The Effect of Covid-19 on Contract and Insurance Law

Covid-19'un Sözleşmelere Etkisi ve Sigorta Hukuku

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Abstract:

The pandemic of Covid-19 has disrupted businesses and insurance and contractual relationships between parties. This article examines the effect of Covid-19 on contract and insurance law, most notably in relation to contract law and the need to redefine the legal notion of "force majeure" and in relation to insurance law regarding business interruption insurance. Possible interpretations to be followed by courts in future claims and liability for contractual and insurance law claims as a result of Covid-19 are discussed and conclusions on the new role of force majeure and on insurance implications following the Covid-19 pandemic are drawn.

Keywords:

Force Majeure, Insurance, Covid-19, Business Interruption Insurance, Breach of Contract.

Öz:

Covid-19 salgınının ortaya çıkışı, ticari ilişkileri, sigorta sözleşmelerini ve taraflar arasındaki sözleşme ilişkilerini etkilemiştir. Bu makale, Covid-19'un sözleşme ve sigorta hukuku üzerindeki etkisini, özellikle de sözleşme hukuku ve "mücbir sebep" kavramını yeniden tanımlama ihtiyacını da dikkate alarak, iş durması sigortası incelenmiştir. Covid-19 salgının olası sonucu olan sigorta hukukuna ilişkin talepler karşısında mahkemeler tarafından izlenecek olası yorumlar ve mücbir sebepler kavramına yüklenecek yeni roller ve bunun Covid-19 salgını sonrasında sigorta hukukuna etkileri de çalışmada incelenmiştir.

Anahtar Kelimeler:

Force Majeure, Sigorta, Covid-19, İş Durması Sigortası, Sözleşmeye Aykırılık.

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I. Introduction

The "new strain" of a novel coronavirus which was identified by the WHO in late 2019 caused initially a public health emergency, which was soon raised to a pandemic status. The seriousness of the situation called for governments to impose total lockdowns which in their turn had a huge impact on the business and commercial world and affected commercial and contractual arrangements. As a result of the widespread lockdowns, the lack of commercial activity prompted commercial companies to look into claiming the operation of "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 was contractually agreed and at the same time claim from their insurers on the basis of their business interruption insurance policies.

This article discusses the impact and effect of the Covid-19 pandemic and related measures on commercial and insurance contracts. More specifically, it discusses the *locus standi* in relation to the need to redefine "force majeure" and the coverage for business interruption claims due to the pandemic.

II. The Case for the Justification of the Occurrence of "Force-Majeure" due to the Covid-19 Pandemic

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.

III. The Position Under Common Law and Continental Law

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 re-

sult 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.

IV. Frustration in Contract Law under Common Law

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 around it, on the basis of the objective of contract law to satisfy the intentions of the parties. It follows from

[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.).

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.

V. The Notion of Changed Circumstances under Continental Law

The aforementioned 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.

A. The position in Japan, Greece, Turkey

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 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

[3] NOTTAGE Luke, 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] IIJIMA, Kazuhiro, Recission and Adjustment of Contracts as Effects of the Doctrine of Changed Circumstances, [1994] 35 Toritsudai Hogakkai Zasshi, 127, 129.

[6] STATHOPOULOS, Michail, Greek Law of Torts I, Sakkoulas 1998, Athens.

[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.

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]

In Turkey also, German legal theory "Wegfall der Geschäftsgrundlage" has been recognized first by academics and the Courts as the main theory for the adaptation of contract. The institution of "adaptation of contracts" has reached to a legal ground with the art. 138 of TCO titled as "Adaptation of Contract" in 2011. According to this article, "*In case an extraordinary event which was not foreseen and not expected to be foreseen by the parties during the conclusion of the contract occurs due to a reason not attributable to the debtor, and if the conditions present during the conclusion of the contract have been changed to the detriment of the debtor to such an extent that demanding performance from the debtor would be contrary to the good faith rules, and if the debtor has not yet performed his/her debt or has performed his/her debt by reserving it's rights arising from hardship, the debtor shall be entitled to request the adaptation of the contract to the new circumstances, or to rescind the contract where such adaptation is not possible by the judge. In continuous contracts, in principle, the debtor shall use the right to termination instead of the right to rescind*." Art. 138 has been adopted also as an exception of the pacta sunt servanda principle.

The Conditions required for the implementation of art. 138 and the adaptation of the contract to the changed circumstances may be listed as follows:[11]

(1) An extraordinary event which was not foreseen and not expected to be foreseen by the parties during the conclusion of the contract must have occurred;

(2) Such event must not have raised due to a reason attributable to the debtor;

(3) As a result of the extraordinary event, the conditions present during the conclusion of the contract must have been altered to the detriment of the debtor to such an extent that requesting performance from the debtor would breach the good faith rules; and

(4) The debtor either must have not yet performed its obligation or has performed its obligation by reserving its rights arising from the hardship.

B. Critical Analysis

The potential for greater flexibility resulting from the doctrine of changed circumstances in

[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] ΝοΒ 35.1057.

[9] Greek Supreme Court Judgment Α.Π. 731/1969, [1969] ΝοΒ 18.658; Greek Court of Appeal Judgment ΕΘ 1680/1980, [1980] Αρμ35.550.

[10] STATHOPOULOS, 504.

[11] For further information regarding the conditions of TCO art. 138 refer to BAYSAL, Başak: Sözleşmenin Uyarlanması [Adaptation of Contract], 2020, N. 496 ff.

principle permitting court adjustment explains its greater readiness to be applied compared to the law of frustration in England.[12] 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.[13] 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.[14]

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 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.[15] 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.

VI. 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 po-

[12] STATHOPOULOS, 504; NOTTAGE, 390-393.

[13] NOTTAGE, 411.

[14] TREITEL, Guenter, The Law of Contract, Sweet & Maxwell 1995; MORRIS, Andrew, Practical Reasoning and Contract as Promise: Extending Contract-Based Criteria to Decide Excuse Cases, (1997) 56 Cambridge L.J. 147.

[15] GOODE, Roy, Commercial Law in the Next Millenium, Sweet & Maxwell, 1998; L. Nottage, *op. cit.*, 416.

tential 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.

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.[16] 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.

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

[16] Reed Smith LLP, Insurance Recovery for Covid-19, <https://www.reedsmith.com/en/perspectives/2020/03/insurance-recovery-for-covid19>.

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;[17] 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.

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.[18]

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.[19]

One school of thought, only considers the historical financial data of the policyholder

[17] 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/>.

[18] FRENCH, Christopher, *The Aftermath of Catastrophes: Valuing Business Interruption Insurance Losses*, [2014] 30 Ga. St. U. L. Rev. 461.

[19] *Ibid*, 464-468.

when calculating business interruption losses.[20] Other courts have held that local post-catastrophe economic conditions should be considered when business interruption losses are valued.[21] 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.[22]

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 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.[23]

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

[20] *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.

[21] *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).

[22] *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).

[23] FRENCH, 490.

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 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.

VII. 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.[24] 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

[24] LEWIS Richard, WEST Mark, 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>

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 exclusions.[25] In addition, as state regulators might want to protect the policyholders and the insurance markets more generally, such exclusions might be inoperable.

VIII. Conclusions

As all sectors have not been adversely affected from Covid-19, and the question whether during the conclusion of the contract Covid-19 was foreseen or not, or, to be more precise, whether the impact of Covid-19 on each contract was foreseen or not, will be surely a subject of discussion during the possible disputes. It seems like this issue will lead to important discussions in the jurisprudence. Therefore, contracting parties should not easily conclude that they are rescued from their obligations due to Covid-19.

Finally, it is worth repeating that the answers of to the questions how long this process, which has gained acceleration upon the categorization of Covid-19 as pandemic, will continue or how this process will be completed, are unclear. Therefore, it is early to make any conclusions about how the abovementioned legal explanations will be reflected in judicial decisions and disputes. In case of the risk that contractual obligations are not performed, the situation of the debtor and the creditor should be assessed in accordance with each concrete case. At this point, we are of the opinion that it would be useful for the contracting parties to gather together as much as possible and renegotiate their contractual relationships that have been affected by the current hardship.

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. 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. In relation to contractual interpretation and "force majeure" the latter will have to be redefined as a legal concept following the Covid-19 pandemic and allow contractual obligations to be suspended or redefined by law or by the will of the contractual parties.

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

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