted.[33]

In considering the desirability of compensation for catastrophic risks, we need to take the societal interests at stake into account. Catastrophic losses are precisely the kinds of risk for which loss-spreading through some kind of insurance scheme seems most warranted. Yet, private insurance coverage for victims is problematic. Hence, the need for disaster prevention measures. Corrective justice is an explorable solution as it allows in the case of large-scale risks where specific individuals who were at fault for a catastrophic loss often will not have the resources to cover more than a small portion of the damages, the imposing of liability indirectly on taxpayers is also a tool for administering liability for catastrophic risks. As the insurance industry seems often reluctant to provide coverage for large-scale natural disasters, government interventions are needed to cover for the inability of private insurance markets to operate in the cases of catastrophic risks, and this is viable through risk spreading. Imposing liability for catastrophic risks can deter undesirable conduct and reinforce the society's limited ability to spread the costs of catastrophe. However, where it may not be feasible to compensate all victims of catastrophic risks, it is necessary to limit the class of victims to those with the most catastrophic losses.The unavailability of full compensation does not mean that all compensation should be denied.[34] Similarly, various governments, in the wake of COVID-19 pandemic have started putting in place similar legislative compensation mechanisms, and others will continue in the aftermath of the pandemic. Such public scheme intervention will help the insurance industry spread the risk and be able to respond to it, and the society to continue to operate.

[33] D. Farber, *op. cit*., 17-27.
[34] *Ibid.*

VII. Conclusions

The legal landscape for insurance coverage for losses associated with COVID-19 will evolve as the outbreak progresses and claims are submitted. The terms and conditions of policies vary from insurer to insurer and client to client. Although many "standard" policy forms may contain exclusions for viruses, others will not. Assureds need examine their insurance policies and their particular circumstances and specific terms of coverage, as they may be already in need to file insurance claims for losses resulting from business interruptions as a result of COVID-19, or may be unable to renew their contracts or have to pay scrupulous premium increases combined with additional restrictions on coverage. The uncertainties surrounding liability for COVID-19 will make these claims and renewals as well as policy renewal negotiations even more challenging.

As the world continues to address the novel coronavirus (COVID-19) pandemic, an important aspect of managing the response to COVID-19 includes a comprehensive review of insurance with an eye toward identifying coverage that may be available to mitigate losses incurred due to the pandemic and government orders arising from the pandemic. Any rushed, definitive or misleading pronouncements about coverage, or the lack thereof, for losses arising out of COVID-19 are not advisable as no clear cut answers may exist and hence a more measured approach is needed.[35] As our discussion has shown, legislative compensation mechanisms set up by governments will help spread the risk and provide holistic compensation solutions, the resort to private insurers and common law liability apart.

[35] Reed Smith (n 15), <https://www.reedsmith.com/en/perspectives/2020/03/insurance-recovery-for-covid19>, accessed 28 March 2020.