

---

---

*McGill Journal of Dispute Resolution*



*Revue de règlement des différends de McGill*

**Volume 6 (2019-2020), Number 4**

**Article**

***Force Majeure and Hardship in the  
Age of Corona: A Historical and  
Comparative Study***

**Klaus Peter Berger and Daniel Behn**

---

---

# Contents

<b>1. Introduction .....</b>	<b>79</b>
<b>2. <i>Pacta sunt servanda</i> versus <i>clausula rebus sic stantibus</i> .....</b>	<b>82</b>
2.1. Examples from Commercial Practice .....	82
2.2. The <i>Pacta</i> Principle.....	84
2.3. The <i>Clausula</i> Principle .....	85
2.4. The Need to Strike a Balance.....	87
<b>3. Confusion between the <i>force majeure</i> and hardship doctrines.....</b>	<b>88</b>
<b>4. Force majeure .....</b>	<b>90</b>
4.1. France.....	93
4.2. Other domestic jurisdictions: .....	96
three different doctrines, one underlying rationale .....	96
4.2.1. The impossibility doctrine .....	97
4.2.2. Frustration .....	98
4.2.3. Impracticability .....	103
4.3. Transnational contract law .....	107
<b>5. Hardship.....</b>	<b>115</b>
5.1. The common law reluctance.....	115
5.2. Civil law jurisdictions.....	117
5.2.1. France: From outright rejection by the courts to a narrow statutory approach .....	117
5.2.2. Germany: The broad approach (“disturbance of the foundation of the transaction”).....	120
5.3. Transnational contract law.....	125
<b>6. Conclusion .....</b>	<b>129</b>

# ***Force Majeure and Hardship in the Age of Corona: A Historical and Comparative Study***

**Klaus Peter Berger and Daniel Behn\***

*Force majeure and hardship provide legal tools to deal with the effect of unexpected future events and unforeseen changes in circumstances, particularly in long-term contracts. Given its global and unprecedented dimensions, its lethal potential and its drastic effects on international contracts the COVID-19 pandemic will generate years, if not decades, of post-pandemic litigation and arbitration focusing on the application of these two concepts. The paper examines the two concepts, from their historic origins over the different paths they took in civil and common law to modern transnational contract law as applied by international arbitral tribunals. Based on this historic and comparative analysis, the paper shows that in such extraordinary times, the doctrines of force majeure and hardship assume the role of regular, rather than exceptional legal remedies, allowing for the risks emanating from the unprecedented crisis to be evenly distributed between the players in the global economy.*

...

*Les doctrines de force majeure et de « hardship » sont des outils juridiques pour gérer l'effet d'événements futurs inattendus et de changements imprévus de circonstances, en particulier dans les contrats à long terme. Compte tenu de ses dimensions mondiales et sans précédent, de son potentiel mortel et de ses effets drastiques sur les contrats internationaux, la pandémie de COVID-19 générera des années, voire des décennies, de litiges et d'arbitrages post-pandémiques axés sur l'application de ces deux concepts. Cet article examine ces deux concepts, depuis leurs origines historiques et les différentes voies qu'ils ont empruntées en droit civil et en common law jusqu'au droit transnational moderne des contrats tel qu'appliqué par les tribunaux arbitraux internationaux. Sur la base de cette analyse historique et comparative, cet article illustre qu'en ces temps extraordinaires, les doctrines de force majeure et de « hardship » deviennent des recours légaux réguliers, plutôt qu'exceptionnels, permettant aux risques émanant de la crise sans précédent d'être également répartis entre les acteurs de l'économie mondiale.*

## 1. Introduction

The recent COVID-19<sup>1</sup> pandemic<sup>2</sup> has been characterized as “humanity’s darkest hour” since World War II.<sup>3</sup> In light of its unprecedented effects on the global economy, it has led to the revival of two classical concepts of international contract law: *force majeure* and hardship.<sup>4</sup> Both concepts provide legal tools to deal with the effect of unexpected future events and unforeseen changes in circumstances, particularly in long-term contracts.<sup>5</sup> Given its global and unprecedented dimensions, its lethal potential and its drastic effects on international contracts, whether long-term or not, the COVID-19 pandemic will generate years, if not decades, of post-pandemic litigation and arbitration focusing on the application of these two concepts. This trend was foreshadowed by governments and public authorities when, early during the pandemic, they acknowledged the crisis as a global *force majeure* event. On February 10, 2020, a spokesperson for the PRC’s Legislative Affairs Commission of the National People’s Congress Standing Committee (全国人大常委会法工委) announced that measures which were implemented by the Chinese government to combat the virus and which

---

\* Dr. Klaus Peter Berger is a Professor of Domestic and International Contract, Business and Comparative Law and the Executive Director, Center for Transnational Law (CENTRAL) and Institute for Banking Law at the University of Cologne Faculty of Law, and an independent international arbitrator.

Dr. Daniel Behn is an Associate Professor of International Law at Queen Mary University of London and an Associate Research Professor at PluriCourts University of Oslo.

- 1 See “Origin of SARS-CoV-2” (26 March 2020), online: *World Health Organization* <<https://www.who.int/health-topics/coronavirus/who-recommendations-to-reduce-risk-of-transmission-of-emerging-pathogens-from-animals-to-humans-in-live-animal-markets>> (COVID-19, an abbreviation for “Coronavirus disease 2019”, is an infectious disease caused by severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2)).
- 2 See “WHO announces COVID-19 outbreak a pandemic” (12 March 2020), online: *World Health Organization* <<http://www.euro.who.int/en/health-topics/health-emergencies/coronavirus-covid-19/news/news/2020/3/who-announces-covid-19-outbreak-a-pandemic>> (COVID-19 was declared as a pandemic by the Director-General of the World Health Organization (WHO), Dr. Tedros Adhanom Ghebreyesus, on 11 March 2020 due to the rapid increase in the number of cases outside China since the end of February 2020 that affected a growing number of countries).
- 3 “Transcript of Kristalina Georgieva’s Participation in the World Health Organization Press Briefing” (3 April 2020), online: *International Monetary Fund* <<https://www.imf.org/en/News/Articles/2020/04/03/tro40320-transcript-kristalina-georgieva-participation-world-health-organization-press-briefing>>.
- 4 See e.g. Marc-Philippe Weller et al, *Virulente Leistungsstörungen – Auswirkungen der Corona-Krise auf die Vertragsgdurchführung* (2020) *Neue Juristische Wochenschrift* 1017 at 1022 (for German law).
- 5 See generally Pascale Accaoui Lorfing, *La renégociation des contrats internationaux* (Bruxelles: Bruylant, 2011) at 28ff [Accaoui Lorfing “La renégociation des contrats internationaux”]; see for the increased significance of the time element in international contract law, Attila Harmathy, “Hardship” in UNIDROIT, ed, *Eppur si muove: The age of uniform law – Essays in honour of Michael Joachim Bonell to celebrate his 70th birthday*, vol II (Rome: UNIDROIT, 2016) at 1039.

interfere with contracts should be considered *force majeure* events.<sup>6</sup> In line with this statement, the China Council for the Promotion of International Trade (CCPIT), a quasi-governmental body, had issued a record number of 6,454 *force majeure* certificates to Chinese companies until 25 March, 2020.<sup>7</sup> They covered a total contract value of about 89.4 billion USD and were intended to exempt local exporters from fulfilling contracts with overseas parties by proving that non-performance of their contracts was due to COVID-19 related measures like holiday extensions or lockdowns.<sup>8</sup> On February 28, 2020, the French Ministry of Economy stated that the COVID-19 pandemic will be considered as a *force majeure* event and that penalties for late deliveries will not be applied in public procurement contracts.<sup>9</sup> Similar declarations were made by other governments.<sup>10</sup> In May 2020, the UK government called upon contract parties to act fairly and responsibly in performing and enforcing contracts that are materially impacted by the COVID-19 pandemic, especially in relation to “making, and responding to, *force majeure*, frustration, change in law, relief event, delay event, compensation and excusing cause claims”.<sup>11</sup>

---

6 “Chinese firms use obscure legal tactics to stem virus losses”, *The Economist* (22 February 2020), online: <<https://www.economist.com/business/2020/02/22/chinese-firms-use-obscure-legal-tactics-to-stem-virus-losses>>.

7 “CCPIT Guides Enterprises to Leverage Force Majeure Certificates, which Help to Maintain Nearly 60% Contracts” (10 April 2020), online: *China Council for the Promotion of International Trade* <[http://en.ccpit.org/info/info\\_40288117668b3d9b017163990e5a082a.html](http://en.ccpit.org/info/info_40288117668b3d9b017163990e5a082a.html)>.

8 *Ibid*; Konstantin Christie, Mino Han & Leonid Shmatenko, “LNG Contract Adjustments in Difficult Times: The Interplay between Force Majeure, Change of Circumstances, Hardship, and Price Review Clauses” (2020) 18:3 OGEL, online: *Oil, Gas & Energy Law* <[www.ogel.org/article.asp?key=3889](http://www.ogel.org/article.asp?key=3889)> at 12 (backed by the CCPIT certificates, the China National Offshore Oil Corporation (CNOOC) and the China National Petroleum Corp (CNPC) issued force majeure notices to its customers).

9 «Déclaration de M. Bruno Le Maire, ministre de l'économie et des finances, sur l'impact économique de l'épidémie de COVID-19, à Paris le 28 février 2020» (28 February 2020), online: Vie Publique <<https://www.vie-publique.fr/discours/273763-bruno-le-maire-28022020-coronavirus>>; «Mesures d'accompagnement des entreprises impactées par le coronavirus (Covid-19)» (28 March 2020), online: *Direction générale de la concurrence, de la consommation et de la répression des fraudes* <<https://www.economie.gouv.fr/dgcrf/mesures-daccompagnement-des-entreprises-impactees-par-le-coronavirus-covid-19>>.

10 “Iraq’s Crisis Cell extends curfew, announces additional measures to contain Covid-19” (22 March 2020), online: *Government of Iraq* <<https://gds.gov.iq/iraqs-crisis-cell-extends-curfew-announces-additional-measures-to-contain-covid-19/>> (the Iraqi government issued a similar declaration, qualifying the period of the COVID-19 crisis a *force majeure* event for all projects and contracts effective from February 20, 2020); “Iraq declares Covid-19 a *force majeure* for all contracts” (1 April 2020), online: *Offshore Technology* <<https://www.offshore-technology.com/comment/iraq-covid-19-force-majeure-contracts/>> (the declaration affected projects worth approximately 291 billion USD).

11 UK Cabinet Office, “Guidance on responsible contractual behaviour in the performance and enforcement of contracts impacted by the Covid-19 emergency” (7 May 2020) at para 15 (c), online (pdf): *GOV.UK* <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/883737/Covid-19\\_and\\_Responsible\\_Contractual\\_Behaviour\\_web\\_final\\_7\\_May.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/883737/Covid-19_and_Responsible_Contractual_Behaviour_web_final_7_May.pdf)>.

Analogies between the COVID-19 pandemic and that of a natural disaster – a classical *force majeure* scenario<sup>12</sup> – can be made, making the initial focus of the debate exclusively on the *force majeure* doctrine understandable. However, in certain jurisdictions both *force majeure* and hardship doctrines – or *force majeure* and hardship clauses in the contracts themselves<sup>13</sup> – may be available and capable of excusing or modifying performance in circumstances such as the COVID-19 pandemic.<sup>14</sup> It is therefore important to understand the relationship between these two doctrines, which – in these and other unforeseen events – can be a difficult task given that they are the products of various national legal traditions and have developed along different paths in different ways.<sup>15</sup>

Given the different and often confusing historical trajectories of these two doctrines, this article aims at providing a comprehensive assessment of the *force majeure* and hardship doctrines as they operate today, in order to make them workable both in the context of the COVID-19 pandemic and in other constellations as well. Towards that end, it first situates these doctrines within their dogmatic and historic<sup>16</sup> origins. The article then seeks to provide an explanation for the differences between and among these two doctrines in selected national jurisdictions from common and civil law which have adopted different approaches to deal with the impact of changed circumstances. Against the background of this limited comparative analysis,

<sup>12</sup> See Section 2.1, below.

<sup>13</sup> See Section 4.3, below.

<sup>14</sup> See Weller et al, *supra* note 4 at 1021; Julia Heinich, «L'incidence de l'épidémie de coronavirus sur les contrats d'affaires: de la force majeure à l'imprévision» (2020) *Recueil Dalloz* 611 at 611.

<sup>15</sup> See e.g. Thomas Rüfner, "Art 8:108" in Nils Jansen & Reinhard Zimmermann, eds, *Commentaries on European Contract Laws* (Oxford: Oxford University Press, 2018) (on excuse of non-performance in European legal systems: "[t]he pertinent rules in the various European legal systems tend to be very different from one country to the next; their history is complicated and the state of the law is confusing in many systems" at para 2); Sukhnam Digwa-Singh, "The Application of Commercial Impracticability under Article 2-615 of the Uniform Commercial Code" in Ewan McKendrick, ed, *Force Majeure and Frustration of Contract*, 2nd ed (London: Lloyd's of London Press, 1995) 305 at 329; Werner Melis, "Force majeure and Hardship Clauses in International Commercial Contracts in View of the Practice of the ICC Court of Arbitration", (1984) 1:3 *J Intl Arb* 212 at 215–16.

<sup>16</sup> See for the benefit of legal history as a tool for the further development of international business law, e.g. in the area of international arbitration, Björn Centner, *Iura Novit Curia in Internationalen Schiedsverfahren: Eine historisch-rechtsvergleichende Studie zu den Grundlagen der Rechtsermittlung* (Tübingen: Mohr Siebeck, 2019) ("[t]he experiences of legal history show the way to the future" [translation by the authors] at 334); see for a similar approach in the context of transnational business law, Klaus Peter Berger, "The Lex Mercatoria (Old and New) and the TransLex-Principles", online: *TransLex* <[https://www.trans-lex.org/the-lex-mercatoria-and-the-translex-principles\\_ID8](https://www.trans-lex.org/the-lex-mercatoria-and-the-translex-principles_ID8)> at para 2 [Berger, "The Lex Mercatoria"]; see generally for the value of legal history for the development of modern law, Friedrich Carl von Savigny, "Ueber den Zweck dieser Zeitschrift" (1815) *Zeitschrift für geschichtliche Rechtswissenschaft* 1 ("[legal] history is not just a collection of examples [from the past], but is the only way to arrive at a true insight into our current state of [legal] affairs" [translation by the authors] at 4).

the article looks at how the two principles have been formulated and applied at the level of transnational business law as reflected in international restatements such as the UNIDROIT Principles of International Commercial Contracts (UPICC) and in the case law of international arbitral tribunals as the natural judges of international business.<sup>17</sup>

## **2. *Pacta sunt servanda* versus *clausula rebus sic stantibus*: The eternal conflict between stability and flexibility of contractual relations**

### **2.1. Examples from Commercial Practice**

Apart from the COVID-19 pandemic there are myriads of examples of changed circumstances in international business life. They relate to situations where the initial conditions or circumstances contemplated by the parties to a long-term contract change subsequently. These changes of circumstances can be of any conceivable character, whether commercial, technical, political, environmental or of any other known or unknown quality:<sup>18</sup>

- a substantial devaluation of the contract currency<sup>19</sup> or dramatic fall in the price for a sold product;<sup>20</sup>
- the refusal of a central bank to grant a permit for payments in the currency due under a contract;<sup>21</sup>

---

<sup>17</sup> See for this pragmatic approach to determine the content of general principles of transnational business law, as opposed to a full-fledged comparative analysis of a plethora of legal systems, Klaus Peter Berger, “General Principles of Law in International Commercial Arbitration, How to Find Them – How to Apply Them” (2011) 5 *World Arb & Mediation Rev* at 97ff [Berger, “General Principles of Law”]; but see Emmanuel Gaillard, “The Use of Comparative Law in International Commercial Arbitration” in Pieter Sanders, ed, *Arbitration in Settlement of International Commercial Disputes Involving the Far East and Arbitration in Combined Transportation*, ICCA Congress series vol 4, (Deventer: Kluwer Law International, 1989) 283ff; Emmanuel Gaillard, “Transnational Law: A Legal System or a Method of Decision-Making?” (2001) 17:1 *Arb Intl* 59 at 59ff.

<sup>18</sup> See the collection of cases in Piet Abas, *Rebus sic stantibus: Eine Untersuchung zur Anwendung der clausula rebus sic stantibus in der Rechtsprechung einiger europäischer Länder* (Cologne: Carl Heymanns Verlag, 1993) at 285ff; Christoph Brunner, “Rules on Force Majeure as Illustrated in Recent Case Law” in Fabio Bortolotti & Dorothy Ufot, eds, *Hardship and Force Majeure in International Commercial Contracts* (Alphen upon Rhine: Kluwer Law International, 2018) 82 at 82 [Brunner, “Rules on Force Majeure”].

<sup>19</sup> See e.g. for Turkey: Ecem Susoy Uygun, “Adapting Bilateral Agreements based on Natural Gas in the Electricity Market” (September 2018), online: *Erdem & Erdem* <<http://www.erdem-erdem.av.tr/publications/newsletter/adapting-bilateral-agreements-based-on-natural-gas-in-the-electricity-market/>>.

<sup>20</sup> ICC Case No 8486, 24 *YB Comm Arb* 162 (1999) at 168.

<sup>21</sup> ICC Case No 3099/3100, 1979, in *Collection of ICC Arbitral Awards 1974-1985*, eds Sigvard Jarvin & Yves Derains (Deventer: Kluwer Law and Taxation Publishers, 1990) at 70; ICC Case No 3093/3100, 1979, in *Collection of ICC Arbitral Awards 1974-1985*, eds Sigvard Jarvin & Yves Derains (Deventer: Kluwer Law and Taxation Publishers, 1990) at 365.

- a regional (such as in South-East Asia in 1997) or global financial crisis (such as in 2008/09) causing extreme economic burdens for a party to a contract;<sup>22</sup>
- a long-term gas or Liquefied Natural Gas (LNG) supply contract concluded 25 years ago in which the gas price formula is linked to the oil price index, and the much lower current gas prices on the spot markets make the contract wholly unprofitable for the buyer;<sup>23</sup>
- civil riots, other hostilities or natural catastrophes that prevent the performance of construction works at a site in a distant country (for example for a road or other infrastructure project);<sup>24</sup>
- detection of a large number of submerged explosives which require removal by a specialized firm at the bottom of a harbor which had been heavily bombarded during a war;<sup>25</sup>
- hurricanes or typhoons that destroy offshore facilities for sub-sea gas or oil exploitation or an offshore wind-park;
- an unprecedented drought that results in the suspension of the operation of a plant for the production of tungsten;<sup>26</sup>
- cancellation of an export license for the export of raw materials which constitutes the subject of a long-term delivery contract;<sup>27</sup>
- extremely high demurrage payments caused by the fact that a ship is detained by state authorities of the country in which the port is located;<sup>28</sup>

---

22 *Tandrin Aviation Holdings Ltd. v Aero Toy Store LLC*, [2010] EWCH 40 (Comm); Brunner, “Rules on Force Majeure”, *supra* note 18 at 91; see also Wolfgang Wiegand, “Die Finanzmarktkrise und die clausula rebus sic stantibus dargestellt am Beispiel der Bonuszahlungen” (9 February 2009), online: *Jusletter* <<https://jusletter.weblaw.ch/juslissues/2009/509.html>> (stating that the world financial crisis fulfils the requirements of clausula rebus sic stantibus (the Swiss hardship doctrine) “in a textbook form”).

23 Pietro Ferrario, *The Adaptation of Long-Term Gas Sale Agreements by Arbitrators* (Alphen upon Rhine: Wolters Kluwer, 2017) at 26.

24 *Gould Marketing Inc v Ministry of National Defence*, 3 IUSCT (1983) 147 (“strikes, riots and other civil strife in the course of the Islamic Revolution had created classic force majeure conditions at least in Iran’s major cities. By ‘force majeure’ we mean social and economic forces beyond the power of the state to control through the exercise of due diligence. Injuries caused by the operation at such forces are therefore not attributable to the state for purposes of its responding for damages” at 152–53) [*Gould Marketing Inc*].

25 ICC Case No 2763, 1980, in *Collection of ICC Arbitral Awards 1974-1985*, eds Sigvard Jarvin & Yves Derains (Deventer: Kluwer Law and Taxation Publishers, 1990) at 158ff.

26 *Global Tungsten & Powders Corp v Largo Resources Ltd*, ICC Case No 19566, Arbitrator Intelligence Materials; see also ICC Case 8790, 29 YB Comm Arb 13 (2004) at 21; Mercédeh Azeredo da Silveira, “Economic Sanctions, Force Majeure and Hardship” in Fabio Bortolotti & Dorothy Ufot, eds, *Hardship and Force Majeure in International Commercial Contracts* (Alphen upon Rhine: Kluwer Law International, 2018) 161 at 161ff.

27 ICC Case No 2478, 3 YB Comm Arb 222 (1978) at 222.

28 *Great Elephant Corp v Trafigura Beheer BV* [2013] EWCA Civ 905; Brunner, “Rules on Force Majeure”, *supra* note 18 at 86ff.



- cancellation of an export license by state authorities;<sup>29</sup>
- state embargoes or sanctions that have an impact on the parties' contractual obligations.<sup>30</sup>

In the COVID-19 pandemic as well as in all the scenarios listed above, the parties are faced with the eternal dilemma of contract law: the conflict between two ancient and fundamental legal maxims, "*pacta sunt servanda*" on the one hand and "*clausula rebus sic stantibus*" on the other.<sup>31</sup> Both maxims were developed by Canonist scholars and moral theologians in the Middle Ages under the influence of Roman law and Roman philosophy, with reference to the paramount significance of the human will.<sup>32</sup> They have survived ever since.

## 2.2. The *Pacta* Principle

The *pacta* principle stands for the sanctity and stability of contractual relations. The principle forms the "hallowed basis"<sup>33</sup> of classical contract theory. That theory regards a contract as a deal: a discrete transaction in the form of a mutual promise that must be kept.<sup>34</sup> Each party is entitled to rely on the performance of obligations undertaken by the other side: "my word is my bond".<sup>35</sup> In the age of liberalism, the *pacta* principle – and the

<sup>29</sup> ICC Case 2478, *supra* note 27 at 223.

<sup>30</sup> ICC Case No 7575, 137 JDI (Clunet) 1378 (2010) at 1380; *Starrett Housing Corp v Iran*, IUSCT Case No 24 (1987) at para 112; *Mobil Oil Iran v Iran*, IUSCT Case No 150 (1987) at para 113ff [*Mobil Oil Iran*]; *Nordic American Shipping A/S Owner v Bayoil USA Inc*, Final Award No 2972, 20 YB Comm Arb 126 (1995) at 130; *Brauer & Co (Great Britain) Ltd v James Clark (Brush Materials) Ltd*, [1952] 2 Lloyd's Rep (CA) 147 at 151.

<sup>31</sup> Christoph Brunner, *Force Majeure and Hardship under General Contract Principles: Exemption for Non-performance in International Arbitration* (Alphen upon Rhine: Kluwer Law International, 2009) at 1–3 [Brunner, "Force Majeure and Hardship"]; Berthold Goldman, "The applicable law: general principles of law – the *lex mercatoria*" in Julian Lew, ed, *Contemporary Problems in International Arbitration* (Dordrecht: Springer Science+Business Media, 1987) 113 at 125; Paul Griffin, "English law in the global LNG business: international LNG sale and purchase—a relational arrangement" (2019) 12 J World Energy L & Bus 216 at 223, 238 (see for long-term gas and LNG sales agreements).

<sup>32</sup> See for the *pacta* principle, David Hughes Parry, *The Sanctity of Contracts in English Law* (London: Stevens & Sons, 1959) at 5ff; for the *clausula* principle see Leopold Pfaff, "Die *clausula rebus sic stantibus* in der Doktrin und der österreichischen Gesetzgebung" in *Festschrift zum siebzigsten Geburtstage seiner Excellenz Dr Joseph Unger* (Universität Wien: Rechts- und Staatswissenschaftliche Fakultät ed, 1898) 221 at 223ff; Ralf Köbler, *Die „clausula rebus sic stantibus“ als allgemeiner Rechtsgrundsatz* (Tübingen: Mohr Siebeck, 1991) at 27ff; Abas, *supra* note 18 at 7ff; Robert Feenstra, "Impossibilitas and *clausula rebus sic stantibus*" in Robert Feenstra, ed, *Fata iuris romani: Études d'histoire du droit* (Leiden: Presse universitaire de Leyde, 1974) 364 at 368ff; Pascal Pichonnaz, "From *Clausula Rebus Sic Stantibus* to Hardship: Aspects of the Evolution of the Judge's Role" (2011) 17:1 *Fundamina* 125 at 125; Reinhard Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (New York: Oxford University Press, 1996) at 581.

<sup>33</sup> Zimmermann, *supra* note 32 at 577.

<sup>34</sup> See Charles Fried, *Contract as Promise: A Theory of Contractual Obligation*, 2nd ed (Oxford: Oxford University Press, 2015) at 117.

<sup>35</sup> See for this ethical commitment to the given word, *Ibid* at 16; see also Rudolf von Jhering,

idea that only parties in privity of contract with one another were entitled to determine the “just price” (“*pretium justum*”) for their transaction – required contracts to be enforced in such an absolute manner that any revision of a contract by a third party was out of the question.<sup>36</sup> Today, the *pacta* principle constitutes the cardinal principle of most national contract laws.<sup>37</sup> For that reason, it is also one of the foundation stones of a civilized society<sup>38</sup> and an “indisputable rule of international law”<sup>39</sup> as well. Ultimately, it is the autonomy of the parties which provides the moral force behind the contract as a binding promise.<sup>40</sup> Consequently, the influence of unforeseen and changed circumstances on the contract tends to be best dealt with when the parties themselves have taken precautions at the drafting stage: “to contract means to foresee” (“*contracter, c’est prévoir*”<sup>41</sup>).

### 2.3. The *Clausula* Principle

The *clausula* principle favors a flexible reaction to scenarios such as the ones described in Section 2.1 above. In those situations, the binding force of a

---

*Der Zweck im Recht*, vol 1 (Leipzig: Breitkopf & Härtel, 1877) at 265; Franz Bydlinksi, *Privatautonomie und objektive Grundlagen des verpflichtenden Rechtsgeschäftes* (Wien: Springer Verlag, 1967) at 109; George Gardner, “An Inquiry into the Principles of the Law of Contracts” (1932) 46:1 Harv L Rev 1 at 1; Matthias Storme, “The Validity and the Content of Contracts” in A S Hartkamp & Christian von Bar, eds, *Towards a European Civil Code*, 2nd ed (The Hague: Ars Aequi Libri 1994) 159 at 184.

- <sup>36</sup> Ahmed Yildirim, *Equilibrium in International Commercial Contracts: With Particular Regard to Gross Disparity and Hardship provisions of the UNIDROIT Principles of International Commercial Contracts* (Nijmegen: Wolf Legal Publishers, 2011) at 21; see also Catherine Pédamon & Jason Chuah, *Hardship in Transnational Commercial Contract: A Critique of Legal, Judicial and Contractual Remedies* (Paris: Legal Publishing, 2013) (“[a]ny (judicial) revision is sacrificed on the altar of the sanctity of contract” at 32).
- <sup>37</sup> *Texaco Overseas Petroleum Co (TOPCO) v Government of the Libyan Arab Republic* (1979), 53 ILR 389 at 462; Marc-Philippe Weller, *Die Vertragstreue: Vertragsbindung - Naturalerfüllungsgrundsatz - Leistungstreue* (Tübingen: Mohr Siebeck, 2009) at 27; Helmut Köhler, “Vertragsrecht und ‚Property Rights‘-Theorie” (1980) 144 *Zeitschrift für das gesamte Handels- und Wirtschaftsrecht* 589 at 589, 592.
- <sup>38</sup> Samuel von Pufendorf, *De iure naturae et gentium*, vol 3 (Oxford: Knochius et Filius, 1703) (“[a] most sacred command of the law of nature and what guides and governs not only the whole method and order but the whole grace and ornament of human life, that every man keeps his faith, or which amounts to the same that he fulfils his contracts, and discharges his promises” at ch 4 para 2).
- <sup>39</sup> Bin Cheng, *General Principles Of Law as Applied by International Courts And Tribunals* (Cambridge: Burlington Press Paperback re-issue, 1987) at 113; Charles Kotuby & Luke Sobota, *General Principles of Law and International Due Process: Principles and Norms Applicable in Transnational Disputes* (Oxford: Oxford University Press, 2017) at 89ff; Hans Wehberg, “Pacta Sunt Servanda” (1959) 53:3 AJIL 775 at 786.
- <sup>40</sup> Fried, *supra* note 34 at 57; see also Hugo Grotius, *On the Law of War and Peace: Including the Law of Nature and of Nations*, vol 1, translated by AC Campbell AM (Ontario: Batoche Books, 2001) (who emphasized personal liberty, ‘private autonomy’, as a fundamental “private right . . . established for the advantage of each individual” at 8); Norbert Horn, “Person und Kontinuität, Versprechen und Vertrauen: Die Perspektive des Zivilrechts” in Harald Herrmann & Klaus Peter Berger, eds, *Norbert Horn Gesammelte Schriften* (Berlin: De Gruyter, 2016) 1199 (freedom and self-responsibility are linked through the legally binding nature of the declaration of will at 1202, 1219ff).
- <sup>41</sup> George Ripert, *La Règle Morale dans les Obligations Civiles* (Paris: LGDJ, 2013) at 151; see

contract may turn into fetters.<sup>42</sup> The *clausula* principle allows the parties to free themselves from the strict application of the *pacta* principle. It is based on the idea that the continued enforceability and performance of a contract is always subject to the continued existence of those circumstances which existed at the time of contracting and which formed the basis for the parties' bargain. Two of the most famous scholars of the Middle Ages, the Italian jurists *Baldus* and *Bartolus*, regarded this as an implied condition in any obligation ("*rebus sic se habentibus*").<sup>43</sup> According to them, there is a "rule that every promise is to be understood with the circumstances being the same".<sup>44</sup> This notion would continue to play an important role as a recurring theme in the historical evolution of the *clausula* principle.<sup>45</sup> Such a premise would create a "crisis of contract" in the late eighteenth century by calling into question the binding force of contracts in certain situations.<sup>46</sup> For others, the *clausula* principle was not a threat to the *pacta* principle. From the civil law perspective, that principle, properly understood, relates to the "inviolability, but not the unchangeability of contracts".<sup>47</sup> This understanding of the *pacta* principle is derived from equity and good faith ("*pacta sunt servanda bona fide*").<sup>48</sup> Good faith, as a standard of contractual behavior, requires a party not to enrich itself at the expense of the other in scenarios of unforeseen and changed circumstances and to cooperate with the other side when such events arise. In this way, good faith can set limits to or inform the *pacta* principle<sup>49</sup> by providing a legal and moral justification against the conception of the *pacta* principle as an absolute one.

---

also Accaoui Lorfing, «La renégociation des contrats internationaux», *supra* note 5 at 29.

42 See Köbler, *supra* note 32 at 275.

43 Zimmermann, *supra* note 32 at 580.

44 Andreas Thier, "Legal history" in Christoph Grigoleit & Ewoud Hondius, eds, *Unexpected Circumstances in European Contract Law* 18 (Cambridge: Cambridge University Press, 2011) at 18.

45 See Section 5.2.2, below.

46 See e.g. Robert A Hillman, "Crisis in Modern Contract Theory" (1988) 67:1 Texas L Rev 103 at 103; see generally Christophe Jamin & Denis Mazeaud, *La nouvelle crise du contrat* (Paris: Dalloz, 2012); see also Zimmermann, *supra* note 32 ("[o]ne of the most interesting, and potentially most dangerous, inroads into *pacta sunt servanda* has, however, been the so-called *clausula rebus sic stantibus*: a contract is binding only as long and as far as (literally:) matters remain the same as they were at the time of conclusion of the contract. It is obvious that such a proviso, if broadly interpreted, can be used to erode the binding nature of contractual promises very substantially; not surprisingly, therefore, the *clausula* doctrine fell into oblivion in the late 18th and the 19th centuries: the heyday of 'classical' contractual doctrine when freedom of contract, economic liberalism and certainty of law reigned supreme" at 579).

47 Hasan Zakariya, "Changed Circumstances and the Continued Validity of Mineral Development Contracts" in Kamal Hossain, ed, *Legal Aspects of the New International Economic Order* (London: Bloomsbury Academic, 2013) 263 at 275.

48 See Tobias Lutz, "Introducing Imprévision into French Contract Law — A Paradigm Shift in Comparative Perspective" in Sanne Jansen & Sophie Stijns, eds, *The French Contract Law Reform: a Source of Inspiration?* (Cambridge: Intersentia, 2016) 89 (exceptions to the *pacta* principle as "concessions to contractual fairness" at 91)

49 ICC Case No 4761, 1987, 114 JDI (Clunet) 1012 (1987) at 1015; see also ICC Case No 5953,

Thus understood, application of the *clausula* principle emphasizes the relational nature<sup>50</sup> of long-term contracts. These contracts derive their legitimacy not only from the parties' will, but also from their relationship. That relationship is placed in a context: the industry, the parties' prior business dealings, the nature and subject matter of the contract, etc. In commercial reality, that context is usually in a constant state of change or flux.<sup>51</sup> To take account of these changes, the contractual bargain is based not only on the parties' explicit consent, but also on implicit terms, conditions or understandings which relate to the change or non-change of that context. The contract is regarded as a "living organism" whose program of contractual right and duties of the parties is flexible enough to accommodate their legitimate expectations.<sup>52</sup>

## 2.4. The Need to Strike a Balance

Determining which of these two principles prevails in a given case of changed circumstances depends on the strength of the *pacta* principle in the relevant jurisdiction and the willingness of courts, doctrine and parties<sup>53</sup> alike to accept equitable exceptions to the rule. In international or transnational contract law, equitable exceptions to the *pacta* principle in the form of various *force majeure* and hardship doctrines have long since been accepted.<sup>54</sup> To varying

---

1989, 117 JDI (Clunet) 1056 (1990) ("[a]nother principle, albeit with a reduced degree of generality because it only concerns the execution of contracts, is formulated by the maxim '*pacta sunt servanda*'. The respect for this rule requires parties to execute their contractual undertakings. However, the modalities of [the parties' execution of their contractual undertakings] are not indicated [by this general rule]. It is the preceding principle [of good faith] which provides this precision in a way that one can merge both principles into one when it comes to the performance of a contractual obligation: '*pacta sunt servanda bona fide*'" at 1061); see also Accaoui Lorfing, *supra* note 5, at 110; Horn, *supra* note 40 (long-term contract as a "cooperation program" at 1204); see generally, Kotuby & Sobota, *supra* note 39 at 91.

50 See generally Stewart Macaulay, "Non-Contractual Relations in Business: A Preliminary Study" (1963) 28:1 American Sociological Review 55 at 55; see generally Ian Macneil, *The New social contract: An inquiry into Modern Contractual Relations* (New Haven: Yale University Press 1980); Ian Macneil, "Contracting Worlds and Essential Contract Theory" (2000) 9:3 Soc & Leg Stud 431 at 432.

51 Nagla Nassar, *Sanctity of Contracts Revisited: A study in the Theory and Practice of Long-term International Commercial Transactions* (Leiden: Martinus Nijhoff, 1994) at 21; see also Accaoui Lorfing, "La renégociation des contrats internationaux", *supra* note 5 (who refers to the standard of "tolérance contractuelle", i.e. the behaviour and state of mind that can be expected from reasonable contract parties, which may, in the presence of changed circumstances, lead to a mode of contract performance which is "reasonably different" from the one agreed upon in the contract at 29, 33ff).

52 Pédamon & Chuah, *supra* note 36 at 36.

53 Nigel Blackaby et al, *Redfern and Hunter on International Arbitration*, 6th ed (Oxford: Oxford University Press, 2015) at para 9.68 (pointing out that the increasing competitive environment of international business makes it often difficult for parties to agree on contract adaptation or accept third-party intervention).

54 See generally, David Rivkin, "Lex Mercatoria and Force Majeure" in Emmanuel Gaillard, ed, *Transnational Rules in International Commercial Arbitration* (Paris: ICC, 1993) at 161.

degrees, both doctrines have become disconnected from the diverse pattern of national legal systems and become part of transnational contract law.<sup>55</sup>

### 3. Confusion between the *force majeure* and hardship doctrines

In both practice and theory, the doctrines of *force majeure* and hardship are sometimes not properly distinguished.<sup>56</sup> There are many reasons for this confusion, which are to be found at all levels of the analysis of these two doctrines.

From a practical perspective, there is a distinction between *force majeure* and hardship doctrines and *force majeure* and hardship clauses<sup>57</sup> in a contract. For example, the doctrines of *force majeure* and hardship are based on different rationales – one on impossibility and the other on changed circumstances – and are distinguishable in most cases. *Force majeure* and hardship clauses in contracts on the other hand have largely developed in practice to be understood as rather indistinguishable. Accordingly, when *force majeure* and hardship clauses are both provided for in a contract, their relationship and overlap is often unclear because they are so frequently understood to operate in the same way.<sup>58</sup> This could be explained by the fact that the common law legal tradition, which has a significant influence on international contracting, does not distinguish between a *force majeure* and a hardship clause in a contract.<sup>59</sup> Also, both *force majeure* and hardship clauses are similar in their purpose: to provide excuse when unforeseen scenarios interrupt performance under a contract.

An example where confusion still persists between the doctrines is in the UN Convention on Contracts for the International Sale of Goods (CISG). The

---

<sup>55</sup> Brunner, “Force Majeure and Hardship”, *supra* note 31 at 4ff.

<sup>56</sup> See also Accaoui Lorfing, “La renégociation des contrats internationaux”, *supra* note 5 at 64ff; *Buyer (Switzerland) v Seller (Kosovo)*, ICC Case No 16369, 2011, 39 YB Comm Arb 169 (2014) (“[c]ommercial practice, in particular in cases where sophisticated legal advice is not available or has not been retained, does not always neatly distinguish between the fundamentally different concepts [of *force majeure* and hardship]” at 202).

<sup>57</sup> See Section 4.3, below.

<sup>58</sup> Michael Furnston, “Drafting of Force Majeure Clauses: Some General Guidelines”, in Ewan McKendrick, ed, *Force Majeure and Frustration of Contract*, 2nd ed (London: Lloyd’s of London Press, 1995) 57 (“[p]erhaps the most important question is the relationship between force majeure and hardship where both clauses exist in the same contract. Are the clauses mutually exclusive? If not, in which order should they be applied? At present, there are no clear answers to these difficult questions” at 58); Phillippe Kahn, “Lex Mercatoria’ et Pratique des Contrats Internationaux, in *Le Contrat Economique International* (Paris-Brussels: Bruylant, 1975) 200 at 205.

<sup>59</sup> Yildirim, *supra* note 36 (neither *force majeure* nor hardship are recognized doctrines in English law. However, contractual *force majeure* and hardship clauses are understood and applied by the English courts at 89).

proponents of the theory of the “last limit of economic sacrifice”<sup>60</sup> under Art. 79 CISG submit that in extreme cases of insurmountable economic impediments – a typical hardship scenario – a party must be excused from performance under the *force majeure* provision of Art. 79 CISG, provided that party is faced with “genuinely unexpected and radically changed circumstances in truly exceptional cases”.<sup>61</sup> Hence, the requirement for excusing performance under *force majeure* is conflated with that of hardship. Similarly, the drafters of the UPICC argue that “there may be factual situations which can at the same time be considered as cases of hardship and of *force majeure*”.<sup>62</sup> For that reason, it is argued that “the concept of hardship may be considered as a particular case of the *force majeure* exemption, although given its distinctive features it is treated as a category of its own”.<sup>63</sup> A similar situation is also reflected in the mixed (“hybrid”<sup>64</sup>) jurisdiction of the US state of Louisiana. Suggestions have been made there “to expand its law beyond the *force*

---

60 Klaus Peter Berger, *Private Dispute Resolution in International Business: Negotiation, Mediation, Arbitration*, vol 2, 3rd ed (Kluwer Law International, 2015) at 536; Brunner, “Rules on Force Majeure”, *supra* note 18 at 90; Brunner “Force Majeure and Hardship”, *supra* note 31 (“[t]he prevailing view by now accepts that the force majeure excuse as reflected in Art. 79 CISG not only applies to cases of physical or factual impossibility, but also to situations where performance has become excessively onerous (but not merely more onerous) for the obligor” at 213); Hof van Cassatie [Court of Cassation], 19 June 2009, Arr Cas 2009 1736 (Belgium); Marcel Fontaine, “The Evolution of the Rules on Hardship”, in Fabio Bortolotti & Dorothy Ufot, eds, *Hardship and Force Majeure in International Commercial Contracts: Dealing with Unforeseen Events in a Changing World* (Alphen upon Rhine: Kluwer Law International, 2018) 11 at para 18; see generally Anna Veneziano, “UNIDROIT Principles and CISG: Change of Circumstances and Duty to Renegotiate according to the Belgian Supreme Court” (2010) 15:1 *Unif L Rev* 137; ICC Case No 16369, *supra* note 56 at 202; Ingeborg Schwenzer, “Force Majeure and Hardship in International Sales Contracts” (2008) 39:4 *VUWLR* 709 (“[i]f one were to hold otherwise, unification of the law of sales would be undermined in a very important area” at 713); Rolf Herber & Beate Czerwenka, *Internationales Kaufrecht: Kommentar zu dem Übereinkommen der Vereinten Nationen vom 11. April 1980 über Verträge über den internationalen Warenkauf*, 2nd ed (Munich: CH Beck, 1991) Art. 79 at para 8; John Honnold, *Uniform Law for International Sales Under the 1980 United Nations Convention*, 3rd ed by Harry Flechtner (The Hague: Kluwer Law International, 2009) at paras 432.2, 442; Karl Neumayer et al, *Convention de Vienne sur les Contrats de Vente Internationale de Marchandises* (Lausanne: Centre du Droit de L’Entreprise, 1993) Art. 79 at para 14.

61 Alejandro M Garro, “*Exemption of Liability for Damages under Article 79 of the CISG*”, CISG-AC Opinion No 7 on Article 79 of the CISG (2007) at para 37; Brunner, “Rules on Force Majeure”, *supra* note 18 (“a very extraordinary depreciation of money occurs or the seller’s delivery, acquisition or production costs increase to such an extent that a case of economic impossibility has occurred” at 90).

62 UNIDROIT *Principles of International Commercial Contracts*, 2017, Art 6.2.2, Comment No 6.

63 Brunner, “Force Majeure and Hardship”, *supra* note 31 at 533; see also Yildirim, *supra* note 36 (“hardship is regarded as a lower degree of force majeure” at 89).

64 See generally Sue Farran & Esin Örücu, *A Study of Mixed Legal Systems: Endangered, Entrenched or Blended* (Farnham: Ashgate Publishing, 2014).

*majeure* doctrine into cases of impracticability, *imprévision*, and hardship [by] injecting a good faith analysis into *force majeure* cases”.<sup>65</sup>

## 4. Force majeure

*Force majeure* (“*vis major*” in Latin) is sometimes translated in English as “Act of God”, but literally translates to “superior force”. The *force majeure* doctrine relates to supervening unforeseen events that make performance impossible. It covers cases of subsequent impossibility, i.e. external supervening events occurring after contract formation, that are beyond the control of the aggrieved party such as fires, floods, droughts, earthquakes, civil riots, terrorist attacks, etc.,<sup>66</sup> which render the performance of a party’s contractual obligations not just excessively onerous as in hardship-type situations,<sup>67</sup> but impossible, whether on a temporary or permanent basis.<sup>68</sup>

The COVID-19 pandemic appears as a classical example for such an event. However, it is important to distinguish between the general evaluation of the pandemic from a political, socio-economic or health-related standpoint, for example by medical researchers, politicians, governments and public authorities and international organizations, and the *legal* qualification of a COVID-19 related situation as a *force majeure* event.

On 30 January 2020, the Director-General of the World Health Organization (WHO) declared that the outbreak of COVID-19 constitutes a

---

65 Christopher R Handy, “No Act of God Necessary: Expanding beyond Louisiana’s Force Majeure Doctrine to Imprevision” (2018) 79:1 La L Rev 241 at 243, 254; see also Charles Tabor, “Dusting Off the Code: Using History to Find Equity in Louisiana Contract Law” (2008) 68:2 La L Rev 549 at 567ff.

66 See the non-exhaustive list of *force majeure* events in “Force Majeure TransLex-Principle VI 3” at VI 3 (c), online: *TransLex Law Research* <[www.trans-lex.org/944000](http://www.trans-lex.org/944000)>.

67 See Section 5, below.

68 See e.g. *Thames Valley Power Ltd v Total Gas & Power Ltd*, [2005] EWHC Comm 2208 (“[t]he force majeure event has to have caused Total to be unable to carry out its obligations under the GSA. Total’s obligation under the GSA is to supply, ie to make physical delivery of, gas in accordance with the conditions. These include provisions in respect of a nominated amount of consumption by the customer for each of the contract years, and a maximum consumption in any one day. Total is unable to carry out that obligation if some event has occurred as a result of which it cannot do that. The fact that it is much more expensive, even very greatly more expensive for it to do so, does not mean that it cannot do so. To interpret clause 15 as applicable in circumstances where performance is ‘commercially impractical’ or Total is ‘commercially unable’ to supply is to enforce a qualification highly uncertain in ambit and open ended in reach which is neither necessary nor obvious and which is inconsistent with the express terms of the [contract]” at para 48); see also Cheng, *supra* note 39 (quoting the Rumano-Turkish Arbitral Tribunal in the case of Michel Maeri (1928): “It is axiomatic that force majeure, in order to release a person from his obligation, must be of such a nature as to make it impossible for him to fulfil the obligation to which he is subject. It does not suffice that the alleged *casus fortuitus*, without preventing the fulfilment of the obligation, merely makes it more onerous” at 227); see also Filali Osman & Éric Loquin, *Les Principes Généraux de La Lex Mercatoria* (PhD Thesis, 1991) (Paris: Librairie Générale de Droit et de Jurisprudence,

“Public Health Emergency of International Concern” (PHEIC)<sup>69</sup>. He advised that “all countries should be prepared for containment, including active surveillance, early detection, isolation and case management, contact tracing and prevention of onward spread of 2019-nCoV infection, and to share full data with WHO”.<sup>70</sup> This is exactly what happened on a global scale in the subsequent months.

In spite of this global reach and profound impact that the COVID-19 pandemic will have on international contracts, the question whether a *force majeure* event does in fact exist in these circumstances remains a legal issue. Once a dispute has arisen between contractual parties, it has to be determined by a court or arbitral tribunal in each individual case.<sup>71</sup>

Typically, the *force majeure* event is not the pandemic as such, but the factual or legal effects of the public health crisis. Factual effects may involve illness or quarantine or even death of key personnel, production facility closures, or interruption of supply chains.<sup>72</sup> Legal effects relate to lockdowns, curfews, travel restrictions and other measures by governments and public authorities which are issued *in reaction* to the crisis.<sup>73</sup>

---

1992) at 162; Pascale Accaoui Lorfing, “L’article 1195 du Code Civil français ou la révision pour imprévision en droit privé français à la lumière du droit comparé” (2018), 5 IBLJ 449 at 450 [Accaoui Lorfing, “L’article 1195 du Code Civil”]; Heinich, *supra* note 14 at 612.

69 World Health Organization, *International Health Regulations (2005)*, Switzerland: 2008, Art. 1 (defines the term PHEIC as “an extraordinary event which is determined, as provided in these regulations to constitute a public health risk to other States through the international spread of disease and to potentially require a coordinated international response” at 9).

70 International Health Regulations Emergency Committee, *Statement on the Second Meeting of the International Health Regulations Regarding the Outbreak of the Novel Coronavirus*, (January 30 2020), 19-nCov, online: WHO <[https://www.who.int/news-room/detail/30-01-2020-statement-on-the-second-meeting-of-the-international-health-regulations-\(2005\)-emergency-committee-regarding-the-outbreak-of-novel-coronavirus-\(2019-ncov\)](https://www.who.int/news-room/detail/30-01-2020-statement-on-the-second-meeting-of-the-international-health-regulations-(2005)-emergency-committee-regarding-the-outbreak-of-novel-coronavirus-(2019-ncov))>.

71 See Weller et al, *supra* note 4 (emphasizing that even though the COVID-19 crisis has the “potential for a new textbook example” of *force majeure*, a case-by-case instead of a sweeping evaluation of the COVID-19 situation is required and no party should be burdened with the Corona risk on a systematic basis at 1021); Eric Wagner et al, “Auswirkungen von COVID-19 auf Lieferverträge”, *Betriebs-Berater* (2020) 845 at 847; see also Heinich, *supra* note 14 at 612 (for a similar view in French law).

72 See UK Cabinet Office, *supra* note 11 (“[i]t is recognised that parties to some contracts may find it difficult or impossible to perform those contracts in accordance with their agreed terms as a result of the impact of Covid-19 – including through illness in the workforce, the effects of restrictions on movement of people and goods, revised ways of working necessary to protect health and safety, the closure of businesses or the reduction in a party’s financial resources available to make payments otherwise due under the contractual arrangements” at para 12).

73 High Court of Delhi, *Halliburton Offshore Services Inc v Vendanta Ltd & ANR*, OMP (I) (Comm) & IA 3697/2020 (“[t]he countrywide lockdown, which came into place on 24th March, 2020 was, in my opinion, prima facie in the nature of force majeure. Such a lockdown is unprecedented, and was incapable of having been predicted either by the respondent or by the petitioner” at para 20); *In re Hitz Restaurant Group*, No BR 20 B 05012, 2020 WL 2924523 (Bankr ND Ill June 3, 2020) (for the effects of an executive order caused by the COVID-19 pandemic when the *force majeure* clause in the contract relates to “governmental



Neither the declaration of the WHO Director-General of 30 January 2020<sup>74</sup> nor *force majeure* certificates issued by public authorities, like the one issued by the Chinese CCPIT,<sup>75</sup> in and of themselves would be tantamount to a legal *force majeure* determination.<sup>76</sup> The Chinese certificates may be considered as providing an indicative effect for the factual existence of *force majeure* in that country. As such, they may be binding for the Chinese court's interpretation of domestic *force majeure* provisions in Art. 117 of the PRC's Contract Law (中国《合同法》<sup>77</sup> and Art. 180 of its General Provisions of the Civil Law (民法总则)<sup>78</sup> due to the lack of separation of powers between the executive branch and the judiciary.<sup>79</sup> They may not, however, prejudice a domestic court's or international arbitral tribunal's<sup>80</sup> factual evaluation of

---

actions" and "orders of government" at 2) [*Hitz Restaurant Group*]; see also Heinrich, *supra* note 14 at 612; Wagner et al, *supra* note 71 at 846; Ludovic Landivaux, "Contrats et coronavirus: un cas de force majeure? Ça dépend...", *Dalloz Actualité* (20 March 2020).

74 Heinrich, *supra* note 14 at 612; see e.g. for the qualification of a public decree preventing construction activities and making construction work on site impossible as a *force majeure* event under the FIDIC contracts Memorandum from International Federation of Consulting Engineers, "FIDIC COVID-19 Guidance Memorandum to Users of FIDIC Standard Forms of Works Contract" (April 2020), online: <<https://www.fidic.org/sites/default/files/COVID%2019%20Guidance%20Memorandum%20-%20PDF.pdf>> at 8 ("COVID-19 may possibly fit the bill of being a Force Majeure or an Exceptional Event, owing to the local authorities/government ban on construction activities. But for such a ban, a Force Majeure/Exceptional Event may still be argued, although the most problematic part of the test appears to be whether a Party 'could not reasonably have avoided or overcome' the event, as it can be argued that the implementation of the relevant health and safety measures may make it possible to overcome the said COVID-19 event" at 8).

75 See CCPIT, *supra* note 7.

76 Brunner "Force Majeure and Hardship", *supra* note 31 at 263 (for acts of public authorities as *force majeure* events).

77 See Contract Law of the People's Republic of China, Art 117 (1999), online (pdf): <<https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/52923/108022/F1916937257/CHN52923%20Eng.pdf>> ("[i]f a contract cannot be fulfilled due to force majeure, the obligations may be exempted in whole or in part depending on the impact of the force majeure, unless laws provide otherwise. If the force majeure occurs after a delayed fulfillment, the obligations of the party concerned may not be exempted. Force majeure as used herein means objective situations which cannot be foreseen, avoided or overcome" at 16); but see Art 1260 PRC's Civil Code (China) (the Contract Law of the People's Republic of China will be replaced by the new PRC's Civil Code which was promulgated on May 28, 2020 and will enter into force on January 1, 2021).

78 Art 180 General Provisions of the Civil Law of the PRC (China); but see Art 1260 PRC's Civil Code (China) (the General Provisions of the Civil Law of the PRC will be replaced by the new PRC's Civil Code which was promulgated on May 28, 2020 and will enter into force on January 1, 2021); *Guiding Opinions of the Supreme People's Court on Several Issues Concerning the Legally and Properly Conduct of Proceedings in Civil Cases Pertinent to the COVID-19 Epidemic* (1) (2020) *Zuigao Renmin Fayuan Gongbao*, para 2 (in which it stressed the need for a strict application of the mentioned statutory provisions to COVID-19 scenarios and emphasized that the burden of proof is on the party invoking these defenses).

79 See World Justice Project, "WJP Rule of Law Index" (2020), online: *World Justice Project* <[worldjusticeproject.org/rule-of-law-index/factors/2020/China/Civil%20Justice/](http://worldjusticeproject.org/rule-of-law-index/factors/2020/China/Civil%20Justice/)> (128 countries were surveyed for the 2020 World Justice Project Rule of Law Index. Among these, China ranks 122 with regards to governmental interference in civil court proceedings).

80 For examples of arbitral awards in which international arbitral tribunals had to determine the effects of orders and measures of governments or public authorities as *force majeure*

the COVID-19 situation in a given case, if that court or tribunal sits outside China.<sup>81</sup>

Both the strict distinction between the outbreak of the COVID-19 pandemic on the one hand and its factual or legal consequences on the other as well as the limited effect of declarations, certificates or similar statements by governments or public authorities are important to prevent misuse of the *force majeure* defense. They help to fight a tactic sometimes called “*price majeure*”<sup>82</sup>, i.e. attempts to renegotiate an unfavorable contractual bargain without the existence of an actual *force majeure* scenario under the guise of a well-accepted legal principle.

In the next section, both national and transnational contexts will provide the basis for explaining how the *force majeure* doctrine developed in certain jurisdictions. While the term used today originates in the French Civil Code, *force majeure* is a doctrine which appears in almost every jurisdiction in the world in some form and which has also emerged in contemporary transnational law and practice. In fact, the use of the term *force majeure* is so prolific that even in the extremely limited jurisdictions where *force majeure* is not recognized as a doctrine incorporated into its contract law (i.e. England and Wales), courts are still capable of applying contractual *force majeure* clauses in contracts – and do so frequently.

## 4.1. France

The notion of *force majeure* in its modern formulations – both as a contractual clause and as a part of the body of law in numerous jurisdictions – derives from the drafters of the French Civil Code (*Code Napoléon* or *Code Civil*) of 1804, who included *force majeure* as an excuse to contractual performance.<sup>83</sup> For historic reasons and because of the idiosyncratic influences of some of the drafters of the *Code Napoléon*, only part of the Roman law doctrine of impossibility and none of the Canon law doctrine of

---

situations see *National Oil Corp v Libyan Sun Oil Company*, ICC Case No 4462, 1987, 16 YB Comm Arb 5 (1991); Klaus Peter Berger & Olivia Johanna Erdelyi, “Force Majeure in International Contract Law: a comment on *National Oil Corporation v Sun Oil*” in P Wautelet, et al, eds, *The Practice of Arbitration: essays in honour of Hans van Houtte* (Oxford: Hart Publishing, 2012) 61; 1. *Gujarat State Petroleum Corp Ltd*, 2. *Alkor Petroo Ltd*, 3. *Western Drilling Contractor's Private Ltd v 1. Republic of Yemen*, 2. *The Yemeni Ministry of Oil & Minerals*, ICC Case No 19299, 2015, Final Award [*Gujarat State Petroleum*]; see for a blend of political, economic and natural events ICC Case No 8873, 1997, 125 JDI (Clunet) 1017 (1998).

<sup>81</sup> Vie Publique, *supra* note 9 (see for the comparable declaration of the French Ministry of Economy of 28 February 2020); Heinich, *supra* note 14 at 612 (“it is not for the government to substitute the judge and to determine for all contracts what can and what cannot be considered a case of force majeure” [translation by the authors] at 612).

<sup>82</sup> *The Economist*, *supra* note 6.

<sup>83</sup> See James Gordley, “Impossibility and Changed and Unforeseen Circumstances” (2004) 52:3 Am J Comp L 513 at 517.

changed circumstances were included.<sup>84</sup> The drafters of the *Code Napoléon* borrowed almost exclusively from the developed legal doctrines of the Northern Natural school.<sup>85</sup> As such, they surely would have known about the doctrine of changed circumstances and the two Roman law rules on impossibility. However, they included only subsequent impossibility in the French Civil Code.

Before the comprehensive reform of its contract law in 2016, Art. 1148 of the French Civil Code stated that *force majeure* exonerates a party from paying damages who had not fulfilled an obligation:

There is no occasion for any damages where a debtor was prevented from transferring or from doing that to which he was bound, or did what was forbidden to him, by reason of *force majeure* or of a fortuitous event.<sup>86</sup>

While the French Civil Code has always contained a provision on the legal consequences of *force majeure*, the drafters of the French Civil Code had not felt it necessary to provide any definition of *force majeure*. One may wonder why the country with one of the earliest codifications of private law and in whose language the legal principle is expressed, waited more than 200 years for a definition of the term. The answer lies in the drafting history of the Code Napoléon: it contained only very few definitions. According to one of its principal drafters, *Portalis* – a lawyer and member of the French State Council –, the French Civil Code was supposed to be “pragmatic, rather than dogmatic”, allowing neither for an “excessive simplification”, nor for a “casuistic legislative approach”.<sup>87</sup>

Over the past two centuries, however, the need for a precise definition arose, but the French courts were unable to develop a general definition of *force majeure* without any guidance in the Civil Code.<sup>88</sup> It was not until 2016 that the French legislature finally ended this state of uncertainty by inserting a new Art. 1218 in the Civil Code which contains a precise definition of *force majeure*:

In contractual matters, there is *force majeure* where an event beyond the control of the debtor, which could not reasonably have been foreseen at the time of the conclusion of the contract and whose effects could not be

---

84 See James Gordley & Arthur Taylor Von Mehren, *An Introduction to the Comparative Study of Private Law Readings, Cases, Materials* (Cambridge: Cambridge University Press, 2006) at 504.

85 See *ibid.*

86 Art 1148 C civ (1804) [translation by the authors].

87 See François Geny, *La Technique législative dans la Codification civile moderne: a propos du Centenaire du Code civil* (Paris: A. Rousseau, 1904) at 1005ff; Walther Hug, “Gesetzesflut und Rechtssetzungslehre” in Ulrich Klug, et al, eds, *Gesetzgebungstheorie, Juristische Logik, Zivil- und Prozeßrecht – Gedächtnisschrift für Jürgen Rödig* (Berlin: Springer, 1978) 3 at 11.

88 See Morgane Cauvin, “Das Leistungsstörungenrecht des französischen Code civil nach der Vertragsrechtsreform 2016” (Doctoral Dissertation, Cologne University, 2020) at 252.

avoided by appropriate measures, prevents performance of his obligation by the debtor.

If the prevention is temporary, performance of the obligation is suspended unless the delay which results justifies termination of the contract. If the prevention is permanent, the contract is terminated by operation of law and the parties are discharged from their obligations under the conditions provided by articles 1351 and 1351-1 [dealing with impossibility of performance].<sup>89</sup>

Natural disasters do not automatically qualify as *force majeure* events under French law.<sup>90</sup> Even though the French courts are very restrictive in accepting even severe diseases as instances of *force majeure*,<sup>91</sup> non-performance based on the effects<sup>92</sup> of extraordinary and systemic events such as the COVID-19 pandemic are considered as falling squarely under the *force majeure* doctrine in French law.<sup>93</sup>

---

<sup>89</sup> Art 1218 C civ, translated in Cartwright, et al, “The Law of Contract, the General Regime of Obligations, and Proof of Obligations: The new provisions of the *Code Civil* created by *Ordonnance n° 2016-131* of 10 February 2016 translated into English”, online: <[www.textes.justice.gouv.fr/art\\_pix/THE-LAW-OF-CONTRACT-2-5-16.pdf](http://www.textes.justice.gouv.fr/art_pix/THE-LAW-OF-CONTRACT-2-5-16.pdf)>.

<sup>90</sup> See Fabrice Leduc, « Catastrophe naturelle et force majeure » (1997) 2 R générale du droit des assurances 409 at 409.

<sup>91</sup> See two French court judgments (CA Basse-Terre, 17 December 2018, *Sasu Hotel Guanahani & Spa c AJ, et al*, No 17/00739; CA Nancy, 22 November 2010, *Comité d'entreprise clinique de traumatologie et d'orthopédie c SA Pret a Partir*, No 09/00003) have refused to qualify the chikungunya virus on the island Saint-Barthélemy in 2013–2014 and the dengue fever on the island of Martinique as *force majeure* due to their relatively mild and non-lethal consequences and local limitation; see also Heinich, *supra* note 14; the plague and the influenza H1N1 of 2009 have likewise not been qualified as *force majeure* events by the French courts, see CA Paris, 25 September 1998, *Chretien et Marcel c STE TMR France et Compagnie d'Assurances UAP*, No 1996/08159; CA Besançon, 8 January 2014, *SARL Application Technique du Nettoyage ATN 25 c SARL RD*, No 12/0229.

<sup>92</sup> See Section 4, above.

<sup>93</sup> See Tribunal de Commerce de Paris, 20 May 2020, *SA Total Direct Energie v. SA Electricité de France and SA RTE Réseau de Transport d'Electricité*, RG 2020016407 (emphasizing the need to examine the effects caused by the COVID-19 pandemic in each individual case and holding that “based on the evidence, the spreading of the [COVID-19] virus has an external effect on the parties which is irresistible and was unforeseeable” leading the court to hold that based on the facts of the case “the conditions of *force majeure* as defined in the [force majeure clause] of Art. 10 (1) of the framework agreement [a model contract provided by the regulating authority] are clearly met” [translation by the authors] at 10–11); but see the case note “La décision de référé Direct Energie/EDF du 20 mai 2020: une compétence discutable du juge des référés, une *force majeure* étendue controversée et incertaine”, online: <https://www.vogel-vogel.com/la-decision-de-refere-direct-energie-edf-du-20-mai-2020-une-competence-discutable-du-juge-des-referes-une-force-majeure-etendue-controversee-et-incertaine/> (which cautions that because the (summary) judgement is based on a contractual *force majeure* clause it is not possible to derive from it the conclusion that the pandemic is necessarily irresistible in a general fashion as required by French law); see for a view confirming that the effects of the pandemic fall squarely under the French *force majeure* doctrine, Pascale Guiomard, “La grippe, les épidémies et la *force majeure* en dix arrêts”, *Dalloz Actualité* (4 March 2020).

The consequences of *force majeure* depend on whether the impediment is temporary or permanent. In case of a temporary impediment, performance of the obligation is suspended unless the resulting delay justifies termination of the contract. This may apply in many cases regarding the consequences of the COVID-19 pandemic, for example if the production of the sold goods can be resumed after the end of the effects of the pandemic on business life, unless the nature of the performance is such that catching up on it at a later date makes no sense for the buyer.<sup>94</sup> In case of a permanent impediment, both the obligor and the other party are freed from their obligation to perform (“*effet libératoire*”), unless the aggrieved party has assumed the risk for the *force majeure* event.<sup>95</sup> The debtor’s exoneration is provided for in Art. 1221 of the French Civil Code for his primary contractual obligation to perform in kind and in Art. 1231(1) for his secondary duty to pay damages for non-performance.<sup>96</sup> Under the pre-2016 law, the French courts held the view that in the case of a permanent impediment, the contract would not be terminated (“*effet résolutoire*”) *ipso iure*, but only through a court judgement.<sup>97</sup> Art. 1218(2) of the French Civil Code makes it clear that under the new 2016 law, the contract is terminated by operation of law (“*résolution de plein droit*”) in the case of a permanent impediment.

## 4.2. Other domestic jurisdictions: three different doctrines, one underlying rationale

Looking at other jurisdictions, one can determine three different approaches that are variations on *force majeure* doctrines, but with some hardship-type justifications: “subsequent impossibility”, “frustration” and “impracticability”. While the use of different terminology seems to imply clear-cut dogmatic concepts and distinctions from the hardship doctrine, the reality looks different. The three doctrines examined in the next section

---

94 Heinich, *supra* note 14 at 613; Landivaux, *supra* note 73.

95 See Fabrice Gréau, “Force majeure” in *Répertoire de droit civil* (Paris: Dalloz, 2017) at para 94; see Art 1351 C Civ (the exception in cases of risk assumption is provided for in Art. 1351 C Civ; pursuant to that provision, the debtor may also invoke *force majeure* if the creditor has previously provided him with a notice to perform).

96 See Pascal Ancel, “Impossibilité et force majeure: un éclairage du droit allemand sur le nouveau droit français des obligations” in Michel Storck, ed, *Mélanges en l’honneur du Professeur Claude Witz* (Paris: LexisNexis 2018) at 25, 33, 37ff; Gaël Chantepie & Mathias Latina, *Le nouveau droit des obligations commentaire théorique et pratique de l’ordre du Code civil*, 2nd ed (Dalloz, 2018) at para. 677; see “Libération par l’effet de la force majeure” in Bertrand Fages, ed, *Le Lamy Droit du Contrat* (Alphen upon Rhine: Wolters Kluwer, 2018) at para 2033; see Gréau, *supra* note 95 at paras 87–93.

97 See e.g. Cass civ, 14 April 1891, Bull civ No 55; Cass civ 1re, 2 June 1982, Bull civ I, No 81-10.158; Cass civ 1re, 13 November 2014, No 13-24.633; Cass civ 1re, 8 June 2016, No 15-18.929; Paul-Henri Antonmattei, *Contribution à l’étude de la force majeure* (Paris: Librairie générale de droit et de jurisprudence, 1992) at para 234.

are attempts at finding solutions to problems in jurisdictions that did not or could not recognize certain historical doctrines into their respective legal systems.

For instance, the US, and to a much lesser extent England, have created or modified impossibility doctrines so as to provide a means to excuse non-performance in situations where performance remains technically possible but would be excessively onerous. One of the reasons for this is that common law jurisdictions did not recognize the Canon law doctrine of changed circumstances and never developed a hardship doctrine. The primary reason for this relates to the incapacity of the common law doctrine of consideration to explain why performance should be excused when a change in the circumstances existing at the time of contracting has caused the foundation or purpose of the obligation to be transformed or destroyed.<sup>98</sup>

Thus, the doctrine of impossibility has been used – almost exclusively in jurisdictions where no doctrine on changed circumstances emerged (the US and to a much lesser extent England, as well as France) – to excuse parties to excessively onerous contracts from performance. These attempts are theoretically problematic, but they nevertheless persist and continue to confuse:

Frustration is not the equivalent of *force majeure* or *Unmöglichkeit* [impossibility] nor is *force majeure Unmöglichkeit*; even *force majeure* under Belgian law is not *force majeure* under French law.<sup>99</sup>

### 4.2.1. The impossibility doctrine

Many of the major jurisdictions of the world recognize some form of an impossibility doctrine tracing its roots to Roman law.<sup>100</sup> This doctrine was derived from the well-known legal principle of Roman law that there is no legal obligation to the impossible (“*impossibilium nulla obligatio est*”).<sup>101</sup> However, excuse from performing the impossible could occur at different times and the Roman law thus had two doctrines on impossibility: initial and

<sup>98</sup> *National Carriers v Panalpina Ltd*, [1981] 1 AC 675 at 688 [*National Carriers*].

<sup>99</sup> Alfons Puelinckx, “Frustration, Hardship, Force Majeure, Imprévision, Wegfall der Geschäftsgrundlage, Unmöglichkeit, Changed Circumstances: A Comparative study in English, French, German and Japanese Law” (1986) 3:2 *J of Intl Arb* 47 at 47; see e.g. Fried, *supra* note 34 (Fried criticizes the doctrines of frustration and impossibility by stating that “though relief is granted in all these cases, confusion begins in the dichotomizing and subdichotomizing. I agree with critics of classical doctrine like Grant Gilmore, who sees there but a single problem” at 58).

<sup>100</sup> See Ole Lando & Hugh Beale, *The Principles of European Contract Law*, combined & revised, (Boston: Kluwer Law International, 1999) at 384, referencing Section 1447 Austrian Civil Code, Section 275 German Civil Code, Arts. 1218, 1256 Italian Civil Code and Art. 790 Portuguese Civil Code.

<sup>101</sup> See Christian Wollschläger, *Die Entstehung der Unmöglichkeitstheorie. Zur Dogmengeschichte des Rechts der Leistungsstörungen* (Cologne: Böhlau, 1970) at 7ff.

subsequent.<sup>102</sup> Initial impossibility of performance required an impossible condition prior to contract formation, while subsequent impossibility required a supervening impossible condition at some point after performance has commenced.

The Roman law doctrines of initial and subsequent impossibility also considered excuse differently under each doctrine. For initial impossibility, there is no obligation to the impossible; an impossible contract is void. However, the doctrine of subsequent impossibility will excuse performance by a party whose obligation has become impossible, only if: a) the party invoking the excuse was not at fault;<sup>103</sup> b) the obligation is either objectively (neither the obligor nor anybody else is able to perform) or subjectively (the obligor is unable to perform, but others could perform) impossible to perform; and c) impossibility (either physical or legal) is absolute. In sum, modern iterations of the doctrine on subsequent impossibility can excuse performance if an unforeseen, supervening event completely outside the control of the parties, which occurs after contract formation, renders performance impossible for the party (subjective) or for everyone else (objective) and the impossibility cannot be attributed to any kind of fault of the obligor, i.e. willful or negligent action or omission causing an impossibility.

Doctrines on initial and subsequent impossibility are common throughout the world. However, there is some variation in the parts recognized: for example, Germany incorporated both initial and subsequent impossibility into its Civil Code; England only recognized initial impossibility at common law (until providing for subsequent impossibility in the first frustration case – discussed below). France, on the other hand, only incorporated subsequent impossibility (as the *force majeure* doctrine and other related French doctrines – discussed above) into the French Civil Code.

#### 4.2.2. Frustration

In England, the common law only recognized initial impossibility. By not recognizing subsequent impossibility or a doctrine of changed circumstances, England – like most common law jurisdictions – never developed a hardship doctrine. Instead, the English courts would develop a doctrine of frustration, which incorporates three sub-doctrines: impossibility, frustration of contract and frustration of purpose. Frustration of contract and frustration of purpose will be the focus of this section, which excuses performance where the underlying basis or purpose of the contract is altered, destroyed or made

---

102 Gordley, *supra* note 83 at 514.

103 Modern iterations of the doctrine also require that the party invoking the excuse has not contractually assumed the risk for the events that rendered performance impossible.

useless. Subsequent impossibility is included here because of its recognition in *Taylor v. Caldwell*.<sup>104</sup>

Prior to the mid-1800s, the English common law did not recognize a doctrine of subsequent impossibility. The case of *Paradine v. Jane*<sup>105</sup> stood for the proposition that subsequent impossibility is not an excuse. In 1863, the English courts created a doctrine of subsequent impossibility that laid the ground for a frustration of contract doctrine. In *Taylor v. Caldwell*,<sup>106</sup> the court held that a party confronted with an unforeseen supervening event, not the fault of either party, that rendered performance impossible could be excused if an implied condition disappeared. According to *Blackburn J.*, the implied condition – slightly different than the implied condition discussed in the context of the Canon law doctrine of changed circumstances – is that all contracts have a thing that is essential to it, and that thing must continue to exist throughout performance.<sup>107</sup> If that thing is destroyed by no fault of the party seeking the excuse, then that party can be excused.<sup>108</sup> This implied condition would be read into contracts seeking frustration as an excuse until relatively recently when the House of Lords abandoned the implied condition as a mere legal fiction.<sup>109</sup> That argument is very similar to the criticism raised in Germany against the introduction of the *clausula* principle into the German Civil Code.<sup>110</sup>

*Taylor v. Caldwell* thus established two new doctrines at common law: subsequent impossibility and frustration of contract. According to the holding in that case, a frustration excuse not only required the destruction of the implied condition, it also required impossibility of performance.<sup>111</sup> However, later cases demonstrated that the frustration excuse could succeed even where performance remained possible, but in extremely rare instances.

---

104 *Taylor v Caldwell*, [1863] 122 ER 309 [*Taylor v Caldwell*] (Taylor, a performer, had agreed to rent Caldwell's music hall for four days. Just prior to the first concert, the music hall was accidentally destroyed by fire).

105 *Paradine v Jane*, [1647] 82 ER 897.

106 *Taylor v Caldwell*, *supra* note 104 (“[t]he contract is not to be construed as a positive contract, but as subject to an implied condition that the parties shall be excused in case, before breach, performance becomes impossible from the perishing of the thing without default of the contractor” at 312); Ewan McKendrick, “Discharge by Frustration” in Hugh Beale, ed, *Chitty on Contracts*, 33rd ed (London: Sweet and Maxwell, 2018) vol I at para 23-05.

107 See *Taylor v Caldwell*, *supra* note 104 at 314; see also *F.A. Tamplin S.S. Co Ltd v Anglo-Mexican Petroleum Products Co Ltd*, [1916] 2 AC 397 at 403.

108 The implied condition in the frustration doctrine is similar to the implied condition first contemplated by *Bartolus* and *Baldus* in the Middle Ages to justify excuse under the Canon law doctrine of changed circumstances, see Section 2.3, above.

109 See *National Carriers*, *supra* note 98 at 687ff; *Denny, Mott & Dickinson Ltd v James B Fraser & Co Ltd*, [1944] AC 265 at 275.

110 See Section 5.2.2, below.

111 *Taylor v Caldwell*, *supra* note 104 (“a condition is implied that the impossibility of performance arising from the perishing of the person or thing shall excuse the performance” at 314).



A well-known early example where performance remained technically possible, but became useless, were the well-known coronation cases, the most prominent being *Krell v. Henry*.<sup>112</sup> That case also expanded the frustration doctrine from an excuse requiring the destruction of the thing essential to the contract (frustration of contract) to also include the non-occurrence of the thing essential to the contract (frustration of the contract's commercial purpose).<sup>113</sup>

Following on from the coronation cases, the next significant case on the frustration doctrine was *Davis Contractors v. Fareham*,<sup>114</sup> where a stricter standard was established requiring that the circumstances must "involve a fundamental or radical change" from the original contractual obligation.<sup>115</sup> That strict and narrow standard still prevails today.<sup>116</sup> The supervening event must have significantly changed the nature (not merely the expense or onerousness) of the outstanding contractual rights and/or obligations from what the parties could reasonably have contemplated at the time of its execution, i.e. "it would be wholly unjust to hold them to the literal sense of its stipulations in the new circumstances".<sup>117</sup> In other words, frustration requires a radical change of the *obligation itself* and not just any radical change in circumstances.<sup>118</sup> The nature and scope of the obligation must be determined through construction of the contract, taking into account its nature and context (the "matrix of facts"), as well as the surrounding circumstances and the parties' knowledge, foresight, assumption and contemplation at the moment of contract conclusion, in particular as to the occurrence of the event and the related distribution of contractual risks.<sup>119</sup> In

---

112 *Krell v. Henry*, [1903] 2 KB 740 (CA) (the defendant agreed to rent an apartment for the purpose of viewing the coronation parade of King Edward VII. When the King became ill and the coronation was postponed, the defendant refused to pay the rent. The court held that the contract could be discharged because "the Coronation procession was the foundation of this contract, and that the non-happening of it prevented the performance of the contract" at 751); see also *Chandler v Webster*, [1904] 1 KB 493; *Blakeley v Muller*, [1903] 2 KB 760; *Clark v Lindsey*, [1903] 88 LT 198; see also for a detailed discussion of these cases from a contemporary perspective *Canary Wharf (BP4) T1 Ltd v European Medicines Agency*, [2019] EWHC 335 (Ch) at paras 35ff, 244ff [*Canary Wharf*].

113 See McKendrick, *supra* note 106 at para 23-033; Guenter Treitel, *Frustration and Force Majeure*, 3rd ed (London: Sweet & Maxwell, 2014) at para 7-001.

114 *Davis Contractors Ltd v Fareham UDC* [1956] AC 696 at 729 [*Davis Contractors*].

115 McKendrick, *supra* note 106 at para 23-012; see also *Davis Contractors*, *supra* note 114 ("frustration occurs whenever the law recognises that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract" at 729).

116 See *Canary Wharf*, *supra* note 112 at para 27; see also *National Carriers*, *supra* note 98 at 688; *Edwinton Commercial Corp v Tsaviris Russ (Worldwide Salvage and Towage) Ltd*, [2007] EWCA Civ 547 at para 110ff [*Edwinton*].

117 *National Carriers*, *supra* note 98 at 700.

118 See McKendrick, *supra* note 106 at para 23-012; see also *Indian company v Pakistani bank*, ICC Case No 1512, 1 YB Comm Arb 128 (1976) at 129 [*Indian company v Pakistani bank*].

119 See *Edwinton*, *supra* note 116 at paras 110ff; *Bunge SA v Kyla Shipping Co Ltd*, [2013]

failing to meet this elevated standard and refusing to discharge the contract, the court in *Davis Contractors* held that the fact that “there had been an unexpected turn of events, which rendered the contract more onerous than had been contemplated, was not a ground for relieving the contractors of the obligation which they had undertaken”.<sup>120</sup>

The frustration doctrine after *Davis Contractors* would be unlikely to succeed in the vast majority of cases. An exception applies in those rare scenarios in which the obligation undertaken in the contract under the circumstances prevailing at the time of its conclusion would, if performed under the changed circumstances, result in a completely different obligation, and that it would require a performance that was excessively onerous or nearly impossible. In other words, “Non haec in foedera veni. It was not this that I promised to do”.<sup>121</sup>

As a consequence of requiring a radical change to the obligation – and similar to the new French law<sup>122</sup> – the frustrated contract is automatically terminated and both parties are released from their obligations from the time of the occurrence of the frustrating event.<sup>123</sup> Sums paid or payable under the contract before termination shall be recoverable or cease to be payable.<sup>124</sup>

Due to this effect of frustration “to kill the contract” and discharge the parties from further liability under it, “the doctrine must not be lightly invoked and must be kept within very narrow limits”.<sup>125</sup> Thus, nearly all attempts at discharging an allegedly frustrated contract have failed in the post-*Davis Contractors* era. For example, the frustration excuse will almost never succeed where performance becomes significantly more costly;<sup>126</sup> or – unlike under the US impracticability doctrine – involves circumstances of inflation or currency fluctuations.<sup>127</sup>

---

EWCA Civ 734 at paras 6ff; McKendrick, *supra* note 106 at paras 23-014, 23-019.

120 *Davis Contractors*, *supra* note 114 at 697.

121 *Ibid* at 729; see also *Canary Wharf*, *supra* note 112 at paras 22, 28ff.

122 See Section 4.1, above.

123 Brunner, “Force Majeure and Hardship”, *supra* note 31 at 90.

124 See *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd*, [1943] AC 32 at paras 67–68; *Law Reform (Frustrated Contracts) Act 1943* (UK), 1943, 6 & 7 Geo VI, s 1(2); McKendrick, *supra* note 106 at para 23-074ff.

125 *J Lauritzen AS v Wijsmüller BV*, [1990] 1 Lloyd’s L Rep 1 at para 8; McKendrick, *supra* note 106 at para 23-007.

126 See *Edwinton*, *supra* note 116 (“the test of ‘radically different’ is important: it tells us that the doctrine is not to be lightly invoked; that mere incidence of expense or delay or onerousness is not sufficient; and that there has to be as it were a break in identity between the contract as provided for and contemplated and its performance in the new circumstances” at para 111).

127 Brunner “Force Majeure and Hardship”, *supra* note 31 at 93; Edwin Peel, *Treitel on the Law of Contract*, 14th ed (London: Sweet & Maxwell, 2015) at paras 19–039ff; see *British Movietone News Ltd v London and District Cinemas*, [1952] AC 166 at 185; *Davis Contractors*, *supra* note 114 at 696.

An example of the English approach to frustration can be found in a series of cases in the 1960s regarding the closure of the Suez Canal and dealing with the question whether contracts affected by that closure could be discharged.<sup>128</sup> In *Tsakiroglou & Co Ltd. v. Noble & Thörl GmbH*, the House of Lords held that while the Canal was closed, the alternative route around the Cape of Good Hope was always available and even though it would be more costly, it was possible and therefore the frustration excuse could not apply.<sup>129</sup> They further held that to succeed, there would have to be a clear indication in the terms of the contract, expressly or impliedly, that the parties contemplated that the impossible method of performance (the Suez Canal) was the *only* method, rather than just *a* method.<sup>130</sup>

The frustration doctrine today looks like an extremely narrow version of a doctrine of changed circumstances with its implied condition. However, it is still far away from the various formulations of the hardship doctrine developed in many civil law jurisdictions around the world. The frustration of contract or frustration of purpose doctrines today require a change in circumstance that modifies or destroys the foundation or the parties' "common purpose"<sup>131</sup> which they pursue with their contract so as to create a radically different obligation that would render performance nearly impossible. An application of the frustration doctrine occurred in 2019 in the case of *Canary Wharf v. European Medicines Agency*,<sup>132</sup> where a lease agreement was alleged to be frustrated following Brexit. The lease was determined not to be frustrated either on the basis of purpose or of supervening illegality, because the supervening event, Brexit, did not frustrate the underlying purpose of the contract, which was to rent headquarter offices in a European Union Member State. This case did not even get close to reaching the high threshold to excuse performance, reinforcing just how seldom a frustration excuse is likely to succeed under English law.

In spite of this exceptional nature of the frustration excuse, effects of or measures taken to combat the COVID-19 pandemic might qualify as such a case under English law in light of its global reach, systemic consequences for

---

128 *Tsakiroglou & Co Ltd v Noble & Thörl GmbH*, [1962] AC 93 [*Tsakiroglou*]; *Société Franco-Tunisienne d'Armement-Tunis v Sidermar SpA*, [1961] 2 QB 278 (Comm); *Albert D Gaon & Co v Societe Interprofessionnelle des Oleagineux Fluides Alimentaires*, [1959] 3 WLR 622 (Comm); *Carapanayoti & Co Ltd v E T Green Ltd*, [1958] 3 WLR 390 (QB).

129 *Tsakiroglou*, *supra* note 128 ("[n]othing was proved or found as to the nature of the goods or other circumstances which would render the route around the Cape unreasonable or impracticable, and this route was at all times available" at 128).

130 *Digwa-Singh*, *supra* note 15 at 325.

131 See *Canary Wharf*, *supra* note 112 ("[f]undamentally, when one seeks to describe what a party promised, one does not recite the individual terms and conditions, but has regard to something much more elemental, that cannot necessarily be captured in the precise terms used by the parties in their contract, but which requires reference to what I will term the parties' 'common purpose'" at para 29).

132 *Canary Wharf*, *supra* note 112.

the global economy, and resulting drastic consequences for the performance of international and domestic contracts. The courts have held contracts to be frustrated because of changes in the law (including exercise of statutory power), supervening illegality, outbreak of war, cancellation of an expected event and abnormal delay outside what the parties could have reasonably contemplated at the time of contracting.<sup>133</sup> It is therefore possible to envisage COVID-19 and consequent governmental actions as potentially falling within one or more of these categories. In particular, where time is of the essence to the performance of the contract, the temporary unavailability of stocks or staff may arguably give rise to a frustrating event. Similarly, governmental restrictions in response to COVID-19 may render the performance of certain obligations illegal. This may potentially give rise to a claim of supervening illegality.

### 4.2.3. Impracticability

It follows from the above that the frustration doctrine was developed in England as a mechanism to deal with both subsequent impossibility and scenarios where the basis of the contract disappears. In the US, a doctrine of commercial impracticability was developed to deal with situations where there are changes to the basic assumption upon which the contract was made rendering performance impracticable.<sup>134</sup> Given the common law reverence of the *pacta* principle, the historic relation between US and English legal systems, and the fact that no doctrine of changed circumstances (as based on the *clausula* principle) emerged in either jurisdiction, the impracticability doctrine would develop in the early twentieth century in the US as something resembling the English frustration doctrine. However, the US would actually also recognize a separate frustration doctrine that is very similar to the impracticability doctrine, but would not be used extensively in practice.

The *Restatement (First) of Contracts* includes a chapter on Impossibility, which is defined in Section 454 as “not only strict impossibility but impracticability because of extreme and unreasonable difficulty, expense, injury or loss involved”.<sup>135</sup> The difference between impracticability and impossibility originates from the case of *Mineral Park v. Howard*. This case

---

<sup>133</sup> See e.g. *Metropolitan Water Board v Dick Kerr* [1918] AC 119 (the court declared a long-term construction contract frustrated and terminated due to an order of the English Ministry of Munitions to cease work on the contract during the war because “the interruption [of performance for the full duration of the war, rendering the prosecution of the works illegal for a period of indefinite duration] is of such a character and duration that it vitally and fundamentally changes the conditions of the contract, and could not possibly have been in the contemplation of the parties to the contract when it was made” at 126).

<sup>134</sup> Melvin Eisenberg, *Foundational Principles of Contract Law* (Oxford: Oxford University Press, 2018) at 625ff; Paula Walter, “Commercial Impracticability in Contracts” (1986) 61 *St John’s L Rev* 225 at 226.

<sup>135</sup> *Restatement (First) of Contracts* §467 (1932).

was decided well before the *Restatement (First) of Contracts* and is the first to deal with impracticability. It is considered to be akin to *Taylor v. Caldwell* in English law. In *Mineral Park v. Howard*, the court held that “a thing is impossible in legal contemplation when it is not practicable; and a thing is impracticable when it can only be done at excessive and unreasonable cost.”<sup>136</sup> Performance can be excused according to Section 467 if acts existing when a bargain is made, or occurring thereafter, make performance of a promise more difficult or expensive than the parties anticipated.<sup>137</sup> Additionally, the *Restatement (First) of Contracts* included Section 288 titled “Frustration of the Object or Effect of the Contract”<sup>138</sup> in an entirely different part of the *Restatement (First) of Contracts*, defining frustration of purpose exactly as the English courts did in *Krell v. Henry*. However, because it was tucked away and unrelated to similar excuses, including no cross-reference to the chapter on Impossibility, the frustration doctrine did not develop in American case law.

The development of a doctrine of impracticability, however, was advanced in American contract law through its incorporation into the Uniform Commercial Code (UCC) Section 2-615, which permits discharge if “performance as agreed has been made impracticable by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made”.<sup>139</sup> The UCC version of the commercial impracticability doctrine requires an assessment of the tacit assumption shared by *both parties* that a given circumstance upon which the contract was made will either persist, occur, or not occur during the contract period (“shared tacit assumption test”<sup>140</sup>). The test is similar to the implied condition found in the English frustration doctrine.<sup>141</sup> Such a common tacit assumption is that an unprecedented scenario such as the one caused by the effects of or by measures taken to combat the COVID-19 pandemic would not occur during the life of the contract. Impracticability under the UCC also requires a change in circumstances that destroys or alters the basic assumption upon which the contract was made.<sup>142</sup> The shared tacit

---

136 *Mineral Park Land Co v Howard*, 172 Cal 289 (1916) at 289.

137 *Restatement (First) of Contracts* §467 (1932).

138 *Restatement (First) of Contracts* §288 (1932).

139 UCC § 2-615 (2002).

140 See the “shared tacit assumption test”: Eisenberg, *supra* note 134 (“[t]acit assumptions are not made explicit, even where they are the basis of a contract, precisely because they are taken for granted. They are so deeply embedded in the minds of the parties that it simply doesn’t occur to the parties to make these assumptions explicit” at 628).

141 See Eisenberg, *supra* note 134 (“[v]ery often, perhaps typically, in such cases, if the parties had addressed the relevant circumstance *ex ante* they would have treated the occurrence or nonoccurrence of the relevant circumstance as a condition to the promisor’s obligation to perform” at 662).

142 See Weller et al, *supra* note 4 (“[m]any parties currently realize that, the world which they assumed when their contract was concluded is not in line with reality, because assumptions

assumption test, however, is always subject to the materiality of the impact of the unexpected circumstance<sup>143</sup> and the assumption of greater liability in the contract itself, or in the circumstances surrounding the conclusion of the contract, including trade usages and the like.<sup>144</sup>

Section 261 of the *Restatement (Second) of Contracts*, which was completed in the 1970s, provides for “Discharge by Supervening Impracticability” in Chapter 11 titled “Impracticability of Performance and Frustration of Purpose” and states the general principle under which a party’s obligation may be discharged due to impracticability:

Where, after a contract is made, a party’s performance is made impracticable without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his duty to render that performance is discharged, unless the language or the circumstances indicate the contrary.<sup>145</sup>

Section 261 essentially does little to modify the test found in UCC Section 2-615, which requires a determination of which party assumed the risk for occurrence of an event (a change in circumstances) that alters the parties’ shared tacit assumption upon which the contract was made,<sup>146</sup> rendering performance impracticable (excessively onerous). Contrary to the *Restatement (First) of Contracts*,<sup>147</sup> neither the UCC nor the *Restatement (Second) of Contracts* explicitly require the supervening event or change in circumstances to be unforeseeable. Therefore, there is some debate as to whether foreseeability is a *sensu strictu* requirement of impracticability<sup>148</sup> or just one factor to be taken into account when determining the contractual risk allocation.<sup>149</sup>

---

on which they have implicitly based their will to contract turn out to be incorrect by the dozen. They range from the expectation to rely on fit-for-work personnel and a global offer of goods to the general freedom of movement. Because these assumptions are so fundamental, the examination of the subjective perceptions of the parties reaches its limits and must be substituted by an abstract perspective” [translation by the authors] at 1021).

143 See Eisenberg, *supra* note 134 at 635.

144 See UCC § 2-615, Comment No 8 (2002); see also *Transatlantic Fin Corp v United States*, 363 F (2nd) 312 (DC Cir 1966) at para 316 [*Transatlantic Fin Corp*]; *Barbarossa & Sons, Inc v Iten Chevrolet, Inc*, 265 NW (2nd) 655 (Minn 1978).

145 *Restatement (Second) of Contracts* § 261 (1981).

146 *United States v Wegematic Corp*, 360 F (2d) 674 (2d Cir 1966) at para 676 [*Wegematic Corp*]; Brunner, “Force Majeure and Hardship”, *supra* note 31 at 99.

147 See *Restatement (First) of Contracts* §454 (1932) (which limited impracticability to situations in which “facts that a promisor had no reason to anticipate . . . render performance of the promise impossible”).

148 *Eastern Air Lines, Inc v Gulf Oil Corp*, 415 F Supp 429 (SD Fla 1975) at 438.

149 *Opera Co of Bos v Wolf Trap Found for Performing Arts*, 817 F (2d) 1094 (4th Cir 1987) at 1100; *Columbian Nat. Title Ins Co v Township Title Serv Inc*, 659 F Supp 796 (D Kan 1987) at 802; *Aluminum Co of America v Essex Group, Inc*, 499 F Supp 53 (WD Pa 1980) (“[i]f it were important to the decision of this case, the Court would hold that . . . foreseeability . . . would not preclude relief under the doctrine of impracticability” at 73); *Transatlantic Fin Corp*, *supra* note 144 (“[f]oreseeability or even recognition of a risk does not necessarily prove

Somewhat oddly, in addition to Section 261 of the *Restatement (Second) of Contracts*, and with no corresponding provision in the UCC, there is a Section 265 in Chapter 11 titled “Discharge by Supervening Frustration” which states the general principle under which a party’s obligation may be discharged due to frustration:

Where, after a contract is made, a party’s principal purpose is substantially frustrated without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his remaining duties to render performance are discharged, unless the language or the circumstances indicate the contrary.<sup>150</sup>

Sections 261 and 265 are not so different from one another. They are both based on a change in circumstances that alters or destroys the basic assumption upon which the contract was made and that either renders performance impracticable or frustrates the purpose of the contract. The underlying rationale for both doctrines is almost identical, and the limited case law in the US on the frustration or purpose doctrine demonstrates a very narrow understanding of what can frustrate a contract: “discharge of a party’s obligations under this doctrine . . . has been limited to situations in which a virtually cataclysmic, wholly unforeseeable event, renders the contract valueless to one party.”<sup>151</sup>

This shows that, similar to the frustration doctrine of English law, the US impracticability doctrine is narrowly construed: “[t]he rationale for the doctrine of impracticability is that the circumstance causing the breach has made performance so vitally different from what was anticipated that the contract cannot reasonably be thought to govern.”<sup>152</sup> Only under rare circumstances<sup>153</sup> and absent an explicit or implicit risk assumption by the aggrieved party could performance be discharged.<sup>154</sup> In the Suez Canal scenario described above, such a risk assumption was assumed by a US court, and the claim for extra costs for a longer journey of the ship around the Cape of Good Hope was therefore denied.<sup>155</sup> Likewise, the risk for the

---

its allocation” at 318); *Centex Corp v Dalton*, 840 SW 2d 952 (Tex 1992); Richard Posner & Andrew Rosenfield, “Impossibility and Related Doctrines in Contract Law: An Economic Analysis” (1977) 6 J Leg Stud 83 at 100.

<sup>150</sup> *Restatement (Second) of Contracts* §265 (1981).

<sup>151</sup> *United States v General Douglas MacArthur Senior Village, Inc*, 508 F (2d) 377 (2nd Cir 1974) at 381.

<sup>152</sup> *Eastern Air Lines, Inc v McDonnell Douglas Corp*, 532 F (2d) (5th Cir 1976) at 957.

<sup>153</sup> See Eisenberg, *supra* note 13 (“contracting parties are more likely to share a tacit assumption that a fact of the present world is certain than to share a tacit assumption concerning the certainty of some aspect of the future world. . . Accordingly, courts may appropriately be more reluctant to give relief in unexpected circumstances cases, which concern future states of the world” at 636).

<sup>154</sup> Allan Farnsworth, *Farnsworth on contracts*, 2nd ed, vol II (Boston: Aspen Law & Business, 1998) at para 9.6.

<sup>155</sup> *Transatlantic Fin Corp*, *supra* note 144 at 318.

functioning of an IT-innovation was held to have been implicitly assumed by the manufacturer.<sup>156</sup> As under English law, the COVID-19 pandemic might be qualified as a case of impracticability because it cannot reasonably be assumed that the contract is to be performed under these exceptional circumstances.

In many cases, the COVID-19 scenario will have rendered performance of the contract impossible. However, the doctrine does not even require performance to be impossible. Rather, excessively onerous performance can also be excused.<sup>157</sup> However, the difficulties that render the performance excessively onerous must be “especially severe and unreasonable”<sup>158</sup> for the impracticability excuse to succeed.<sup>159</sup> Unlike the English frustration doctrine, there have been instances in American case law where the impracticability excuse succeeds without a supervening event, but with a fundamental change in circumstances that rendered performance virtually worthless.<sup>160</sup> Overall, however, the US impracticability doctrine is similar in content to the English frustration doctrine and less restrictive than it; while at the same time being much more restrictive than the type of hardship doctrines developed in civil law jurisdictions.

### 4.3. Transnational contract law

As far as transnational contract law is concerned<sup>161</sup>, the *force majeure* excuse may rightly be characterized as a truly transnational legal principle. For a number of reasons, that principle is part of the “New Lex Mercatoria”.<sup>162</sup>

---

<sup>156</sup> *Wegematic Corp*, *supra* note 146 at 675.

<sup>157</sup> *Restatement (Second) of Contracts* §261, Comment d (1981) (“‘impracticability’ means more than ‘impracticality’” comment d); see also UCC § 2-615, (2002) (“[I]ncreased costs alone does not excuse performance unless the rise in cost is due to some unforeseen contingency which alters the essential nature of the performance” comment No 4); see *Transatlantic Fin Corp*, *supra* note 144.

<sup>158</sup> See Rivkin, *supra* note 54 (quoting from *Louisiana Power & Light Co v Allegheny Ludlum Industries*, 517 F Supp 1319, 1324 (ED La 1981) and emphasizing that pursuant to that judgement, an increase of 38 percent over the original contract price due to rises in the costs of raw materials “did not increase to the extent necessary to excuse its performance under the doctrine of commercial impracticability” at 169).

<sup>159</sup> *Florida Power & Light Co v Westinghouse Electric Corp*, 826 F (2d) 239 (1987) at 254ff (in one of the more well-known examples of discharge due to impracticability, a contract in relation to disposal of spent nuclear fuel anticipated to generate 20 million USD in profit would have resulted in a loss of 80 million USD due to an unforeseen cancellation of a government program).

<sup>160</sup> Brunner “Force Majeure and Hardship”, *supra* note 31 at 97ff.

<sup>161</sup> See for the approach taken in this article to determine the content of transnational commercial law, Berger, “General Principles of Law”, *supra* note 17.

<sup>162</sup> R Doak Bishop, “International Arbitration of Petroleum Disputes: The Development of a Lex Petrolea”, 23 YB Comm Arb 1131 (1998) at 1169; Norbert Horn, “Changes in Circumstances and the Revision of Contracts in Some European Laws and in International Law”, in Norbert Horn, ed, *Adaptation and renegotiation of contracts in international trade and finance*, (Deventer: Kluwer, 1985) 15 at 26; Rivkin, *supra* note 54 at 165ff; Michael Mustill, “The New Lex Mercatoria: The First Twenty-five Years” (1988) Arb Intl 86 at 86ff.



First, most international contracts have contained and will continue to contain *force majeure* clauses. Second, the *force majeure* doctrine was explicitly recognized as a general principle of law by the Iran-United States Claims Tribunal.<sup>163</sup> Third, the *force majeure* doctrine is reflected in both the CISG and the UPICC.

The *force majeure* exemptions under Art. 79 CISG and Art. 7.1.7 UPICC have overcome the differences contained in most domestic legal systems. They reflect a good digest of the decisive requirements of the transnational *force majeure* doctrine. Art. 7.1.7 UPICC provides:

1. Non-performance by a party is excused if that party proves that the non-performance was due to an impediment beyond its control and that it could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences;
2. When the impediment is only temporary, the excuse shall have effect for such period as is reasonable having regard to the effect of the impediment on the performance of the contract;
3. The party who fails to perform must give notice to the other party of the impediment and its effect on its ability to perform. If the notice is not received by the other party within a reasonable time after the party who fails to perform knew or ought to have known of the impediment, it is liable for damages resulting from such non-receipt.
4. Nothing in this article prevents a party from exercising a right to terminate the contract or to withhold performance or request interest on money due.<sup>164</sup>

This provision and other transnational rules<sup>165</sup> are essentially in line with its French origin.<sup>166</sup> However, there is one subtle distinction. The transnational *force majeure* doctrine and the application of *force majeure* clauses in

---

163 *Anaconda-Iran, Inc v Iran*, IUSCT Case No 167 (1986) (“[u]nder a variety of names most, if not all, legal systems recognize force majeure as an excuse for contractual non-performance. Force majeure therefore can be considered a general principle of law” at para 43) [*Anaconda-Iran*]; *Questech Inc v Iran*, IUSCT Case No 59 (1985) at 121; see also *Mobil Oil Iran, supra* note 30 at para 117; Maurizio Brunetti, “The Lex Mercatoria in Practice: The Experience of the Iran-United States Claims Tribunal” (2002) 18:4 *Arb Intl* 355 at 359; John Crook, “Applicable Law in International Arbitration: The Iran-US Claims Tribunal Experience” (1989) 83 *Am J Intl L* 278 at 293; John Westberg, “Contract Excuse in International Business Transactions: Awards of the Iran-United States Claims Tribunal” (1989) 4 *ICSID Rev* 215 at 238ff.

164 *UNIDROIT Principles of International Commercial Contracts*, 2016, Art 7.1.7.

165 *Principles of European Contract Law*, Art 8:108; Study Group on the European Civil Code, *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR)* (Munich: Sellier European Law Publishers, 2009) at 238 (referring to Art. III-3:103); *TransLex-Principle VI 3, supra* note 66.

166 See e.g. Barry Nicholas, “Force majeure in French law” in Ewan McKendrick, ed, *Force majeure and frustration of contract* (London: Lloyd’s of London Press, 1995) 21 at 24; Rüfner, *supra* note 15 at para 13; ICC Case No 10527, 2000, 131 *JDI* (Clunet) 1263 (2004) at 1263; CAP (Paris Chamber of International Arbitration) Case No 3150, 39 *YB Comm Arb* (2014) 65 at 72 [*CAP Case No 3150*]; ICC Case No 3099/3100, *supra* note 21 at 70; ICC Case No 3093/3100, *supra* note 21 at 367.

contracts do not appear to be grounded in impossibility, which of course is the sole justification for the original French doctrine. This deemphasis on impossibility in turn explains why the requirements for the application of *force majeure* clauses or the transnational *force majeure* doctrine end up looking very similar to the hardship doctrine.<sup>167</sup>

All combined, the transnational rules and the practice of international long-term contracting have led to the general understanding that the *force majeure* excuse for non-performance as a transnational doctrine and as a contractual clause is based on the following four cumulative requirements:<sup>168</sup>

- *Externality*: The occurrence of an external event<sup>169</sup> for which the obligor has not assumed the risk;
- *Unavoidability/Irresistibility*: The occurrence of the external event<sup>170</sup> was beyond the obligor's (typical) sphere of control/the ordinary organization of his business<sup>171</sup> and was absolute;<sup>172</sup>
- *Unforeseeability*: The event and its consequences, i.e. the adverse impact on the obligor's ability to perform, could not reasonably have been avoided or overcome by the obligor, e.g. by alternative and commercially reasonable (measured against

<sup>167</sup> See Section 5.3, below.

<sup>168</sup> Brunner, "Force Majeure and Hardship", *supra* note 31 at 111–12; Brunner, "Rules on Force Majeure", *supra* note 18 at 85; Nassar, *supra* note 51 at 207ff; Stephan Schmitz, *Allgemeine Rechtsgrundsätze in der Rechtsprechung des Iran-United States Claims Tribunal, Eine Untersuchung über das anwendbare Recht, nachträgliche Leistungshindernisse und Entlastungsgründe sowie ungerechtfertigte Bereicherung* (Frankfurt am Main: Peter Lang, 1992) at 146ff; TransLex-Principle VI 3, *supra* note 66 at VI 3 (a); ICC Case No 2142, 1974, 1 YB Comm Arb 132 (1976); ICC Case No 3880, 1983, 10 YB Comm Arb 44 (1985); ICC Case No 5864, 1989, 124 JDI (Clunet) 1073 (1997) at 1076 [ICC Case No 5864]; ICC Case No 8501, 1996, 128 JDI (Clunet) 1164 (2001) at 1166; ICC Case No 2216, 1974, 102 JDI (Clunet) 917 (1975) at 919; Michael Polkinghorne & Charles Rosenberg, "Expecting the Unexpected: The Force Majeure Clause" (2015) 16 Bus L Intl 49 at 57; ICC Force Majeure and Hardship Clauses March 2020, ICC Force Majeure Clause ("Long Form"). International Chamber of Commerce "ICC Force Majeure and Hardship Clause" (March 2020) at art 1, online (pdf): <https://iccwbo.org/content/uploads/sites/3/2020/03/icc-force majeure-hardship-clauses-march2020.pdf> [ICC, "Force Majeure and Hardship Clause"].

<sup>169</sup> See the list of typical force majeure events in Translex Principle VI 3, *supra* note 66 at VI 3 (c); see also *Gujarat State Petroleum*, *supra* note 80; Klaus Peter Berger, "Force Majeure Clauses and their Relationship with the Applicable Law, General Principles of Law and Trade Usages" in Fabio Bortolotti & Dorothy Ufot, eds, *Hardship and Force Majeure in International Commercial Contracts* (Alphen upon Rhine: Kluwer Law International, 2018) 137 at 144 [Berger, "Force Majeure Clauses"].

<sup>170</sup> Pascal Pichonnaz, "Ch 7 Non-performance, s1: Non-performance in general, Art 7.1.7" in Stefan Vogenauer, ed, *Commentary on the UNIDROIT Principles of International Commercial Contracts*, 2nd ed (Oxford: Oxford University Press, 2015) 864 at para 22 (events which are external to the obligor's sphere of risk are usually also unavoidable) [Pichonnaz, "Art 7.1.7"].

<sup>171</sup> See e.g. *Ad Hoc-Award of September 9, 1983*, 12 YB Comm Arb 63 (1987) at 74 (stating that a state enterprise which is integrated into the state economic plan may not invoke a change of that plan as a force majeure event).

<sup>172</sup> CAP Case No 3150, *supra* note 166 at 72.

the risk-distribution in the contract) modes of performance, procurement or transportation, or other safety measures;<sup>173</sup>

- *Causation* (“*conditio sine qua non*” or “but-for” test): The obligor’s non-performance was, as a “matter of commercial reality”,<sup>174</sup> caused by the external event and not by the obligor’s own fault, e.g. by self-inflicted production problems, defective goods or packaging etc.<sup>175</sup>

The COVID-19 pandemic meets this four-pronged test, provided that a court or arbitral tribunal confirms that the situation caused by the effects of or by measures taken to combat the COVID-19 pandemic constitutes a *force majeure* event.<sup>176</sup> The pandemic clearly is an external event. In Europe, it was also unforeseeable, at least with respect to contracts concluded before February 2020.<sup>177</sup> It is true that some medical experts have emphasized the threat of zoonotic spillover, i.e. the transmission of pathogens from nonhuman animals to humans for many years. These experts have hinted at the fact that the elevation of spillover events is two to three times higher now than 40 years ago, driven by the huge increase in the human population and expansion into wildlife areas.<sup>178</sup> Virologists have also predicted for many years that a pandemic such as the SARS of 2002-2004 could break out again.<sup>179</sup>

---

173 Pichonnaz, “Art 7.1.7”, *supra* note 170: (“[i]f a diligent merchant is expected to take alternative measures in the obligor’s place, these have to be taken; even a substantial loss due to additional costs should not be enough to justify the absence of alternative measures” at para 26).

174 Alan Berg, “The detailed drafting of a force majeure clause”, in Ewan McKendrick, ed, *Force majeure and frustration of contract* (London: Lloyd’s of London Press, 1995) 63 at 71.

175 *Classic Maritime Inc v Limbungan Makmur SDN BHD*, [2019] EWCA Civ 1102 (“[i]t is a valid use of language to say that a failure to supply the cargo (or even a cargo) does not ‘result from’ an event if in fact the event makes no difference because the charterer was never going to supply a cargo anyway” at para 45); see also *Bremer Handelsgesellschaft v Vanden Avenne-Izegem*, [1978] 2 Lloyd’s Rep 109 at para 82 (CA) (quoted in para 19 of the judgement: “[The force majeure clause] is concerned with excusing a party from liability for a breach which has occurred. In such a context it would be a surprise that a party could be excused from liability where, although an event within the clause had occurred which made performance impossible, the party would not have performed in any event for different reasons” at para 45).

176 See Section 4, above.

177 Weller et al, *supra* note 4 at 1021; see also Heinich, *supra* note 14.

178 Kevin Berger, “*The Man Who Saw the Pandemic Coming - Will the world now wake up to the global threat of zoonotic diseases?*” (12 March 2020), online: <<http://nautilus.us/issue/83/intelligence/the-man-who-saw-the-pandemic-coming>> interviewing Dennis Carroll, Former Director of the pandemic influenza and emerging threats unit at the federal Agency for International Development (USAID) for nearly 15 years who now heads the Global Virome Project at Texas A&M University: “[d]o you think the current outbreak was inevitable? Oh, sure. It was predictable. It’s like if you had no traffic laws and were constantly finding pedestrians getting whacked by cars as they crossed the street”; see also Za Zhu et al, “A pneumonia outbreak associated with a new coronavirus of probable bat origin” (2020) 579 *Nature* 270 at 270ff, online: <<https://www.ncbi.nlm.nih.gov/pubmed?term=32015507>>.

179 Center for Health Security, “Event 201”, online: *Center for Health Security* <<https://www.centerforhealthsecurity.org/event201/about/>> (“[i]n recent years, the world has seen a growing number of epidemic events, amounting to approximately 200 events annually. These events

In January 2013, the German Parliament published a comprehensive risk analysis study conducted by the German government-related *Robert Koch Institute* together with a number of German government agencies. This study qualified the occurrence of a hypothetical viral pandemic such as COVID-19 as “conditionally probable” (“*bedingt wahrscheinlich*”), i.e. as an event which, “statistically, would occur once in a period of 100 to 1,000 years”.<sup>180</sup> At the same time, the German study makes it clear that the COVID-19 scenario was not foreseeable *per se*, given that no one could predict *when* and *where* such a pandemic would occur.<sup>181</sup> In spite of the disastrous and potentially lethal nature and systemic consequences of quickly spreading infectious diseases, parties to international contracts cannot be expected to be “on permanent alert”. In the legal context of the *force majeure* doctrine, the COVID-19 pandemic must thus be characterized as “an event so unlikely to occur that reasonable business parties see no need explicitly to allocate the risk of its occurrence, although the impact it might have would be of such magnitude that the parties would have negotiated over it, had the event been more likely”.<sup>182</sup>

With respect to regular *force majeure* events, the unforeseeability of the event does not necessarily imply that the event was also beyond the obligor’s sphere of control/the ordinary organization of his business, i.e. was unavoidable. The distinction between these two requirements is reflected in the 2020 ICC Force Majeure Model Clause. While the events listed in the clause as “Presumed Force Majeure Events” relieve the affected party from proving the unforeseeability of the event, the Model Clause also states that this party must in any case prove that it could not have avoided or overcome the effects of the impediment.<sup>183</sup> However, the relationship between both

---

are increasing, and they are disruptive to health, economies, and society. Managing these events already strains global capacity, even absent a pandemic threat. *Experts agree that it is only a matter of time before one of these epidemics becomes global—a pandemic with potentially catastrophic consequences.* A severe pandemic, which becomes “Event 201,” would require reliable cooperation among several industries, national governments, and key international institutions” [emphasis added]; see also Global Preparedness Monitoring Board, “A World at Risk, Annual Report on Global Preparedness for Health Emergencies” (September 2019), online (pdf): *Global Preparedness Monitoring Board* <[https://apps.who.int/gpmb/assets/annual\\_report/GPMB\\_Annual\\_Report\\_English.pdf](https://apps.who.int/gpmb/assets/annual_report/GPMB_Annual_Report_English.pdf)> (“[t]he world is at acute risk for devastating regional or global disease epidemics or pandemics that not only cause loss of life but upend economies and create social chaos” at 11ff).

<sup>180</sup> “Risikoanalyse Bevölkerungsschutz Bund: Pandemie durch Virus Modi-SARS” (3 January 2013) at 55–56, online (pdf): *Deutscher Bundestag: Drucksache 17/12051* <<http://dipbt.bundestag.de/doc/btd/17/120/1712051.pdf>> (the study predicts almost all of the circumstances surrounding the COVID-19 pandemic).

<sup>181</sup> *Ibid* (“[t]he occurrence of new diseases [such as COVID-19] is a natural event which may occur over and over again. However, it is not foreseeable in practice which new infectious diseases may occur, where they occur and when this will happen” [translation by the authors] at 66).

<sup>182</sup> See for this definition of unforeseeability, Brunner “Force Majeure and Hardship”, *supra* note 31 at 158 citing Pietro Trimarchi, “Commercial impracticability in contract law: An economic analysis” (1991) 11:1 *Intl Rev L & Econ* 63 at 65, n 9.

<sup>183</sup> See annotations to Art 3 of the 2020 ICC Force Majeure Model Cause, ICC, “Force Majeure

requirements is influenced by the severity of the *force majeure* event. The severe global consequences of the COVID-19 pandemic, which affected multiple business sectors and not just individual companies or employees – for example with respect to lockdowns, quarantine of personnel, interruption of global supply chains etc – make it easier for the affected party to prove the unavailability of its non-performance.<sup>184</sup>

The Iran-US Claims Tribunal has rightly emphasized that “*force majeure* being an exception to the obligation to perform [i.e. the *pacta* principle], a party that invokes it has the burden of proving that [the above four] conditions of *force majeure* existed with regard to the contractual obligations which it did not perform”.<sup>185</sup> Since *force majeure* is a defense invoked by the non-performing party, this distribution of the burden of proof follows from another transnational legal principle: “*actori incumbit onus probatio*”.<sup>186</sup> This distribution of the burden of proof is another reason for the restrictive application of the *force majeure* doctrine: In those not infrequent cases in which the exact cause of the supervening external event cannot be established, a court or arbitral tribunal will typically not allow the *force majeure* defense to succeed.<sup>187</sup>

Finally, the party invoking the *force majeure* doctrine is obliged to notify his contractual partner in writing of the existence and nature of the disruptive event and his intention to make use of the *force majeure* exception in order to prevent surprises of the other side.<sup>188</sup> That notice requirement is also reflected in Art. 79(4) CISG, Art. 7.1.7(3) UPICC, other transnational contract principles<sup>189</sup> and in most contractual *force majeure* clauses.<sup>190</sup> It follows from these same provisions that if the aggrieved party violates its duty to notify the other side, it has not forfeited its right to invoke the *force majeure* exception, but the other party is entitled to damages.<sup>191</sup> It must

---

and Hardship Clause”, *supra* note 168.

184 Brunner, “Force Majeure and Hardship”, *supra* note 31 (“[t]he obligor may be excused if illnesses, deaths or vacancies of employees are caused by extraordinary external events as in the case of an epidemic affecting the obligors entire personnel” at 168); Wagner et al, *supra* note 71 at 846.

185 *Sylvania Technical Systems, Inc v Iran*, IUSCT Case No 64 (1985) at para 52.

186 “Force Majeure TransLex-Principle XII 1”, online: [TransLex Law Research <www.trans-lex.org/966000>](http://www.trans-lex.org/966000); ICC Case No 3344, 109 JDI (Clunet) 978 (1982) at 983; *Asian Agricultural Products Ltd v The Republic of Sri Lanka*, ICSID Case No Arb/87/3, Final Award (27 June 1990); Cheng, *supra* note 39 at 327; Philippe Fouchard, *L'arbitrage commercial international* (Paris: Dalloz, 1965) at 441; see also for English law *Tradax Export SA v André et Cie*, [1976] 1 Lloyd’s Rep (CA) 416; *Channel Island Ferries Ltd v Sealink UK Ltd*, [1988] 1 Lloyd’s Rep (CA) 323; *Avimex SA v Dewulf & Cie*, [1979] 2 Lloyd’s Rep (QB Comm) 57 at 67.

187 Rűfner, *supra* note 15 at para 28.

188 Brunner “Force Majeure and Hardship”, *supra* note 31 at 342ff.

189 TransLex-Principle VI 3, *supra* note 66 at VI 3 (d).

190 Berg, *supra* note 174 at 99ff; ICC Case 2478, *supra* note 27 at 223; ICC Case No 4237, 1974, 10 YB Comm Arb 52 (1985) at 57.

191 Brunner, “Force Majeure and Hardship”, *supra* note 31 at 103; Pichonnaz, “Art 7.1.7”, *supra* note 170 at para 41.

be compensated for every kind of loss it could have avoided if it had been informed in time and in sufficient form and detail. This duty to notify is also part of the transnational *force majeure* doctrine.<sup>192</sup>

If the *force majeure* doctrine invoked by a non-performing party has met the four requirements outlined above, contractual performance is, depending on the nature and duration of the supervening external event, partially or totally,<sup>193</sup> temporarily or permanently,<sup>194</sup> suspended, with the aggrieved party being under an obligation to continue to perform only insofar as this is reasonable under the circumstances.<sup>195</sup> Termination of the contract is only an “*ultima ratio*” remedy and the parties are compensated for performance already rendered.<sup>196</sup>

In international contracting practice, the regulation of *force majeure* events is often left to boilerplate clauses.<sup>197</sup> Rather than providing legal certainty when *force majeure* events occur, some of those clauses may raise difficult problems of contract interpretation.<sup>198</sup> The four fundamental requirements of the transnational *force majeure* doctrine may serve as a yardstick for the internationally useful construction<sup>199</sup> of such *force majeure*

192 See TransLex-Principle VI 3, *supra* note 66 at VI 3 (d); ICC Case No 5864, *supra* note 168 at 1076; ICC Case 8790, *supra* note 26 at 21; *Lockheed Corp v Iran*, IUSCT Case No 829 (1988) at 300ff; *Touche Ross v Iran*, IUSCT Case No 480 (1985) at 294ff [*Touche Ross*].

193 *Anaconda-Iran*, *supra* note 163 at 211–12.

194 See Brunner, “Rules on Force Majeure”, *supra* note 18 (“[g]enerally, impediments to performance only exempt the obligor as long as they exist” and adding that a temporary may be qualified as a permanent impediment “when it appears reasonable that the impediment will persist for the whole or such a large part of the period allowed by the contract for performance as to substantially interfere with the contractual purpose” at 98–99); see also Brunner, “Force Majeure and Hardship”, *supra* note 31 at 91–100; see also ICC Case No 7539, 1995, 123 JDI (Clunet) 1030 (1996).

195 *Touche Ross*, *supra* note 192 (“[w]hile the valid invocation of force majeure provides a defense against a possible claim for breach of contract based on failure to perform, it does not, in the circumstances of this case, relieve the invoking party of the obligation to continue to do whatever is still reasonable to carry out its duties under the Contract” at 298).

196 *Anaconda-Iran*, *supra* note 163 at 211–12; *Mobil Oil Iran*, *supra* note 30 at para 113ff; *Gould Marketing Inc*, *supra* note 24; *International Schools Inc v Iran*, IUSCT Case No 123 (1987); Schmitz, *supra* note 168 at 163ff.

197 Polkinghorne & Rosenberg, *supra* note 168 (warning against the use of vague formulations in such clauses at 57); see for the ICC model clauses and their revision, Filip de Ly, “Analysing the ICC Force Majeure Clause 2003” in Fabio Bortolotti & Dorothy Ufot, eds, *Hardship and Force Majeure in International Commercial Contracts: Dealing with Unforeseen Events in a Changing World* (Alphen upon Rhine: Kluwer Law International, 2018) 113 at 113ff; Ercüment Erdem, “Revision of the ICC Force Majeure and Hardship Clause” in Fabio Bortolotti & Dorothy Ufot, eds, *Hardship and Force Majeure in International Commercial Contracts: Dealing with Unforeseen Events in a Changing World* (Alphen upon Rhine: Kluwer Law International, 2018) 123.

198 Brunner, “Force Majeure and Hardship”, *supra* note 31 at 83; Berger, “Force Majeure Clauses”, *supra* note 169 at 138ff; Pichonnaz, “Art 7.1.7”, *supra* note 170 at para 13.

199 See for this approach to the construction of international contracts, Klaus Peter Berger, “Vom praktischen Nutzen der Rechtsvergleichung: Die international brauchbare Auslegung nationalen Rechts” in Klaus Peter Berger et al, eds, *Festschrift für Otto Sandrock zum 70.*

clauses by an arbitral tribunal.<sup>200</sup> However, intricate questions may remain. One relates to the proper relationship and hierarchy between *force majeure* and hardship clauses in the same contract.<sup>201</sup>

Another concerns the question whether the list of *force majeure* events in the contractual clause is exhaustive or whether it merely provides examples of events with characteristics that may be used to admit unlisted *force majeure* events which share the same qualities<sup>202</sup> or which constitute *force majeure* events “in the sense of generally accepted principles”.<sup>203</sup> Scenarios like the COVID-19 pandemic are covered by such clauses. Some *force majeure* clauses specifically list “diseases”, “plagues”, “epidemics”, “health emergencies”<sup>204</sup> or similar health-related situations as *force majeure* events. For example, the recently revised ICC Force Majeure Model Clause of March 2020 lists plagues and epidemics as “Presumed Force Majeure Events”.<sup>205</sup> In the absence of proof to the contrary, such events shall be presumed to be uncontrollable and unforeseeable *force majeure* events, provided that the party invoking *force majeure* is able to prove that the effects of the impediment could not reasonably have been avoided or overcome.<sup>206</sup> The same ICC Clause lists these health-related events together with “natural disasters” or “extreme natural events”. The COVID-19 pandemic has been characterized as “a natural catastrophe in slow motion”<sup>207</sup> or a “natural event”.<sup>208</sup> There is thus an argument to be made, for example in jurisdictions like the US which apply a rather strict approach to the interpretation of such clauses<sup>209</sup>, that even clauses which *only* list such “natural” events may be understood to also cover the COVID-19 scenario. Even if this is not the case, a typical *force majeure* clause may be applied to the current pandemic if it lists not only specific *force majeure* events, but also includes a catch-all phrase to cover similar situations (“... and any event of a similar nature”). Hardship

---

*Geburtstag* (Heidelberg: Verlag Recht und Wirtschaft, 2000) 49.

200 Brunner “Force Majeure and Hardship”, *supra* note 31 at 107; see also Berg, *supra* note 174 at 75; ICC Case 2478, *supra* note 27 at 223.

201 Furmston, *supra* note 58 at 62.

202 *Fyffes Group Ltd v Reefer Express Lines Pty Ltd*, [1996] 2 Lloyd’s Rep (Comm) 171 at 196; ICC Case No 11265, 2009, ICC Bull 20 No 2 (2009), Final Award at para 128; ICC Case No 3093/3100, *supra* note 21 at 366.

203 ICC Case No 16369, *supra* note 56 at 201.

204 See e.g. *Clifford Gardener v Clydesdale Bank Ltd*, [2013] EWHC 4356 (Ch) at para 25.

205 ICC, “Force Majeure and Hardship Clause”, *supra* note 168 at art 3(e).

206 *Ibid.*

207 See Weller et al, *supra* note 4 (quoting the renowned German virologist Christian Drosten at 1017).

208 Deutscher Bundestag, *supra* note 180 at 55, 66.

209 See e.g. *Kel Kim Corp v Central Markets Inc*, 524 NY 2d 384 (NY App Ct 1987)

(“[o]rordinarily, only if the force majeure clause specifically includes the event that actually prevents a party’s performance will that party be excused” at 385); but see *Hitz Restaurant Group*, *supra* note 73 (in which a Corona related executive order was held by the court to be covered by the contractual force majeure clause which did not refer to health-related situations, but to “governmental actions” and “orders of government” at 2).

clauses can also cover scenarios like the COVID-19 pandemic without the need to enter into an analysis of their wording, since they usually do not list specific events, but contain a sweeping reference to “events beyond the reasonable control” of the party invoking hardship.<sup>210</sup>

## 5. Hardship

Hardship is concerned with situations in which the performance of contractual obligations has not become impossible for the aggrieved party. Unlike a party confronted with a *force majeure* event, that party can still perform, but in doing so it is confronted with fundamental difficulties not anticipated at the time the contract was concluded. The possibility to continue specific performance of the contract despite the excessive impact of the change of circumstances is a characteristic feature of hardship.<sup>211</sup> In the COVID-19 pandemic, this possibility is not given in most of the cases. However, in a number of scenarios, performance of the contract, albeit in a modified form, might still be possible, provided the contract could be adapted to these changed circumstances.<sup>212</sup> In the following sections, we will discuss how various iterations of the hardship doctrine have developed and how they operate in domestic jurisdictions as well as in the transnational context.

### 5.1. The common law reluctance

Among others, countries like Germany, France, Greece, Austria, Italy, Poland, Hungary, Portugal, the Netherlands, Switzerland, Russia, Argentina, Brazil, Peru, Colombia, Japan and Egypt have adopted statutory or judge-made rules on hardship.<sup>213</sup> These are all civil law jurisdictions. In the common law world, a hardship doctrine is not accepted or at least not to the same extent. In any event, the common law doctrines relating to hardship developed along a completely different path from the civil law versions of the hardship doctrine. One reason for this divergence is that there are different dogmatic conceptions of the binding force of contracts in common law jurisdictions, which along with other historic idiosyncrasies, prevented the recognition of any type of Canon law doctrine of changed circumstances under the common law. On the other hand, and while still subject to some idiosyncrasies and selective transplants, the civil law tradition would historically, and with some exceptions like France, be much more amenable to the Canon law doctrine

---

210 “Force Majeure TransLex-Principle VIII 1”, online: *TransLex Law Research* <[www.trans-lex.org/951000](http://www.trans-lex.org/951000)>.

211 Accaoui Lorfing, «L'article 1195 du Code Civil», *supra* note 68 at 450.

212 Weller et al, *supra* note 4 at 1022.

213 Brunner, “Force Majeure and Hardship”, *supra* note 31 at 402; ICC Case No 16369, *supra* note 56 at 202.



of changed circumstances and the later hardship doctrine because in these jurisdictions the binding force of a contract merely requires an agreement with an intent to be bound. Such a requirement therefore would allow most civil law jurisdictions to accept a doctrine that excuses performance if the reason why the parties agreed to be bound fundamentally changes; and many of them have.

A contract in the common law tradition requires consideration (a bargained-for exchange) to be enforceable, which will bind the parties regardless of whether the purpose of the contract disappears at a later time: “a man must stick to his bargain”.<sup>214</sup> The *pacta* principle, which has its roots in the idea that parties can create binding contractual obligations only through their mutual consent,<sup>215</sup> prevails in these circumstances, i.e. the parties remain strictly bound by the terms of their bargain even if performance becomes more onerous for one of them.

As discussed in Section 4.2.2 above, English law does recognize a form of a hardship doctrine, but much more limited than any hardship doctrine in civil law jurisdictions. The frustration doctrine in English law can excuse performance in cases of extreme economic or commercial loss, but the English courts have no power to adapt the contract to changed circumstances.<sup>216</sup> This strict approach has rightly been criticized as not being in line with commercial reality:

I would hazard the respectful observation that most commercial people would find it an offensive conclusion that, having entered into a contract on the basis of a common assumption or with shared acceptance of a certain state of affairs, when those assumptions are falsified by subsequent events the parties should nonetheless be held strictly to their contract.<sup>217</sup>

As provided in Section 4.2.3 above, US law does recognize a form of the hardship doctrine, but similar to English law, the hardship doctrine in US law is extremely limited in application. The impracticability doctrine in US law can excuse performance in cases where a contract becomes excessively onerous due to a dramatic and unexpected rise in cost resulting in a financial

---

<sup>214</sup> Parry, *supra* note 32 at 1ff; Nassar, *supra* note 51 at 3ff; James Gordley, “Natural Law Origins of the Common Law of Contract” in John Barton, ed, *Towards a General Law of Contract* (Berlin: Duncker & Humblot, 1990) 367 at 370ff; *Restatement (Second) of Contracts*, Chapter 16 (Remedies), Introductory Note (1981).

<sup>215</sup> Weller, *supra* note 37 at 38.

<sup>216</sup> See Section 4.2.2, above.

<sup>217</sup> Andrew Rogers, “Frustration and Estoppel” in Ewan McKendrick, ed, *Force Majeure and Frustration of Contract*, 2ed (London: Lloyd’s of London Press, 1995) 245 (in reaction to *Davis Contractors*: “It may be sad that [the parties] made the contract on the ‘basis’ or on the ‘footing’ that their expectations would be fulfilled. . . . But it by no means follows that disappointed expectations lead to frustrated contracts” at 246); see also *ibid* (“[t]he operation of the doctrine of frustration is one of the least successful of the efforts of lawyers to meet the needs of commerce” at 245).

loss that was not bargained for,<sup>218</sup> but US courts' powers are limited to releasing such a party fully or partially from its duty to perform.<sup>219</sup>

## 5.2. Civil law jurisdictions

When considering those civil law legal systems that have developed hardship doctrines, there are two main approaches.<sup>220</sup> One is centered on the scenario in which performing contractual obligations has become excessively onerous for one party. Another broader approach considers more generally situations where the “foundations of the transaction” have been destroyed or substantially modified, thereby bringing the hardship doctrine in those jurisdictions closer to impossibility and *force majeure*, i.e. events rendering the performance of the contract impossible to perform as originally contemplated.

### 5.2.1. France: From outright rejection by the courts to a narrow statutory approach

Until 2016, France stood out in the civil law world with its complete rejection of a hardship doctrine (“*théorie de l'imprévision*”) in private law.<sup>221</sup> This is the result of the Canon law doctrine of changed circumstances not having made its way into the *Code Napoléon*. In 1876, the French *Cour de Cassation* had condemned *l'imprévision* in the case *Canal de Craponne*, which is considered to be one of the most important court judgements in the area of French private law.<sup>222</sup> In that judgement, the Court invoked the binding force of contracts in Art. 1134 of the *Code Napoléon* of 1804<sup>223</sup> to justify its refusal to adapt a fee for the maintenance of a canal, the amount of which had been agreed between the parties in 1567. In spite of the obvious need to adapt the fee, the court ruled that a court cannot modify a contract unless there is a provision of law allowing it to do so.<sup>224</sup> There was none in French law at the

---

218 See for this “unbargained-for risk test”, Eisenberg, *supra* note 134 at 643.

219 See Section 4.2.3, above.

220 Fontaine, *supra* note 60 at para 12.

221 See Pédamon & Chuah, *supra* note 36 at 22.

222 Cass civ, 6 Mars 1876, *Canal de Craponne* [1876] D 1876 I 193 [*Craponne*]; see generally Abas, *supra* note 18 at 48ff.

223 The provision has since been reformed. The version in force at the time of the judgement reads: “Agreements lawfully entered into take the place of the law for those who have made them. They may be revoked only by mutual consent, or for causes authorized by law” [translation by the authors].

224 *Craponne*, *supra* note 222 (“[d]ans aucun cas, il n'appartient aux tribunaux, quelque équitable que puisse apparaître leur décision, de prendre en considération le temps et les circonstances pour modifier les conventions des parties et substituer des clauses nouvelles à celles qui ont été librement acceptées par les contractants” at 197); see also Henri Capitant et al, *Les grands arrêts de la jurisprudence civile*, t 2, vol 2, 13th ed (Paris: Dalloz, 2015) at 172ff; see Pédamon & Chuah, *supra* note 36 (for cases of legislative allowance of contract revision at

time of the judgement.

For a long time, this position has been generally criticized and gradually diluted by an increasing number of exceptions.<sup>225</sup> Still the French *Cour de Cassation* held to its position.<sup>226</sup> The French courts were concerned that to decide otherwise would open unacceptable loopholes for parties who seek to escape their contractual commitments. Additionally, leaving contract adaptation to the discretion of the courts was regarded as undermining legal certainty in contract law.

Commercial parties tried to escape this strict case law by resorting to arbitration, and by including adaptation<sup>227</sup> or renegotiation<sup>228</sup> clauses into their contracts or allowing arbitrators to act as *amicales compositeurs*, freed from the constraints of the law.<sup>229</sup> Only in the field of administrative contracts (“*contrats administratifs*”) did the French *Conseil d’Etat*, the highest administrative court, accept the *théorie de l’imprévision* and allowed for the judicial adaptation of such contracts in the case of changed circumstances in a decision of 1916. It justified that decision with the “public interest in the continuation of public services”,<sup>230</sup> which subsequently

35).

225 See against the theory, Christophe Jamin et al, *Les effets du contrat*, 3rd ed (Paris: Librairie générale de droit de la jurisprudence, 2001) at paras 296, 348; Arne Alberts, *Wegfall der Geschäftsgrundlage: Nachträgliche Äquivalenzstörungen im deutschen und französischen Vertragsrecht* (Baden-Baden: Nomos, 2015) at 78ff; Gabriel Marty & Pierre Raynaud, *Droit civil: Les obligations*, t 1, 2nd ed (Paris: Sirey, 1988) at paras 250ff; Valérie Boccara & Gaëlle Marraud des Grottes, “Les notaires face aux défis du siècle” (2004) 117 *Petite affiches* 3 at 3, 6; Ripert, *supra* note 41 at 151; Charles Gavoty & Olivier Edwards, “Vers un extension de l’obligation de renégociation en matière contractuelle?” (2004) 128 *Petites Affiches* 18 at 18–19; Pascal Ancel, *Imprévision* in *Répertoire de droit civil* (Paris: Dalloz, 2017) at para 4, 31; Louis Thibierge, *Le contrat face à l’imprévu* (Paris: Economica, 2011); see in favor of the theory, Denis Mazeaud, “La révision du contrat” (2005) 129 *Petites Affiches* 4 at para 28ff; Catherine Thibierge, “Libres propos sur la transformation des contrats” (1997) *RTDC* 397 at para 28ff; Marceau Long et al, *Les grands arrêts de la jurisprudence administrative*, 22nd ed (Paris: Dalloz, 2019) at 179; François Terré et al, *Droit civil: Les obligations*, 12th ed (Paris: Dalloz, 2019) at 544–45.

226 See e.g. Cass civ, 15 november 1933 [1934] *Gaz Pal I* (“[I]a règle que les conventions légalement formées tiennent lieu de loi à ceux qui les ont faites est générale et absolue” at 68); see also Lutz, *supra* note 48 (with reference to French case law at 95).

227 ICC Case No 2708, 1976, in *Collection of ICC Arbitral Awards 1974-1985*, eds Sigvard Jarvin & Yves Derains (Deventer: Kluwer Law and Taxation Publishers, 1990) at 297.

228 See Terré, *supra* note 222 at para 474, 1331ff; Ancel, *supra* note 225 at para 101ff; see generally Pédamon & Chuah, *supra* note 36 at 18.

229 Abas, *supra* note 18 at 64.

230 CE, 30 Mar 1916, *Compagnie générale d’éclairage de Bordeaux*, [1916] *Rec Lebon* 125 (in the case, a company had received a public permit to provide the city of Bordeaux with gas produced from coal, provide that the gas price would not go beyond a certain limit; due to disruptions caused by the First World War, the cost for the coal quintupled and the maximum price agreed in the contract could not cover the company’s costs; the court ordered the company to continue the gas deliveries but required the state to pay a contribution (“indemnité d’imprévision”) to the company’s increased costs).

assumed the quality of a constitutional principle.<sup>231</sup> However, even though it acknowledged the hardship doctrine in principle, the *Conseil d'Etat* did not allow for renegotiation of the contract by the parties themselves.

It was only through the reform of French contract law enacted by the *Ordonnance of 10 February 2016* that the *Canal de Craponne* judgement was reversed by the French legislature. Realizing that France was lagging behind the general development in that area in Europe,<sup>232</sup> a new Art. 1195 was inserted into the French Civil Code dealing with the *théorie de l'imprévision*. That article provides as follows:

If a change of circumstances that was unforeseeable at the time of the conclusion of the contract renders performance excessively onerous for a party who had not accepted the risk of such a change, that party may ask the other contracting party to renegotiate the contract. The first party must continue to perform his obligations during renegotiation.

In the case of refusal or the failure of renegotiations, the parties may agree to terminate the contract from the date and on the conditions which they determine, or by a common agreement ask the court to set about its adaptation. In the absence of an agreement within a reasonable time, the court may, at the request of a party, revise the contract or put an end to it, from a date and subject to such conditions as it shall determine.<sup>233</sup>

It follows from the wording of Subsection 1 that the new French provision is still only concerned with excessive onerousness (“*l'imprévision*”) as opposed to the wider approach of “foundations of the contract” or similar formulas of the hardship doctrine, which are present in some other civil law legal systems like Germany or the Netherlands.<sup>234</sup> Excessive onerousness means more than a mere increase in the costs of performance, which must be expected by parties to long-term contracts. Rather, one party must be confronted with an extreme, extraordinary, not-to-be-expected rise in performance costs or an extreme decrease of the benefits it expected to derive from the other side’s counter-performance.<sup>235</sup> However, even under these circumstances, Art. 1195 of the French Civil Code cannot be invoked if the aggrieved party has accepted the risk, e.g. by means of a specific contract provision or by entering into a highly speculative contract.<sup>236</sup> It cannot be assumed that the factual or legal effects of the COVID-19 pandemic have been accepted by the

231 Cons const, 25 July 1979, [1979] Rec 33, 79-105 DC (“[l]a continuité du service public qui, tout comme le droit de grève, a le caractère d’un principe de valeur constitutionnelle . . .” at para 1).

232 See “Rapport au Président de la République relatif à l’ordonnance n° 2016-131 du 10 février 2016 portant réforme du droit des contrats, du régime général et de la preuve des obligations”, online: *Légifrance* <<https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000032004539&categorieLien=id>>.

233 Art 1195 C Civ translation, *supra* note 89.

234 Fontaine, *supra* note 60 at para 39.

235 Accaoui Lorfing, “L’article 1195 du Code Civil”, *supra* note 68 at 452ff.

236 *Ibid* at 453.

parties to a commercial contract, which is why, in addition to constituting *force majeure* events,<sup>237</sup> they qualify as hardship events under Art. 1195.<sup>238</sup>

The French courts are now mandated to adapt the contract if the parties' good faith attempts to renegotiate have failed and if, in light of this failure, one party requests the court to do so. This new judicial authority has been characterized as "astonishing" and "innovative".<sup>239</sup> In light of the fact that even for administrative contracts, the French courts followed a rather restrictive approach for many decades,<sup>240</sup> it remains to be seen whether and to what extent French courts will in fact make use of their newly granted wide judicial discretion under Subsection 2 ("the court *may* . . .") in order to adapt the parties' contract.<sup>241</sup> Given that the French courts have historically taken a restrictive view on the renegotiation or adaptation of contracts, it may be that in practice the courts feel inclined to refer the renegotiation process back into the hands of the parties as opposed to modifying the terms of the contract themselves. This would not only serve to strengthen party autonomy; it would also reduce judicial intervention to a bare minimum under the new law.<sup>242</sup> In many cases, however, the French courts will not be able to exercise their powers under Art. 1195 because commercial parties very often exclude the application of that provision in their contracts.<sup>243</sup>

### 5.2.2. Germany: The broad approach ("disturbance of the foundation of the transaction")

In Germany, the *clausula* principle had been expressly rejected by the drafters of the Civil Code (*Bürgerliches Gesetzbuch*, *BGB*) of 1900 as leading to legal insecurity and undermining contractual compliance by the parties.<sup>244</sup> In line with the general view held in nineteenth-century legal science,<sup>245</sup> the Canon law doctrine of changed circumstances was regarded as being incompatible with the will theory.<sup>246</sup> The will theory prohibited reading an

237 See Section 4.1, above.

238 Heinrich, *supra* note 14 at 614.

239 Accaoui Lorring, "L'article 1195 du Code Civil", *supra* note 68 at 458.

240 Thibierge, *supra* note 225 at para 338.

241 See Philippe Stoffel-Munck, "L'imprévision et la réforme des effets du contrat" (2016) 11275 RDC 30 (the author argues that French judges, at least in the first years after the reform, will opt for contract termination rather than contract adaptation because they are more familiar with that concept. This, however, would always require a corresponding request for relief from a party).

242 Accaoui Lorring, "L'article 1195 du Code Civil", *supra* note 67 at 461.

243 Heinrich, *supra* note 14 (emphasizing that such clauses have become typical clauses ("clauses de style") in commercial contracts governed by French law at 614).

244 See generally Lutzi, *supra* note 48 at 100ff; Benno Mugdan, *Motiv zu dem Entwurfe eines Bürgerlichen Gesetzbuches*, vol 1 (Berlin: Guttentag, 1888) at 249.

245 See Zimmermann, *supra* note 32 at 581.

246 See also Fried, *supra* note 34 ("[o]ne may ask what it would even mean to give effect to 'the will of the parties' in a case where the parties had no convergent will on the matter at hand" at 63).

implied condition (“*tacita conditio*”) as to the continuing existence of the initial circumstances – a theory that had been developed by the Italian scholars *Bartolus* and *Baldus* in the Middle Ages<sup>247</sup> – into a contract that had been deliberately entered into by the parties without specifying the specific reasons or circumstances underlying the original bargain in the contract.<sup>248</sup> Traces of that idea can still be found in Austrian law, where the *clausula* principle is based on Section 901 of the Austrian Civil Code (*Allgemeines Bürgerliches Gesetzbuch, ABGB*). That section provides that if the parties have made their reason to contract or underlying purpose as a condition of their contractual bargain, that condition will be treated as any other legal condition.<sup>249</sup> The Austrian version of the doctrine of changed circumstances is based on that provision.

In spite (or because) of the rejection by the drafters of the German Civil Code to incorporate the Canon law doctrine of changed circumstances into the Code, there was considerable theoretical debate on the subject among German scholars in the late nineteenth and early twentieth century.<sup>250</sup> Even before the enactment of the *BGB* in 1900, it was argued by the German scholar *Windscheid* in 1892 that if the Canon law doctrine of changed circumstances is “thrown out by the door . . . it will always re-enter through the window”,<sup>251</sup> That time of re-entry did in fact come with the dramatic hyperinflation that Germany experienced between 1914 – the beginning of the First World War – and 1923 – the year when a new currency (“*Rentenmark*”) was introduced to stop the hyperinflation. That scenario caused much litigation before the German courts. In some of these cases, beginning with the first case in 1922, the Imperial Court of Justice (“*Reichsgericht*”) came to rely on the notion of “disappearance of the foundation of the transaction” (“*Wegfall der Geschäftsgrundlage*”).<sup>252</sup> That theory had been developed by the well-known German scholar *Oertmann* some years earlier.<sup>253</sup> It was essentially based on

---

247 See Section 2.3 at 9 above.

248 Mugdan, *supra* note 244 (emphasizing that such a condition would have to be characterized as a mere motive of the parties that would have no impact on the legal validity of the contract at 249); see also Otto Lenel, “Die Lehre von der Voraussetzung (im Hinblick auf den Entwurf des bürgerlichen Gesetzbuches)” (1889) 74 AcP 213 (he argued that accepting such a condition would have “substantial legal uncertainty” as an “inescapable consequence” at 216).

249 Section 901 Civil Code (Austria) (“[i]f the parties declared the motive or the ultimate purpose of their approval expressly as a condition, the motivation or ultimate purpose is considered as any other condition. Furthermore, such declarations do not have an impact on the effectiveness of contracts for consideration” [translation by Peter Andreas Eschig & Erika Pircher-Eschig]).

250 Köbler, *supra* note 32 at 90 (see the references to the studies of Endemann (1899), Dernburg (1899), Bindewald (1901) and Artur Kaufmann (1907)).

251 Bernhard Windscheid, “Die Voraussetzung” (1892) 78 AcP 161 at 197; Bernhard Windscheid, *Die Lehre des römischen Rechts von der Voraussetzung* (Düsseldorf: Buddeus, 1850) at 1ff.

252 Reichsgericht [RG] [Imperial Court], 3 February 1922, 103 RGZ 328 at 332 (Germany).

253 Paul Oertmann, *Die Geschäftsgrundlage: Ein neuer Rechtsbegriff* (Erlangen: Deichert, 1921); see also Eugen Locher, “Geschäftsgrundlage und Geschäftszweck” (1923) 121 AcP 1 at 71;

the principle of good faith enshrined in Section 242 of the *BGB*.<sup>254</sup> Given there was no Canon law doctrine of changed circumstances in the *BGB* at the time, the German courts grounded the *Wegfall der Geschäftsgrundlage* doctrine in the principle of good faith. The principle of good faith, having a moral component itself, is not dissimilar to the broader moral justification of the Canon law doctrine of changed circumstances. It thus provided a sound justification for bringing the morally grounded doctrine of changed circumstances into the German legal system. As *Windscheid* had predicted, the hardship doctrine in Germany did end up coming in “through the window”, i.e. not through the incorporation of the *clausula* principle into the Code, but through the moral grounding of good faith.

The German hardship doctrine, as developed exclusively in the case law initially, was morally grounded but it also featured another component of the Canon law doctrine of changed circumstances: the implied condition. Pursuant to the *Wegfall der Geschäftsgrundlage* doctrine, every contract is based on general grounds agreed upon between the parties, even if not spelled out specifically. These implied conditions concern the maintenance of the general grounds upon which the contractual relationship is based; and, if fundamentally altered, would allow termination or modification of the contract. According to the German hardship doctrine, termination or modification of the contract would cover situations, like the COVID-19 scenario,<sup>255</sup> where – without the fault of either party – the foundation or reason upon which the agreement is based disappears. It will also cover situations where there is an alteration of the equilibrium between the parties’ respective obligations, or where there is mistake by the parties regarding what circumstances were essential to the formation of the parties’ agreement (provided both parties were aware of them).

Up until the year 2002, the doctrine of changed circumstance in Germany could only be found in legal doctrine and the case law of the Federal Court of Justice (*Bundesgerichtshof, BGH*), which followed the earlier case law of the Imperial Court of Justice.<sup>256</sup> However, in the course of a substantial reform

---

Denis Philippe, *Changement de circonstances et bouleversement de l'économie contractuelle* (Brussels: Bruylant, 1986) at 227ff.

254 See generally Fried, *supra* note 34 (“these doctrines [good faith, unconscionability and duress] explicitly authorize courts in the name of fairness to revise contractual arrangements or to overturn them altogether” at 74); Reinhard Zimmermann, *Breach of Contract and Remedies under the new German Law of Obligations* (2002) 48 Saggi, Conferenze e Seminari 1 (“[t]he rules on change of circumstances have, under the old law, been worked out and generally recognized under the auspices of the general good faith rule of § 242 BGB and they have thus constituted one of the most famous examples of a judge-made legal doctrine” at 12–13).

255 Weller et al, *supra* note 4 at 1021; Wagner et al, *supra* note 71 at 846.

256 Bundesgerichtshof [BGH] [Federal Court of Justice], 15 Feb 1951, 1 BGHZ 170 at 176 (Germany); BGH, 4 April 1951, 1 BGHZ 334 (Germany); BGH, 23 May 1951, 2 BGHZ 176 at 183 (Germany); BGH, 28 June 1951, 2 BGHZ 379 at 383 (Germany); see also the case law of

of the general contract law in the German Civil Code in 2002, a new Section 313 was introduced into the *BGB*, which, under the title “disturbance of the foundation of the transaction” (“*Störung der Geschäftsgrundlage*”), which codified the existing case law:

1. If circumstances, which became the basis of a contract, have significantly changed since the contract was entered into and if the parties would not have entered into the contract or would have entered into it with different contents if they had foreseen this change, adaptation of the contract may be demanded to the extent that, taking account of all the circumstances of the specific case, in particular the contractual or statutory distribution of risks, one of the parties cannot reasonably be expected to uphold the contract without alteration.
2. It is equivalent to a change of circumstances if material conceptions that have become the basis of the contract are found to be incorrect.
3. If adaptation of the contract is not possible or one party cannot reasonably be expected to accept it, the disadvantaged party may withdraw from the contract. In the case of a contract with continuing obligations, the right to terminate takes the place of the right to withdraw.<sup>257</sup>

It is noteworthy that the provision is not limited to cases of economic onerousness that occur *after* contract conclusion (Subsection 1). In line with *Oertmann’s* broad approach and the case law of the German courts, Subsection 2 of Section 313 equates the initial absence of “material conceptions [of the parties] that have become the basis of the contract” with the subsequent change of initial circumstances. This scenario relates to common mistakes of the parties or initial conceptions of one side which were not rejected by the other party when the contract was negotiated and concluded and have thus become part of the basis of their transaction.<sup>258</sup>

German law is also very adaptation-friendly. If the prerequisites of Subsection 1 or 2 are met and there is a reasonable adaptation option, the aggrieved party may demand adaptation from the other side.<sup>259</sup> This adaptation-friendliness of the German law becomes particularly relevant in the COVID-19 context, because, due to its war-like character, the risks

---

the highest court for the British Zone in Germany: OGHBrZ, 31 March 1949, 1 OGHZ 386 at 395 (Germany); OGHBrZ, 7 July 1949, 2 OGHZ 202 at 208 (Germany); OGHBrZ, 30 March 1950, 3 OGHZ 343 at 345 (Germany); OGHBrZ, 23 June 1950, 4 OGHZ 91 at 96 (Germany); OGHBrZ, 13 July 1950, 4 OGHZ 165 at 172 (Germany).

<sup>257</sup> Section 313, German Civil Code (BGB), translation from the original German, online: <[www.gesetze-im-internet.de/englisch\\_bgb/englisch\\_bgb.html#p1146](http://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#p1146)>; see Lutz, *supra* note 48 at 104ff.

<sup>258</sup> BGH, 8 Nov 2001, NJW 2002, 292 (Germany).

<sup>259</sup> Norbert Horn, “Neuverhandlungspflicht” (1981) 181 AcP 255 [Horn, “Neuverhandlungspflicht”]; Norbert Horn, “Vertragsbindung unter veränderten Umständen: Zur Wirksamkeit von Anpassungsregelungen in langfristigen Verträgen” NJW 1985 at 1118.



resulting from such a crisis shall not be carried by one party alone.<sup>260</sup> The mere fact that no agreement can be reached with the other side is no bar to adaptation.<sup>261</sup> In that case, the aggrieved party may pursue its adaptation claim before the competent court. The aggrieved party is entitled to withdraw from or to terminate the contract due to the changed circumstances only if contract adaptation turns out to be illegal, impracticable or unreasonable for the other side.<sup>262</sup>

Not surprisingly, the liberal nature and broad scope of Section 313 of the German Civil Code has led to the revival of the criticism of the early days of the *BGB*.<sup>263</sup> It is argued that this broad scope can lead the parties into the “constant temptation”<sup>264</sup> to escape their contractual commitments by reference to Section 313. There is thus widespread consensus in German legal doctrine that the codification has not changed the subsidiary and exceptional nature of the hardship excuse. Accordingly, the application of Section 313, like its case law-developed predecessor (the *Wegfall der Geschäftsgrundlage* doctrine), remains tied to the principle of good faith. This time, however, not with respect to its moral foundation, but with respect to the need for a similarly restrictive approach in the interest of legal certainty and the upholding of contractual commitments. To that end, Section 313 shall be applied “with the same [high] degree of care as the principle of good faith”.<sup>265</sup>

Jurisdictions influenced by the German doctrine of *Wegfall der Geschäftsgrundlage* include the Scandinavian countries (Norway, Denmark, Sweden and Finland), as well as Japan, Greece, Argentina and Brazil.<sup>266</sup> However, the picture is diverse as to the courts’ powers to intervene and

---

<sup>260</sup> Weller et al, *supra* note 4 at 1021.

<sup>261</sup> BGH, 30 Sept 2011, NJW 2012, 373 (Germany).

<sup>262</sup> Christian Grüneberg in *Palandt: Bürgerliches Gesetzbuch*, 79th ed (Munich: C.H. Beck, 2020) at § 313, para 42.

<sup>263</sup> See Wolfgang Jakob Hau, *Vertragsanpassung und Anpassungsvertrag* (Tübingen: Mohr Siebeck, 2003) at 250; Thomas Lobinger, *Die Grenzen rechtsgeschäftlicher Leistungspflichten: Zugleich ein Beitrag zur Korrekturbedürftigkeit der §§ 275, 311a, 313 BGB n.F. 245* (Tübingen: Mohr Siebeck, 2004); Ulrich Huber, “Das geplante Recht der Leistungsstörungen” in Wolfgang Ernst & Reinhard Zimmermann, eds, *Zivilrechtswissenschaft und Schuldrechtsreform: Zum Diskussionsentwurf eines Schuldrechtsmodernisierungsgesetzes des Bundesministeriums der Justiz* (Tübingen: Mohr Siebeck, 2001) 31.

<sup>264</sup> Werner Flume, *Allgemeiner Teil des Bürgerlichen Rechts*, vol II, 3rd ed (Berlin-Heidelberg: Springer, 1979) at 526.

<sup>265</sup> Thomas Finkenauer in Wolfgang Krüger, ed, *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, vol III, 8th ed (Munich: C.H. Beck, 2019) § 311 at § 313, paras 5 and 52; Dieter Medicus & Stephan Lorenz, *Schuldrecht I: Allgemeiner Teil*, 21st ed (Munich: C.H. Beck, 2015) at para 561; Lars Böttcher in Harm Peter Westermann, et al, eds, *Erman Bürgerliches Gesetzbuch*, vol I, 15th ed (Cologne: Otto Schmidt, 2017) §§ 1-761, AGG at § 313 para 32; Arndt Teichmann in Beate Gsell, ed, *Soergel Bürgerliches Gesetzbuch*, vol V, 13th ed (Stuttgart: W Kohlhammer, 2014) § 311 at § 313 para 30.

<sup>266</sup> See Lando & Beale, *supra* note 100 at 328.

adapt the contract in these countries.<sup>267</sup> Some jurisdictions allow for contract termination as the sole remedy. That result is not in line with the idea prevailing in international contracting practice that a solution should always be found that avoids the premature termination of the contract by one side, thus making the avoidance of the contract a remedy of last resort.<sup>268</sup>

### 5.3. Transnational contract law

At the transnational level<sup>269</sup>, it has often been argued that the hardship principle is far less elaborated, established and acknowledged than the *force majeure* doctrine and that it cannot yet be said that there is a definitive hardship doctrine in the transnational context. It is therefore argued that hardship, unlike *force majeure*, does not constitute a transnational legal principle which can be considered part of the so called “New Lex Mercatoria”.<sup>270</sup> However, for a number of reasons, the restrictive view of English law (and most other common law jurisdictions) on hardship should be regarded as a “singular rule”, which should not prevent the recognition of hardship as a general contract principle.<sup>271</sup> One core argument is that English

---

267 Pascale Accaoui Lorfin, “Adaptation of Contracts by Arbitrators” in Fabio Bortolotti & Dorothy Ufot, eds, *Hardship and Force Majeure in International Commercial Contracts: Dealing with Unforeseen Events in a Changing World* (Alphen upon Rhine: Kluwer Law International, 2018) 41 at 43 [Accaoui Lorfin, “Adaptation of Contracts by Arbitrators”].

268 For the principle of “*ut res magis valeat quam pereat*” as a general principle of transnational contract law, see “Force Majeure TransLex-Principle IV 5.3” and Commentary No 2, online: *TransLex Law Research* <[www.trans-lex.org/925000](http://www.trans-lex.org/925000)>; *Association of service industry firms v Service industry firm*, Award of 27 May 1991, 17 YB Comm Arb 11 (1992) at 15.

269 See for the approach taken in this article to determine the content of transnational commercial law, Berger, “General Principles of Law”, *supra* note 17.

270 See Filip de Ly, “Country Report Netherlands” in Michael Joachim Bonell, ed, *A New Approach to International Commercial Contracts, The UNIDROIT Principles of International Commercial Contracts* (The Hague: Kluwer Law International, 1999) 204 (reporting about the holding of the tribunal in ICC Case No. 7110 in its Partial Final Award of 4 May 1998: “[a]s to hardship, the Tribunal held in one sentence that the theory of changed circumstances does not form part of widely recognized and generally accepted legal principles” at 231); for the doctrine of New Lex Mercatoria, see generally, Orsolya Toth, *The Lex Mercatoria in Theory and Practice* (Oxford: Oxford University Press, 2017); Klaus Peter Berger, *The Creeping Codification of the New Lex Mercatoria*, 2nd revised ed (Alphen upon Rhine: Kluwer Law International, 2010) at 53ff [Berger, “Creeping Codification”].

271 See e.g. Fouchard, *supra* note 186 (“on pourrait aussi se demander si la clause *rebus sic stantibus* et ses conséquences en droit administratif français ne correspondent pas effectivement à un principe général du droit qu’il faudrait introduire dans ce genre de rapports internationaux” at 429); Hans Van Houtte, “Changed Circumstances and *Pacta Sunt Servanda*” in Emmanuel Gaillard, ed, *Transnational Rules in International Commercial Arbitration* (Paris: International Chamber of Commerce, 1993) 105 at 115; Horn, *supra* note 162 (“[t]his principle has found a modern, important and clear expression in article 62 of the Vienna Convention on the Law of Treaties of 1968-69 which deals with ‘Fundamental Change of Circumstances’. . . article 62 is a strong argument for the existence of a general legal principle which might also be relevant to transnational contracts with or between private parties” at 125).

law accepts the frustration doctrine,<sup>272</sup> which is very similar to the US impracticability doctrine (which like the frustration doctrine is a restrictive version of a hardship-type doctrine). Therefore, the alleged rejection of the impracticability doctrine under English law is in fact contradictory.<sup>273</sup>

It is thus not surprising that the doctrine of changed circumstances was acknowledged as a general principle of law in Art. V of the Claims Settlement Declaration<sup>274</sup> and in the case law of the Iran-US Claims Tribunal based on that Declaration.<sup>275</sup> In addition, the UPICC, since their first edition of 1994, include a Section 2 of Chapter 6 (“Performance”) entitled “Hardship”. These provisions combine aspects of domestic laws and experience from international contract practice and thus reflect a transnational hardship principle.<sup>276</sup> *Vice versa*, the drafters of the new French provision explicitly acknowledged the influence of the UPICC provision.<sup>277</sup> So did the Dutch legislature.<sup>278</sup>

Endeavoring to strike a balance between sanctity of contracts (*pacta* principle) and changed circumstances (*clausula* principle), the UPICC make it clear that hardship situations must remain the rare exception and that the *pacta* principle will usually prevail. In that regard, Art. 6.2.1 provides:

Where the performance of a contract becomes more onerous for one of the parties, that party is nevertheless bound to perform its obligations subject to the following provisions on hardship.<sup>279</sup>

---

<sup>272</sup> See Section 4.2.2, above.

<sup>273</sup> Brunner “Force Majeure and Hardship”, *supra* note 31 at 410.

<sup>274</sup> *Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran*, 19 January 1981, reprinted in (1983) 1 Iran-US CTR 9 at Art V [“Claims Settlement Agreement”].

<sup>275</sup> See *Questech Inc v Iran*, *supra* note 163 (“[t]his concept of changed circumstances, also referred to as *clausula rebus sic stantibus*, has in its basic form been incorporated into so many legal systems that it may be regarded as a general principle of law . . . While it might be argued that, in view of wider and narrower formulations of the *clausula* in different legal systems and of certain differences in its practical application it would not be easy to establish a common core of such a general principle of law, the consideration of changed circumstances in the present context is warranted by the express wording of Art. V of the Claims Settlement Declaration” at 122); *Rockwell International Systems, Inc v Islamic Republic of Iran, Ministry of Defence*, IUSCT 340 (1990) at para 92; Schmitz, *supra* note 168 at 181ff.

<sup>276</sup> Accaoui Lorfing, “Adaptation of Contracts by Arbitrators”, *supra* note 267 at 54ff.

<sup>277</sup> Claude Witz, “Störung des vertraglichen Gleichgewichts im neuen französischen Schuldrecht”, in Florian Bien & Jean-Sébastien Borghetti, eds, *Die Reform des französischen Vertragsrechts, ein Schritt zu mehr europäischer Konvergenz?* (Tübingen: Mohr Siebeck, 2016) 119 at 135; Ancel, *supra* note 225 at para 49; Stoffel-Munck, *supra* note 241.

<sup>278</sup> ICC Case No 8468, 24 YB Comm Arb 162 (1999) at 167.

<sup>279</sup> *UNIDROIT Principles of International Commercial Contracts*, 2016, Art 6.2.1; see also Ewan McKendrick, “Chapter 6: Performance, Section 2: Hardship” in Stefan Vogenauer ed, *Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)* (Oxford: Oxford University Press, 2015) at Article 6.2.1, para 4.

This wording is in line with the domestic doctrine of changed circumstances in various countries.<sup>280</sup> Likewise, international arbitral practice considers the *clausula* principle as “a dangerous exception to the principle of sanctity of contracts”. Consequently, its application must be limited “to cases where *compelling reasons* justify it”.<sup>281</sup>

As a consequence of this restrictive approach, the wording of the actual hardship provision in the UPICC reveals its narrow character. It is not concerned with the broad notion of the “foundation of the transaction” or similar concepts of domestic law, such as in Germany. Rather, its sole purpose is to restore the lost economic equilibrium of a valid contract whose continuing performance would threaten one side with an overwhelming loss. Within the UPICC, hardship is defined in Art. 6.2.2, which provides:

There is hardship where the occurrence of events fundamentally alters the equilibrium of the contract either because the cost of a party’s performance has increased or because the value of the performance a party receives has diminished, and

- (a) the events occur or become known to the disadvantaged party after the conclusion of the contract;
- (b) the events could not reasonably have been taken into account by the disadvantaged party at the time of the conclusion of the contract;
- (c) the events are beyond the control of the disadvantaged party; and
- (d) the risk of the events was not assumed by the disadvantaged party.<sup>282</sup>

This definition shows two things. First, the requirements of hardship are very similar to those of the *force majeure* doctrine:<sup>283</sup> occurrence of an event, of whatever nature, after contract conclusion for which the obligor has not assumed the risk, unforeseeability, unavailability and the causing by the event of an economic disequilibrium in the contract.<sup>284</sup> Second, this

---

<sup>280</sup> See Section 5.2.2, above, for German law.

<sup>281</sup> *Indian company v Pakistani bank*, *supra* note 118 (“[t]he principle ‘*Rebus sic stantibus*’ is universally considered as being of strict and narrow interpretation, as a dangerous exception to the principle of sanctity of contracts. Whatever opinion or interpretation lawyers of different countries may have about the ‘concept’ of changed circumstances as an excuse for nonperformance, they will doubtless agree on the necessity to *limit* the application of the so-called ‘doctrine *rebus sic stantibus*’ (sometimes referred to as ‘frustration’, ‘force majeure’, ‘imprévision’, and the like) to cases where *compelling reasons* justify it, having regard not only to the fundamental character of the changes, but also to the particular type of the contract involved, to the requirements of fairness and equity and to all circumstances of the case” at 129); ICC Case No 8486, *supra* note 20 (“Hence, the termination of a contract for unforeseen circumstances (‘hardship’, ‘*clausula rebus sic stantibus*’) should be allowed only in truly exceptional cases” at 167); see also ICC Case No 9479 (2001) ICC Bull 12 No 2 67 at 70 online: *TransLex Law Research* <[www.trans-lex.org/209479](http://www.trans-lex.org/209479)>; Yildirim, *supra* note 36 at 87.

<sup>282</sup> *UNIDROIT Principles of International Commercial Contracts* 2016, Art. 6.2.2.

<sup>283</sup> See Section 4.3, above.

<sup>284</sup> ICC, “Force Majeure and Hardship Clause”, *supra* note 168 at art 2; Yildirim, *supra* note 36 at 86.

economic disequilibrium must be “fundamental”. The mere increase in cost of performance never suffices. The event must have placed an excessive burden on the aggrieved party, rendering performance substantially more onerous, whether due to a fundamental increase in costs or a diminished value of the performance of the other side. Whether there is such a fundamental economic imbalance cannot be determined by simply referring to abstract figures like an increase in costs of 100 or 200 percent as compared to the initial contractual cost calculations.<sup>285</sup> That question can only be answered against the circumstances of each individual case, including the nature of the contract, its subject matter and the conditions of the market in which that contract was concluded.<sup>286</sup> The COVID-19 pandemic does qualify as an event causing a “fundamental” economic disequilibrium.<sup>287</sup>

As to the legal effects of hardship, Art. 6.2.3 UPICC places the parties in the driver’s seat and entitles the aggrieved party to request renegotiation from the other side.<sup>288</sup> Only if these renegotiations have failed, either party may ask the court or arbitral tribunal to terminate the contract or adapt it to the changed circumstances,<sup>289</sup> whatever that court or tribunal deems more reasonable in a given case in the exercise of the wide discretion granted to it. If a court or arbitral tribunal is called upon to adapt the contract, it must take the nature and severity of the hardship event into account. In cases of such extraordinary occurrences like the COVID-19 pandemic, they must bear in mind that these events are so exceptional and extraneous to the contract that, absent a specific risk assumption in the contract, neither party shall bear the full risk emanating from such crisis, but that this risk must be shared by the parties.<sup>290</sup> In these circumstances, the tribunal’s task is necessarily limited

---

285 The figure of 50 percent in the official Comment to Art 6.2.2 UPICC was deleted in the 2004 edition; see Yildirim, *supra* note 36 at 100ff.

286 McKendrick, *supra* note 279 at Art 6.2.2, para 9.

287 Weller et al, *supra* note 4 at 1021.

288 See, for the legal principles applicable to such renegotiations, Klaus Peter Berger, “Renegotiation and Adaptation of International Investment Contracts: The Role of Contract Drafters and Arbitrators” (2003) 36 Vand J Transnat’l L 1347 at 1363ff [Berger, “Role of Contract Drafters”].

289 See, for an arbitral tribunal’s powers to adapt contracts, and the required distinction between the procedural authority of the tribunal to adapt the contract, the substantive legitimacy of adaptation under the law applicable to the contract, and the search for adaptation standards, Klaus Peter Berger, “Power of Arbitrators to Fill Gaps and Revise Contracts to Make Sense” in Ian Fletcher, Loukas Mistelis & Marise Cremona, eds, *Foundations and Perspectives of International Trade Law* (London: Sweet & Maxwell, 2001) 269 at paras 19-015ff [Berger, “Power of Arbitrators to Fill Gaps”]; ICC, “Force Majeure and Hardship Clause, *supra* note 168 (the 2020 ICC Hardship Clause provides for three alternative legal consequences of hardship: 1) the aggrieved party’s right to terminate the contract without adaptation, 2) the parties’ right to ask the court or arbitral tribunal to adapt the contract with a view to restoring its equilibrium, or to terminate the contract, as appropriate, or 3) the parties’ right to request the judge or arbitrator to declare the termination of the contract).

290 Weller et al, *supra* note 4 at 1021; see also Wagner et al, *supra* note 71 at 848; see also UK Cabinet Office, *supra* note 11 (“[R]esponsible and fair behaviour is strongly encouraged in performing and enforcing contracts where there has been a material impact from Covid-19.

to “a fair distribution of the losses between the parties”.<sup>291</sup> This follows from the general rule that the effect of the adaptation cannot be a “better deal” than the one initially concluded as a result of mutual concessions, accommodations and withdrawals of initial demands during the contract negotiations. This approach was adopted by the tribunals in the well-known *AMINOIL*,<sup>292</sup> *Mobil Oil Iran*<sup>293</sup> and *Wintershall*<sup>294</sup> arbitrations and in many ICC arbitral awards.<sup>295</sup> At the same time, arbitral tribunals must be wary of admitting unjustified attempts to renegotiate the contractual bargain under the guise of an accepted legal principle.<sup>296</sup>

## 6. Conclusion

Even though the *force majeure* and hardship doctrines both deal with the legal effect of unforeseen circumstances on contractual relationships, they took different paths in civil and common law jurisdictions, depending on the extent to which these jurisdictions were willing to admit exceptions to the *pacta* principle. In spite of these differences – or maybe because of them – transnational business law has developed a unified approach towards both doctrines which is also reflected in the myriad of *force majeure* and hardship clauses to be found in international commercial contracts.

The COVID-19 pandemic provides the biggest conceivable litmus test for the viability and maturity of these important doctrines in modern times, both on the domestic and the international level. While most scenarios caused by the pandemic will involve the *force majeure* doctrine and its domestic counterparts, cases will remain in which a modified performance is still possible and will thus be governed by the hardship doctrine or similar concepts of domestic law from which the transnational doctrine has emerged.

The notions of unforeseeability and unavoidability, which are common requirements of both principles, must be judged against the background of the uniqueness and severity of the COVID-19 crisis. In spite of the numerous

---

This includes being reasonable and proportionate in responding to performance issues and enforcing contracts (including dealing with any disputes), acting in a spirit of co-operation and aiming to achieve practical, just and equitable contractual outcomes having regard to the impact on the other party (or parties), the availability of financial resources, the protection of public health and the national interest” at para 14).

<sup>291</sup> *UNIDROIT Principles of International Commercial Contracts*, 2016, Art 6.2.3, Comment No 7.

<sup>292</sup> *Government of the State of Kuwait v the American Independent Oil Company (AMINOIL)*, 9 YB Comm Arb 71 (1984) at paras 24, 59 [AMINOIL].

<sup>293</sup> *Mobil Oil Iran*, *supra* note 30.

<sup>294</sup> *Wintershall AG, International Ocean Resources, Inc (formerly Koch Qatar, Inc) and others v the Government of Qatar*, 15 YB Comm Arb 30 (1990) [*Wintershall AG v Qatar*].

<sup>295</sup> Antonio Crivellaro, “La révision du contrat dans la pratique de l’arbitrage international” (2017) 1 Rev Arb 69 (“the authority of arbitrators to revise contracts is certainly admitted in international commercial law” [translation by the authors] at 79ff).

<sup>296</sup> See Section 4, above, for similar considerations regarding the *force majeure* principle.

predictions of medical researchers and virologists during the past years, a disastrous scenario affecting the entire global economy like the “world virus crisis”<sup>297</sup> caused by COVID-19 pandemic, could not have been foreseen even by the most diligent merchants. Nor could its consequences have been avoided by them. Ultimately, the strict requirements of both the *force majeure* and the hardship doctrines emphasize the accountability of parties to commercial contracts for their own business affairs as a flip side of party autonomy and of the recognition of self-determination of the individual that goes along with it.<sup>298</sup> In highly exceptional global scenarios such as the one caused by the effects of or by measures taken to combat the COVID-19 pandemic, self-accountability and self-determination of international businesspeople lose their principal justification and legitimacy. In such extraordinary times, the doctrines of *force majeure* and hardship assume the role of regular, rather than exceptional legal remedies, allowing to distribute evenly between the players in the global economy the risks emanating from the unprecedented COVID-19 pandemic.

---

<sup>297</sup> Weller et al, *supra* note 4 at 1020.

<sup>298</sup> See Flume, *supra* note 264 (“[a]pplication of the principle of private autonomy means the recognition of the ‘high-handedness’ of the individual in the creative design of its legal relationships” [translation by the authors] at 6–7).