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Remembering Stefano Rodotà

TERMINATING OR RENEGOTIATING?
THE AFTERMATH OF COVID-19 ON COMMERCIAL CONTRACTS

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Covid-19 has been a stress test for commercial contracts, sometimes making performance impossible, sometimes making it more costly. The response fashioned by the most influential contract laws of the world has been varied. While the common law galaxy is traditionally restrictive in the face of contractual contingencies and tends to deny judicial remedies which may interfere with party autonomy, continental European legal systems have proved more sensitive to channeling the pandemic event into the civil law doctrines already consolidated in the written codes and strengthened as a result of the reforms of recent years. This paper will firstly explore the remedies available in the main contract laws to govern impossibility or hardship connected with the Covid-19 pandemic, exposing a tension between the liberal approach of the common law inspired by the pacta sunt servanda principle and the 'social' continental experiences revolving around good faith and constitutional solidarity. It will then exploit the outcomes of this comparative analysis to confront arguments for and against termination or renegotiation of commercial contracts affected by the pandemic. Finally, it will argue that contracting parties should remain free to renegotiate their contract, failing which the court should not have the power to adapt it to supervening circumstances, as the only remedy should be the termination of the agreement.

I. COVID-19 AS A STRESS-TEST FOR CONTRACT LAW

The Covid-19 pandemic has entailed a huge human cost in terms of lost lives and often irreversible health damage for those who have contracted the virus. The impact on the economy has not been less with many activities having to close their doors due to the measures adopted by public authorities aiming to contain the virus. The closures lasted for many months, sometimes interspersed with short periods of reopening, to the extent that many workers found themselves without income and the governments of the most advanced economies have had to implement various support programs seeking to provide basic means of subsistence. No sector was spared, including most supplies of non-essential goods and services such as catering, transport, tourism, construction and entertainment.

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Covid-19 has been a real stress test for contract law,[1] with repercussions not limited to this or that contract, or a particular contract category, but spreading like wildfire to most negotiations, including business networks and supply chains. Many commercial contracts have been affected not so much by the pandemic itself as by the subsequent emergency measures taken by the authorities, which have imposed lockouts of most manufacturing activities, border closures and other restrictions on freedom of movement.

Against this background, the traditional principle that covenants must be observed (*pacta sunt servanda*) has been put to the test. In its purest meaning, the principle requires the unaltered execution of contracts in spite of external circumstances making performance more onerous.[2] It responds to a vision of the contract which is, on the one hand, *hollowed*, insofar as it enhances the duty – moral even more than legal – to keep the promises given,[3] and on the other hand, *voluntary*, insofar as it rests on the idea that it is the contracting parties themselves, not the law, who may best manage possible contingencies in the drafting phase already (after all, '*contracter, c'est prévoir*').[4] If the parties have not foreseen anything in relation to these circumstances, it means that they have accepted the risk of their contingency, being aware, since the conclusion of the agreement, that no event occurring in the surrounding economic environment can release one of them from the obligations undertaken.[5] At the heart of this lies also an economic explanation, namely that the promisees would have a certain degree of hesitation in contracting if the legal system allowed promisors to easily escape their obligations due to changes of circumstances they might encounter in the life of the contract.[6] Still, the fear of such deterrence has seemed unjustified to others. As long as

[1] C. Twigg-Flesner, 'The Covid-19 Pandemic – a Stress Test for Contract Law?' 9(3) *Journal of European Consumer and Market Law*, 89 (2020).

[2] To this effect significant is Blackburn J.'s statement in *Taylor* v. *Caldwell* (1863) 3 B&S 826, 833: 'Where there is a positive contract to do a thing not in itself unlawful, the contractor must perform it or pay damages for not doing it, although in consequence of unforeseen accidents the performance of his contract has become unexpectedly burdensome or even impossible'. See also Lord Simon in *British Movietonenews Ltd.* v. *London District Cinemas* [1952] A.C. 166, 185: 'The parties to an executory contract are often faced, in the course of carrying it out, with a turn of events which they did not at all anticipate – a wholly abnormal rise or fall in prices, a sudden devaluation of currency, an unexpected obstacle to execution or the like. Yet this does not of itself affect the bargain they have made'.

[3] R. Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (Oxford: Oxford University Press, 1996), 577.

[4] G. Ripert, *La Règle Morale dans les Obligations Civiles* (Paris: LGDJ, 2013), 151.

[5] See the ancient English case *Paradine* v. *Jane*, 82 Eng. Rep. 897 (1647). Prince Rupert, an invader, had dispossessed a tenant. The Court held that the tenant was not excused from his duty to pay rent to the landlord, on the ground that 'when the party by his own contract creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract'.

[6] P. Hay, 'Frustration and Its Solution in German Law' 10 *American Journal of Comparative Law*, 345, 346 (1961).

as the parties know that performance can only be required within certain limits, related to its possibility and not onerousness, this can only provide an incentive to negotiate.[7]

It is quite obvious that a blind application of the *pacta sunt servanda* maxim in times of Covid-19 would lead to outcomes incompatible with the duties of fairness and loyalty that should mark the execution of contracts or, in common law systems – which do not know a general duty of good faith in the interpretation and performance of contracts – to outcomes in any case incompatible with the intentions of the contracting parties, who, had they foreseen a similar development of the pandemic at the time of the drafting of their contract, would not have concluded it at all or would have concluded it under very different conditions. The response fashioned by the contract laws of the most influential legal systems has been varied, as it has been conditioned by different historical and cultural roots.[8] While the common law galaxy is traditionally restrictive in the face of contractual contingencies and tends to deny judicial remedies which may interfere with party autonomy, continental European legal systems have proved more sensitive to channeling the pandemic event into the civil law doctrines already consolidated in the written codes and strengthened as a result of the reforms of recent years (first and foremost, the recent reform of the French Civil Code). However, the remedies of the termination of the contract, its judicial adaptation, the duty to renegotiate – often theorized in an uncritical, generalized way – have not always proved adequate.[9]

This paper will firstly explore the remedies available in the main contract laws to govern impossibility or hardship connected with the Covid-19 pandemic, exposing a tension between the liberal approach of the common law inspired by the *pacta sunt servanda* principle and the 'social' continental experiences revolving around good faith and constitutional solidarity. It will then exploit the outcomes of this comparative analysis to confront arguments for and against termination or renegotiation of commercial contracts affected by the pandemic. Finally, it will argue that contracting parties should remain free to renegotiate their contract, failing which the court should not have the power to adapt it to supervening circumstances, as the only remedy should be the termination of the agreement.

[7] Cf. M. Cohen, 'The Basis of Contract' 46 *Harvard Law Review*, 553, 573 (1933).
[8] Noting that 'the pertinent rules in the various European legal systems tend to be very different from one country to the next; their history is complicated and the state of the law is confusing in many systems', see T. Rüfner, 'Art 8:108', in N. Jansen and R. Zimmermann eds, *Commentaries on European Contract Laws* (Oxford: Oxford University Press, 2018), § 2.
[9] Highlighting that each remedy shall be tailored to the requirements of each individual case, see P. Perlingieri, 'Equilibrio delle posizioni contrattuali ed autonomia privata', in Id., *Il diritto dei contratti tra persona e mercato* (Napoli: Edizioni Scientifiche Italiane, 2003), 466.

II. THE *FORCE MAJEURE* DOCTRINE

It is difficult to piece together how the pandemic has impacted contracts. In some cases, performance has become impossible (e.g., airlines forced to cancel flights as a result of travel bans; people having booked hotel accommodation they could not reach because of the lockdowns; live performances being cancelled). In other, more problematic cases, performance has simply become more burdensome, such as a tenant of commercial property being required to pay rent despite the closure of his business or a supplier of raw materials having to face its unavailability on the market and the general rise in prices. In the event performance has become not excessively onerous but impossible as a result of supervening events (e.g. earthquakes, floods, fires, drought, civil unrest, terrorist attacks, etc.),[10] the legal systems concerned respond with the *force majeure* doctrine, developed by the Romans around the concept of *culpa levissima* (the promisor has been diligent, or has been guilty but to a lesser degree), and later worked on by the canonists on moral grounds (the promisor has not committed a sin).[11]

And so the doctrine was grafted onto modern civil codes, appearing in the *Code Napoléon*, though without a clear-cut definition (in truth, the code contained very few definitions, as it was meant to be pragmatic rather than dogmatic).[12] Only in 2016 did this state of uncertainty cease through the introduction of a specific notion of *force majeure* in Art. 1218 French Civil Code,[13] occurring when an event beyond the promisor's control, which could not reasonably be foreseen at the time of the conclusion of the contract and whose effects cannot be avoided by appropriate measures, prevents performance. The contract is automatically discharged and parties are released from their obligations.

If, on the other hand, the impediment is only temporary, performance is suspended unless the resulting delay justifies termination of the contract. In times of Covid-19, this could be the case where performance of a contract for the supply of goods or services resumes once businesses reopen, unless clients no longer have an interest in delayed performance.[14] The

[10] See, for example, the American case *Siegel* v. *Eaton & Prince Co.*, 46 N.E. 449 (1896), in which the doctrine of impossibility was applied to discharge a contract for the manufacture and installation of an elevator in a department store when the store was destroyed by fire.

[11] J. Gordley, 'Impossibility and Changed and Unforeseen Circumstances' 52 *American Journal of Comparative Law*, 513, 514-516 (2004).

[12] F. Geny, *La Technique législative dans la Codification civile moderne: a propos du Centenaire du Code civil* (Paris: A. Rousseau, 1904), 1005.

[13] Art. 1218(1): Il y a force majeure en matière contractuelle lorsqu'un événement échappant au contrôle du débiteur, qui ne pouvait être raisonnablement prévu lors de la conclusion du contrat et dont les effets ne peuvent être évités par des mesures appropriées, empêche l'exécution de son obligation par le débiteur.

[14] See C. Brunner, 'Rules on Force Majeure as Illustrated in Recent Case Law', in F. Bortolotti and D. Ufot eds, *Hardship and Force Majeure in International Commercial Contracts* (Alphen upon Rhine: Kluwer Law International, 2018), 98-99, noting that 'generally impediments to performance only exempt the obligor as long as they exist' and that a temporary impediment may become permanent 'when it appears

same distinction between permanent and temporary impossibility can be found in Art. 1256 of the Italian Civil Code.

The English frustration doctrine covers impossibility too. A frustrated contract is automatically discharged.

The factual or legal effects of the pandemic, not the pandemic itself, appear to meet the requirements of *force majeure* under the above-mentioned jurisdictions. The former include disease, death, quarantine, plant closures and disruption of supply chains; the latter, lockdowns, curfews, and generally all the restrictions adopted by public authorities.[15] However, the *force majeure* doctrine seems unsuitable to address the consequences of the pandemic, not so much because it requires a case-by-case judicial or arbitral determination,[16] but because of some inherent limits, the first, shared by many civil law systems, being that pecuniary obligations are never impossible, since impossibility must be objective, i.e. be such for any promisor, and absolute, i.e. be insuperable even with the utmost diligence.[17]

Some Italian scholars, particularly sensitive to constitutional solidarity, have advocated for the 'non-enforceability' (*inesigibilità*) of pecuniary debts in the face of the exceptionality of the Covid-19 emergency and the risks that compliance with governmental measures may entail for the survival of many businesses.[18] A contract should not be enforced where its

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'.

[15] As far as lockdowns are concerned, see High Court of Delhi, *Halliburton Offshore Services Inc* v. *Vendanta Ltd & ANR*, OMP (I) (Comm) & IA 3697/2020, holding that 'the countrywide lockdown, which came into place on 24th March, 2020 was (…) prima facie in the nature of force majeure. Such a lockdown is unprecedented, and was incapable of having been predicted either by the respondent or by the petitioner' (§ 20).

[16] F. Gambino, 'Il rapporto obbligatorio', in R. Sacco ed., *Trattato di diritto civile* (Torino: Utet, 2015), 192.

[17] There is broad consensus to this effect in Italian case-law. See, e.g., Cassazione, 30 April 2012, no. 6594, *Giustizia civile*, I, 1873 (2013); Cassazione, 16 March 1987, no. 2691, *Foro italiano*, I, 1209 (1989). Concurring Italian scholarship includes M. Giorgianni, *L'inadempimento. Corso di diritto civile* (Milano: Giuffrè, 1975), 299; C.M. Bianca, 'Dell'inadempimento delle obbligazioni', in A. Scialoja and G. Branca eds, *Commentario del codice civile* (Bologna-Roma: Zanichelli-Foro italiano, 1979), 80; B. Inzitari, 'Delle obbligazioni pecuniarie', in F. Galgano ed., *Commentario del codice civile Scialoja-Branca* (Bologna-Roma: Zanichelli-Foro italiano, 2011), 13. Under French law, see Cour de cassation com., 16 September 2014, no. 13-20.306, https://www.legifrance.gouv.fr/juri/id/JURITEXT000029480960 (last visited 3 November 2021).

[18] Though with different nuances, cf. P. Sirena, 'L'impossibilità ed eccessiva onerosità della prestazione debitoria a causa dell'epidemia di CoViD-19' *Nuova giurisprudenza civile commentata*, 73, 75 (supplement no. 3/2020); A. De Mauro, 'Pandemia e contratto: spunti di riflessione in tema di impossibilità sopravvenuta della prestazione' *giustiziacivile.com*, 227, 231 (2020); V. Cuffaro, 'Le locazioni commerciali e gli effetti giuridici dell'epidemia' *giustiziacivile.com*, 233, 235 (2020). Occasionally, some Italian courts have followed suit: Tribunale di Bologna, 4 June 2020, *Foro italiano*, 2492 (2020); Tribunale di Rimini, 25 May 2020, *Foro italiano*, 2497 (2020).

performance conflicts with the promisor's rights which are hierarchically superior to those of the promisee (e.g. the protection of the company's productivity).[19]

This theory is not fully satisfactory, not even when the promisor is an entrepreneur and therefore economic interests of constitutional relevance are at stake. It is true that many businesses find it difficult to pay, but there are just as many, despite being affected by government measures, which continue to pay for supplies and leases, simply because they have more liquidity or have drawn up a financial plan. Exempting the struggling business from performing the contract would mean transferring the business risk to the counterparty who is to receive the supply of good or service or the rent for the premises. However, for this theory to be consistent, the business risk would have to be transferred in full, together with the associated benefits and the powers to manage it, with the consequence of allowing that counterparty to also share in the profits and the power to administer the business, but this conclusion is obviously absurd.[20] At the end of the day, if Covid-19 were to amount to supervening impossibility of fulfilling pecuniary obligations, not only entrepreneurs, but anyone could feel justified to no longer pay for supplies and leases.[21]

Solidarity cannot be a one-way street. One cannot look exclusively at the promisor's position, because it may well be the case that it is the promisee to be harmed in his constitutional rights by non-performance, that his survival is jeopardized by the asserted impossibility of performance. Without considering that the justified failure to perform the contract of the first promisor could trigger chain defaults, thereby seriously damaging the entire economy.[22]

What we are experiencing is a market crisis, not a crisis of a single contract, which, as such, requires a balancing extended to all the relevant interests at stake. Put differently, the pandemic is blind, having touched all contracting parties, both the weak and the strong.[23]

Not even a merely temporary impediment, in the form of a suspension limited to the time during which the containment measures last,[24] appears to be decisive, if it is true that this could equally damage the promisee and, once the cause of impossibility ceases, and therefore

[19] The interests that may determine the non-enforceability of the obligation on the debtor's part may relate to his life or health, his property or business: L. Mengoni, 'Responsabilità contrattuale', in C. Castronovo, A. Albanese and A. Nicolussi eds, *Obbligazioni e negozio, Scritti II* (Milano: Giuffrè, 2011), 332.

[20] A. Gentili, 'Una proposta sui contratti d'impresa al tempo del coronavirus' *giustiziacivile.com*, 6-7 (2020). See also T.V. Russo, 'L'*arma letale* della buona fede. Riflessioni a margine della "manutenzione" dei contratti in seguito alla sopravvenienza pandemica' *Rivista di diritto bancario*, 133, 146 (2021), claiming that rebalancing cannot mean transferring the business risk to the party who doesn't run that business.

[21] A. Gentili, n. 20 above, 6; G. Alpa, 'Note in margine agli effetti della pandemia sui contratti di durata' *Nuova giurisprudenza civile commentata*, 57, 60 (supplement no. 3/2020).

[22] N. Cipriani, 'L'impatto del lockdown da COVID-19 sui contratti' *Rivista di diritto bancario*, 651, 667 (2020).

[23] T.V. Russo, n. 20 above, 143.

[24] This was the solution offered by Italian emergency law: art. 3(6-*bis*) d.l. 23 February 2020 no. 6.

productive activities are resumed, the promisor could still have a hard time performing, due, for example, to a shortage of labor or credit crunch.

III. THE HARDSHIP DOCTRINE

The second situation is more complex, that is when, as a result of a change of circumstances, performance remains possible but becomes more onerous for the promisor.[25] While the lockdowns mainly called for the *force majeure* doctrine, during the following reopening of the activities and recovery of the economy, some contracting parties could experience an increase in costs or reduction in profits, as a result of constraints imposed to contain contagion that may last for a long time.[26]

In contract practice, the distinction between *force majeure* and hardship often blurs, and it is not clear whether the clauses referring thereto are mutually exclusive or, if they are compatible, in what order they should be applied[27] (which is why an accurate and separate regulation is certainly desirable).[28] The reason underlying this confusion is the influence of common law on international contracts, which tends not to differentiate *force majeure* and hardship clauses.[29]

Some scholars, probably inspired by what happens in contractual practice, have sometimes challenged the dichotomy, because after all, both clauses seek to solve the same problem: excusing the non-performing promisor.[30] Even the oldest Italian literature brought the two institutions together, considering hardship as a 'weak' form of impossibility of performance,

[25] Change of circumstances relates to the 'situation in which, due to supervening and reasonably unforeseeable events, the performance of the obligation has become excessively onerous for the debtor or the counter-performance he receives has severely diminished its value': R. Momberg Uribe, *The Effect of a Change of Circumstances on the Binding Force of Contracts: Comparative Perspectives (Ius Commune Europaeum)* (Antwerp: Intersentia, 2011), 16.

[26] E. Navarretta, 'CoVid-19 e disfunzioni sopravvenute dei contratti. Brevi riflessioni su una crisi di sistema' *Nuova giurisprudenza civile commentata*, 87, 90 (supplement no. 3/2020).

[27] Contending that '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', see M. Furmston, 'Drafting of Force Majeure Clauses: Some General Guidelines', in E. McKendrick ed., *Force Majeure and Frustration of Contract* (London: Lloyd's of London Press, 2nd ed., 1995), 58. See also ICC Case no. 16369/2011, 39 *YB 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)'.

[28] F. Benatti, 'Contratto e Covid-19: possibili scenari' *Banca Borsa e Titoli di Credito*, 198, 200 (2020).

[29] K.P. Berger and D. Behn, '*Force Majeure* and Hardship in the Age of Corona: A Historical and Comparative Study' 6(4) *McGill Journal of Dispute Resolution*, 78, 88 (2019-2020).

[30] See C. Fried, *Contract as Promise: A Theory of Contractual Obligation* (Oxford: Oxford University Press, 2nd ed., 2015), 58, arguing that 'though relief is granted in all these cases, confusion begins in the dichotomizing and subdichotomizing. I agree with critics of classical doctrine like Grant Gilmore, who sees there but a single problem'.

as if hardship were situated on a lower step in the scale of possibilities compared to impossibility.[31]

These attempts at unification do not, however, appear to be acceptable, since the nature of the contingency is different. In the event of hardship, it does not make performance impossible, but rather compromises the balance between the obligations originally agreed. But above all, different remedies may be envisaged,[32] because hardship, unlike impossibility, may not lead, as will be seen, to discharge.

There remains, however, the issue of charting the overall contours of hardship[33] and the risk of its excessive theorizing.[34] Some American commentators have ironically remarked that 'the doctrines of impossibility (and) commercial impracticability (...) comprise unclimbed peaks of contract doctrine. Clearly, all of the famous early and mid-twentieth century mountaineers, Corbin, Williston, Farnsworth and many lesser persons have made assaults on this topic but none has succeeded in conquering the very summit'.[35] While it is certain that impossibility excuses performance, it is not equally certain that mere hardship has the same effect. This is also reflected in the different terminology used to describe the concept in the various languages: *imprévision*; *Geschäftsgrundlage*; *eccessiva onerosità sopravvenuta*. Paradoxically, the English language, by now the lingua franca of international contracts, does not have an appropriate word, probably because it does not know the concept at its roots.[36]

In truth, such definitional issues are coupled with fundamental policy issues, whose solution may lead to admitting or denying the remedy.[37] Along these lines the legal systems have been classified as 'open' (Germany, the Netherlands, Italy, Spain) and 'closed' (England and

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[31] A. De Martini, 'Eccessiva onerosità della prestazione, diminuita utilità della controprestazione e principio di corrispettività, nella dinamica del contratto' *Giurisprudenza completa Cassazione civile*, III, 687 (1951); E. Betti, *Teoria generale delle obbligazioni* (Milano: Giuffrè, 1953), I, 188. See also A. Yildirim, *Equilibrium in International Commercial Contracts: With Particular Regard to Gross Disparity and Hardship provisions of the UNIDROIT Principles of International Commercial Contracts* (Nijmegen: Wolf Legal Publishers, 2011), 89, claiming that 'hardship is regarded as a lower degree of force majeure'.

[32] In the Italian scholarship see R. Scognamiglio, 'Contratti in generale', in G. Grosso and F. Santoro Passarelli eds, *Trattato di diritto civile* (Milano: Giuffrè, 3rd ed., 1972), 288; A. Pino, *L'eccessiva onerosità della prestazione* (Padova: Cedam, 1952), 84; A. Boselli, *La risoluzione del contratto per eccessiva onerosità* (Torino: Utet, 1952), 99; C.G. Terranova, 'L'eccessiva onerosità nei contratti', in P. Schlesinger ed., *Il Codice Civile. Commentario*, *Sub artt. 1467-1469* (Milano: Giuffrè, 1995), 47.

[33] See Art. 6:111 PECL Comment A: 'of course there is sometimes a very fine line between a performance which is only possible by totally unreasonable efforts, and a performance which is only very difficult even if it may drive the debtor into bankruptcy'.

[34] Arguing that the Courts' excessive theorizing of the frustration doctrine is a very unusual phenomenon for English contract law, see G. Treitel, *Frustration and Force Majeure* (London: Sweet & Maxwell, 1994), § 16-005.

[35] J. White and R. Summers, *Uniform Commercial Code* (St. Paul, MN: West Group, 2006), § 3-10.

[36] D. Tallon, 'Hardship', in A. Hartkamp, M. Hesselink, E. Hondius, C. Joustra, E. Du Perron and M. Veldman eds, *Towards a European Civil Code* (New York: Kluwer Law International, 3rd ed., 2004), 500.

[37] Contending that 'all considerations of the extent to which an obligor may be relieved from the binding force of his obligation for reasons other than physical and objective impossibility must face some fundamental questions of theory and policy', see P. Hay, n. 6 above, 346.

France until the recent reform of contract law) depending on whether or not they grant the adjustment of contracts in the event of unforeseen circumstances.[38]

IV. *WEGFALL DER GESCHÄFTSGRUNDLAGE* UNDER THE GERMAN CIVIL CODE

'Open' systems include legal systems that consider it unfair, unjust, contrary to good faith, on the one hand, to force the promisor to perform a contract that has become, as a result of an unforeseen and unforeseeable circumstance, of disproportionate economic value compared to what was originally agreed, and, on the other hand, to allow the promisee to take advantage of the hurdles of the other party. These are, for the most part, systems with written constitutions which have preceptive and not merely programmatic value.[39] The constitutional instances of prevention of social injustice and inclusion in the market demand to construe contract law as having primarily redistributive purposes.[40] The economic benchmark is the social market economy (*soziale Marktwirtschaft*), prevailing in Germany since the end of the World War II, which is particularly considerate of the phenomena of social distress and marginality, and determined to counter the abuse of economic power in negotiations. The socio-economic upheavals that crossed Germany during the two world wars and the sufferings experienced by the Germans during the Nazi regime explain the social orientation of the German system and the divergence existing with common law jurisdictions in governing supervening circumstances.[41]

Historically, as early as the Middle Ages, the theorization of the so-called *rebus sic stantibus* clause was the first, dangerous inroad into *pacta sunt servanda*, thus slowly eroding the dogma of the absolute binding nature of contractual agreements. Two Italian jurists, Baldo degli Ubaldi and Bartolo da Sassoferrato, articulated that any contract is binding provided that the circumstances existing at the time of its conclusion remain the same (*rebus sic se habentibus*).[42]

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[38] E. Hondius and H.C. Grigoleit, 'Introduction: An Approach to the Issues and Doctrines Relating to Unexpected Circumstances', in E. Hondius and H.C. Grigoleit eds, *Unexpected Circumstances in European Contract Law* (Cambridge: Cambridge University Press, 2011), 3, 11.

[39] A. Karampatzos, 'Supervening Hardship as Subdivision of the General Frustration Rule: A Comparative Analysis with Reference to Anglo-American, German, French and Greek Law' 2 *European Review of Private Law*, 105, 120 (2005).

[40] Arguing that the redistributive capacity of contract law shall not aim at efficiency, but at inclusion within the market and prevention of social injustice: E. Navarretta, n. 26 above, 93.

[41] A. Karampatzos, n. 39 above, 121.

[42] A. Thier, 'Legal History', in E. Hondius and H.C. Grigoleit eds, *Unexpected Circumstances in European Contract Law* n. 38 above, 18. Contending that 'one of the most interesting, and potentially most dangerous, inroads into *pacta sunt servanda* has, however, been the so-called *clausula rebus sic stantibus* (…). 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', see R. Zimmermann, n. 3 above, 579.

Fearing that the *rebus sic stantibus* clause could undermine party autonomy, legal certainty and the tenets of economic liberalism,[43] the drafters of the German Civil Code (BGB) decided not to include it in the new code. It was not until a century later, in 2001, that § 313 BGB was amended to cover cases where there is a significant change of the circumstances which became the basis of a contract. In such cases, parties may ask the court for adaptation, proving that they would not have concluded the contract or would have concluded it under different conditions had they anticipated the change of circumstances. Adaptation is not granted if it appears that the preservation of the contract, even if adjusted, is unacceptable to one of the parties, taking into account all the circumstances of the case, in particular the contractual or statutory distribution of risk. When it is not possible to adapt the contract, the party may exercise the right of withdrawal.

The rule evidently draws on the doctrine of the disturbance of foundation of transaction (*Wegfall der Geschäftsgrundlage*), elaborated by Oertmann in 1921[44] on the basis of Windscheid's theory of presupposition,[45] and based on the idea that there are certain circumstances, although tacit or implicit, which the parties consider fundamental in their bargaining and of which they presuppose the unaltered existence for the entire duration of their agreement, so that their distortion would justify termination or adaptation of the contract. The theory of presupposition has also been transplanted into Italy, where, albeit with some criticism, it operates autonomously from hardship (*eccessiva onerosità sopravvenuta*).[46]

While subjecting the contract to an implicit condition, the doctrines of the disturbance of foundation and presupposition are grounded on a subjective/psychological foundation, which has rightly attracted criticism, as it purports to terminate or modify the contract on the basis of a fictitious and volatile element, i.e. the common assumption of the contracting parties, who may never have thought about the change of circumstances or even less reached an agreement on how to govern it.[47]

And yet, at the basis of the theory lies a key objective criterion too, the general principle of good faith laid down in § 242 of the BGB, which allows the court to review or subvert the

[43] H. Kötz and S. Patti, *Diritto europeo dei contratti* (Milano: Giuffrè, 2nd ed., 2017), 457.
[44] P. Oertmann, *Die Geschäftsgrundlage: Ein neuer Rechtsbegriff* (Leipzig: Deichert, 1921).
[45] B. Windscheid, *Die Lehre des römischen Rechts von der Voraussetzung* (Düsseldorf: Buddeus, 1850); Id., 'Die Voraussetzung' 78 *Archiv für die civilistische Praxis*, 161 (1892).
[46] C.M. Bianca, *Diritto civile, III, Il contratto* (Milano: Giuffrè, 2000), 467; C. Scognamiglio, 'Presupposizione e comune intenzione delle parti' *Rivista del diritto commerciale*, II, 130 (1985); G.B. Ferri, 'Motivi, presupposizione e l'idea di meritevolezza' *Europa e diritto privato*, 371 (2009); A. Cataudella, 'Eccessiva onerosità sopravvenuta e presupposizione' *Rivista trimestrale di diritto processuale civile*, 789 (2016). Italian courts tend to define presupposition as a kind of 'implied condition': Cassazione, 13 October 2016, no. 20620, in *www.dejure.it*
[47] Cf. L. Trakman, 'Frustrated Contracts and Legal Fictions' 46 *The Modern Law Review*, 39 (1983).

contract for the sake of justice.[48] Good faith requires the party not to enrich himself unduly if an unforeseen change of circumstances makes performance too burdensome and to cooperate with the other party. Good faith, which has a moral component, has thus made it possible to transplant into the German codified system the doctrines, having an equally moralistic nature, developed by the medieval jurists around the change of circumstances. Moreover, it was Windscheid himself who predicted that the hardship doctrine, thrown out by the door, would re-enter through the window, that is, not through the codification of the *rebus sic stantibus* clause but through the duty of good faith.[49]

Clinging to good faith, German courts applied the doctrine of the disturbance of foundation well before the reform of the BGB, thereby showing that the Parliament has done nothing more than give statutory cover to a practice already established in case-law. Nevertheless, the extraordinary nature of its applications (the 1920s hyperinflation, the end of the Third Reich, the 1948 siege of Berlin, the German reunification, the Iranian revolution, the Gulf War and the fall of the Berlin Wall)[50] strengthens the idea that the doctrine has been used not to make an inroad into the *pacta sunt servanda* principle but as an exceptional and subsidiary means of restoring the equity of the contract where other remedies are not available.[51] Not intending to change the way the doctrine has been applied so far in case-law, the new § 313 BGB should be understood as a sort of restatement[52] and has remained almost on paper, probably because of its stringent requirements or the hostility of the operators, anchored to the idea of its exceptional character.[53]

V. *IMPRÉVISION* UNDER THE NEW ART. 1195 OF THE FRENCH CIVIL CODE

France has now joined the ranks of open systems. In truth, this is a recent repositioning, since the *Cour de Cassation* has traditionally been hostile to allowing discharge or adjustment

[48] Arguing that the doctrine of good faith 'explicitly authorize(s) courts in the name of fairness to revise contractual arrangements or to overturn them altogether', see C. Fried, n. 30 above, 74. See also W.F. Ebke and B. M. Steinhauer, 'The Doctrine of Good Faith in German Contract Law', in J. Beatson and D. Friedman eds, *Good Faith and Fault in Contract Law* (Oxford: Oxford University Press, 1995), 171; B. Markesinis, W. Lorenz and G. Dannemann, *The German Law of Obligations, I, The Law of Contracts and Restitution – A Comparative Introduction* (Oxford: Clarendon Press, Oxford 1997), 513, claiming that 'good faith permeates almost the entire (German) law of contract and (…) goes even beyond that'.
[49] B. Windscheid, 'Die Voraussetzung' n. 45 above, 197.
[50] For further references on German case-law see M. Kovac and C. Poncibò, 'Towards a Theory of Imprévision in the EU?' 14(4) *European Review of Contract Law*, 344, 369 (2018); H. Rösler, 'Hardship in German Codified Private Law – In Comparative Perspective to English, French and International Contract Law' 3 *European Review of Private Law*, 483, 487 (2007).
[51] K.P. Berger and D. Behn, n. 29 above, 124.
[52] A. Karampatzos, n. 39 above, 132-133.
[53] E. Ferrante, 'Pandemia e contratto. Alcune proposte per il contenimento dell'incertezza' *Actualidad Jurídica Iberoamericana*, 300, 311 (2020).

of contracts which have become excessively onerous.[54] In the leading *Canal de Craponne* case, dated 1876, the Court held that, however equitable the judicial decision may seem, in no case is the judge entitled to take into consideration time or other circumstances to adjust the contract and substitute new clauses for those which have been freely accepted by the parties.[55] On this basis, the Court refused to grant the revision of a fee for the maintenance of a canal, determined back in 1567. Art. 1134 French Civil Code establishes the force of law of the contract between the parties, which no judge could breach.[56] Moreover, unlike in Germany, the use of good faith in France as a corrective tool for contractual injustice has always been lukewarm (despite its codification in Art. 1104 French Civil Code), as confirmed by the most recent case-law of the Supreme Court.[57] This strict approach has been somehow mitigated by the *Conseil d'État*, but only when it comes to *contrats administratifs* between private parties and the public authority, based on the relevance of the public interest in the continuation of essential services.[58]

Already in the years preceding the 2016 reform of the Code Civil, a robust scholarly movement had pointed to the substantial decline of the Napoleonic code on a global level, due to the disconnection between the letter of the code and the intense interpretative activity undertaken by the courts, which has made French contract law inefficient, unpredictable and hostile to trade, thereby increasing the costs of commercial transactions. English common law had long since replaced French contract law as the preferred applicable law in international negotiations, as it was perceived as being more business-friendly and oriented at pragmatism and certainty of contract relations.[59] This led to the reformulation of Art. 1195 French Civil Code in an attempt to codify the hardship doctrine (*imprévision* in French), late in coming compared to other civil law jurisdictions.[60] The article now gives the party required

[54] I. de Lamberterie, 'The Effect of Changes in Circumstances – French Report', in D. Harris and D. Tallon eds, *Contract Law Today, Anglo-French Comparisons* (Oxford: Oxford University Press, 1989), 220.
[55] Cour de Cassation, 6 March 1876, *Canal de Craponne*, [1876] D 1876 I 193.
[56] Contending that 'la règle que les conventions légalement formées tiennent lieu de loi à ceux qui les ont faites est générale et absolue', see Cour de Cassation, 15 November 1933, [1934] Gaz Pal I.
[57] See Cour de Cassation, 19 June 2019, no. 17-29.000, https://www.legifrance.gouv.fr/juri/id/JURITEXT000038734034 (last visited 3 November 2021), where the court held that a party is entitled to refuse to renegotiate the contract, even where such refusal could be detrimental to the other party.
[58] Conseil d'État, 30 March 1916, *Compagnie générale d'éclairage de Bordeaux*, [1916] Rec Lebon 125. The administrative court ordered the company to keep supplying gas and the State to pay an *indemnité d'imprévision* to cover the increased cost suffered by the company.
[59] Cf. S. van Loock, 'The Reform of the French Law of Obligations: How Long Will the Belgians Remain Napoleon's Most Loyal Subjects?', in S. Stijns and A. Jansen eds, *The French Contract Law Reform: A Source of Inspiration?* (Antwerp: Intersentia, 2016), 7; B. Fauvarque-Cosson, 'The French Contract Law Reform and the Political Process' 13 *European Review of Contract Law*, 337 (2017); S. Rowan, 'The New French Law of Contract' 44 *International & Comparative Law Quarterly*, 6 (2017).
[60] The first country to introduce hardship in its civil code was Poland in 1933, followed by other civil law jurisdictions, such as Italy and Greece, during/after WWII: C. Pédamon and R. Vassileva, 'Contractual

to perform a contract which has become excessively onerous due to a change of circumstances unforeseeable at the time of the conclusion of the contract, without having accepted the risk of such a change, the right to ask the other party for a renegotiation of the contract. In the event of refusal or failure to renegotiate, the parties may discharge the contract or ask the court for its adaptation. Absent an agreement, the court may, at the request of a party, adjust the contract or terminate it. The new Art. 1195 thus outlines a multi-stage process, beginning with the voluntary renegotiation of the parties and ending with the possible discharge or judicial adaptation.[61]

On closer inspection, the *imprévision* doctrine is based on different requirements compared to § 313 BGB, in that it does not require a disturbance to the foundation of contract but that the performance has become *excessivement onéreuse*, to be understood not as a mere increase in the cost of performance, which must always be reasonably expected in long-term contracts,[62] but as an extreme, extraordinary and unforeseeable economic imbalance.[63] From this point of view, the Italian Civil Code is more accurate, as it allows for the termination of long-term contracts in which performance of one of the parties has become excessively onerous, requiring that the event, in addition to being unforeseeable, be 'extraordinary' (Art. 1467 Italian Civil Code). Neither the French nor the Italian Civil Code quantify the relevant threshold of hardship, which, if on the one hand, seems to hamper legal certainty, on the other, suits more a judgment tailored to the circumstances of each particular case. Accordingly, the threshold is higher where the contract is highly speculative or concluded in a very volatile market, lower where there is immediate danger of the promisor's insolvency.[64] In international trade, unforeseeable and extraordinary events amounting to a change of circumstances may include a substantial devaluation of the currency, a dramatic drop in the price of a commodity, a regional or global financial crisis, civil riots, natural disasters, embargoes or other economic sanctions.[65] The contingencies arising from Covid-19 seem to fall fully within this casuistry, since the factual and legal effects of the pandemic cannot be

Performance in COVID-19 Times: Does Anglo-French Legal History Repeat Itself?' 1 *European Review of Private Law*, 3, 11 fn. 21 (2021).

[61] 'Processus fait de plusieurs étapes': B. Fages, *Droit des obligations* (Paris: LGDJ, 2016), 295.

[62] Most courts and arbitrators consider price fluctuations foreseeable. See the case-law cited by I. Schwenzer and E. Muñoz, 'Duty to Re-negotiate and Contract Adaptation in Case of Hardship' 20(4) *Internationales Handelsrecht*, 150, 153 fn. 49 (2020).

[63] P. Accaoui Lorfing, 'L'article 1195 du Code Civil français ou la révision pour imprévision en droit privé français à la lumière du droit comparé' *International Business Law Journal*, 449, 452 (2018).

[64] I. Schwenzer and E. Muñoz, n. 62 above, 153. See also E. Mckendrick, 'Article 6.2.2', in S. Vogenauer ed., *Commentary on the UNDROIT Principles of International Commercial Contracts (PICC)* (Oxford: Oxford University Press, 2nd ed., 2015), 816, § 8.

[65] K.P. Berger and D. Behn, n. 29 above, 82-84.

said to present a risk foreseen and accepted by the contracting parties at the time of the conclusion of the contract.[66] This is certainly not the first epidemic to hit the earth, so that it is not an entirely unpredictable event. For many years, experts have warned against the risk of transmission of pathogens from animals to humans, due to the increase in global population and the occupation of natural areas.[67] Yet, there is no doubt that the consequences of this pandemic, which are devastating from a human, social and economic point of view, cannot be said to be predictable.[68] Other epidemics, such as SARS (2002-2004) or MERS (2012) have had higher mortality rates, but have not spread as rapidly and widely as Covid-19, nor have they required significant containment measures.

However, an issue may arise in determining the exact date the pandemic can be considered to have begun, and therefore no longer unpredictable, which may be alternatively set at the official confirmations of public authorities, the subsequent lockdowns, or earlier moments such as the identification of the virus in China or the first communication of the World Health Organization (WHO).[69] Thus, a contract entered into when the existence of the virus in China was already known may not meet the requirement of unpredictability.

The idea behind this requirement is that, had the parties anticipated the adverse event, they would have negotiated a specific contractual clause; failing that, it is as if the parties had implicitly allocated the risk of its occurrence.[70] However, predictability is a slippery yardstick because it depends on: the duration of the contract (the longer it is, the more predictable the event will be at the time of its conclusion);[71] its possible 'relational' nature (i.e., where it draws

[66] J. Heinich, 'L'incidence de l'épidémie de coronavirus sur les contrats d'affaires: de la force majeure à l'imprévision' *Recueil Dalloz*, 611, 614 (2020). However, before Covid-19, French courts did not consider health emergencies (e.g. the dengue virus, the H1N1 flu epidemic, the chikungunya virus and the avian flu) to be force majeure, on the ground that they were foreseeable or avoidable: see the decisions cited by C. Pédamon and R. Vassileva, n. 60 above, 23.

[67] See the expert reports cited by K.P. Berger and D. Behn, n. 29 above, 110.

[68] C. Twigg-Flesner, 'A Comparative Perspective on Commercial Contracts and the Impact of COVID-19: Change of Circumstances, Force Majeure, or What?', in K. Pistor, *Law in the Time of Covid-19* (New York: Columbia Law School, 2020), 162-163. Supervening circumstances need to be considered not only for the nature of the event but also for the magnitude of the consequences. See P. Joskow, 'Commercial Impossibility, the Uranium Market and the Westinghouse Case' *Journal of Legal Studies*, 119, 160-161 (1977), arguing that 'if we had two similar occurrences, let's say embargoes, the seller would have to perform if the price rise were small, but would not be required to perform if the resulting cost increase were very large. Such asymmetric treatment of differing consequences from similar events only appears to make sense if we expand our notion of possible contingencies to include elements identified by both event and consequence'. A similar reasoning was articulated by Germany's Reichsgericht when it had to address the impact of the First World War on a lease signed in 1912 for eight years. The Court held that while the war was a predictable event, its dramatic consequences were not: Reichsgericht, 21 September 1920, RGZ 100, 129.

[69] C. Pédamon and R. Vassileva, n. 60 above, 24; F. Benatti, n. 28 above, 204.

[70] See *Lloyd* v. *Murphy*, 25 Cal. 2d 48, 54 (1944): 'If (the event) was foreseeable there should have been provision for it in the contract, and the absence of such a provision gives rise to the interference that the risk was assumed'.

[71] M.A. Eisenberg, 'Impossibility, Impracticability, and Frustration' 1(1) *Journal of Legal Analysis*, 207, 216 (2009): 'for example, if a party rents a theater for twenty years, it is reasonably foreseeable that the

sap from the commercial context where it is placed, which may constantly change);[72] its placement in the international market (where price fluctuations are usually higher than those occurring in domestic markets, and therefore more predictable);[73] the subjective qualities of the contracting parties. If they are unsophisticated or involved in transactions of small value and on a small scale, they might consider the non-occurrence of a given circumstance as a certain fact, although the probability of its occurrence is objectively high. The opposite is true for highly sophisticated or large-scale parties.[74] Furthermore, in the event of markets for relatively standardized goods, where the occurrence of certain events appears reasonably predictable to the extent that suppliers are able to insure themselves and build the premium into the sale price, it would be difficult to afford a supplier, who passed the cost of insurance onto the consumer, a remedy based on the subjective unpredictability of the circumstance which has occurred.[75]

These remarks show that discharging the burden of proof in a judgment to obtain adaptation or termination of a commercial contract may be difficult, and this would make the new Art. 1195 French Civil Code unattractive for the most substantial business transactions, which, in any case, usually contain force majeure or hardship clauses.[76]

theater may be destroyed during the contract time by some catastrophic event. In contrast, if the same party rents the same theater for the next evening, destruction of the theater by a catastrophic event during the contract time may not be reasonably foreseeable'. See also C. Hardy, 'Risk and Risk-Bearing', in A. Kronman and R. Posner eds, *The Economics of Contract Law* (Boston-Toronto: Little, Brown and Company, 1979), 26-27; P. Trimarchi, 'Commercial Impracticability in Contract Law: An Economic Analysis' 11 *International Review of Law & Economics*, 63, 71 (1991); D. Campbell and D. Harris, 'Flexibility in Long-Term Contractual Relationships: The Role of Co-Operation' 20 *Journal of Law and Society*, 166, 169 (1993).

[72] K.P. Berger and D. Behn, n. 29 above, 87. For a definition of relational contracts, see the High Court of England and Wales in *Yam Seng PTE Ltd* v. *International Trade Corporation Ltd*, [2013] EWHC 111 (QB) § 142: 'such 'relational' contracts, as they are sometimes called, may require a high degree of communication, cooperation and predictable performance based on mutual trust and confidence and involve expectations of loyalty, which are not legislated for in the express terms of the contract but are implicit in the parties' understanding and necessary to give business efficacy to the arrangements. Examples of such relational contracts might include some joint venture agreements, franchise agreements and long-term distributorship agreements'.

[73] I. Schwenzer and E. Muñoz, n. 62 above, 154.

[74] M.A. Eisenberg, n. 71 above, 216-217. See also Id. and L. Lon Fuller, *Basic Contract Law* (St. Paul, Minn.: Thomson West, 2005), 769, arguing that: 'to one who has contracted to carry goods by truck over a road traversing a mountain pass, a landslide filling the pass may be a very disruptive and unexpected event. But one who contracts to build a road through the mountains might view the same event, occurring during the course of construction, as a temporary set-back and a challenge to her resourcefulness'.

[75] M.A. Eisenberg, n. 71 above, 217.

[76] C. Pédamon and R. Vassileva, n. 60 above, 29.

VI. RISK ALLOCATION CRITERIA IN COMMON LAW JURISDICTIONS

On the opposite side of the spectrum lie the more liberal and capitalistic Anglo-American systems, which show a lower sensitivity to the social instances that would justify the excuse of the promisor from excessively onerous performance. A general hardship doctrine has been met with hostility by those claiming that contracting parties, at the moment of stipulation, allocate, explicitly or tacitly, all possible risks that may condition performance, including those connected to unforeseen circumstances. From this point of view, a judicial reallocation of risks through the hardship doctrine is an interference with freedom of contract, that cannot be justified on the grounds of economic efficiency.[77]

Explicit risk allocation occurs through force majeure or hardship clauses, which may prevent the discharge remedy from being activated. As Williston wrote, 'a man may contract to do what is impossible, as well as what is difficult, and be liable for failure to perform'.[78] These clauses are widespread in international trade and Anglo-American contracts which, not by chance, are much more detailed and comprehensive than continental ones.

However, these clauses are naturally incomplete, since they certainly cannot foresee any contingency that might make performance impossible or burdensome in the future.[79] There has been discussion on whether the contractual list of adverse events should be considered exhaustive or susceptible to extension to circumstances with similar characteristics.[80] In addition, the clause frustrating the contract when performance has become impossible may not cover the different situation in which the party can only perform the contract with delay or incurring greater costs than those originally envisaged.[81] In some cases, the ambiguity is even intentional,[82] and the contracting parties postpone the necessary clarification to

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[77] G. Triantis, 'Contractual Allocation of Unknown Risks: A Critique of the Doctrine of Commercial Impracticability' *University of Toronto Law Journal*, 450, 480 (1992). But see M.A. Eisenberg, n. 71 above, 247, contending that Triantis' theory is contradicted by 'the existence of systematic cognitive problems affecting decision-making, such as bounded rationality, which limits the future scenarios that actors can be realistically expected to envision; overoptimism; and defects in capability, including systematic underweighting of future benefits and costs as compared to present benefits and costs and systematic underestimation of low-probability risks'.

[78] S. Williston, *A Treatise on the Law of Contracts* (New York: Baker, Voorhis & Co., 1938), VI, § 1931. See also the US Supreme Court in *Chicago, Mil. & St. P. Ry.* v. *Hoyt*, 149 U.S. 1, 14-15 (1893), holding that 'there can be no question that a party may by an absolute contract bind himself or itself to perform things which subsequently become impossible'.

[79] R. Hillman, 'Court Adjustment of Long-Term Contracts: An Analysis under Modern Contract Law' *Duke Law Journal*, 1, 4 and 15 (1987).

[80] Cf. ICC Case no. 3093/3100 of 1979, § 366, in S. Jarvin & Y. Derains, *Collection of ICC Arbitral Awards 1974-1985* (Deventer: Kluwer Law and Taxation Publishers, 1990); ICC Case no. 11265 of 2009, §128, *ICC Bulletin* 20 no. 2 (2009), Final Award; ICC Case no. 16369 of 2011, § 201, 39 *Yearbook Commercial Arbitration*, 169 (2014).

[81] C. Twigg-Flesner, n. 1 above, 90.

[82] M. Polkinghorne and C. Rosenberg, 'Expecting the Unexpected: The Force Majeure Clause' 16 *Business Law International*, 49, 57(2015).

litigation. This means that the risk of litigation over the exact construction of these clauses is not neutralized, and the courts could frustrate the clauses by reading them strictly.

With some peace of mind, clauses covering 'diseases', 'plagues', 'epidemics' or 'health emergencies' could extend to Covid-19,[83] although their wording is not always so accurate. Often the parties do not draft them with due attention to the particularities of their relationship because they use standard models (such as the ICC force majeure or hardship clauses) or prioritize other elements such as price and securities.[84] In any case, careful negotiation of clauses increases transaction costs and not all parties can afford sound legal advice.[85]

It is therefore important to identify risk allocation criteria that can operate when the parties have not agreed on force majeure or hardship clauses or these are incomplete. American courts have sometimes inferred an implicit allocation from the circumstance that the party, who normally includes in its contracts a clause of exemption from liability in the event of a given contingency, enters into a contract without relying on this practice.[86] Law & economics scholarship claims that, absent explicit risk assignment clauses, performance shall be excused when the promisee is the 'superior risk bearer', i.e. the party who can bear the risk of the change of circumstances in the most efficient way either because he can prevent its occurrence at a lower cost than that inherent in the adverse event or because he is able to insure himself (by purchasing a policy on the market) or self-insure (by increasing the sale price). On the other hand, if the promisor is the superior risk bearer, non-performance amounts to breach of contract.[87] The ideal discharge situation is that in which the promisor could not have reasonably taken measures to prevent the occurrence of the event and the promisee could have insured at a lower cost than the promisor because he was in a better position to assess the probability of its occurrence and the extent of the loss.[88]

This way of reasoning has also had applications in the courts. In *Transatlantic Financing Corp.* v. *United States*,[89] concerning a dispute that arose around the discharge of a contract for the transport of wheat from the United States to Iran on the occasion of the closure of the Suez Canal which would have forced the circumnavigation of Africa, Judge Wright observed that

[83] K.P. Berger and D. Behn, n. 29 above, 114.
[84] F. Benatti, n. 28 above, 200.
[85] E. McKendrick, 'Force Majeure and Frustration – Their Relationship and a Comparative Assessment', in E. McKendrick ed., *Force Majeure and Frustration of Contract* n. 27 above, 52.
[86] *Barbarossa & Sons, Inc.* v. *Iten Chevrolet, Inc.*, 265 N.W.2d 655 (Minn. 1978).
[87] R.A. Posner and A.M. Rosenfield, 'Impossibility and Related Doctrines in Contract Law: An Economic Analysis' 6(1) *Journal of Legal Studies*, 83, 90 (1977).
[88] ibid 92.
[89] 363 F.2d 312 (D.C. Cir. 1966).

'Transatlantic was no less able than the United States to purchase insurance to cover the contingency's occurrence. If anything, it is more reasonable to expect owner-operators of vessels to insure against the hazards of war. They are in the best position to calculate the cost of performance by alternative routes (and therefore to estimate the amount of insurance required), and are undoubtedly sensitive to international troubles which uniquely affect the demand for and cost of their services'.

In truth, it is questionable that the carrier (Transatlantic) was the superior risk bearer since it was able to better estimate the probability of the risk and the entity of the loss. Actually, the shipper (US Government) appeared to be the party who could better appreciate the risks of a war in the Middle East and the consequences of a delay in transportation, and could certainly have better self-assured.[90]

More generally, the economic analysis of law shows some shortcomings in the field of impossibility and hardship, because judges do not always have the economic competence to establish who the superior risk bearer is,[91] and it is not always easy to determine the party who could best foresee the risk, prevent it or insure against it.[92] The Covid-19 pandemic does not appear to be the kind of contingency that could have been foreseen by the parties or covered by insurance. In fact, it is well known that an efficient insurance of risks requires some statistical regularity and, therefore, the possibility of calculating them with a reasonable degree of accuracy, which does not seem possible for extraordinary events affecting not this or that contract but the entire market.[93]

On closer inspection, an efficient analysis of the doctrines of impossibility and hardship ends up reiterating the *pacta sunt servanda* principle, with the only difference that, instead of holding the promisor always liable, they require a complex factual examination of the superior risk bearer, who most often turns out to be the promisor.[94]

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[90] M.A. Eisenberg, n. 71 above, 252.

[91] 'Judges and lawyers are not economists and would certainly feel puzzled facing the numerous assumptions and calculations that an "economic" analysis of cases calls for; the uncertainty caused thereby would be much greater than the problem purported to be solved': M. Rapsomanikis, 'Frustration of Contract in International Trade Law and Comparative Law' 18 *Duquesne Law Review*, 551, 570 (1979-1980). See also C. Bruce, 'An Economic Analysis of the Impossibility Doctrine' 11 *Journal of Legal Studies*, 311, 321 (1982), claiming that 'in many cases (...) the court will be unable to determine which of the parties is the superior risk bearer, either because the parties' insurance costs are very similar or because the court lacks sufficient information'.

[92] J. Gordley, n. 11 above, 524; M.A. Eisenberg, n. 71 above, 251. For critical remarks see also T.V. Russo, n. 20 above, 147, arguing that the economic analysis of law conflicts with the principle of solidarity enshrined in the Italian legal system, which may justify a judicial adaptation of the contract in the event of hardship.

[93] P. Trimarchi, n. 71 above, 66-67.

[94] M. Cenini, B. Luppi and F. Parisi, *Law and Economics: The Comparative Law and Economics of Frustration in Contracts*, in E. Hondius and H.C. Grigoleit eds, *Unexpected Circumstances in European Contract Law* n. 38 above, 36.

Economic imbalances may not even be adjusted through a corrective use of good faith, which has always struggled to establish as a fully-fledged doctrine in the common law world. US scholarship appealing to fairness to justify discharge of contracts that have become excessively burdensome has remained isolated.[95] The decision of the English High Court in *Yam Seng Pte Ltd* v. *International Trade Corporation Ltd*, which supported an implied duty of good faith in relational contracts, has not been universally endorsed.[96] However, in the face of the emergency triggered by the pandemic, the Cabinet Office has issued a note inviting contractors to be 'reasonable and proportionate in responding to performance issues and enforcing contracts, acting in a spirit of co-operation and aiming to achieve practical, just and equitable outcomes having regard to the impact on the other party (or parties)'.[97] The British Institute of International and Comparative Law echoed this view, wondering whether there is room for a 'creative, graded, but nevertheless rigorous approach without prejudicing the underlying need for legal certainty'.[98]

VII. FRUSTRATION IN ENGLISH CONTRACT LAW

Yet, the hardship doctrine is foreign to the English common law. A contract can only be discharged if, after its conclusion, its substance has become impossible (*frustration of contract*) or the commercial purpose has been destroyed (*frustration of purpose*).[99] Any contract is supposed to be based on the implied condition of the persistence of the contractual thing or purpose throughout its duration; if these fail and the promisor is not at fault, performance may be excused. Contracts should, therefore, be construed not only on the basis of the terms expressly agreed on by the parties, but also on the basis of their tacit assumptions in relation to the non-change of the circumstances existing at the time of the formation of the

[95] See, for example, R.L. Birmingham, 'A Second Look at the Suez Canal Cases: Excuse for Nonperformance of Contractual Obligations in the Light of Economic Theory' 20 *Hastings Law Journal* 1393, 1396 (1969), claiming that 'fairness is arguably the foundation of all relief'.
[96] [2013] EWHC 111 (QB).
[97] Cabinet Office, 'Guidance on Responsible Contractual Behaviour in the Performance and Enforcement of Contracts Impacted by the COVID-19 Emergency', https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/883737/_Covid-19_and_Responsible_Contractual_Behaviour__web_final___7_May_.pdf (last visited 3 November 2021).
[98] British Institute of International and Comparative Law, 'Breathing Space – A Concept Note on the Effect of the Pandemic on Commercial Contracts', https://www.biicl.org/documents/10306_breathing_space_concept_note.pdf (last visited 3 November 2021).
[99] A. Burrows, *A Casebook on Contract* (Oxford: Hart Publishing, 2016), 731; J. Beatson, *Anson's Law of Contract* (Oxford: Oxford University Press, 2002), 236.

agreement, thereby making the contract a living organism, capable of absorbing all the legitimate expectations of the contracting parties.

The leading English case is *Taylor* v. *Cadwell*, where a music hall that had been rented for a concert burnt down.[100] Blackburn J wrote that 'in contracts in which the performance depends on the continued existence of a given person or thing, a condition is implied that the impossibility of performance arising from the perishing of the person or thing shall excuse the performance'. This is a typical case of impossibility[101] but sometimes the frustration doctrine has been used to discharge contracts which have become useless. Think of the famous coronation cases, such as *Krell* v. *Henry*, where the defendant had rented a room with a view over Pall Mall to attend the coronation process of Edward VII, which was postponed due to an illness.[102] Henry was released from his obligation to pay the rent, as the purpose of the lease had been frustrated. Frustration of purpose is seldom applied, as it requires the party be aware of the purpose that the other party is pursuing with the contract, and assumed the risk associated with changing circumstances.[103]

The doctrine of tacit assumptions has also taken root in American contract law. Parties necessarily remain silent on an indefinite number of circumstances, which appear too basic to merit explicit attention.[104] The uncertainty of future events means that the idea that a contract can cover any contingency affecting performance is clearly 'sheer fantasy'.[105] In fact, Section 2-615 of the Uniform Commercial Code (UCC) allows for the discharge of the contract if 'performance as agreed has been made impracticable by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made'. In the times we are living, parties may have shared the assumption that a pandemic of unprecedented social and economic costs would never occur.

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[100] (1863) 3 B. & S. 826 (QB).

[101] But see A. Puelinckx, 'Frustration, Hardship, Force Majeure, Imprévision, Wegfall der Geschäftsgrundlage, Unmöglichkeit, Changed Circumstances: A Comparative Study in English, French, German and Japanese Law' 3(2) *Journal of International Arbitration*, 47 (1986), arguing that 'frustration is not the equivalent of *force majeure*'.

[102] [1902] 2 KB 740. A similar case is *Herne Bay Steamboat* v. *Hutton*, [1903] 2 KB 683, concerning the hire of a vessel to see the naval review accompanying the coronation and take a cruise around the fleet, which was not frustrated because the fleet could still be viewed. For a commentary on the coronation cases, see R. Mcelroy and G. Williams, 'The Coronation Cases–I' 4 *Modern Law Review*, 241 (1941), and, 'The Coronation Cases–II' 5 *Modern Law Review*, 1 (1941).

[103] H. Kötz and S. Patti, n. 43 above, 464; E. McKendrick, 'Discharge by Frustration', in H. Beale ed., *Chitty on Contracts* (London: Sweet and Maxwell, 33rd ed., 2018), I, § 23-007.

[104] 'Tacit assumptions are not made explicit, even where they are the basis of a contract, precisely because they are taken for granted. They are so deeply embedded in the minds of the parties that it simply doesn't occur to the parties to make these assumptions explicit': M. Eisenberg, *Foundational Principles of Contract Law* (Oxford: Oxford University Press, 2018), 628.

[105] R. Barnett, *Contracts: Cases and Doctrine* (New York: Aspen, 2003), 1027.

On the contrary, performance cannot be excused when a change of circumstances – and here we see a notable difference with continental legal systems – has made performance simply more costly.[106] Excessive onerousness does not in itself frustrate the contract, unless there is also a fundamental or radical change in the originally agreed obligations, so that the promisor would have to perform a radically different contract, if not actually impossible. And so, in *Davis Contractors* it was held that the fact that there had been 'an unexpected turn of events, which rendered the contract more onerous than had been contemplated, (is) not a ground for relieving the contractors of the obligation which they had undertaken'.[107] But already many years earlier, in the famous *Suez Canal* cases, the House of Lords had ruled that the closure of the canal, although it made the transport of goods much more expensive, did not frustrate the contracts, since the alternative route around the Cape of Good Hope was always available.[108] Only where it was demonstrated that the parties had, even tacitly, assumed that navigation through the Suez Canal was the only way to perform the contract, and not one of many, then performance may be excused.

Having construed the frustration doctrine in such restrictive terms, it is likely that it can apply only to contracts whose performance has been made impossible by compliance with the containment measures in the acute phase of the contagion, not to those contracts which have become more onerous in the post-lockdown period.[109] In fact, in the recent case *Salam Air SAOC* v. *Latam Airlines Group SA*,[110] the High Court of England and Wales refused to discharge a series of aircraft leases on the ground that the risks that the airline might be unable to undertake passenger flights for some significant time, or that there might be a dramatic and long-lasting fall in the demand for air travel, were inherent in the commercial operation of the aircrafts and assumed by the airline under the leases.

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[106] C. Twigg-Flesner, n. 1 above, 90. See also *Edwinton Commercial Corp* v. *Tsavliris Russ (Worldwide Salvage and Towage) Ltd*, [2007] EWCA Civ 547, holding that 'mere incidence of expense or delay or onerousness is not sufficient' (§ 111); and, more recently, *Canary Wharf (BP4) T1 Ltd* v. *European Medicines Agency*, [2019] EWHC 335 (Ch).

[107] [1956] AC 696 at 697. For a similar reasoning by a US court, see *Eastern Air Lines, Inc* v. *McDonnell Douglas Corp*, 532 F (2d) (5th Cir 1976): 'the rationale for the doctrine of impracticability is that the circumstance causing the breach has made performance so vitally different from what was anticipated that the contract cannot reasonably be thought to govern'.

[108] Cf. *Tsakiroglou & Co Ltd* v. *Noblee & Thörl GmbH*, [1962] AC 93; *Société 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).

[109] C. Pédamon and R. Vassileva, n. 60 above, 36.

[110] [2020] EWHC 2414 (Comm).

VIII. THE US DOCTRINES OF IMPRACTICABILITY AND FRUSTRATION

The regulation of change of circumstances in the United States is more articulated. The frustration doctrine appears in Section 265 of the Restatement (Second) of Contracts which makes room for the discharge of the contract when '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'. This is precisely frustration of purpose.

Compared to English law, however, the legal framework is complicated by a parallel doctrine which also allows termination of a contract in the event of 'not only strict impossibility but impracticability because of extreme and unreasonable difficulty, expense, injury or loss involved' (Section 454 of the Restatement (First) of Contracts, but see also Section 261 of the Restatement (Second)). Impracticability had already been established, years earlier, in case-law whereby performance is impossible even when it is not practicable, i.e. when it can only be carried out at an excessive and unreasonable cost.[111] One of the best-known cases is *Florida Power & Light Co.* v. *Westinghouse Electric Corp.*, where a contract for disposal of spent nuclear fuel, which was anticipated to generate profits for $20 million, and instead would result in a $80 million loss due to the unforeseen cancellation of a government program, was found to be impracticable.[112]

In the United States, the doctrine of impossibility has been altered to encompass situations in which, although performance remains materially possible and the purpose of the contract is still achievable, its costs have risen disproportionately to what was originally anticipated. Impossibility, frustration and impracticability coexist to respectively regulate cases similar to *force majeure*, the supervening uselessness of the contract and excessive onerousness.[113]

However, although hardship has the dignity of an autonomous doctrine in the United States, the way in which it has been construed militates against an extensive application. In fact, the courts, while not agreeing on an unambiguous quantitative threshold,[114] have been consistent

[111] *Mineral Park Land Co* v. *Howard*, 172 Cal 289 (1916). A contractor had agreed to extract the gravel necessary for the construction of a bridge from the plaintiff's land. The contractor took some gravel from the plaintiff's land and then purchased the rest on the market, claiming that part of the gravel on the plaintiff's land was below water and extracting it would have required extremely expensive techniques. The Supreme Court of California found the contract to be discharged on the ground that 'although there was gravel on the land, it was so situated that the defendants could not take it by ordinary means, nor except at a prohibitive cost. To all fair intents then, it was impossible for defendants to take it'.

[112] 826 F (2d) 239 (1987).

[113] For this classification see R.A. Posner and A.M. Rosenfield, n. 87 above, 85.

[114] See *Louisiana Power & Light Co* v. *Allegheny Ludlum Industries*, 517 F Supp 1319 (ED La 1981), where an increase of 38 percent of the contract price due to fluctuations of the costs of raw materials was not deemed sufficient to excuse performance under the doctrine of commercial impracticability.

in stating that 'mere hardship is not enough',[115] that increased costs must be 'excessive and unreasonable',[116] that the risks involved must be 'unusual and have such severe consequences that they must have been beyond the scope of the assignment of risks inherent in the contract, that is, beyond the agreement made by the parties',[117] that discharge is 'limited to situations in which a virtually cataclysmic, wholly unforeseeable event, renders the contract valueless to one party'.[118] The commentary to Section 261 of the Restatement Second also refers to 'extreme and unreasonable difficulty or expense', reading that 'a mere change in the degree of difficulty or expense due to such cause as increased wages, prices of raw materials, or costs of construction unless well beyond the normal range, does not amount to impracticability'.

Accordingly, it remains to be seen whether US courts will be ready to excuse performance of contracts that have become impracticable or frustrated as a result of Covid-19. The recent decisions of the US courts seem to indicate that these doctrines are not to be invoked lightly. For example, *In re Condado Plaza Acquisition LLC*,[119] a New York bankruptcy court denied that a contract for the purchase of a hotel in Puerto Rico had been frustrated due to the hotel being required to shut down during the pandemic. The decisive argument was that the contract expressly disclaimed any obligation to maintain operations at the hotel.

In *Rosado* v. *Barry University*,[120] a Florida federal court rejected a University's claim that its contractual obligation to provide in-person instruction to its students during the pandemic had been made impossible or frustrated. The court argued that the COVID-19 pandemic 'does not conclusively establish the defense of impossibility or frustration of purpose on the facts alleged, particularly given the overlapping and sometimes contradictory state and local regulations, and evolving standards, for dealing with the virus'. Besides, there was indication that the University had assumed the risks connected with the pandemic, since 'it would certainly be anomalous, without sufficiently strong evidence of contractual intent, to permit a party to reap the full benefits of an agreement in return for only partial performance'.

[115] *Piaggio* v. *Somerville*, 119 Miss. 6 (1919); *Wischhusen* v. *American Medicinal Spirits Co.*, 163 Md. 565 (1933); *Browne & Bryan Lumber Co.* v. *Toney*, 188 Miss. 71 (1940). See also Comment no. 4 to UCC Section 2-615, (2002): 'increased cost alone does not excuse performance unless the rise in cost is due to some unforeseen contingency which alters the essential nature of the performance'.
[116] *Vernon* v. *Los Angeles*, 290 P.2d 841 (Cal. 1955).
[117] *Misahara Construction Co.* v. *Transit-Mixed Concrete Corp.*, 310 N.E.2d 363 (Mass. 1974).
[118] *United States* v. *General Douglas MacArthur Senior Village*, *Inc*, 508 F (2d) 377 (2nd Cir 1974).
[119] 2020 WL 6038813 (Bankr. S.D.N.Y. October 9, 2020).
[120] 2020 U.S. Dist. LEXIS 204355 (S.D. Fla. October 30, 2020).

IX. DISCHARGE AND JUDICIAL ADAPTATION OF CONTRACTS

Comparing continental and common law systems shows how the doctrine of hardship is the rule in the former, the exception in the latter.

Differences are not confined to the requirements but extend to the remedies to govern contingencies. Art. 1218(2) French Civil Code provides for the termination by operation of law (*de plein droit*) of contracts whose performance has become definitively impossible. The Italian Civil Code also provides for termination not only in the event of supervening impossibility (Art. 1463 et seq.) but also when performance has become excessively onerous (Art. 1467 et seq.).[121] In the event of hardship, the preservation of the contract would cause extraordinary damage to one party and, at the same time, a correlative extraordinary, unexpected and unjustified gain for the other.[122] In common law jurisdictions, termination under the frustration doctrine is the only remedy available to parties, with the consequence that they will be released from obligations not yet performed or will have to return what has been already performed.[123]

Discharge, especially in those jurisdictions where it is provided as an exclusive remedy (e.g. Italy), does not appear entirely adequate because many situations suggest that it is better to save the contract or terminate it at a later date, giving the parties the opportunity to engage in a process of adjustment of their relationship to the supervening circumstances. Where the contract is terminated by operation of law, parties may not even be aware thereof. Conversely, where it is necessary to go to court, discharge by hardship may take a long time, and in the meantime the party will likely have entered into a substitute transaction to remedy the other party's breach.[124]

In long-term contracts, hardship may be only temporary and the parties may still be interested in continuing the relationship and receiving future performance. But even in other contracts, discharge may be an inadequate remedy, as repayment obligations may expose the party to a liquidity crisis or bankruptcy.[125] The party who, for example, has received a loan would have to repay the outstanding amount immediately.

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[121] Earlier than the entry into force of the Italian Civil Code (1942), influential scholars advocated that the consequences of changes of circumstances shall be either termination or performance. See G. Osti, 'La così detta clausola «rebus sic stantibus»' *Rivista di diritto civile*, 1 (1912); M. Andreoli, 'Revisione delle dottrine sulla sopravvenienza contrattuale' *Rivista di diritto civile*, 309 (1938).

[122] P. Trimarchi, *Il contratto: inadempimento e rimedi* (Milano: Giuffrè, 2010), 234.

[123] E. McKendrick, n. 103 above, § 23-074; E. Allan Farnsworth, 'The Restatement (Second) of Contracts' 47(2) *Rabel Journal of Comparative and International Private Law*, 336, 340 (1983). See also *Fibrosa Spolka Akcyjna* v. *Fairbairn Lawson Combe Barbour Ltd*, [1943] AC 32.

[124] I. Schwenzer and E. Muñoz, n. 62 above, 161.

[125] N. Cipriani, n. 22 above, 657.

These reasons have prompted various jurisdictions to identify a remedy better suited to the particularities of the case, such as judicial adaptation. As seen above, the new Art. 1195 French Civil Code gives the court, at the request of one party, the power to adapt the contract if the parties' attempts at renegotiation have failed. This is an unprecedented and surprising power,[126] all the more so considering the historical hostility of the French Supreme Court to interfere with freedom of contract. However, there remains to be seen whether the courts will use this new discretionary power or, as seems more likely, will return the renegotiation process back to the parties, thereby dismissing the unfortunate task of directly rewriting their contract.[127] In any case, a specific derogation clause, which is quite frequent in commercial contracts, would be sufficient to put Art. 1195 out of play.

§ 313 BGB appears even more adaptation-friendly, as the parties may ask the court for adaptation, even if they have not first tried to renegotiate it by themselves. Actually, the provision of judicial adaptation makes the preliminary attempt at a voluntary renegotiation redundant.[128] Discharge can only occur when adaptation proves to be unreasonable or impossible.

The court is thus endowed with flexible powers, being tasked with striking a fair balance between the conflicting interests of the parties, allocating the risks caused by the change of circumstances. The social orientation of German private law, which finds its highest expression in the general clause of good faith (§ 242 BGB), provides a solid justification for the judiciary to interfere with contracts in order to correct injustice carried out on the weaker party, i.e. the promisor obliged to perform a contract which has become of disproportionate economic value as a result of unforeseeable circumstances. Moreover, the maintenance of the contract, judicially adjusted, does not jeopardize the security of commercial transactions nor lead to their paralysis.[129]

International soft law instruments too provide for judicial adaptation as a default rule: Art. 6.2.3(4) of the Principles of International Commercial Contracts 2016 of the International Institute for the Unification of Private Law (UNIDROIT PICC); Art. 6:111(3) of the Principles of European Contract Law elaborated by the Commission on European Contract

[126] J. Heinich, n. 66 above, 614.
[127] P. Stoffel-Munck, 'L'imprévision et la réforme des effets du contrat' *Revue des contrats*, 30 (2016).
[128] Claiming that a duty to renegotiate 'makes you feel kinder and doesn't have a cost', see M. Barcellona, 'Appunti a proposito di obbligo di rinegoziazione e gestione delle sopravvenienze' *Europa e diritto privato*, 472, 501 (2003). See also G. Amadio, 'L'abuso dell'autonomia contrattuale tra invalidità e adeguamento' *Rivista di diritto civile*, 268 (2006).
[129] P. Hay, n. 6 above, 347, 363-364; A. Forte, 'Economic Frustration of Commercial Contracts: A Comparative Analysis with Particular Reference to the United Kingdom' *Juridical Review*, 1, 19-20, 22-23 (1986).

Law (PECL); Article III-1:110(2)(b) of the Draft Common Frame of Reference by the Study Group on a European Civil Code (DCFR). And some international law scholars construe the 1980 UN Convention on the International Sale of Goods (CISG) as affording courts a right to adjust contracts to changed circumstances.[130]

Clearly, however, the discretion of German courts to establish whether there has been a fundamental change in the basis of the contract, and adapt it to a socially just content, cannot degenerate into arbitrariness. The cautious approach of German case-law reflects this idea.[131] Some authors point out that adaptation should not be governed by equitable reasons, since the court should rather restore the fictional will of the parties, i.e. supplement the contract with the risk distribution clauses that the parties would probably have agreed upon had they foreseen the change of circumstances at the time of stipulation.[132] Others are simply wary of *Rechtsprechungspositivismus*, i.e. case-law positivism.[133]

Prior to the 2016 novel, French legal culture too showed strong hostility to judicial activism. The reasons are historical and stretch back to the Revolution and the reaction against the abuses of judicial power carried out during the *Ancien Régime*, which remained 'indelibly engraved in the memory of the nation'.[134]

The issue does not concern English law, as it does not give courts the power to rewrite the contract, and perhaps appropriately so, given that in other legal systems similar provisions end up discouraging the parties from considering reaching an amicable settlement agreement which is more efficient than a judicial decision (being quicker and less costly).[135]

The United States are more adaptation-friendly, since § 272(2) of Restatement (Second) provides that if frustration and impracticability rules 'will not avoid injustice, the court may grant relief on such terms as justice requires'. More explicit is Official Comment 6 to UCC § 2-615, which states that 'in situations in which neither sense nor justice is served by either

[130] P. Schlechtriem, 'Transcript of a Workshop on the Sales Convention: Leading Cisg Scholars Discuss Contract Formation, Validity, Excuse for Hardship, Avoidance, Nachfrist, Contract Interpretation, Parol Evidence, Analogical Application, and Much More by Harry M. Flechtner' *Journal of Law & Commerce*, 18 (1999); Y. Ishida, 'Cisg Article 79: Exemption of Performance, and Adaptation of Contract through Interpretation of Reasonableness – Full of Sound and Fury, but Signifying Something' 30(2) *Pace International Law Review*, 331, 378-379 (2018).

[131] H. Rösler, n. 50 above, 511.

[132] H. Smit, 'Frustration of Contract: A Comparative Attempt at Consolidation' 58 *Columbia Law Review* 287, 299, 307, 313 (1958); A. Puelinckx, n. 101 above, 61; R. Hillman, n. 79 above, 17.

[133] K. Adomeit, 'Der Rechtspositivismus im Denken von Hans Kelsen und von Gustav Radbruch' *Juristenzeitung*, 161 (2003).

[134] V.V. Palmer, ' "May God Protect Us from the Equity of *Parlements*": Comparative Reflections on English and French Equity Power' 73 *Tulane Law Review*, 1287, 1293 (1999).

[135] I. Schwenzer and E. Muñoz, n. 62 above, 159. On the Italian situation specifically, see A. Federico, 'Misure di contenimento della pandemia e rapporti contrattuali' *Actualidad Jurídica Iberoamericana*, 236, 239 (2020), arguing that the current length of Italian trials weighs against leaving the solution of the social and economic issues arising from the pandemic with the judiciary.

answer when the issue is posed in flat terms of "excuse" or "no excuse", adjustment under the various provisions of this Article is necessary'. However, only in rare and exceptional circumstances have courts made use of the power to make adjustments, but this has not translated into a 'license to reallocate gains and losses on the basis of distributional considerations', since the court must always act within the framework defined by the parties.[136]

It is not surprising, so, that US courts have refrained from revising the rent of commercial leases. For example, in *Palm Springs Mile Associates, Ltd.* v. *Kirkland's Stores, Inc.*,[137] a tenant of a shopping center claimed that he was excused from paying rent due to the governmental restrictions resulting from the Covid-19 pandemic. The Florida Court found the tenant's argument to be 'unavailing', since it failed to establish a direct causal link between the governmental restrictions and its inability to pay rent. Indeed, the legal consequences of the pandemic had only indirectly prevented the tenant from performing. A similar decision was taken by a NY Court in *BKNY1, Inc. d/b/a 132 Lounge* v. *132 Capulet Holdings, LLC.*[138] A tenant of a restaurant argued that the orders issued to contain the Covid-19 pandemic had made performance impossible and frustrated the purpose of the commercial lease. The Court held that the doctrine of impossibility does not apply when performance is merely more burdensome. Not even the frustration doctrine was relevant, since 'the frustrated purpose must be so completely the basis of the contract that, as both parties understood, without it, the transaction would have made little sense', while in the case at issue the plaintiff had closed its business only for two months (April and May 2020).

These cases confirm that it is questionable that courts hold the key to ending the economic imbalances caused by the Covid-19 pandemic. Revising a contract requires technical expertise on market conditions, as well as information on the subjective costs and benefits of the contracting parties, which the courts do not always possess, and the decision may come too late, when the situation of impossibility or hardship has ceased, and may even be useless or harmful.[139]

It may be argued that both problems may be solved through an arbitration clause taking the decision away from courts and referring it to an arbitrator, chosen by agreement between the parties from among experts. However, not even arbitration is a panacea for these evils, if it

[136] M.A. Eisenberg, n. 71 above, 255.
[137] 2020 WL 5411353 (S.D. Fla. September 9, 2020).
[138] 2020 WL 5745631, 2020 NY Slip Op 33144(U) (N.Y. Sup. Ct., Kings Ctny., September 23, 2020).
[139] F. Benatti, n. 28 above, 209-210. See also H. Kötz and S. Patti, n. 43 above, 455, contending that the lawmakers, rather than the contracting parties, may better address the loss of purchasing power. In fact, that was the case with the inflation occurred in Germany after the two world wars.

is true that the average duration of arbitration proceedings administered by respectful institutions is 13 months, and it is controversial whether arbitrators have the power to adapt contracts absent an explicit attribution by the parties and a provision to that effect in the *lex contractus* of the place of arbitration.[140]

X. THE CONS OF A DUTY TO RENEGOTIATE

Given the limits of judicial adaptation, it is necessary to consider whether the best remedy is to let, or even compel, the parties renegotiate their contract quickly and away from the courts. It has already been seen that Art. 1195 French Civil Code gives one party the right to call for a renegotiation of the contract, which the other party may either accept or refuse. This provision has been criticized because during renegotiation the parties are not freed from their obligations, but in the pandemic context it is likely that they are more interested in their own survival rather than restoring economic balance to the contract.[141]

Although the point is debated, the prevailing opinion formed on the letter of the reformed § 313 BGB rules out a real duty to renegotiate, as the provision allows to apply immediately to the court for adaptation.[142]

The Italian Civil Code contains no rule on the renegotiation of contracts which have become excessively onerous. However, in the face of the economic imbalance generated by unforeseen events, some scholars have theorized an obligation on the part of the contracting parties to renegotiate their contract on the basis of the duty of good faith in the performance of contracts (Art. 1375 Italian Civil Code),[143] raised to a value of public policy, based on active social morality or solidarity.[144] The violation of the duty to renegotiate would amount to breach of contract and entitle the party interested in the maintenance of the relation to refrain from performing (*inadempienti non est adimplendum*: Art. 1460 Italian Civil Code),[145]

[140] C. Brunner, *Force Majeure and Hardship under General Contract Principles: Exemption for Non-Performance in International Arbitration* (The Hague: Kluwer Law International, 2008), 494. By contrast, advocating for the power of arbitrators to revise international contracts, see A. Crivellaro, 'La révision du contrat dans la pratique de l'arbitrage international' *Revue de l'arbitrage*, 69 (2017).

[141] C. Pédamon and R. Vassileva, n. 60 above, 28.

[142] H. Kötz, *Europäisches Vertragsrecht* (Tübingen: Mohr Siebeck, 2015), 407.

[143] F. Macario, *Adeguamento e rinegoziazione nei contratti a lungo termine* (Napoli: Jovene, 1996), 152; F. Criscuolo, 'Equità e buona fede come fonti di integrazione del contratto. Potere di adeguamento delle prestazioni contrattuali da parte dell'arbitro (o del giudice) d'equità' *Rivista dell'arbitrato*, 71, 76-78 (1999); P. Gallo, 'Revisione e rinegoziazione del contratto' *Digesto delle discipline privatistiche – Sezione civile*, agg., VI (Torino: Utet, 2011), 812; R. Sacco and G. De Nova, *Il contratto* (Milano: Giuffrè, 2016), 1710.

[144] Arguing this way, see the Italian Corte di Cassazione, Ufficio del Massimario, Relazione no. 56 of July 8th 2020, https://www.cortedicassazione.it/cassazione-resources/resources/cms/documents/Relazione_Tematica_Civile_056-2020.pdf (last visited 3 November 2021), 21-22.

[145] A.M. Benedetti and R. Natoli, 'Coronavirus, emergenza sanitaria e diritto dei contratti: spunti per un dibattito' *dirittobancario.it*, 25 March 2020, 1.

claim compensation for damages,[146] or even seek a judgment producing the same effects of the contract the parties would have renegotiated (Art. 2932 Italian Civil Code).[147]

Cries for a duty to renegotiate have intensified during the pandemic and the measures to tackle it, which have affected the economic balance or the usefulness of many contracts.[148] Even lower courts have not hesitated to impose an obligation to renegotiate relational contracts affected by the pandemic, seeking to restore fairness, even where Parliament has not made law on the issue.[149]

A duty to renegotiate is laid down in all international soft-law instruments (Art. 6.2.3(1) UNIDROIT PICC; Art. 6:111(2) PECL; Art. III-1:110(3)(d) DCFR). The ICC Hardship Clauses 2003 and 2020 provide that 'the parties are bound, within a reasonable time of the invocation of this Clause, to negotiate alternative contractual terms which reasonably allow to overcome the consequences of the event'.

At a time like this of social and economic emergency, renegotiation has unquestionable advantages, being likely to be quicker and less costly than judicial adaptation, but above all it makes it possible to keep the contract alive by relying on a counterparty that most of the time can be hardly replaced. Trustworthiness in long-term contracts is an essential element in the business world. By renegotiating the contract, the parties themselves, not a third party, rewrite their agreement as the best possible interpreters of the changed set of interests, saving their existing relationship and not precluding future contracts. Moreover, by renegotiating the contract, the parties may not only address current contingencies that require immediate adjustment, but also define a medium-to-long-term path taking into account the expected timeframe for a return to normality, the resumption of economic activities, and the stabilization of the market and the individual business involved.[150]

However, the advantages of renegotiation exist to the extent that they are left to the voluntary choice of the contracting parties. Imposing a legal duty to renegotiate all contracts that have become unbalanced due to changes of circumstances would firstly infringe freedom of

[146] This is the solution provided for by Art. 6:111(3)(c) PECL.
[147] F. Macario, n. 143 above, 426; M. Costanza, 'Clausole di rinegoziazione e determinazione unilaterale del prezzo', in U. Draetta and C. Vaccà eds, *Inadempimento, adattamento, arbitrato* (Milano: Egea, 1992), 316; V. Roppo, *Il contratto* (Milano: Giuffrè, 2nd ed., 2011), 973. In case-law, see Tribunale di Bari, 14 June 2011, *Contratti*, 571 (2012). See also E. Ferrante, n. 53 above, 310-311, contending that an open-ended judgment, i.e. an order to renegotiate the contract, does not make sense. By contrast, an order to renegotiate a contract with a detailed content would be tantamount to judicial adaption.
[148] See, *ex multis*, F. Macario, 'Per un diritto dei contratti più solidale in epoca di coronavirus' *giustiziacivile.com*, 207 (2020); D. Maffeis, 'Problemi dei contratti nell'emergenza epidemiologica da Covid-19' *giustiziacivile.com*, 3 (2020); L. Guerrini, 'Coronavirus, legislazione emergenziale, e contratto: una fotografia' *giustiziacivile.com*, 345 (2020).
[149] Tribunale di Roma, 27 August 2020, *Giurisprudenza italiana*, 2443 (2020).
[150] F. Benatti, n. 28 above, 209.

contract. No rule under Italian law, for example, imposes equivalence of performance.[151] Without considering that, in the meantime, the relationship of trust and collaboration between the parties may have broken down, but that relationship is essential not only to reach a renegotiation agreement but also to make it work.[152]

At other times the parties need speed and certainty in defining a relationship that has become unstable, and have no interest in undertaking lengthy and tedious renegotiations.[153] But above all, a legal duty to renegotiate would produce effects potentially detrimental to the very instances of social solidarity invoked by its supporters. Consider a lease agreement. If, theoretically, a reduction of the rent may appear to be in accordance with good faith in order to cope with the financial hardship of the tenant, in practice this renegotiation may not be fair where the landlord economically depends on the lease and has no other sources of income, but at the same time continues to pay taxes or has a pending loan agreement for the purchase of that property whose payments have not been suspended. Or think of the entrepreneur demanding a renegotiation of the contract with a consultant or supplier, which could well drag these into the same liquidity crisis from which the entrepreneur would like to be saved. Think, again, of a restaurateur, forced, during the lockdown, to close the rented premises to the public, but who in the meantime has benefited from tax credits and layoff schemes for his employees, and has made considerable profits from the take-away business: is it fair to grant him the right to impose a revision of the rent on the other party?[154]

The injustice of a forced renegotiation depends on the subjective conditions of the parties being not all equal.[155] It is one thing if the promisee is a bank, a multinational company, a businessman who receives state aid[156] or discovers in the pandemic an opportunity to increase his profits, quite another if he is an employee, a supplier, a professional, and in general a party who does not have the stability and the means to undergo reductions, suspensions, postponements. It may well be the case that the party adversely affected by the lockdown measures, invoking an obligation to renegotiate, is actually the one economically

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[151] See P. Perlingieri, 'Equilibrio normativo e principio di proporzionalità nei contratti', in Id., *Il diritto dei contratti tra persona e mercato* n. 9 above, 454, arguing that the principle of proportionality bans only a blatant and unjustified disproportion between the duties undertaken by the parties. In a similar vein, see F. Galgano, *Trattato di diritto civile* (Padova: Cedam, 2010), II, 535-536.

[152] F. Benatti, n. 28 above, 207. See also G. Roth, '§ 313 Bgb', in W. Krüger ed., *Münchener Kommentar Zum Bürgerlichen Gesetzbuch* (München: CH Beck, 5th ed., 2007), § 93.

[153] Y.M. Atamer, 'Article 79', in S. Kröll, L. Mistelis and P. Perales Viscasillas eds., *UN Convention on Contracts for the International Sale of Goods – Commentary* (München: Hart Publishing, 2011), 1091, § 84.

[154] T.V. Russo, n. 20 above, 148.

[155] A. Gentili, n. 20 above, 9.

[156] See Tribunale di Roma, 15 January 2021, https://www.lanuovaproceduracivile.com/wp-content/uploads/2021/04/romanorinegoziazione.pdf (last visited 3 November 2021), which did not recognize a duty to renegotiate the rent of the lease of a guesthouse on the ground that the business could have benefited from tax credits and the suspension of mortgage payments.

stronger and able to cope with the pandemic.[157] The imposed renegotiation could also cause trouble to the other party in performing other contracts to which he is bound, triggering a chain effect of spreading the damage of an already serious economic crisis. This can be seen in the event of an entrepreneur who receives a lower amount for his supplies and is thus forced to fire his employees.

Determining the party deserving of greater protection in an exceptional context of economic paralysis in which every party seems to be the weaker party is an effort that cannot be left to judicial discretion or imposed on the parties through a legal duty to renegotiate all contracts whose economic balance has been altered by the pandemic. The discretion of the court may become arbitrary since it would have to invent the renegotiated agreement. Good faith never indicates a single content to the exclusion of everything else and it is not always the case that a series good faith solutions are also fair.[158] Nor can renegotiation be imposed on the parties if it is true that it can lead to outcomes incompatible with social solidarity and economic stability.

The government of solidarity, and the balancing of all the relevant interests, must be entrusted to the law-makers, not the courts or the contracting parties. Parties should be given the option of renegotiating their contracts, with all the associated benefits. There would not even be a need for a law that makes the renegotiation power explicit, since it is a power inherent in freedom of contract.

In the event of (legitimate) refusal or failure of voluntary renegotiation, the only remedy should be the termination of the agreement, because judicial adaptation poses the wide-ranging problems already seen. It is not surprising that, in common law systems, the general remedy provided for by the frustration doctrines is automatic discharge, which releases the parties from an agreement that may be long-term and require the continuation of a fiduciary element that in the meantime may have failed. Forcing parties to remain in a contract that no longer meets their interests may be an inefficient remedy, if only because it would generate

[157] N. Cipriani, n. 22 above, 663.

[158] A. Gentili, 'La replica della stipula: riproduzione, rinnovazione, rinegoziazione del contratto' *Contratto e impresa*, 667, 713 (2003). See also M. Barcellona, n. 128 above, 486, arguing that good faith may be used to define only accessory contractual duties.

further litigation.[159] Moreover, the very provision of an automatic discharge could encourage them to negotiate a new contract in order not to disrupt their business relation.[160]

If litigation ensues, the court should be granted the sole power to ascertain a discharge that has already occurred by operation of law. The simple alternative between voluntary renegotiation and discharge of contracts which have become useless or excessively burdensome in times of pandemic appears to be the fairest and most efficient solution, on the assumption that instances of social solidarity are adequately protected by the Governments.

[159] See *Co-operative Insurance Society Ltd* v. *Argyll Stores (Holdings) Ltd*, [1997] 2 WLR 898, where Lord Hoffmann held that judicial adaptation 'is not only a waste of resources but yokes the parties together in a continuing hostile relationship. The order for specific performance prolongs the battle. If the defendant is ordered to run a business, its conduct becomes the subject of a flow of complaints, solicitors' letters and affidavits. This is wasteful for both parties and the legal system'.

[160] H. Rösler, n. 50 above, 507. See also A. Schwartz, 'Relational Contracts in the Courts: An Analysis of Incomplete Agreements and Judicial Strategies' 21(2) *Journal of Legal Studies*, 271 (1992).