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

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1. Introduction

The recent COVID-19[1] pandemic[2] has been characterized as "humanities darkest hour", at least since World War II.[3] 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.[4] Both concepts provide legal tools to deal with the effect of unexpected future events and unforeseen changes in circumstances, particularly in long-term contracts.[5] 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 interfere with contracts should be considered *force majeure* events.[6] 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

[1] COVID-19, an abbreviation for „Coronavirus disease 2019", is an infectious disease caused by severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2), *see Origin of SARS-CoV-2* (March 26, 2020) 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 (accessed April 20, 2020).

[2] 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, *see WHO announces COVID-19 outbreak a pandemic*, http://www.euro.who.int/en/health-topics/health-emergencies/coronavirus-covid-19/news/news/2020/3/who-announces-covid-19-outbreak-a-pandemic (accessed April 20, 2020).

[3] Statement of the IMF's managing director, Kristalina Georgieva, during a WHO press briefing on April 3rd 2020, https://www.imf.org/en/News/Articles/2020/04/03/tr040320-transcript-kristalina-georgieva-participation-world-health-organization-press-briefing (accessed April 20, 2020).

[4] *See*, *e.g.*, for German law Marc-Philippe Weller, et al., *Virulente Leistungsstörungen - Auswirkungen der Corona-Krise auf die Vertragsdurchführung*, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 2020, 1017, 1022.

[5] *See generally* PASCALE ACCAOUI LORFING, LA RENÉGOCIATION DES CONTRATS INTERNATIONAUX 28 et seq. (Bruylant 2011); *see* for the increased significance of the time element in international contract law Attila Harmathy, *Hardship*, *in* EPPUR SI MUOVE: THE AGE OF UNIFORM LAW — ESSAYS IN HONOUR OF MICHAEL JOACHIM BONELL TO CELEBRATE HIS 70TH BIRTHDAY Vol. II, 1039 (International Institute for the Unification of Private Law ed., Unidroit 2016).

[6] *A force to be reckoned with-Chinese firms use obscure legal tactics to stem virus losses*, *The virus has led to firms trying to get out of contracts*, https://www.economist.com/business/2020/02/20/chinese-firms-use-obscure-legal-tactics-to-stem-virus-losses (accessed April 20, 2020).

certificates to Chinese companies until March 25, 2020.[7] 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.[8] 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.[9] Similar declarations were made by other governments.[10]

Analogies between the COVID-19 pandemic and that of a natural disaster – a classical *force majeure* scenario[11] – 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[12] – may be available and capable of excusing or modifying performance in circumstances such as the COVID-19 pandemic.[13] 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.[14]

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[7] *CCPIT Guides Enterprises to Leverage Force Majeure Certificates, which Help to Maintain Nearly 60% Contracts,* http://en.ccpit.org/info/info_40288117668b3d9b017163990e5a082a.html (accessed April 20, 2020).

[8] *Id.*; 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, K. Christie, M Han, and L Shmatenko (2020 forthcoming), LNG Contract Adjustments in Difficult Times: The Interplay between Force Majeure, Change of Circumstances, Hardship, and Price Review Clauses, OGEL March 2020, 1, 12.

[9] The original text of the declaration can be found here: https://www.vie-publique.fr/discours/273763-bruno-le-maire-28022020-coronavirus (accessed April 20, 2020). The declaration was later listed among the government's measures for assisting businesses during the epidemic: https://www.economie.gouv.fr/dgccrf/mesures-daccompagnement-des-entreprises-impactees-par-le-coronavirus-covid-19 (accessed April 20, 2020).

[10] 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, https://gds.gov.iq/iraqs-crisis-cell-extends-curfew-announces-additional-measures-to-contain-covid-19/ (accessed April 20, 2020); the declaration affected projects worth approximately 291 billion USD, https://www.offshore-technology.com/comment/iraq-covid-19-force-majeure-contracts/ (accessed April 20, 2020).

[11] *See infra* Section 2.1.

[12] *See infra* Section 4.3.

[13] *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*, RECUEIL DALLOZ 2020, 611.

[14] *See, e.g.,* Thomas Rüfner, *in* COMMENTARIES ON EUROPEAN CONTRACT LAWS Art. 8:108 § 2 (Nils Jansen & Reinhard Zimmermann eds., Oxford University Press 2018) on excuse of non-performance in European legal systems: "The pertinent rules in the various European legal systems tend to be very different

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 the context of the COVID-19 pandemic as well as in other constellations. After situating these doctrines within their dogmatic and historic[15] origins, the article seeks to provide an explanation for the differences between and among these two doctrines in various national jurisdictions and at the transnational level.

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:[16]

from one country to the next; their history is complicated and the state of the law is confusing in many systems"; Sukhnam Digwa-Singh, *The Application of Commcercial Impracticability under Article 2-615 of the Uniform Commercial Code*, *in* FORCE MAJEURE AND FRUSTRATION OF CONTRACT 305, 329 (Ewan McKendrick ed., Lloyd's of London Press 2nd ed. 1995); Werner Melis, *Force majeure and Hardship Clauses in International Commercial Contracts in View of the Practice of the ICC Court of Arbitration*, 1 JOURNAL OF INTERNATIONAL ARBITRATION 212, 215-216 (1984).

[15] *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 (Mohr 2019) 334: "The experiences of legal history show the way to the future." (translation by the authors); *see* for a similar approach in the context of transnational business law („New Lex Mercatoria") KLAUS PETER BERGER, *The Lex Mercatoria (Old and New) and the TransLex-Principles*, https://www.trans-lex.org/the-lex-mercatoria-and-the-translex-principles_ID8, para. 2 (accessed April 20, 2020); *see* generally for the value of legal history for the development of modern law: Friedrich Carl von Savigny, *Ueber den Zweck dieser Zeitschrift*, ZEITSCHRIFT FÜR GESCHICHTLICHE RECHTSWISSENSCHAFT 1815, 1, 4: „[Legal] history is not just a collection of examples [from the past], but the only way to arrive at a true insight into our current state of [lega] affairs" (translation by the authors).

[16] *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 285 et seq. (1993); Christoph Brunner, *Rules on Force Majeure as Illustrated in Recent Case Law*, *in* HARDSHIP AND FORCE MAJEURE IN INTERNATIONAL COMMERCIAL CONTRACTS 82 (Fabio Bortolotti & Dorothy Ufot eds., ICC 2018).

- a substantial devaluation of the contract currency[17] or dramatic fall in the price for a sold product;[18]
- the refusal of a central bank to grant a permit for payments in the currency due under a contract;[19]
- 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;[20]
- a long-term gas or Liquified 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;[21]
- 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);[22]
- 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;[23]
- hurricanes or typhoons that destroy off-shore facilities for sub-sea gas or oil exploitation or an off-shore wind-park;
- an unprecedented drought that results in the suspension of the operation of a plant for the production of tungsten;[24]
- cancellation of an export license for the export of raw materials which constitutes the subject of a long-term delivery contract;[25]

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[17] *See, e.g.,* for Turkey: Ecem Susoy Uygun, *Adapting Bilateral Agreements based on Natural Gas in the Electricity Market*, Erdem & Erdem Newsletter (Sep. 2018) http://www.erdem-erdem.av.tr/publications/newsletter/adapting-bilateral-agreements-based-on-natural-gas-in-the-electricity-market/ (accessed April 20, 2020).

[18] ICC Case No. 8486 of 1996, 24 Y.B. Comm. Arb. 162, 168 (1999).

[19] ICC Case No. 3099/3100 of 1979, Collection of ICC Arbitral Awards 1974-1985 67, 70 (Sigvard Jarvin & Yves Derains eds. 1990); ICC Case No. 3093/3100 of 1979, Collection of ICC Arbitral Awards 1974-1985 365 (Sigvard Jarvin & Yves Derains eds. 1990).

[20] Tandrin Aviation Holdings Ltd. v. Aero Toy Store LLC [2010] EWCH 40 (Comm.); Brunner, *supra* note 16, at 91; *see also* WOLFGANG WIEGAND, DIE FINANZMARKTKRISE UND DIE CLAUSULA REBUS SIC STANTIBUS DARGESTELLT AM BEISPIEL DER BONUSZAHLUNGEN, Jusletter.ch of February 9, 2009 (https://jusletter.weblaw.ch/juslissues/2009/509.html) (accessed April 20, 2020), stating that the world financial crisis fulfils the requirements of *clausula rebus sic stantibus* (the Swiss hardship doctrine) "in a textbook form".

[21] PIETRO FERRARIO, THE ADAPTATION OF LONG-TERM GAS SALE AGREEMENTS BY ARBITRATORS 26 (Wolters Kluwer 2017).

[22] Gould Marketing, Inc. v. Ministry of National Defence, 3 Iran-U.S. Cl. Trib. Rep. 147, 152-153 (1983): "[S]trikes, 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".

[23] ICC Case No. 2763 of 1980, Collection of ICC Arbitral Awards 1974-1985 157, 158 et seq. (Sigvard Jarvin & Yves Derains eds. 1990).

[24] Global Tungsten & Powders Corp. v. Largo Resources Ltd. (ICC Case No. 19566 of 2014), Arbitrator Intelligence Materials; *see also* ICC Case No. 8790 of 2000, 29 Y.B. Comm. Arb. 13, 20 (2004); Mercédeh Azeredo da Silveira, *Economic Sanctions, Force Majeure and Hardship*, *in* HARDSHIP AND FORCE MAJEURE IN INTERNATIONAL COMMERCIAL CONTRACTS 161 (Fabio Bortolotti & Dorothy Ufot eds., ICC 2018).

[25] ICC Case No. 2478 of 1974, 3 Y.B. Comm. Arb. 222 (1978).

- 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;[26]
- cancellation of an export license by state authorities;[27]
- state embargoes or sanctions that have an impact on the parties' contractual obligations.[28]

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.[29] 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.[30] 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"[31] of classical contract theory. That theory regards a contract as a deal: a discrete transaction in the form of a mutual promise that must

[26] Great Elephant Corp. v. Trafigura Beheer BV (The Crudersky) [2013] EWCA Civ 905; Brunner, *supra* note 16, at 86 et seq.
[27] ICC Case No. 2478 of 1974, 3 Y.B. Comm. Arb. 222, 223 (1978).
[28] ICC Case No. 7575 of 2002, 137 Journal du droit international (Clunet) 1378, 1380 (2010), excerpts available at: www.trans-lex.org/207575 (accessed April 20, 2020); Starrett Housing Corp. v. Iran, 16 Iran-U.S. Cl. Trib. Rep. 112 (1987); Mobile Oil Iran v. Iran, 16 Iran-U.S. Cl. Trib. Rep. 3, 38 (1987), excerpts available at: www.trans-lex.org/232000 (accessed April 20, 2020); Nordic American Shipping A/S Owner v. Bayoil USA Inc. Charterer, Final Award of April 26, 1993, 20 Y.B. Comm. Arb. 126, 130 (1995) (Society of Maritime Arbitrators), excerpts available at: www.trans-lex.org/250300 (accessed April 20, 2020); Brauer & Co (Great Britain) Ltd. v. James Clark (Brush Materials) Ltd, [1952] 2 Lloyd's Rep. 147, 151 (CA) (Eng.), excerpts available at: www.trans-lex.org/308700 (accessed April 20, 2020).
[29] CHRISTOPH BRUNNER, FORCE MAJEURE AND HARDSHIP UNDER GENERAL CONTRACT PRINCIPLES: EXEMPTION FOR NON-PERFORMANCE IN INTERNATIONAL ARBITRATION 1-3 (Kluwer Law International 2009); Berthold Goldman, *The applicable law: general principles of law — the lex mercatoria*, *in* Contemporary Problems in International Arbitration 113, 125 (Julian Lew ed., 1987); *see* for long-term gas and LNG sales agreements Paul Griffin, *English law in the global LNG business: international LNG sale and purchase—a relational arrangement*, 12 The Journal of World Energy Law & Business 216, 223 (2019).
[30] *See* for the *pacta* principle: DAVID HUGHES PARRY, THE SANCTITY OF CONTRACTS IN ENGLISH LAW 5 et seq. (Stevens 1959); for the *clausula* principle *see* Leopold Pfaff, *Die clausel Rebus sic stantibus in der Doctrin und der österreichischen Gesetzgebung*, *in* FESTSCHRIFT ZUM SIEBZIGSTEN GEBURTSTAGE SEINER EXCELLENZ DR. JOSEPH UNGER 221, 223 et seq. (Universität Wien: Rechts- und Staatswissenschaftliche Fakultät ed., 1898); RALF KÖBLER, DIE „CLAUSULA REBUS SIC STANTIBUS" ALS ALLGEMEINER RECHTSGRUNDSATZ 27 et seq. (1991); Abas, *supra* note 16, at 7 et seq.; Robert Feenstra, *Impossibilitas and clausula rebus sic stantibus*, *in* FATA IURIS ROMANI: ÉTUDES D'HISTOIRE DU DROIT 364, 368 et seq (Robert Feenstra ed., Presse universitaire de Leyde 1974); Pascal Pichonnaz, *From clausula rebus sic stantibus to hardship*, 17 FUNDAMINA: A JOURNAL OF LEGAL HISTORY 125 (2011); REINHARD ZIMMERMANN, THE LAW OF OBLIGATIONS: ROMAN FOUNDATIONS OF THE CIVILIAN TRADITION 581 (Juta & Co 1990).
[31] Zimmermann, *supra* note 30, at 577.

be kept.[32] Each party is entitled to rely on the performance of obligations undertaken by the other side: "my word is my bond".[33] In the age of liberalism, the *pacta* principle – and the 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 question.[34] Today, the *pacta* principle constitutes the cardinal principle of most national contract laws.[35] For that reason, it is also one of the foundation stones of a civilized society[36] and an "indisputable rule of international law"[37] as well. Ultimately, it is the autonomy of the parties which provides the moral force behind the contract as a binding promise.[38] Consequently, the influence of unforeseen and changed circumstances on the contract tends to be best dealt with when the parties

[32] CHARLES FRIED, CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION 117 (Oxford University Press 2nd ed. 2015): "Bargains are struck and their prices evaluated on the assumption that they will be kept."

[33] *See* for this ethical commitment to the given word *id.*, at 16: "The obligation to keep a promise is grounded not in arguments of utility but in respect for individual autonomy and in trust": *see also* RUDOLF VON JHERING, DER ZWECK IM RECHT Vol. I, 206 et seq. (Breitkopf & Härtel 1923); FRANZ BYDLINSKI, PRIVATAUTONOMIE UND OBJEKTIVE GRUNDLAGEN DES VERPFLICHTENDEN RECHTSGESCHÄFTES 109 (Springer 1967); George Gardner, *An Inquiry into the Principles of the Law of Contracts*, 46 HARV. L. REV. 1 (1932); Matthias Storme, *The Validity and the Content of Contracts*, *in* TOWARDS A EUROPEAN CIVIL CODE 159, 184 (Arthur Hartkamp, et al. eds., Ars Aequi Libri 1994).

[34] Ahmet Yıldırım, Equilibrium in International Commercial Contracts: With Particular Regard to Gross Disparity and Hardship Provisions of the UNIDROIT Principles of International Commercial Contracts 21 (Wolf Legal Publishers 2011); *see also* Catherine Pédamon & Jason Chuah, Hardship in Transnational Commercial Contracts: A Critique of the Legal, Judicial and Contractual Remedies 32 (Paris Legal Publ. 2013): "Any (judicial) revision is sacrificed on the altar of the sanctity of contract."

[35] Texaco Overseas Petroleum Co (TOPCO) v. Government of the Libyan Arab Republic, Award of January 19, 1974, 53 Int'l Law Rep. 389, 462 (1979) (Ad Hoc); MARC-PHILIPPE WELLER, DIE VERTRAGSTREUE: VERTRAGSBINDUNG - NATURALERFÜLLUNGSGRUNDSATZ - LEISTUNGSTREUE 27 (Mohr Siebeck 2009); Helmut Köhler, *Vertragsrecht und „Property Rights"-Theorie*, 144 ZHR 589, 592 (1980).

[36] *See* from the perspective of natural law SAMUEL VON PUFENDORF, DE IURE NATURAE ET GENTIUM Vol. III, Ch. 4 para. 2 (Kennett Lichfield trans., 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".

[37] Bin Cheng, General Principles Of Law as applied by International Courts And Tribunals 113 (Burlington Press Paperback re-issue ed. 1987); Charles Kotuby & Luke Sobota, General Principles of Law and International Due Process 89 et seq. (Oxford University Press 2017); Hans Wehberg, *Pacta Sunt Servanda*, 53 Am. J. Int'l. L. 775, 786 (1959).

[38] Fried, *supra* note 32, at 57; *see also* HUGO GROTIUS, ON THE LAW OF WAR AND PEACE: INCLUDING THE LAW OF NATURE AND OF NATIONS, Vol. I, 12 (Rev. Campbell A.M trans., 1814), who emphasized personal liberty ("private autonomy") as a fundamental "private right . . . established for the advantage of each individual"; Norbert Horn, *Person und Kontinuität, Versprechen und Vertrauen: Die Perspektive des Zivilrechts*, *in* NORBERT HORN, GESAMMELTE SCHRIFTEN 1199, 1202 et seq. and 1219 et seq. (Harald Herrmann & Klaus Peter Berger eds., De Gruyter 2016): "freedom and self-responsibility are linked through the legally binding nature of the declaration of will".

themselves have taken precautions at the drafting stage: "to contract means to foresee" ("*contrater, c'est prévoir*"[39]).

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 these situations, the binding force of a contract may turn into fetters.[40] 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*").[41] According to them, there is a "rule that every promise is to be understood with the circumstances being the same".[42] This notion would continue to play an important role as a recurring theme in the historic evolution of the *clausula* principle.[43] Such a premise would create a "crisis of contract" in the late eighteenth century by calling into question the binding force of contracts.[44] For others, the *clausula* principle was not a threat to the *pacta* principle. Properly understood, that principle relates to the "inviolability, but not the unchangeability of contracts".[45] This understanding of the *pacta* principle is derived from equity and good faith (*"pacta sunt servanda bona fide"*).[46] Good faith, as a standard of contractual behavior, requires a

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[39] GEORGES RIPERT, LA RÈGLE MORALE DANS LES OBLIGATIONS CIVILES 151 (LGDJ-Lextenso 2014); *see also* Accaoui Lorfing, *supra* note 5, at 29.
[40] *See* Köbler, *supra* note 30, at 275.
[41] Zimmermann, *supra* note 30, at 580.
[42] Andreas Thier, *Legal history*, *in* UNEXPECTED CIRCUMSTANCES IN EUROPEAN CONTRACT LAW 18 (Christoph Grigoleit & Ewoud Hondius eds., Cambridge University Press 2011).
[43] *See infra* Section 5.2.2.
[44] *See, e.g.,* Robert Hillman, *Crisis in Modern Contract Theory Essay*, 67 TEX. L. REV. 103 (1988); CHRISTOPHE JAMIN & DENIS MAZEAUD, LA NOUVELLE CRISE DU CONTRAT (Dalloz 2012); *see also* Zimmermann, *supra* note 30, at 579: "One 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."
[45] Hasan Zakariya, *Changed Circumstances and the Continued Validity of Mineral Development Contracts*, *in* LEGAL ASPECTS OF THE NEW INTERNATIONAL ECONOMIC ORDER 263, 275 (Kamal Hossain ed., Bloomsbury Academic 2013).
[46] *See* Tobias Lutzi, *Introducing Imprévision into French Contract Law - A Paradigm Shift in Comparative Perspective*, *in* THE FRENCH CONTRACT LAW REFORM: A SOURCE OF INSPIRATION? 89, 91 (Sanne Jansen & Sophie Stijns eds., Intersentia 2016): exceptions to the *pacta* principle as "concessions to contractual

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[47] by providing a legal and moral justification against the conception of the *pacta* principle as an absolute one.

Thus understood, application of the *clausula* principle emphasizes the relational nature[48] 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.[49] 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 to accommodate their legitimate expectations.[50]

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

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fairness."

[47] ICC Case No. 4761 of 1987, 114 Journal du droit international (Clunet) 1012, 1015 (1987), excerpts available at: www.trans-lex.org/204761 (accessed April 20, 2020); *see also* ICC Case No. 5953 of 1989, 117 Journal du droit international (Clunet) 1056, 1061 (1990), excerpts available at: www.trans-lex.org/205953 (accessed April 20, 2020): "Another 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'"; *see also* Accaoui Lorfing, *supra* note 5, at 110; Horn, *supra* note 38, at 1204 (long-term contract as a "cooperation program"); *see generally* Kotuby & Sobota, *supra* note 37, at 91 et seq.

[48] *See generally* Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AMERICAN SOCIOLOGICAL REVIEW 55, 55 (1963); IAN MACNEIL, THE NEW SOCIAL CONTRACT: AN INQUIRY INTO MODERN CONTRACTUAL RELATIONS (Yale University Press 1980); Ian Macneil, *Contracting Worlds and Essential Contract Theory*, 9 SOCIAL & LEGAL STUDIES 431 (2016).

[49] NAGLA NASSAR, SANCTITY OF CONTRACTS REVISITED: A STUDY IN THE THEORY AND PRACTICE OF LONG-TERM INTERNATIONAL COMMERCIAL TRANSACTIONS 21 (Martinus Nijhoff 1994); *see also* Accaoui Lorfing, *supra* note 5, at 29 and 33 et seq., 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.

[50] Pédamon & Chuah, *supra* note 34, at 36.

the willingness of courts, doctrine and parties[51] alike to accept equitable exceptions to the rule, especially in in highly extraordinary situations such as those caused by the COVID-19 pandemic. In international or transnational contract law, equitable exceptions from the *pacta* principle in the form of the various *force majeure* and hardship doctrines have long since been accepted.[52] To varying degrees, both doctrines have become disconnected from the diverse pattern of national legal systems and become part of transnational contract law.[53]

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.[54] 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[55] 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, while *force majeure* and hardship clauses in contracts 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.[56] This could be explained by the influence of the Anglo-Saxon legal tradition

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[51] NIGEL BLACKABY & CONSTANTINE PARTASIDES, REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION § 9.68 (Oxford University Press 6th ed. 2015) 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 "[E]specially . . . when one party stands to make a substantial financial gain by holding the other party to an unambiguous contractual commitment. The concept of fairness sometimes appears to take second place behind the prospect of profit".

[52] David Rivkin, *Lex Mercatoria and Force majeure*, *in* TRANSNATIONAL RULES IN INTERNATIONAL COMMERCIAL ARBITRATION 161 (Emmanuel Gaillard ed., ICC 1993).

[53] Brunner, *supra* note 29, at 4 et seq.

[54] *See* Accaoui Lorfing, *supra* note 5, at 64 et seq.; ICC Case No. 16369 of 2011, 39 Y.B. Comm. Arb. 169, 202 (2014): "Commercial 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]."

[55] See infra Section 4.3.

[56] Michael Furmston, *Drafting of Force Majeure Clauses: Some General Guidelines*, *in* FORCE MAJEURE AND FRUSTRATION OF CONTRACT 57, 62 (Ewan McKendrick ed., Lloyd's of London Press 2nd ed. 1995): "Perhaps 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"; Philippe Kahn, *"Lex mercatoria" et pratique des contrats internationaux*, *in* LE CONTRAT ÉCONOMIQUE INTERNATIONAL 200, 205 (Bruylant 1975).

in international contracting, where there is no distinction understood between a *force majeure* and hardship clause in a contract.[57] 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 proponents of the theory of the "last limit of economic sacrifice"[58] 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".[59] Hence, the requirement for excusing performance under *force majeure* is conflated with that of hardship. Similarly, the drafters of the UNIDROIT Principles of International Commercial Contracts (UPICC) argue that "there may be factual situations which can *at the same time* be considered as cases of hardship and of force majeure".[60] For that reason, it is argued

[57] Yildirim, *supra* note 34, at 89. 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. It is likely that any failure to distinguish between the two clauses is attributable to their absence as doctrines at law.

[58] KLAUS PETER BERGER, PRIVATE DISPUTE RESOLUTION IN INTERNATIONAL BUSINESS: NEGOTIATION, MEDIATION, ARBITRATION Vol. II, para. 24-65 (Kluwer Law International 3rd ed. 2015); Brunner, *supra* note 16, at 90; Brunner, *supra* note 29, at 213: "The 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"; Ingeborg Schwenzer, *in* COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG) Art. 79, para. 321 (Peter Schlechtriem & Ingeborg Schwenzer eds., C.H. Beck, Oxford University Press 4th ed. 2016); Hof van Cassatie [Cass.] [Court of Cassation], June 19, 2009, Arr. Cas 2009, 1736 (Belg.), English translation available at: http://cisgw3.law.pace.edu/cases/090619b1.html (accessed April 20, 2020); Marcel Fontaine, *The Evolution of the Rules on Hardship*, *in* HARDSHIP AND FORCE MAJEURE IN INTERNATIONAL COMMERCIAL CONTRACTS 11, at para. 18 (Fabio Bortolotti & Dorothy Ufot eds., ICC 2018); Anna Veneziano, *UNIDROIT Principles and CISG: Change of Circumstances and Duty to Renegotiate according to the Belgian Supreme Court*, 15 UNIF. L. REV. 137(2010); ICC Case No. 16369 of 2011, 39 Y.B. Comm. Arb. 169 (2014); Ingeborg Schwenzer, *Force Majeure and Hardship in International Sales Contracts Wider Perspectives*, VICTORIA U OF WELLINGTON L. REV. 709 713 (2008): "If one were to hold otherwise, unification of the law of sales would be undermined in a very important area"; ROLF HERBER & BEATE CZERWENKA, INTERNATIONALES KAUFRECHT: KOMMENTAR ZU DEM ÜBEREINKOMMEN DER VEREINTEN NATIONEN VOM 11. APRIL 1980 ÜBER VERTRÄGE ÜBER DEN INTERNATIONALEN WARENKAUF Art. 79, para. 8 (C.H. Beck 1991); JOHN HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION Art. 79, paras. 432.2 and 442 (Kluwer 4th ed. 2009); KARL NEUMAYER & CATHERINE MING, CONVENTION DE VIENNE SUR LES CONTRATS DE VENTE INTERNATIONALE DE MARCHANDISES Art. 79, para. 14 (Centre du Droit de l'Entreprise 1993).

[59] *CISG Advisory Council Opinion* No. 7, *supra* note 89, at para. 37; Brunner, *supra* note 16, at 90: "a very extraordinary deprecation 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".

[60] *UNIDROIT Principles of International Commercial Contracts 2016*, Art. 6.2.2, Comment No. 6 (UNIDROIT ed., 2017) (emphasis added).

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".[61] A similar situation is also reflected in the mixed ("hybrid"[62]) jurisdiction of the US state of Louisiana. Suggestions have been made there "to expand its law beyond the *force majeure* doctrine into cases of impracticability, *imprévision*, and hardship [by] injecting a good faith analysis into *force majeure* cases".[63]

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.,[64] which render the performance of a party's contractual obligations not just excessively onerous as in hardship-type situations,[65] but impossible, whether on a temporary or permanent basis.[66]

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[61] Brunner, *supra* note 29, at 392; *see also* Yildirim, *supra* note 34, at 89: "hardship is regarded as a lower degree of force majeure".

[62] *See generally* on the nature and significance of hybrid jurisdictions like Louisiana, Quebec, Scotland, Indonesia or the Philippines SUSAN FARRAN, et al., A STUDY OF MIXED LEGAL SYSTEMS ENDANGERED, ENTRENCHED OR BLENDED (Ashgate 2014).

[63] Christopher Handy, No Act of God Necessary: Expanding beyond Louisiana's Force Majeure Doctrine to Imprevision Comments, 79 LOUISIANA LAW REVIEW 241, 243, 254 (2018); see for another approach Charles Tabor, Dusting Off the Code: Using History to Find Equity in Louisiana Contract Law, 68 LA. L. REV. 549, 567 et seq. (2007).

[64] *See* the non-exhaustive list of *force majeure* events in TransLex-Principle VI.3 (c), www.trans-lex.org/944000 (accessed April 20, 2020).

[65] *See infra* Section 5.

[66] *See, e.g.,* Thames Valley Power Ltd. v. Total Gas & Power Ltd. [2005] EWHC 2208 (Comm.), [2006] 1 Lloyd's Rep. 441 [451], excerpts available at: www.trans-lex.org/307500 (accessed April 20, 2020): "The *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]"; *see also* Cheng, *supra* note 37, at 227, quoting the Rumano-Turkish Arbitral Tribunal in the case of Michel Macri (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", *see also* FILALI OSMAN & ÉRIC LOQUIN, LES PRINCIPES GÉNÉRAUX DE LA LEX MERCATORIA 162 (Librairie Générale de Droit et de Jurisprudence 1992); Pascale Accaoui Lorfing, *L'article 1195 du Code Civil français ou la révision pour imprévision en*

The COVID-19 pandemic appears as a classical example for such an event. However, one needs to first distinguish between the general evaluation of the pandemic from a political, socio-economic and 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 "Public Health Emergency of International Concern" (PHEIC)[67]. 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".[68] 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 contacts, 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.[69]

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. Legal effects relate to lockdowns, curfews, travel restrictions and other

droit privé français à la lumière du droit comparé, REVUE DE DROIT DES AFFAIRES INTERNATIONALES 449, 450 (2018); Heinich, *supra* note 13, at 612.

[67] Art. 1 of the 2005 International Health Regulations defines the term PHEIC as "an extraordinary event which is determined, as provided in these Regulations:

i. to constitute a public health risk to other States through the international spread of disease; and
ii. to potentially require a coordinated international response".

[68] Statement on the second meeting of the International Health Regulations (2005) Emergency Committee regarding the outbreak of novel coronavirus (2019-nCoV) of 30 January 2020, 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) (accessed April 20, 2020).

[69] See Weller, et al., *supra* note 4, at 1021, 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; Eric Wagner, et al., *Auswirkungen von COVID-19 auf Lieferverträge*, BETRIEBS-BERATER 2020 845, 847; *see* for a similar view in French law Heinich, *supra* note 13, at 612.

measures by governments and public authorities which are issued *in reaction* to the crisis.[70]

Neither the declaration of the WHO Director-General of 30 January 2020,[71] nor *force majeure* certificates issued by public authorities, like the one issued by the Chinese CCPIT,[72] in and of themselves, would be tantamount to a legal *force majeure* determination.[73] 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)[74] and Art. 180 of its General Provisions of the Civil Law (民法总则)[75] due to the lack of separation of powers between the executive branch and the judiciary.[76] They may not, however, prejudge a domestic court's or

[70] Heinich, *supra* note 13, at 612; Wagner, et al., *supra* note 69, at 846; Ludovic Landivaux, *Contrats et coronavirus: un cas de force majeure ? Ça dépend…*, DALLOZ ACTUALITÉ March 20, 2020.

[71] Heinich, *supra* note 13, 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 FIDIC COVID-19 GUIDANCE MEMORANDUM TO USERS OF FIDIC STANDARD FORMS OF WORKS CONTRACTFIDIC Guidance Memorandum, https://fidic.org/sites/default/files/COVID%2019%20Guidance%20Memorandum%20-%20PDF.pdf, 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 case 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."

[72] *See supra* note 8.

[73] See for acts of public authorities as force majeure events Brunner, *supra* note 29, at 263 et seq.

[74] "If 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." https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/52923/108022/F1916937257/CHN52923%20Eng.pdf (accessed April 20, 2020).

[75] "Where the non-performance of civil obligations is caused by a force majeure, no civil liability shall arise therefrom, except as otherwise provided for by any law. A force majeure means any objective circumstance that is unforeseeable, inevitable, and insurmountable.", https://pku-law.com/en_law/c6f2d80ee8c0c709bdfb.html (accessed April 20, 2020); on April 20, 2020, the Supreme People's Court of the People's Republic of China issued its "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 (I)", 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, http://www.court.gov.cn/fabu-xiangqing-226241.html (accessed April 20, 2020).

[76] 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, https://worldjusticeproject.org/rule-of-law-index/factors/2020/China/Civil%20Justice/ (accessed April 20, 2020) .

international arbitral tribunal's[77] factual evaluation of the COVID-19 situation in a given case, if that court or tribunal sits outside China.[78]

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*" [79], 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 with frequency.

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[77] See 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* situations National Oil Corporation v. Libyan Sun Oil Company (First Award on *Force majeure*), ICC Case No. 4462 of 1985, 29 International Legal Materials 565 (1990), excerpts of the First and Final Award are also published in 16 Y.B. Comm. Arb. 5 (1991); *see* Klaus Peter Berger & Olivia Johanna Erdelyi, *Force Majeure in International Contract Law — A Comment on National Oil Corporation v Sun Oil*, *in* THE PRACTICE OF ARBITRATION — ESSAYS IN HONOUR OF HANS VAN HOUTTE (Patrick Wautelet ed., Hart 2012); *see also* 1. Gujarat State Petroleum Corp. Ltd., 2. Alkor Petro Ltd., 3. Western Drilling Contractors Private Ltd. v. 1. Republic of Yemen, 2. The Yemeni Ministry of Oil and Minerals, ICC Case No. 19299 of 2015, text available at https://www.italaw.com/cases/4209 (accessed April 20, 2020); *see* for a blend of political, economic and natural events ICC Award No. 8873 of 1997, 125 Journal du droit international (Clunet) 1017 (1998).

[78] *See* for the comparable declaration of the French Ministry of Economy of 28 February 2020 *supra* note 9; Heinich, *supra* note 13, 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).

[79] *A force to be reckoned with-Chinese firms use obscure legal tactics to stem virus losses*, *The virus has led to firms trying to get out of contracts*, https://www.economist.com/business/2020/02/20/chinese-firms-use-obscure-legal-tactics-to-stem-virus-losses (accessed April 20, 2020).

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.[80] 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 changed circumstances were included.[81] The drafters of the *Code Napoléon* borrowed almost exclusively from the developed legal doctrines of the Northern Natural school.[82] 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.[83]

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

[80] James Gordley, *Impossibility and Changed and Unforeseen Circumstances*, 52 THE AMERICAN JOURNAL OF COMPARATIVE LAW 513, 518 (2004).
[81] James Gordley & Arthur Taylor von Mehren, AN INTRODUCTION TO THE COMPARATIVE STUDY OF PRIVATE LAW READINGS, CASES, MATERIALS 504 (Cambridge University Press 2006).
[82] *Id*.
[83] Translation by the authors, French original available here: https://www.legifrance.gouv.fr/affichCodeArticle.do?idArticle=LEGIARTI000006436410&cidTexte=LEGITEXT000006070721&dateTexte=18040217 (accessed April 20, 2020).

dogmatic", allowing neither for an "excessive simplification", nor for a "casuistic legislative approach".[84]

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.[85] 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 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].[86]

While natural disasters do no automatically qualify as *force majeure* events under French law[87] and the French courts are very restrictive in accepting even severe diseases as instances of *force majeure,*[88] non-performance based on the effects[89] of extraordinary and systemic events such as the COVID-19 pandemic are considered as falling squarely under the *force majeure* doctrine in French law.[90] The consequences

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[84] Francois Geny, *La Technique législative dans la Codification civile moderne*, *in* LE CODE CIVIL (1804-1904) — LIVRE DU CENTENAIRE Vol. II, 1005 et seq. (Société D'études Législatives ed., Arthur Rousseau 1904); Walther Hug, *Gesetzesflut und Rechtssetzungslehre*, *in* GESETZGEBUNGSTHEORIE, JURISTISCHE LOGIK, ZIVIL- UND PROZEßRECHT GEDÄCHTNISSCHRIFT FÜR JÜRGEN RÖDIG 11 (Ulrich Klug, et al. eds., Springer 1978).

[85] Morgane Cauvin, Das Leistungsstörungsrecht des französischen Code civil nach der Vertragsrechtsreform 2016 252 (Jan. 14, 2020) (unpublished manuscript) (on file with authors).

[86] *See* for an English translation of the new Code Civil provisions: http://www.textes.justice.gouv.fr/art_pix/THE-LAW-OF-CONTRACT-2-5-16.pdf (accessed April 20, 2020).

[87] Fabrice Leduc, *Catastrophe naturelle et force majeure*, REVUE GÉNÉRALE DU DROIT DES ASSURANCES 1997, 409.

[88] Two French court judgements (Basse-Terre, 17 déc. 2018, n° 17/00739 ; Nancy, 22 nov. 2010, n° 09/00003) have refused to qualify the chikungunya virus on the island Saint-Barthélemy in 2013-2014 and the dengue fever in Martinique as *force majeure* due to their relatively mild and non-lethal consequences and local limitation; *see also* Heinich, *supra* note 13; the plague and the influenca H1N1 of 2009 have likewise not been qualified as force majeure events by the French courts, see *Paris, 25 sept. 1996, n° 1996/08159; Besançon, 8 janv. 2014, n° 12/0229.*

[89] *See supra* Section 4.

[90] *See*, *e.g.*, Pascale Guiomard, *La grippe, les épidémies et la force majeure en dix arrêts*, DALLOZ ACTUALITÉ March 4, 2020.

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 later date makes no sense for the buyer.[91] 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.[92] 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.[93] Under the pre-2016 law in France, 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.[94] 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 boundaries from the hardship doctrine, the reality looks different. The three doctrines examined in the next

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[91] Heinich, *supra* note 13, at 613; Landivaux, *supra* note 70.

[92] Fabrice Gréau, *Force Majeure*, *in* REPERTOIRE DE DROIT CIVIL para. 94 (Dallloz 2017); the exception in cases of risk assumption is provided for in Art. 1351 Code Civil; pursuant to that provision, the debtor may also invoke *force majeure* if the creditor has previously provided him with a notice to perform.

[93] Pascal Ancel, *Impossibilité et force majeure: un éclairage du droit allemand sur le nouveau droit français des obligations*, *in* MÉLANGES EN L'HONNEUR DU PROFESSEUR CLAUDE WITZ 25, 33 & 37 et seq. (Michel Storck ed., LexisNexis 2018); GAËL CHANTEPIE & MATHIAS LATINA, LE NOUVEAU DROIT DES OBLIGATIONS COMMENTAIRE THÉORIQUE ET PRATIQUE DE L'ORDRE DU CODE CIVIL para. 677 (Dalloz 2nd ed. 2018); BERTRAND FAGES (ED.), LE LAMY DROIT DU CONTRAT 2034 – Libération par l'effet de la force majeure (Wolters Kluwer 2018); Gréau, *supra* note 92, para. 87 et seq.

[94] *See, e.g.*, Cour de Cassation [Cass.] [supreme court for judicial matters] civ., April 14, 1891, Bull. civ. no. 55; Cass. 1e civ., June 2, 1982, Bull. civ. I, No. 205; Cass. 1e civ., Nov. 13, 2014, No. 13-24.633; Cass. 1e civ., June 8, 2016, Nr. 15-18.929; PAUL-HENRI ANTONMATTEI, CONTRIBUTION À L'ÉTUDE DE LA FORCE MAJEURE para. 234 (Librairie Générale de Droit et de Jurisprudence 1992).

section 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, England and subsequently the US are jurisdictions that 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.[95]

Thus, the doctrine of impossibility has been used – almost exclusively in jurisdictions where no doctrine on changed circumstances emerged (common law jurisdictions and France) – to excuse 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.[96]

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.[97] This doctrine was derived from the well-known legal principle of Roman law that "there is no legal obligation to the impossible" ("*impossibilium nulla est obligatio*").[98] However, excuse from performing the impossible

[95] National Carriers Ltd. v. Panalpina (Northern) Ltd. [1981] 1 AC 675 [688] "[T]here will be cases of total failure of consideration, where there is no subsequent 'frustrating' event. Not every total failure of consideration ends in the contract being frustrated, and the total failure of consideration theory says nothing about what constitutes a 'frustrating' event."

[96] Alfons Puelinckx*, Frustration, Hardship, Force Majeure, Imprévision, Wegfall der Geschäftsgrundlage, Unmöglichkeit, Changed Circumstances: A Comparative study in English, French, German and Japanese Law*, 3 JOURNAL OF INTERNATIONAL ARBITRATION 47 (1986); see also Fried, supra note , at 58, criticizing the doctrines of frustration and impossibility by stating that "[t]hough 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" (footnote omitted).

[97] *See* OLE LANDO & HUGH BEALE, THE PRINCIPLES OF EUROPEAN CONTRACT LAW PART I & II 384 (Kluwer Law International Combined and revised ed. 1999) with reference to § 1447 Austrian Civil Code, § 275 German Civil Code, §§ 1218, 1256 Italian Civil Code and Art. 790 Portuguese Civil Code.

[98] CHRISTIAN WOLLSCHLÄGER, DIE ENTSTEHUNG DER UNMÖGLICHKEITSLEHRE ZUR DOGMENGESCHICHTE DES RECHTS DER LEISTUNGSSTÖRUNGEN 7 et seq. (Böhlau 1970).

could occur at different times and the Roman law thus had two doctrines on impossibility: initial and subsequent.[99] 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 to an obligation that has become impossible, only if: a) the party invoking the excuse was not at fault;[100] b) the impossibility is both objectively (neither the obligor nor anybody else is able to perform) and 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 occurrs after contract formation, renders performance impossible for the party (subjective) as well as 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 their 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 on changed circumstances, England – like most common law jurisdictions,– never developed a hardship doctrine. Instead, the English courts would develop a doctrine of frustration, which includes subsequent impossibility,

[99] Gordley, *supra* note 80, at 515.
[100] 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.

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 useless. Subsequent impossibility is included here because of its recognition in the first frustration case, *Taylor v. Caldwell.*[101]

Prior to the mid-1800s in England, the common law did not recognize a doctrine of subsequent impossibility. The case of *Paradine v. Jane*[102] stood for the proposition that subsequent impossibility is not an excuse. In 1863, the English courts created a frustration of contract doctrine that also established a doctrine of subsequent impossibility. In *Taylor v. Caldwell*,[103] the court held that 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.[104] If that thing is destroyed by no fault of the party seeking the excuse, then that party can be excused.[105] 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 fiction.[106] That argument is very similar to the criticism raised in Germany against the introduction of the *clausula* principle into the German Civil Code.[107]

Taylor v. Caldwell established two new doctrines at common law: subsequent impossibility and frustration of contract. According to the holding in that case, a frustration

[101] Taylor v. Caldwell (1863) 122 Eng. Rep. 309 (K.B.): Taylor, a performer, had agreed to rent Caldwell's music hall for four days. Just prior to the first concert, the music hall was accidently destroyed by fire.
[102] Paradine v. Jane (1647) 82 Eng. Rep. 897 (K.B.).
[103] "The 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." Taylor v. Caldwell (1863) 122 Eng. Rep. 309 [312] (K.B.); Ewan McKendrick, *Discharge by Frustration*, *in* CHITTY ON CONTRACTS Vol. I, No. 23-005 (Hugh Beale ed., Sweet and Maxwell, Thompson Reuters 33rd ed. 2018).
[104] Taylor v. Caldwell (1863) 122 Eng. Rep. 309 [314] (K.B.); see also F.A.Tamplin S.S. Co Ltd. v. Anglo-Mexican Petroleum Products Co Ltd. [1916] 2 AC 397 [403].
[105] 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* above Section 2.3.
[106] National Carriers Ltd. v. Panalpina (Northern) Ltd. [1981] AC 675 [687 et seq.]; Denny, Mott and Dickinson Ltd. v. James B. Fraser & Co. Ltd. [1944] AC 265 [275]; McKendrick, *supra* note 103, at Vol I para. 23-011.
[107] *See infra* Section 5.2.2.

excuse not only required the destruction of the implied condition, it also required impossibility of performance.[108] However, later cases demonstrated that the frustration excuse could succeed even where performance remained possible, but in extremely rare instances. An early example where performance remained technically possible were the well-known coronation cases, the most prominent being *Krell v. Henry.*[109] 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).[110]

Following on from the coronation cases, the next significant case on the frustration doctrine was *Davis Contractors v. Fareham,*[111] where a stricter standard was established requiring that the circumstances must "involve a fundamental or radical change" from the original contractual obligation.[112] That strict and narrow standard still prevails today.[113] 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".[114] In other words, frustration requires a radical change of *the obligation itself* and not just any radical change in circumstances, [115] The nature

[108] "A condition is implied that the impossibility of performance arising from the perishing of the person or thing shall excuse the performance." Taylor v. Caldwell (1863) 122 Eng. Rep. 309 [314] (K.B.).
[109] 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", *Id.* at 751; *see also* Chandler v. Webster [1904] 1 KB 493; Blakeley v. Muller [1903] 2 KB 760; Clark v. Lindsay [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, paras. 35 et seq. and 244 et seq. (Ch).
[110] McKendrick, *supra* note 103, at Vol I para. 23-033; GUENTER TREITEL, FRUSTRATION AND FORCE MAJEURE para. 7-001 (Sweet & Maxwell 3rd ed. 2014).
[111] Davis Contractors Ltd. v. Fareham U.D.C [1956] AC 696 [728].
[112] McKendrick, *supra* note 103, at Vol I, para. 23-012; *see also* Davis Contractors Ltd. v. Fareham U.D.C [1956] AC 696 [728]: "[F]rustration 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."
[113] Canary Wharf (BP4) T1 Ltd. v. European Medicines Agency [2019] EWHC 335 (Ch), para. 27; *see also* National Carriers Ltd. v. Panalpina (Northern) Ltd. [1981] 1 AC 675 [688]; Edwinton Commercial Corporation v. Tsavliris Russ (Worldwide Salvage and Towage) Ltd. [2007] EWCA Civ. 547, para. 110 et seq.
[114] National Carriers Ltd. v. Panalpina (Northern) Ltd. [1981] 1 AC 675 [700].
[115] McKendrick, *supra* note 103, at Vol I, para. 23-012; *see also* ICC Case No. 1512 of 1971, 1 Y.B. Comm. Arb. 128, 129 (1976).

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 vent and the related distribution of contractual risks.[116] In 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".[117]

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".[118]

As a consequence of requiring a radical change to the obligation – and similar to the new French law[119] – the frustrated contract is automatically terminated and both parties are released from their obligations from the time of the occurrence of the frustrating event.[120] Sums paid or payable under the contract before termination shall be recoverable or cease to be payable.[121]

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".[122] Thus, nearly all attempts at discharging an allegedly frustrated contract have failed in the post-*Davis Contractors* era. For example, the frustration

[116] Edwinton Commercial Corp. v. Tsavliris Russ (Worldwide Salvage & Towage) Ltd. [2007] EWCA Civ. 547; Bunge SA v. Kyla Shipping Co Ltd. [2013] EWCA Civ. 734; McKendrick, *supra* note 103, at Vol I, paras. 23-014 and 23-019.
[117] Davis Contractors Ltd. v. Fareham U.D.C [1956] AC 696 [728].
[118] *Id.* at 729; *see also* Canary Wharf (BP4) T1 Ltd. v. European Medicines Agency [2019] EWHC 335 (Ch), paras. 22 and 28 et seq.
[119] *See supra* Section 4.1.
[120] Brunner, *supra* note 29, at 90.
[121] Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd. [1943] AC 32; Section 1 (2) Law Reform (Frustrated Contracts) Act 1943; McKendrick, *supra* note 103, at Vol I, paras. 23-074 et seq.
[122] J Lauritzen A.S. v. Wijsmuller B.V. (The Super Servant Two) [1990] 1 Lloyd's L. Rep. 1 [8] (CA); McKendrick, *supra* note 103, at Vol I, para. 23-007.

excuse will almost never succeed where performance becomes significantly more costly;[123] or – unlike under the US impracticability doctrine – involves circumstances of inflation or currency fluctuations.[124]

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.[125] "In *Tsakiroglou & Co Ltd. v. Noblee & Thörl GmbH*, the House of Lords held 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.[126] 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.[127]

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 purpose[128] of the contract so as to create a radically different obligation that would render performance nearly impossible. An application of the frustration doctrine occurred in

[123] Edwinton Commercial Corporation v. Tsavliris Russ (Worldwide Salvage and Towage) Ltd. [2007] EWCA Civ. 547, para. 111: "… the test of 'radically different' is important: it tells us that the doctrine is not to be lightly invoked; that the 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."
[124] Brunner, *supra* note 29, at 92 et seq.; EDWIN PEEL, TREITEL ON THE LAW OF CONTRACT 819 et seq. (Sweet & Maxwell 14th ed. 2015); *see* British Movietone News Ltd. v. London and District Cinemas, [1952] AC 166, 185; Davis Contractors Ltd. v. Fareham U.D.C [1956] AC 696 [696].
[125] Tsakiroglou & Co Ltd. v. Noblee & Thörl GmbH [1962] AC 93; Societe Franco-Tunisienne d'Armement-Tunis v. Sidermar SpA [1961] 2 QB 278 (Comm); Albert D Gaon & Co v. Societe Interprofessionelle des Oleagineux Fluides Alimentaires [1959] 3 WLR 622 (Comm); Carapanayoti & Co. Ltd. v. E. T. Green Ltd. [1958] 3 WLR 390 (QB).
[126] Tsakiroglou & Co Ltd. v. Noblee & Thörl GmbH [1962] AC 93: "[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".
[127] Digwa-Singh, *supra* note 14, at 325.
[128] Canary Wharf (BP4) T1 Ltd. v. European Medicines Agency [2019] EWHC 335 (Ch), para. 29: "Fundamentally, 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'".

2019 in the case of *Canary Wharf v. European Medicines Agency*,[129] where a lease agreement was alleged to be frustrated following Brexit. The lease was determined to not be frustrated either on the basis of purpose or of supervening illegality, whereby 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, the COVID-19 pandemic might qualify as such a case under English law in light of its global reach, systemic consequences for 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. 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

Where the frustration doctrine developed in England as a mechanism to deal with both subsequent impossibility and scenarios where the basis of the contract disappears, the US developed a doctrine of commercial impracticability to deal with situations where there are changes to the basic assumption upon which the contract was made rendering performance impracticable.[130] 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

[129] Canary Wharf (BP4) T1 Ltd. and others v. European Medicines Agency [2019] EWHC 335 (Ch).
[130] MELVIN EISENBERG, FOUNDATIONAL PRINCIPLES OF CONTRACT LAW 625 et seq. (Oxford University Press 2018); Paula Walter, *Commercial Impracticability in Contracts*, ST. JOHN'S LAW REVIEW 225, 226 (1986).

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".[131] The difference between impracticability and impossibility originates from the case of *Mineral Park v. Howard*. This case 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."[132] 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.[133] Additionally, the *Restatement (First) of Contracts* included Section 288 titled "Frustration of the Object or Effect of the Contract"[134] 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 the basic assumption on which the contract was made . . .".[135] 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"[136]). A notion similar to the implied condition found in the English frustration

[131] Restatement (First) of Contracts §454 (Am Law Inst 1932).
[132] Mineral Park Land Co. v. Howard 172 Cal. 289, 156 P. 458 (1916).
[133] Restatement (First) of Contracts §467 (Am Law Inst 1932).
[134] Restatement (First) of Contracts §288 (Am Law Inst 1932).
[135] U.C.C. § 2-615 (Am Law Inst & Unif. Law Comm'n 2002).
[136] See for this "shared tacit assumption test": Eisenberg, *supra* note 130, at 628: "Tacit assumptions are not made explicit, even where they are the basis of a contract, precisely because they are taken for

doctrine.[137] Such a common tacit assumption is that an unprecedented scenario such as the one caused by 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.[138] The shared tacit assumption test, however, is always subject to the materiality of the impact of the unexpected circumstance[139] 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.[140]

The *Restatement (Second) of Contracts,* which was completed in the 1970s, provides "Discharge by Supervening Impracticability" Section 261 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.[141]

Section 261 essentially does little to modify the test found in the 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,[142] rendering performance impracticable (excessively onerous). Contrary to the *Restatement (First) of Contracts,*[143] neither the UCC nor the

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 . . . ."

[137] *Id*. at 662: "Very 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."

[138] See Weller, et al., *supra* note 4, at 1021: "Many parties currently realize that ‚the worlds which they assumed when their contract was concluded' is not in line with reality, because assumptions 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).

[139] *Id*. at 635.

[140] *See* U.C.C. § 2-615, Comment No. 8 (AM LAW INST & UNIF. LAW COMM'N 2002).; *see also* Transatlantic Fin. Corp. v. United States, 363 F 2nd 312, 316 (D.C Cir. 1966); Barbarossa & Sons, Inc v. Iten Chevrolet, Inc., 265 N.W. 2nd 655 (Minn. 1978).

[141] Restatement (Second) of Contracts § 261 (Am Law Inst 1981).

[142] United States v. Wegematic Corp., 360 F.2d 674, 676 (2d Cir. 1966); Brunner, *supra* note 29, at 99.

[143] § 457 RESTATEMENT (FIRST) OF CONTRACTS limited impracticability to situations in which "facts that a

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[144] or just one factor to be taken into account when determining the contractual risk allocation.[145]

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.[146]

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."[147]

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

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promisor had no reason to anticipate . . . render performance of the promise impossible".

[144] Eastern Air Lines, Inc. v. Gulf Oil Corp., 415 F. Supp. 429, 438 (S.D. Fla. 1975).

[145] Opera Co. of Bos. v. Wolf Trap Found. for Performing Arts, 817 F.2d 1094, 1100 (4th Cir. 1987); Columbian Nat. Title Ins. Co. v. Twp. Title Servs., Inc., 659 F. Supp. 796, 802 (D. Kan. 1987); Aluminum Co. of America v. Essex Group, Inc., 499 F. Supp. 53, 76 (W.D. Pa. 1980): "If it were important to the decision of this case, the Court would hold that . . . foreseeability . . . would not preclude relief under the doctrine of impracticability"; Transatlantic Financing Corp. v. United States, 363 F.2nd 312, 318 (D.C.Cir.1966): "Foreseeability or even recognition of a risk does not necessarily prove its allocation"; Centex Corp. v. Dalton 840 S.W.2d 952 (Tex. 1992); Richard Posner & Andrew Rosenfield, *Impossibility and Related Doctrines in Contract Law: An Economic Analysis*, 6 THE JOURNAL OF LEGAL STUDIES 83, 100 (1977).

[146] Restatement (Second) of Contracts § 265 (Am Law Inst 1981).

[147] United States v. General Douglas MacArthur Senior Village, Inc. 508 F.2d 377, 381 (2nd Cir. 1974).

what was anticipated that the contract cannot reasonably be thought to govern."[148] Only under rare circumstances[149] and absent an explicit or implicit risk assumption by the aggrieved party could performance be discharged.[150] 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.[151] Likewise, the risk for the functioning of an IT-innovation was held to have been implicitly assumed by the manufacturer.[152] Like 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.[153] However, the difficulties that render the performance excessively onerous must be "especially severe and unreasonable"[154] for the impracticability excuse to succeed.[155] Unlike the English frustration doctrine, there have been instances in American case law where the impracticability excuse succeeds with no supervening event, but with a fundamental change in circumstances that rendered performance virtually worthless.[156] Overall, however, the US impracticability doctrine is similar in content to the English frustration

[148] Eastern Air Lines, Inc. v. McDonnell Douglas Corp. 532 F.2d 957 (5th Cir. 1976).
[149] Eisenberg, *supra* note 130, at 636: "[C]ontracting 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 . . .".
[150] ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS Vol. II, para. 9.6 (Aspen Law & Business 2nd ed. 1998).
[151] Transatlantic Financing Corp. v. United States, 363 F.2d 312, 318 (D.C.Cir.1966).
[152] United States v. Wegematic Corp, 360 F.2d 674, 675 (2nd Cir. 1966).
[153] RESTATEMENT (SECOND) OF CONTRACTS § 261, Comment d (AM LAW INST 1981): "[I]mpracticability means more than impracticality"; *see also* U.C.C. § 2-615, Comment 4 (AM LAW INST & UNIF. LAW COMM'N): "Increased 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."; *See* Transatlantic Financing Corp. v. United States, 363 F.2d 312 (D.C. Cir. 1966).
[154] Rivkin, *supra* note 52, at 169, quoting from Louisiana Power & Light Co. v. Allegheny Ludlum Industries, 517 F. Supp. 1319, 1324 (E.D. La. 1981) and emphasizing that pursuant to that judgement, an increase of 38% 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".
[155] Florida Power & Light Co. v. Westinghouse Electric Corp. 826 F.2d 239 (1987): 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 dollars in profit would have resulted in a loss of 80 million dollars due to an unforeseen cancellation of a government program.
[156] Brunner, *supra* note 29, at 97 et seq.

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, 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".[157] 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.[158] 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;

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[157] R. Doak Bishop, International Arbitration of Petroleum Disputes: The Development of a Lex Petrolea, 23 Y.B. COMM. ARB. 1131, 1169 (1998); Norbert Horn, *Changes in Circumstances and the Revision of Contracts in Some European Laws and in International Law*, in ADAPTATION AND RENEGOTIATION OF CONTRACTS IN INTERNATIONAL TRADE AND FINANCE 15, 26 (Norbert Horn ed., Kluwer 1985); Rivkin, supra note 52, at 165 et seq.; Michael Mustill, *The New Lex Mercatoria: The First Twenty-five Years*, 4 ARB. INT'L. 86 (1988).

[158] Anaconda-Iran, Inc. v. Iran, 13 Iran-U.S. Cl. Trib. Rep. 199, 211-212 (1986), excerpts available at: https://www.trans-lex.org/231800 (accessed April 20, 2020): "Under 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"); Questech Inc. v. Iran, 9 Iran-U.S. Cl. Trib. Rep. 107 (1985), excerpts available at: https://www.trans-lex.org/231400 (accessed April 20, 2020); *see also* Mobil Oil Iran, Inc. v. Iran, 16 Iran-U.S. Cl. Trib. Rep. 39, para. 117 (1987), excerpts available at: www.trans-lex.org/232000 (accessed April 20, 2020); Maurizio Brunetti, *The Lex Mercatoria in Practice: The Experience of the Iran-United States Claims Tribunal*, 18 ARB. INT'L. 355, 359 (2002), excerpts available at: www.trans-lex.org/100950 (accessed April 20, 2020); John Crook, *Applicable Law in International Arbitration: The Iran-U.S. Claims Tribunal Experience*, 83 AM. J. INT'L. L. 278, 293 (1989), excerpts available at: www.trans-lex.org/120000 (accessed April 20, 2020); John Westberg, *Contract Excuse in International Business Transactions: Awards of the Iran-United States Claims Tribunal*, 4 ICSID REV. 215, 238 et seq.(1989).

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.[159]

This provision and other transnational rules[160] are essentially in line with its French origin.[161] However, there is one subtle distinction and that is that the transnational *force majeure* doctrine and the application of *force majeure* clauses in 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.[162]

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:[163]

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[159] UNIDROIT Principles of International Commercial Contracts 2016, Art. 7.1.7 (UNIDROIT ed., 2017).
[160] Art. 8:108 Principles of European Contract Law; Art. III-3:103 Draft Common Frame of Reference; TransLex-Principle VI.3., www.trans-lex.org/944000 (accessed April 20, 2020).
[161] *See, e.g.,* Barry Nicholas, *Force majeure in French law*, *in* FORCE MAJEURE AND FRUSTRATION OF CONTRACT 21, 24 (Ewan McKendrick ed., Lloyd's of London Press 2nd ed. 1995); Rüfner, *supra* note 14, Art. 8:108, No. 13; ICC Case No. 10527 of 2000, 131 Journal du droit international (Clunet) 1263, 1264 (2004), excerpts available at: www.trans-lex.org/210527 (accessed April 20, 2020); CAP Case No. 3150, 39 Y.B. COMM. ARB. 65, 72 (2014) (Paris Chamber of International Arbitration), excerpts available at: www.trans-lex.org/203150 (accessed April 20, 2020); ICC Case No. 3099/3100 of 1979, Collection of ICC Arbitral Awards 1974-1985 67, 70 (Sigvard Jarvin & Yves Derains eds. 1990); ICC Case No. 3093/3100 of 1979, Collection of ICC Arbitral Awards 1974-1985 365, 367 (Sigvard Jarvin & Yves Derains eds. 1990).
[162] *See infra* Section 5.3.
[163] Brunner, *supra* note 29, at 111 et seq.; Brunner, *supra* note 16, at 85; Nassar, *supra* note 49, at 207 et seq.; 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 146 et seq. (Peter Lang 1992); TransLex-Principle VI.3 (a), www.trans-lex.org/944000 (accessed April 20, 2020); ICC Case No. 2142 of 1974, 1 Y.B. COMM. ARB. 132 (1976), excerpts available at: www.trans-lex.org/202142 (accessed April 20, 2020); ICC Case No. 3880 of 1983, 10 Y.B. COMM. ARB. 44 (1985), excerpts available at: www.trans-lex.org/203880 (accessed April 20, 2020); ICC Case No. 5864 of 1989,

- *Externality*: The occurrence of an external event[164] for which the obligor has not assumed the risk;
- *Unavoidability/Irresistibility*: The occurrence of the external event[165] was beyond the obligor's (typical) sphere of control/the ordinary organization of his business[166] and was absolute;[167]
- *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 the risk-distribution in the contract) modes of performance, procurement or transportation, or other safety measures;[168]
- *Causation* (*"conditio sine qua non" or "but-for" test*): The obligor's non-performance was, as a "matter of commercial reality",[169] 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.[170]

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124 Journal du droit international (Clunet) 1073, 1076 (1997), excerpts available at: www.trans-lex.org/205864 (accessed April 20, 2020); ICC Case No. 8501 of 1996, 128 Journal du droit international (Clunet) 1164, 1166 (2001); ICC Case No. 2216 of 1974, 102 Journal du droit international (Clunet) 917, 919 (1975), excerpts available at: www.trans-lex.org/202216 (accessed April 20, 2020); Michael Polkinghorne & Charles Rosenberg, *Expecting the Unexpected: The Force Majeure Clause*, 16 BUS. L. INT'L 49, 57 (2015); Art. 1 ICC Force Majeure and Hardship Clauses March 2020, ICC Force Majeure Clause („Long Form"), https://iccwbo.org/content/uploads/sites/3/2020/03/icc-forcemajeure-hardship-clauses-march2020.pdf.

[164] *See* the list of typical *force majeure* events in Translex Principle VI.3. (c), www.trans-lex.org/944000 (accessed April 20, 2020); *see also* 1. Gujarat State Petroleum Corp. Ltd., 2. Alkor Petro Ltd., 3. Western Drilling Contractors Private Ltd. v. 1. Republic of Yemen, 2. The Yemeni Ministry of Oil and Minerals, ICC Case No. 19299 of 2015, text available at https://www.italaw.com/cases/4209 (accessed April 20, 2020); Klaus Peter Berger, *Force Majeure Clauses and their Relationship with the Applicable Law, General Principles of Law and Trade Usages*, *in* HARDSHIP AND FORCE MAJEURE IN INTERNATIONAL COMMERCIAL CONTRACTS 144 (Fabio Bortolotti & Dorothy Ufot eds., ICC 2018).

[165] Events which are external to the obligor's sphere of risk are usually also unavoidable, Pichonnaz, *supra* note 29, at Art. 7.17, No. 22.

[166] *See*, *e.g.,* Ad Hoc-Award of September 9, 1983, 12 Y.B. COMM. ARB. 63, 74 (1987), excerpts available at: www.trans-lex.org/260300 (accessed April 20, 2020), 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.

[167] CAP Case No. 3150, 39 Y.B. COMM. ARB. 65, 72 (2014) (Paris Chamber of International Arbitration), excerpts available at: www.trans-lex.org/203150 (accessed April 20, 2020).

[168] Pichonnaz, *supra* note 29, at Art. 7.17, para. 26: "If 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."

[169] Alan Berg, *The detailed drafting of a force majeure clause*, *in* FORCE MAJEURE AND FRUSTRATION OF CONTRACT 63, 71 (Ewan McKendrick ed., Lloyd's of London Press 2nd ed. 1995).

[170] Classic Maritime Inc v. Limbungan Makmur SDN BHD [2019] EWCA Civ. 1102, para. 45: "It 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"; *see also* Bremer Handelsgesellschaft v. Vanden Avenne-Izegem [1978] 2 Lloyd's Rep 109, para. 82 (CA) (quoted in para. 19 of the above 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

The COVID-19 pandemic meets this four-pronged test, provided that a court or arbitral tribunal confirms that the pandemic constitutes a *force majeure* event.[171] The pandemic clearly is an external event. In Europe, it was also unforeseeable, at least with respect to contracts concluded before February 2020.[172] 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, and 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.[173] Virologists have also predicted for many years that a pandemic such as the SARS of 2002-2004 could break out again.[174] In a comprehensive risk analysis study conducted by the German government-related *Robert-Koch Institute* together with a number of German government agencies, which was published by the German Parliament in January 2013, the occurrence of a hypothetical viral pandemic such as COVID-19 was qualified as "conditionally probable" ("*bedingt wahrscheinlich*"), i.e. as an event which, "statistically, would occur once in a period of 100 to 1,000 years".[175] At the same

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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 . . .".

[171] *See supra* Section 4.

[172] Weller, et al., *supra* note 4, 1021; see also Heinich, *supra* note 13.

[173] Scientists are confident that the COVI-19 outbreak, which began in Wuhan, China, stemmed from a virus inherent in bats which are considered to be a reservoir for coronaviruses and which were sold on a fish market there, Berger, The Man Who Saw the Pandemic Coming- Will the world now wake up to the global threat of zoonotic diseases?, http://nautil.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: "Do 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 Zhou/Yang/Wang *et al*, A pneumonia outbreak associated with a new coronavirus of probable bat origin, Nature 579, 270-273 (2020), https://www.ncbi.nlm.nih.gov/pubmed?term=32015507; Zhou/Zang/Wang, A Novel Coronavirus from Patients with Pneumonia in China, 2019,N. Engl. J. Med. 2020, 727 et seq.

[174] Event 201, A Global pandemic Exercise, http://www.centerforhealthsecurity.org/event201/about: "In recent years, the world has seen a growing number of epidemic events, amounting to approximately 200 events annually. These events 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 (GPMB), A World at Risk, Annual Report on Global Preparedness for Health Emergencies, September 2019, p. 11 et seq: "The 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.

[175] Risikoanalyse Bevölkerungsschutz Bund: Pandemie durch Virus „Modi-SARS, Deutscher Bundestag: Drucksachen [BT] 17/12051 of 3 January 2013, Annex 4, p. 55, 56: http://dipbt.bundestag.de/doc/btd/17/120/1712051.pdf (Ger.); the study predicts almost all of the circumstances surrounding the COVID-19 pandemia.

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.[176] 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 "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".[177]

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.[178] However, the relationship between both 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 etcetera –, make it easier for the affected party to prove the unavoidability of its non-performance.[179]

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

[176] *Id*., at 66 "The occurence 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) (emphasis added).
[177] See for this definition of unforeseeability Brunner, *supra* note 29, at 158 with reference to Pietro Trimarchi, *Commercial impracticability in contract law: An economic analysis*, 11 INT'L REV. L. & ECON. 63, 65 (1991).
[178] *See* the annotations to Art. 3 of the 2020 ICC Force Majeure Model Cause, https://iccwbo.org/content/uploads/sites/3/2020/03/icc-forcemajeure-hardship-clauses-march2020.pdf (accessed April 20, 2020).
[179] See Brunner, *supra* note 29, at 168: "...the 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…"; see also Wagner, et al., *supra* note 69, at 846.

regard to the contractual obligations which it did not perform".[180] 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*".[181] 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.[182]

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.[183] That notice requirement is also reflected in Art. 79(4) CISG, Art. 7.1.7(3) UPICC, other transnational contract principles[184] and in most contractual *force majeure* clauses.[185] 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.[186] It must 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.[187]

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[180] Sylvania Technical Systems v. Iran, 8 Iran-U.S. Cl. Trib. Rep. 298, 312 (1985).
[181] *See* TransLex-Principle XII.1, www.trans-lex.org/966000 (accessed April 20, 2020); ICC Award No. 3344, 109 Journal du droit international (Clunet) 978, 983 (1982), excerpts available at: www.trans-lex.org/203344 (accessed April 20, 2020); Asian Agricultural Products Ltd. v. The Republic of Sri Lanka, ICSID Case No. ARB/87/3, Final Award (June 27, 1990), 16 Y.B. COMM. ARB. 106, 122 (1991), excerpts available at: www.trans-lex.org/240500 (accessed April 20, 2020); Cheng, *supra* note 37, at 327; PHILIPPE FOUCHARD, L' ARBITRAGE COMMERCIAL INTERNATIONAL 441 (Dalloz 1965); *see also* for English law Tradax Export S.A. v. André et Cie [1976] 1 Lloyd's Rep. 416 (CA); Channel Island Ferries Ltd. v. Sealink U.K. Ltd. [1988] 1 Lloyd's Rep. 323 (CA); Avimex S.A. v. Dewulf & Cie [1979] 2 Lloyd's Rep. 57 at 67 (QB Comm.).
[182] Rüfner, *supra* note 14, at Art. 8:108, No. 28.
[183] Brunner, *supra* note 29, at 342 et seq.
[184] *See, e.g.,* TransLex-Principle VI.3 (d), www.trans-lex.org/944000 (accessed April 20, 2020).
[185] Berg, *supra* note 169, at 99 et seq.; *see, e.g.*, ICC Case No. 2478 of 1974, 3 Y.B. Comm. Arb. 222, 223 (1978); ICC Case No. 4237 of 1974, 10 Y.B. COMM. ARB. 52, 57 (1985).
[186] Brunner, *supra* note 29, at 103 with reference to ICC awards; Pichonnaz, *supra* note 29, at Art. 7.17, para. 41.
[187] *See* TransLex-Principle VI.3 (d), www.trans-lex.org/944000 (accessed April 20, 2020); ICC Case No. 5864 of 1989, 124 Journal du droit international (Clunet) 1073, 1076 (1997), excerpts available at: www.trans-lex.org/205864 (accessed April 20, 2020); ICC Case No. 8790 of 2000, 29 Y.B. COMM. ARB. 13, 21 (2004), excerpts available at: www.trans-lex.org/208790 (accessed April 20, 2020); Lockheed Corp. v. Iran, 18 Iran-U.S. Cl. Trib. Rep. 292, 300 et seq. (1988), excerpts available at: www.trans-lex.org/232200 (accessed April 20, 2020); Touche Ross v. Iran, 9 Iran-U.S. Cl. Trib. Rep. 284, 294 et seq. (1985), excerpts available at: www.trans-lex.org/231500 (accessed April 20, 2020).

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,[188] temporarily or permanently,[189] suspended, with the aggrieved party being under an obligation to continue to perform only insofar as this is reasonable under the circumstances.[190] Termination of the contract is only an "*ultima ratio"* remedy and the parties are compensated for performance already rendered.[191]

In international contracting practice, the regulation of *force majeure* events is often left to boilerplate clauses.[192] Rather than providing legal certainty when *force majeure* events occur, some of those clauses may raise difficult problems of contract interpretation.[193] The four fundamental requirements of the transnational *force majeure* doctrine may serve as a yardstick for the internationally useful construction[194] of such *force majeure* clauses by an arbitral tribunal.[195] However, intricate questions may remain.

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[188] Anaconda-Iran, Inc. v. Iran*,* 13 Iran-U.S. Cl. Trib. Rep. 199, 211-212 (1986), excerpts available at: www.trans-lex.org/231800 (accessed April 20, 2020).

[189] *See* Brunner, *supra* note 29, at 98-99: "Generally, impediments to performance only exempt the obligor as long as they exist" and adding that a temporary may be requalified 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"; *see also* ICC Case No. 18982, quoted by Brunner, *supra* note 29, at 99-100 (who was a member of the tribunal in that arbitration); *see also* ICC Case No. 7539 of 1995, 123 Journal du droit international (Clunet) 1030 (1996), excerpts available at: www.trans-lex.org/207539 (accessed April 20, 2020).

[190] Touche Ross v. Iran, 9 Iran-U.S. Cl. Trib. Rep. 284, 298 (1985), excerpts available at: www.trans-lex.org/231500 (accessed April 20, 2020): "While 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."

[191] Anaconda-Iran, Inc. v. Iran*,* 13 Iran-U.S. Cl. Trib. Rep. 199 (1986), excerpts available at: www.trans-lex.org/231800 (accessed April 20, 2020); Mobile Oil Iran v. Iran, 16 Iran-U.S. Cl. Trib. Rep. 3, 38 et seq. (1987); Gould Marketing, Inc. v. Ministry of National Defence, 3 Iran-U.S. Cl. Trib. Rep. 147 (1983); International Schools Inc. v. Iran, 14 Iran-U.S. Cl. Trib. Rep. 65 (1987); SCHMITZ, *supra* note 163, at 163 et seq.

[192] Polkinghorne & Rosenberg, *supra* note 163, at 57, warning against the use of vague formulations in such clauses; *see* for the ICC model clauses and their revision Filip de Ly, *Analysing the ICC Force Majeure Clause 2003*, *in* HARDSHIP AND FORCE MAJEURE IN INTERNATIONAL COMMERCIAL CONTRACTS 113 (Fabio Bortolotti & Dorothy Ufot eds., ICC 2018), Ercüment Erdem, *Revision of the ICC Force Majeure and Hardship Clause*, *in* HARDSHIP AND FORCE MAJEURE IN INTERNATIONAL COMMERCIAL CONTRACTS 123 (Fabio Bortolotti & Dorothy Ufot eds., ICC 2018).

[193] Brunner, *supra* note 29, at 83; Berger, *supra* note 164, at 138 et seq.; Pichonnaz, *supra* note 29, at Art. 7.17, No.13.

[194] *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* FESTSCHRIFT FÜR OTTO SANDROCK ZUM 70. GEBURTSTAG 49 (Klaus Peter Berger, et al. eds., Verlag Recht und Wirtschaft 2000).

[195] Brunner, *supra* note 29, at 107; *see also* Berg, *supra* note 169, at 75; ICC Case No. 2478 of 1974, 3 Y.B. Comm. Arb. 222, 223 (1978).

One relates to the proper relationship and hierarchy between *force majeure* and hardship clauses in the same contract.[196]

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[197] or which constitute *force majeure* events "in the sense of generally accepted principles".[198] Scenarios like the COVID-19 pandemic are covered by such clauses. Some *force majeure* clauses specifically list "diseases", "plagues", "epidemics", "health emergencies"[199] 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".[200] 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.[201] 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"[202] or a "natural event".[203] There is thus an argument to be made, for example in jurisdictions which apply a rather strict approach to the interpretation of such clauses[204], 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*

[196] Furmston, *supra* note 56, at 62.
[197] Fyffes Group Ltd. v. Reefer Express Lines Pty Ltd. [1996] 2 Lloyd's Rep. 171, 196 (Comm.); ICC Case No. 11265 of 2009, 20(2) ICC Int'l Ct. of Arb. Bull. 53 (2009); ICC Case No. 3093/3100 of 1979, Collection of ICC Arbitral Awards 1974-1985 365, 366 (Sigvard Jarvin & Yves Derains eds. 1990).
[198] *See* ICC Case No. 16369 of 2011, Collection of ICC Arbitral Awards 2012-2015 313, 342 (Jean-Jacques Arnaldez et al. eds. 2019).
[199] *See*, *e.g.*, Clifford Gardner v. Clydesdale Bank Ltd [2013] EWHC 4356, para. 25 (Ch).
[200] Art. 3(e) ICC Force Majeure and Hardship Clauses March 2020, ICC Force Majeure Clause („Long Form"), https://iccwbo.org/content/uploads/sites/3/2020/03/icc-forcemajeure-hardship-clauses-march2020.pdf
[201] *Id.*
[202] Weller, et al., *supra* note 4, at 1017 quoting the renowned German virologist Christian Drosten.
[203] Risikoanalyse Bevölkerungsschutz Bund: Pandemie durch Virus „Modi-SARS, Deutscher Bundestag: Drucksachen [BT] 17/12051 of 3 January 2013, Annex 4, p. 55, 66: http://dipbt.bundestag.de/doc/btd/17/120/1712051.pdf (Ger.) (accessed April 20, 2020).
[204] *See, e.g., Kel Kim Corp. v. Central. Markets Inc.* 524 N.Y.S.2d 384 (Court of Appeals of New York, 1987) "Ordinarily, only if the force majeure clause specifically includes the event that actually prevents a party's performance will that party be excused."

events, but also includes a catch-all phrase to cover similar situations ("…and any event of a similar nature"). Hardship 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.[205]

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.[206] 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.[207] 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.[208] 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. The reason for this is that there are different dogmatic conceptions of the binding force of contracts in common law jurisdictions, which along

[205] *See*, *e.g.*, Art. 2 a) 2020 ICC Hardship Clause, https://iccwbo.org/content/uploads/sites/3/2020/03/icc-forcemajeure-hardship-clauses-march2020.pdf; *see also* TransLex-Principle VIII.1, https://www.trans-lex.org/951000 (accessed April 20, 2020).
[206] Accaoui Lorfing, *supra* note 66, at 450.
[207] Weller, et al., *supra* note 4, at 1022.
[208] *See* Brunner, *supra* note 29, at 402 et seq.; ICC Case No. 16369 of 2011, Collection of ICC Arbitral Awards 2012 – 2015 313, 343 (Jean-Jacques Arnaldez et al. eds. 2019).

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 be much more amenable to the Canon law doctrine 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".[209] Therefore, at common law, no relevance is placed on a valid reason for the agreement: once there is consideration, there is a valid contract, and issues of fairness and morality are irrelevant so long as the agreement is legally enforceable. The *pacta* principle, which has its roots in the idea that parties can create binding contractual obligations only through their mutual consent,[210] 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.[211] 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

[209] Parry, *supra* note 30, at 1 et seq.; Nassar, *supra* note 49, at 3 et seq.; James Gordley, *Natural Law Origins of the Common Law of Contract*, *in* TOWARDS A GENERAL LAW OF CONTRACT 367, 370 et seq. (John Barton ed., Duncker & Humblot 1st ed. 1990); RESTATEMENT (SECOND) OF CONTRACTS, Chapter 16 (Remedies), Introductory Note (AM LAW INST 1981).
[210] Weller, *supra* note 35, at 38.
[211] *See supra* Section 4.2.2.

affairs, when those assumptions are falsified by subsequent events the parties should nonetheless be held strictly to their contract.[212]

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 loss that was not bargained for,[213] but US courts' powers are limited to releasing such a party fully or partially from its duty to perform.[214]

5.2. Civil law jurisdictions

When considering those civil law legal systems that have developed hardship doctrines, there are two main approaches.[215] 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.[216] 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

[212] Andrew Rogers, *Frustration and estoppel*, *in* FORCE MAJEURE AND FRUSTRATION OF CONTRACT 245, 246 (Ewan McKendrick ed., Lloyd's of London Press 2nd ed. 1995) in reaction to Davis Contractors Ltd. v. Fareham Urban District Council [1956] AC 696 [714 et seq.]: "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"; *see also* Rogers, *id*, at 245: "The operation of the doctrine of frustration is one of the least successful of the efforts of lawyers to meet the needs of commerce".
[213] *See* for this "unbargained-for risk test" Eisenberg, *supra* note 130, at 643 et seq.
[214] *See supra* Section 4.2.3.
[215] Fontaine, *supra* note 58, at para. 12.
[216] *See* PÉDAMON & CHUAH, *supra* note 34, at 22 et seq.

judgements in the area of French private law.[217] In that judgement, the Court invoked the binding force of contracts in Art. 1134 of the *Code Napoléon* of 1804[218] 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.[219] There was none in French law at the time of the judgement.

For a long time, this position has been generally criticized and gradually diluted by an increasing number of exceptions.[220] Still the French *Cour de Cassation* held to its position.[221] 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[222] or renegotiation[223] clauses into their contracts or allowing

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[217] Cass civ., Mar. 6, 1876, *Canal de Craponne*, D 1876 I, 193; *see generally* Abas, *supra* note 16, at 48 et seq.

[218] The provision has since been reformed. The version in force at the time of the judgement read: "Les conventions légalement formées tiennent lieu de loi à ceux qui les ont faites. Elles ne peuvent être révoquées que de leur consentement mutuel, ou pour les causes que la loi autorise"; English translation by the authors: "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."

[219] *Canal de Craponne*, *id*.: "Dans 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"; *see also* HENRI CAPITANT, et al., LES GRANDS ARRÊTS DE LA JURISPRUDENCE CIVILE Vol. II, 172 et seq (Dalloz 2nd ed. 2015); *see* for cases of legislative allowance of contract revision PÉDAMON & CHUAH, *supra* note 34, at 35.

[220] Against the theory: CHRISTOPHE JAMIN, ET AL., LES EFFETS DU CONTRAT PARAS 296, 348 (Librairie générale de droit et de jurisprudence 3rd ed. 2001); ARNE ALBERTS, WEGFALL DER GESCHÄFTSGRUNDLAGE: NACHTRÄGLICHE ÄQUIVALENZSTÖRUNGEN IM DEUTSCHEN UND FRANZÖSISCHEN VERTRAGSRECHT 78 et seq. (Nomos 2015); GABRIEL MARTY & PIERRE RAYNAUD, DROIT CIVIL — LES OBLIGATIONS Vol. I, paras. 250 et seq. (Sirey 2nd ed. 1988); Valérie Boccara & Gaëlle Marraud Des Grottes, *Les notaires face aux défis du siècle*, Petites affiches - n°117 (2004) 3, 6 ; Ripert, *supra* note 39, at 151; Charles Gavoty & Olivier Edwards, *Vers une extension de l'obligation de renégociation en matière contractuelle ?*, Petites affiches - n°128 (2004) 18, 19 ; Pascal Ancel, *Imprevision*, *in* Repertoire de droit civil paras. 4 and 31 (Dallloz 2017); Louis Thibierge, Le contrat face à l'imprévu (Economica 2011); in favor of the theory: Denis Mazeaud, *La révision du contrat*, Petites affiches - n°129 (2005) 4, paras. 28 et seq.; Catherine Thibierge, *Libres propos sur la transformation du droit des contrats*, Revue trimestrielle de droit civil 357, paras. 28 et seq. (1997); Prosper Weil, et al., Les grands arrêts de la jurisprudence administrative No. 29, p. 179, para. 5 (Dalloz 22nd ed. 2019); François Terré, et al., Droit civil: Les obligations para. 471 (Dalloz 12th ed. 2019).

[221] *See, e.g.,* Cass. civ., Nov. 15, 1933, Gaz. Pal. 1934 I 68 "La règle que les conventions légalement formées tiennent lieu de loi à ceux qui les ont faites est générale et absolue."; *see also* Lutzi, *supra* note 46, at 95 with reference to French case law.

[222] *See, e.g.,* ICC Case No. 2708 of 1976, Collection of ICC Arbitral Awards 1974-1985 297 (Sigvard Jarvin & Yves Derains eds. 1990).

[223] *See* Terré, *supra* note 221, at paras. 474 and 1331 et seq.; Ancel, *supra* note 220, at paras. 101 et

arbitrators to act as *amiables compositeurs*, freed from the constraints of the law.[224] 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 adaption 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",[225] which subsequently assumed the quality of a constitutional principle.[226] 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,[227] 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

seq.; *see also* generally PÉDAMON & CHUAH, *supra* note 34, at 18.

[224] Abas, *supra* note 16, at 64.

[225] Conseil d'État [CE] [highest administrative court], *Compagnie générale d'éclairage de Bordeaux*, Mar. 30, 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 WW I, 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.

[226] Conseil constitutionnel [CC] [Constitutional Court] decision No. 79-105 DC, July 25, 1979, Rec. 33: "[L]a continuité du service public qui, tout comme le 16:26 13.06.2019 droit de grève, a le caractère d'un principe de valeur constitutionnelle . . .".

[227] *See* the legislative report to the President of the French Republic of February 11, 2016, https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000032004539&categorieLien=id (accessed April 20, 2020).

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.[228]

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.[229] 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.[230] 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.[231] It cannot be assumed that the factual or legal effects of the COVID-19 pandemic has been accepted by the parties to a commercial contract, which is why, in addition to constituting a *force majeure* event,[232] it qualifies as a hardship event under Art. 1195.[233]

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".[234] In light of the fact that even for administrative contracts, the French courts followed a rather restrictive approach for many decades,[235] 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 ("[T]he court *may* . . .") in order to adapt the parties' contract.[236] Given that the French courts have historically taken a restrictive

[228] Official translation available at: http://www.textes.justice.gouv.fr/art_pix/THE-LAW-OF-CONTRACT-2-5-16.pdf (accessed April 20, 2020).
[229] Fontaine, *supra* note 58, at 30.
[230] Accaoui Lorfing, *supra* note 66, at 452 et seq.
[231] *Id.* at 453.
[232] *See supra* Section 4.1.
[233] Heinich, *supra* note 13, at 614.
[234] *Id.* at 458.
[235] L. Thibierge, *supra* note 220, at para. 338.
[236] *See* Philippe Stoffel-Munck, *L'imprévision et la réforme des effets du contrat*, REVUE DES CONTRATS N°112z5 30 (2016) who 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.

view on the renegotiation or adaption 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.[237] 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.[238]

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.[239] In line with the general view held in nineteenth-century legal science,[240] the Canon law doctrine of changed circumstances was regarded as being incompatible with the will theory.[241] The will theory prohibited reading an 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[242] – 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.[243] 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.[244]

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[237] Accaoui Lorfing, *supra* note 66, at 461.

[238] Heinich, supra note 13, at 614, emphasizing that such clauses have become typical clauses („*clause de style*") in commercial contracts governed by French law.

[239] *See generally* Lutzi, *supra* note 46, at 100 et seq.; BENNO MUGDAN, MOTIVE ZU DEM ENTWURFE EINES BÜRGERLICHEN GESETZBUCHES Vol. I, 249 (Guttentag 1888).

[240] *See* Zimmermann, *supra* note 30, at 581.

[241] Fried, *supra* note 32, at 63: "[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".

[242] *See supra* p. 19.

[243] Mugdan, *supra* note 239, at 249 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; *see also* Otto Lenel, *Die Lehre von der Voraussetzung (im Hinblick auf den Entwurf des bürgerlichen Gesetzbuches)*, 74 ACP 213, 216 (1889), who argued that accepting such a condition would have "substantial legal uncertainty" as an "inescapable consequence."

[244] § 901 ABGB provides "If 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.

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.[245] Even before the enactment of the *BGB* in 1900, it was argued by the German scholar *Windscheid* in 1892 that if the Cannon law doctrine of changed circumstances is "thrown out by the door . . . it will always re-enter through the window".[246] That time of re-entry did in fact come with the dramatic hyperinflation that Germany experienced between 1914 – the beginning of World War I – 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*").[247] That theory had been developed by the well-known German scholar *Oertmann* some years earlier.[248] It was essentially based on the principle of good faith enshrined in Section 242 of the *BGB.*[249] 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

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Furthermore, such declarations do not have an impact on the effectiveness of contracts for consideration. . . .", translation by PETER ANDREAS ESCHIG & ERIKA PIRCHER-ESCHIG, DAS ÖSTERREICHISCHE ABGB — THE AUSTRIAN CIVIL CODE (GERMAN - ENGLISH) (LexisNexis 2013).

[245] *See* the references to the studies of Endemann (1899), Dernburg (1899), Bindewald (1901) and Artur Kaufmann (1907) by Köbler, *supra* note 30, at 90.

[246] Bernhard Windscheid, *Die Voraussetzung*, 78 ACP 161, 197 (1892); BERNHARD WINDSCHEID, DIE LEHRE DES RÖMISCHEN RECHTS VON DER VORAUSSETZUNG 1 et seq. (Buddeus 1850)

[247] Reichsgericht [RG] [Imperial Court], Feb. 3, 1922, 103 RGZ 328, 332.

[248] Paul Oertmann, Die Geschäftsgrundlage: Ein neuer Rechtsbegriff (Deichert 1921); *see also* Eugen Locher, *Geschäftsgrundlage und Geschäftszweck*, 121 AcP 1, 71 (1923); Denis Philippe, Changement de circonstances et bouleversement de l'économie contractuelle 227 et seq. (Bruylant 1986).

[249] *See generally* Fried, *supra* note , at 74: "These doctrines (of good faith, unconscionability and duress] explicitly authorize courts in the name of fairness to revise contractual arrangements or to overturn them altogether"; REINHARD ZIMMERMANN, BREACH OF CONTRACT AND REMEDIES UNDER THE NEW GERMAN LAW OF OBLIGATIONS 13 (Centro di studi e ricerche di diritto comparato e straniero 2002): "The 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".

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,[250] where – without the fault of either party – the foundation or reason upon which the agreement is based disappears; but 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 the case law of the Federal Court of Justice (*Bundesgerichtshof, BGH*), which followed the earlier case law of the Imperial Court of Justice.[251] However, in the course of a substantial reform 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

[250] Weller, et al., *supra* note 4, at 1021; Wagner, et al., *supra* note 69, at 846.
[251] Bundesgerichtshof [BGH] [Federal Court of Justice], Feb. 15, 1951, 1 BGHZ 170, 176; BGH, April 4, 1951, 1 BGHZ 334; BGH, May 23, 1951, 2 BGHZ 176, 183: BGH, June 6, 1951, 2 BGHZ 379, 383; *see also* the case law of the highest court for the British Zone in Germany: OGHBrZ, Mar. 31, 1949, 1 OGHZ 386, 395; OGHBrZ, July 7, 1949, 2 OGHZ 202, 208; OGHBrZ, Mar. 30, 1950, 3 OGHZ 343, 345; OGHBrZ, June 23, 1950, 4 OGHZ 91, 96; OGHBrZ, July 13, 1950, 4 OGHZ 165, 172.

> 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.[252]

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.[253]

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.[254] This adaption-friendliness of the German law becomes particularly relevant in the COVID-19 context, because, due to its war-like character, the risks resulting from such a crisis shall not be carried by one party alone.[255] The mere fact that no agreement can be reached with the other side is no bar to adaptation.[256] 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 .[257]

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[252] Translation from the German original available here: https://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#p1146 (accessed April 20, 2020); *see generally* Lutzi, *supra* note 46, at 104 et seq.
[253] BGH, Nov. 8, 2001, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 2002, 292.
[254] Norbert Horn, Neuverhandlungspflicht, 181 ACP 255 (1981); Norbert Horn, Vertragsbindung unter veränderten Umständen: Zur Wirksamkeit von Anpassungsregelungen in langfristigen Verträgen, NJW 1985, 1118.
[255] Weller, et al., *supra* note 4, at 1021
[256] Bundesgerichtshof [BGH] [Federal Court of Justice], Sept. 30, 2011, NJW 2012, 373.
[257] Christian Grüneberg, *in* PALANDT: BÜRGERLICHES GESETZBUCH at § 313, para. 42 (C.H. Beck 2019).

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.*[258] It is argued that this broad scope can lead the parties into the "constant temptation"[259] 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".[260]

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.[261] However, the picture is diverse as to the courts' powers to intervene and adapt the contract in these countries.[262] 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.[263]

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[258] *See supra* p. 35; *see* WOLFGANG HAU, VERTRAGSANPASSUNG UND ANPASSUNGSVERTRAG 250 (Mohr Siebeck 2003); THOMAS LOBINGER, DIE GRENZEN RECHTSGESCHÄFTLICHER LEISTUNGSPFLICHTEN: ZUGLEICH EIN BEITRAG ZUR KORREKTURBEDÜRFTIGKEIT DER §§ 275, 311A, 313 BGB N.F 245 (Mohr Siebeck 2004); Ulrich Huber, *Das geplante Recht der Leistungstörungen*, *in* Zivilrechtswissenschaft und Schuldrechtsreform: Zum Diskussionsentwurf eines Schuldrechtsmodernisierungsgesetzes des Bundesministeriums der Justiz 31 (Wolfgang Ernst & Reinhard Zimmermann eds., Mohr Siebeck 2001).
[259] WERNER FLUME, ALLGEMEINER TEIL DES BGB Vol. II, § 26.7 (Springer 3rd ed. 1979).
[260] Thomas Finkenauer, *in* MÜNCHENER KOMMENTAR ZUM BÜRGERLICHEN GESETZBUCH Vol. III [§§ 311-432], § 313 paras. 5 and 52 (Wolfgang Krüger ed., C.H. Beck 8th ed. 2019); DIETER MEDICUS & STEPHAN LORENZ, SCHULDRECHT I: ALLGEMEINER TEIL para. 561 (C.H. Beck 21st ed. 2015); Lars Böttcher, *Erman Bürgerliches Gesetzbuch*, Vol. I [§§ 1-761, AGG], § 313 para. 32 (Harm Peter Westermann, et al. eds., Dr. Otto Schmidt 15th ed. 2015); Arndt Teichmann, *in* SOERGEL BÜRGERLICHES GESETZBUCH Vol. V [§§ 311, 311a-c, 313, 314], at § 313 para. 30 (Beate Gsell ed., W. Kohlhammer 13th ed. 2014).
[261] *See* Lando & Beale, *supra* note 97, at 328.
[262] Pascale Accaoui Lorfing, *Adaptation of Contracts by Arbitrators*, *in* HARDSHIP AND FORCE MAJEURE IN INTERNATIONAL COMMERCIAL CONTRACTS 41, 43 (Fabio Bortolotti & Dorothy Ufot eds., ICC 2018).
[263] *See* for the principle of "*ut res magis valeat quam pereat*" as general principle of transnational contact law TransLex-Principle IV.5.3 and Commentary No. 2, www.trans-lex.org/925000 (accessed April 20, 2020); Ad Hoc-Award of May 27, 1991, 17 Y.B. COMM. ARB. 11, 16 (1992), excerpts available at: www.trans-lex.org/260400 (accessed April 20, 2020).

5.3. Transnational contract law

At the transnational level, 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".[264] 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.[265] One core argument is that English law accepts the frustration doctrine,[266] which is very similar to the US impracticability doctrine (which like the frustration doctrine is a restrictive version of a hardship-type doctrine) and that therefore the alleged rejection of the impracticability doctrine under English law is in fact contradictory.[267]

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[268] and in the case law of the Iran-US Claims Tribunal based on that Declaration.[269] In addition,

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[264] *See, e.g.,* ICC Case No. 7110 of 1996, 10(2) ICC Int'l Ct. of Arb. Bull. 39, 54 et seq. (1999), stating that "the theory of changed circumstances does not form part of the widely recognized and generally accepted legal principles"; *see generally* for the doctrine of the New Lex Mercatoria ORSOLYA TOTH, THE LEX MERCATORIA IN THEORY AND PRACTICE (Oxford University Press 2017); KLAUS PETER BERGER, THE CREEPING CODIFICATION OF THE NEW LEX MERCATORIA 53 et seq. (Kluwer Law International 2nd ed. 2010).

[265] *See, e.g.,* Fouchard, *supra* note 181, at 428: "[O]n 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"; Hans van Houtte, *Changed Circumstances and Pacta Sunt Servanda*, *in* TRANSNATIONAL RULES IN INTERNATIONAL COMMERCIAL ARBITRATION 105, 115 (Emmanuel Gaillard ed., ICC 1993); Horn, *supra* note 157, at 25: "This 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*" (emphasis added).

[266] *See supra* section 4.2.2.

[267] Brunner, *supra* note 29, at 410.

[268] 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, 1 Iran-US CTR 9 (1983).

[269] Questech Inc. v. Iran, 9 Iran-U.S. Cl. Trib. Rep. 107, 122 (1985), excerpts available at: https://www.trans-lex.org/231400122 (accessed April 20, 2020): "This 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"; Rockwell International Systems Inc. v. Iran, 15 Y.B. Comm. Arb. 239, 243 (1990) (Iran-U.S. Cl. Trib.); SCHMITZ, *supra* note 163, at 181 et seq.

the UPICC, since its first edition of 1994, include a Section 2 of Chapter 6 ("Performance") entitled "Hardship". Those provisions combines aspects of domestic laws and experience from international contract practice and thus reflects a transnational hardship principle.[270] *Vice versa*, the drafters of the new French provision explicitly acknowledged the influence of the UPICC provision.[271] So did the Dutch legislature.[272]

Endeavoring to strike the 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.[273]

This wording is in line with the domestic doctrine of changed circumstances in various countries.[274] Likewise, international arbitral practice considers the *clausula* principle as "a dangerous exception to the principle of sanctity of contracts and whose application must be limited "to cases where compelling reasons justify it".[275]

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[270] Accaoui Lorfing, *supra* note 262, at 54 et seq.
[271] *See* Claude Witz, *Störung des vertraglichen Gleichgewichts im neuen französischen Schuldrecht*, *in* DIE REFORM DES FRANZÖSISCHEN VERTRAGSRECHTS EIN SCHRITT ZU MEHR EUROPÄISCHER KONVERGENZ? 119, 135 (Florian Bien & Jean-Sébastien Borghetti eds., Mohr Siebeck 2016); Ancel, *supra* note 220, at para. 49; Stoffel-Munck*, supra* note 236.
[272] ICC Case No. 8468 of 1996, 24 Y.B. Comm. Arb. 162, 167 (1999).
[273] UNIDROIT Principles of International Commercial Contracts 2016, Art. 6.2.1 (UNIDROIT ed., 2017); *see also* Ewan McKendrick, *in* COMMENTARY ON THE UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS (PICC) at Art. 6.2.1, para. 4 (Stefan Vogenauer ed., Oxford University Press 2nd ed. 2015).
[274] *See supra* Section 5.2.2 for German law.
[275] ICC Case No. 1512 of 1971, 1 Y.B. Comm. Arb. 128, 129 (1976), excerpts available at: www.trans-lex.org/201512 (accessed April 20, 2020): "The 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"; ICC Case No. 8486 of 1996, 24 Y.B. Comm. Arb. 162, 167 (1999), excerpts available at: www.trans-lex.org/208486 (accessed April 20, 2020): "Hence, the termination of a contract for unforeseen circumstances ('hardship', '*clausula rebus sic stantibus*') should be allowed only in truly exceptional cases"; *see also* ICC Award No. 9479, 12(2) ICC Int'l Ct. of Arb. Bull. 67, 70 (2001), excerpts available at: www.trans-lex.org/209479 (accessed April 20, 2020); Yildirim, *supra* note 34, at 87.

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.[276]

This definition shows two things. First, the requirements of hardship are very similar to those of the *force majeure* doctrine:[277] occurrence of an event, of whatever nature, after contract conclusion for which the obligor has not assumed the risk, unforeseeability, unavoidability and the causing by the event of an economic disequilibrium in the contract.[278] Second, this 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 with respect to abstract figures like an increase in costs of 100 or 200 percent as compared to the initial contractual cost calculations.[279] 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

[276] UNIDROIT Principles of International Commercial Contracts 2016, Art. 6.2.2 (UNIDROIT ed., 2017).
[277] *See supra* Section 4.3.
[278] See Art. 2 2020 ICC Hardship Clause, https://iccwbo.org/content/uploads/sites/3/2020/03/icc-forcemajeure-hardship-clauses-march2020.pdf; Yildirim, *supra* note 34, at 86.
[279] The figure of 50% in the official Comment to Art. 6.2.2 UPICC was deleted in the 2004 edition; see Yildirim, *supra* note 34, at 100 et seq.

contract was concluded.[280] The COVID-19 pandemic does qualify as an event causing a "fundamental" economic disequilibrium.[281]

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.[282] 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,[283] 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.[284] In these circumstances, the tribunal's task is necessarily limited to "a fair distribution of the losses between the parties".[285] 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,*[286] *Mobil Oil*[287] and *Wintershall/Qatar*[288] arbitrations and in many ICC arbitral

[280] McKendrick, *supra* note 273, at Art. 6.2.2, para. 9.
[281] Weller, et al., *supra* note 4, at 1021.
[282] *See* for the legal principles applicable to such renegotiations Klaus Peter Berger, *Renegotiation and Adaption of International Investment Contracts: The Role of Contract Drafters and Arbitrators*, 36 VANDERBILT JOURNAL OF TRANSNATIONAL LAW 1347, 1363 et seq. (2003).
[283] *See* for arbitral tribunal's powers to adapt contract and the required distinction between the procedural authority of the tribunal to adapt the contract, the substantive legitimacy of adaption 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* FOUNDATIONS AND PERSPECTIVES OF INTERNATIONAL TRADE LAW 269, at paras. 19-015 et seq. (Ian Fletcher, et al. eds., Sweet & Maxwell 2001); the 2020 ICC Hardship Clause provides for three alternative legal consequences of hardship: 1) the aggrived party's right to terminate the contract without adptation, 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, https://iccwbo.org/content/uploads/sites/3/2020/03/icc-forcemajeure-hardship-clauses-march2020.pdf.
[284] Weller, et al., *supra* note 4, at 1021; *see also* Wagner, et al., *supra* note 69, at 848.
[285] UNIDROIT Principles of International Commercial Contracts 2016, Art. 6.2.3, Comment No. 7 (UNIDROIT ed., 2017).
[286] The Government of Kuwait v. American Independent Oil Company (AMINOIL), 9 Y.B. Comm. Arb. 71 at paras. 24 and 59 (1984).
[287] Mobil Oil Iran v. Iran, 16 Iran-U.S. Cl. Trib. Rep. 3, 54 (1987).
[288] Wintershall AG et al. v. The Government of Qatar, 15 Y.B. Comm. Arb. 30 (1990).

awards.[289] 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.[290]

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 may be *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 predictions of medical researchers and virologists during the past years, a disastrous scenario affecting the entire global economy like the "world virus crisis"[291] 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

[289] Crivellaro, *La révision du contrat dans la pratique de l'arbitrage international*, REV D ARB 69, at 79 et seq. (2017): "[T]he authority of arbitrators to revise contracts is certainly admitted in international commercial law" (translation by the author).
[290] *See supra* Section 4 for similar considerations regarding the *force majeure* principle.
[291] Weller, et al., *supra* note 4, at 1020.

recognition of self-determination of the individual that goes along with it.[292] In highly exceptional global scenarios such as the one caused by 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.

[292] *See* Flume, *supra* note 259, § 1.5: "Application 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).