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PERFORMANCE OF CONTRACTS AND SOCIAL CRISIS – A COMPARATIVE STUDY OF FRENCH AND GERMAN LEGAL SYSTEMS REGARDING UNEXPECTED CHANGES

Julian Amoulong – Alexandro Mariano Pastore

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This article examines, through a comparative legal approach, the manners by which French and German legal systems deal with unexpected changes of circumstances after the conclusion of a contract in a context of social crisis, taking COVID-19 as occasion. Accordingly, statutory provisions for impossibility and hardship in the respective systems are analysed, as well as their applicability to the coronavirus pandemic. Furthermore, a spotlight is placed on the so-called emergency legislation enacted during the crisis. This article is not only intended to explain the existing legal solutions, but also to give an opinion on them.

Keywords: Private Comparative Law – Performance of Contracts – Unexpected changes – France – Germany

INTRODUCTION

The outbreak of Coronavirus disease (COVID-19), caused by the SARS-CoV-2 virus[1], was situated in Wuhan (China) in December 2019. On March 11, 2020, the World Health Organization (WHO), through an assessment delivered by its Director-General, first referred to COVID-19 as a pandemic.[2] Just two days later, the WHO pointed out Europe as the new pandemic epicenter. In the following months, the pandemic was worldwide in the spotlight, daily covered by global media, spreading faster than supposed. Since hospitals were overfilled with patients, public authorities resorted to collective quarantines, restrictions to business activities and people´s movement, and even lockdowns of cities or even regions for weeks, attempting to counter the infection speed, while treatments and vaccines were not available. On May 4, 2023, WHO downgraded the COVID-19 status, ending the global emergency. Thus far, WHO records more than 750 million cases and almost 7 million deaths.[3]

It has been said that COVID-19 upended the world, changing not only public health systems, but also spreading through other fields, on a scale possibly never seen before (given the fact that the previous pandemics came about before the globalization), in a chain reaction that led to a "crisis of human society".[4] Although the legal problems that arose (such as the impracticality or price shifting for the parties) occurred equally everywhere, they were treated differently by the legal systems, which can be attributed to

[1] *see* World Health Organization (WHO) https://www.who.int/health-topics/coronavirus#tab=tab_1 (last visited Apr. 1, 2024).

[2] For the detailed timeline of the pandemic, *see* World Health Organization (WHO) https://www.who.int/news/item/29-06-2020-covidtimeline (last visited Apr. 1, 2024).

[3] For a comprehensive overview of the cases recorded worldwide, *see* World Health Organization (WHO) https://data.who.int/dashboards/covid19/cases?n=c (last visited Apr. 1, 2024).

[4] Luo Li et al., *The Pandemic Crisis and Its Global Legal Impact on Information Protection, Creative Economy and Business Activities*, *in* Global Pandemic, Technology and Business 1, 9 (2021).

the fact that different countries provide different solutions and are based on different doctrines.
This article covers the solutions provided by French and German legal systems to deal with the matter of unexpected changes (thus, after the conclusion of a contract) amid social crisis and their possible application to the coronavirus pandemic, comparing one system to another, i.e., through their similarities and differences.[5]

I. ORIGINS OF IMPOSSIBILITY AND HARDSHIP

Roman Law admitted different standards of liability for non-performance of contracts (*dolus malus, culpa lata, culpa levis in concreto* and *culpa levis in abstracto)*[6], along with exempting circumstances: *vis maior* (casus maior) and *casus fortuitus (casus minor)*.[7] They both relate to irresistible and unforeseeable events, beyond the control of the contracting party[8], in accordance with the maxim *impossibilium nulla obligatio est* ("The impossible is no legal obligation.")[9], also found as *ad impossibilia nemo tenetur (*"Nobody is held to to the impossible.").[10]
Prof. Gordley drew on the evolution of legal solutions given to situations in which unforeseen circumstances after the conclusion of a contract can significantly impact its performance and even render it impossible. He analyses the shift from Roman Law into Middle Ages – period when the widely known *clausula rebus sic stantibus* ("By the clause the situation thus remaining."[11]) is said to have emerged[12], due to the influence of canonists over the postglossators, as an exception to the rigidity of *Pacta sunt servanda* ("Pacts must be respected")[13] put forward by Grotius.[14]
Then, proceeding with the historical evolution, he places the unforeseen changes already in the national legal outcomes of France, Germany and England by the 18th and 19th Centuries, with the modern formulation under the *Code Civil* (1804) and the *Bürgerliches*

[5] For the methodology of comparative law studies, *see* Gerhard Dannemann, *Comparative Law: Study of Similarities or Differences?*, *in* The Oxford Handbook of Comparative Law 383-420 (Mathias Reimann & Reinhard Zimmermann eds. 2006).
[6] Cosimo Cascione, Diritto romano manuale breve tutto il programma d'esame con domande e risposte commentate 191 (2007).
[7] Pasquale Voci, Istituzioni di diritto romano 384 (6th ed. 2004): "La responsabilità del debitore finisce se l'adempimento è reso impossibile da una circostanza fortuita: si parla di caso, o caso fortuito; e quando l´evento è particolarmente rovinoso, e ineluttabile, di forza maggiore (*vis maior*)".
[8] For the differentiation between the two, *see* René Robaye, Le droit romain 310-312 (6th ed. 2023).
[9] Aaron X. Fellmeth & Maurice Horwitz, Guide to Latin in International Law 127 (2n ed. 2021).
[10] *Id*. at 127.
[11] *Id.* at 56.
[12] For the linguistic variations of the formulation, *see* María do Carmo Henríquez Salido et al., *La clàusula «rebus sic stantibus» en la jurisprudència actual*, 66 Revista de Llengua i Dret 189, 191 (2016).
[13] Fellmeth & Horwitz, *supra* note 9 at 222.
[14] *see* Pascal Pichonnaz, Les fondements romains du droit privé 364-365 (1st ed. 2008): "La justification du caractère obligatoire de tous les pactes se fondait d´abord sur la morale et deviendra une pierre angulaire de la doctrine du droit naturel de Grotius."

Gesetzbuch (1900)[15], conceived during the period known, in European Legal History, as the age of Codification, in the expression coined by Jeremy Bentham.[16]
Despite being allocated within the same Subgroup[17], the development of private law in Germany has been profoundly in contrast to France, which is the reason, why they both developed differently regarding the treatment of unexpected circumstances. This was also due to the situation that a unified German state did not yet exist at the beginning and middle of the 19th century, by which time the Code Civil had long already been in force in France.[18] Even Since France and Germany figure as the major representatives of the Romano-Germanic Subgroup (Civil Law), they represent an interesting and traditional choice in Comparative Law.
When it comes specifically to the expression of the legal solutions to unexpected changes that affect the performance of contracts in France and Germany[19], one should come across two different concepts: impossibility[20] and hardship[21], that will be presented in each of the legal systems herein taken for comparison, before moving forward into the possible use of such legal mechanisms to pandemic coronavirus. For now, it is worthy to mention those concepts will be addressed as developed in *statutory laws and settled case law* of those countries, not as contractual provisions. Indeed, it is quite frequent in business contracts laying down the so-called "force majeure clauses" and "hardship clauses", freely agreed by parties, determining the definition of the events and the legal consequences.
Therefore, a clear distinction must be made between the possibility of contractually resolving impossibility and hardship situations by means of contractual clauses written for this purpose and the legally prescribed solution[22], which is the main focus of this article.

[15] *see* James Gordley, *Impossibility and Changed and Unforeseen Circumstances*, 52 Am. J. Comp. Law 513-530 (2004).
[16] *see* Jean-Louis Halpérin, *The Age of Codification and Legal Modernization in Private Law*, *in* The Oxford Handbook of European Legal History 908, 908 (Heikki Pihlajamäki, Markus D. Dubber, & Mark Godfrey eds., 2018).
[17] Already in 19th Century, Prof. René David systematized, under a comparative perspective, the world major legal systems, arranging them in Groups or Families The Western Law is split in Anglo-Saxon Subgroup (Common Law) and Romano-Germanic Subgroup (Civil Law). *see* René David, Camille Jauffret-Spinosi & Marie Goré, Les grands systèmes de droit contemporains (12th ed. 2016).
[18] Zimmermann therefore also describes the German civil code as "Late Fruit of the Codification Movement", *see* Reinhard Zimmermann, The New German Law of Obligations: Historical and Comparative Perspective 6 (2005).
[19] *see* Angela Carpi, *Le Sopravvenienze Contrattuali Nella Mixed Jurisdiction Della Louisiana, Tra Rigidità Del Sistema E Necessità Di Riforma. L'ipotesi Della Forza Maggiore*, *in* Chi resiste alla globalizzazione? Globalismi, regionalismi, nazionalismi nel diritto del XXI secolo 59, 60 (Angela Carpi Michele Raziadei Timoteo eds., 2023).
[20] Also known as principle or doctrine of impossibility.
[21] The term "hardship" itself does not belong to Civil Law. Nevertheless, following the proposal of Hannes Rössler, this term is hereby employed as a generic term, under a legal comparative approach, comprising the French *théorie d´imprévision* and the German *Störung der Geschäftsgrundlage*. *see* Hannes Rössler, *Hardship in German Codified Private Law – in Comparative Perspective to English, French and International Contract Law*, 15 European Review of Private Law 483, 485 (2007).
[22] Ivo Bach, *The Impact of Force Majeure on Contractual Obligations, in* German National Reports on the 21st International Congress of Comparative Law 205, 221 (Martin Schmidt-Kessel ed., 2022)

In any case, with this contractual nature, such clauses are found both in Civil Law and Common Law, with a view to ruling any possible factual or legal change that could impact the performance. That is the reason why, even if this work deals with the two countries of Continental Europe, belonging to Civil Law, it is important – as a preliminary step, essential in order to prevent glaring errors – to take into account that the legal concept *force majeure*[23], as emerged in the French Civil Code does not correspond to the force majeure found in Common Law[24], where force majeure is merely an optional contractual disposition. Definitely, Common Law handles impossibility on a different basis, framed by case law: the doctrine of frustration, which comprises impossibility of performance (absolute), impracticability (relative) and frustration of purpose.[25]

II. FRENCH LEGAL SYSTEM

2.1 *The French approach to unexpected changes*

The *Code Civil* (Civil Code), also known as the Napoleonic Code and enacted in 1804, *"provides the overall framework of the law of contract and contains the general principles applicable to all types of contract"*[26], in its Book II, Title III. The freedom of contract and its consequent binding force are paramount principles in French Law[27]; once a valid contract is concluded, it must be performed in good faith by both parties.[28] There are few hypotheses by which non-performance of the original terms of contracts is lawful. They consist of an exception to the rule and, under such conditions, they are applied in a very restrict way.
The French Law of Obligations was extensively reshaped in 2016, by *Ordonnance*[29] n° 2016-131 of February 10, 2016, which entered into force on October 1, 2016, and was later ratified and revised through Law nº 2018-287 of April 20, 2018. The Reform comprises not only contracts, but also the general regime of obligations and the proof of obligations. It has been said that the Reform embodied rules and concepts developed and already put in place by case law since the enactment of the Civil Code in 1804, so doing in order to

[23] Apart from quotes (which will kept as read the original), in this article the expression "*force majeure",* in italics, refers to the French Law aception, whereas "force majeure" belongs to British/American one. Besides, all other words in French or German, as foreign words, will be also found in italics.
[24] Regarding the terminology of force majeure in the French system, *see* Vernon Valentine Palmer, *Excused Performances: Force Majeure, Impracticability, and Frustration of Contracts*, 70 Am. J. Comp. Law 70, 73 (2022): "Force majeure in the French legal tradition has a different role and significance. It is the short-hand expression for the defense of 'impossibility,' a defense arising by operation of law under the Code Civil. The defense applies when three basic conditions are satisfied: *irrésistibilité*, *imprévisibilité*, and *extériorité*."; Regarding the terminology of force majeure in the United States, *see id.* at 73:
"As stated previously, in the United States, the same term refers to contract clauses which derogate from the common law doctrines. One should bear in mind that similar clauses are found in international contracts, including those drafted in France and other continental countries."
[25] Regarding the terminology of impossibility, *see id.* at 71-72.
[26] Solène Rowan, The New French Law of Contract 20 (2022).
[27] However, this freedom – implicitly enshrined – has evolved throughout the centuries (from *principle de l´autonomie de la volonté* into *volonté contrôlée*, *volontarisme social* or *solidarisme contractuel*). *see*, Philippe Malinvaud, Mustapha Mekki & Jean-Baptiste Seube, Droit des obligations 88 (17th ed. 2023).
[28] Code civil [C. civ.] [Civil Code] art. 1102-1104 (Fr.) (Current Version).
[29] A legislative authorization to the Executive issue a statute law, in accordance with art. 38 of French Constitution.

re-establish the primacy of statutory law as legal source[30], along with other important innovations[31], in order to carry the social and legal evolution across the decades[32] and restore the French legal influence among international systems[33], also as for international business[34]. In a broader perspective, this evolution takes place in the scenario of multiple initiatives tending to harmonize the law of obligations across Europe, such as UNIDROIT´s Principles, the Draft Common Frame of Reference (DCFR) and the Principles of European Contract Law (PECL).[35]
Therefore, it is convenient to split the legal analysis of the elements at stake into before and after the Reform of 2016, examining the legal solutions provided for unexpected changes in French Law: impossibility under the form of *force majeure* and *cas fortuit*, on one hand, and hardship through *théorie d´imprévision*, on the other hand.
In a nutshell, impossibility was codified in France since the Napoleonic Code entered into force, as *force majeure* and *cas fortuit* by article 1148, and nowadays only *force majeure* by article 1218, whereas hardship was not set up in the Civil Code: it was progressively put in place by case law, through *théorie d´imprévision* (literally, theory of unpredictability), and now is codified under article 1195.

2.1.1. *Before the Reform of French Law of Obligations*

a. *Impossibility (Force Majeure and Cas Fortuit)*

The Article 1147 of the Civil Code contains the general provision of full compensation (interest and damages) in case of non-performance or delay in the execution of the obligation, unless the debtor can establish that non-performance was due to *a cause étrangère*

[30] Regarding the matter of "law in books" *versus* "law in action", as enshrined by Roscoe Pound (although in the context of Common Law) *see*, Roscoe Pound, *Law in Books and Law in Action* , 44 AM. L. REV. 1, 12 (1910): "It is the work of lawyers to make the law in action conform to the law in the books, not by futile thunderings against popular lawlessness, nor eloquent exhortations to obedience of the written law, but by making the law in the books such that the law in action can conform to it, and providing a speedy, cheap and efficient legal mode of applying it. On no other terms can the two be reconciled."
[31] *see* Malinvaud, Mekki, & Seube, *supra* note 27 at 61.
[32] *see* Rowan, *supra* note 26 at 1:
"Indeed, since its enactment in 1804, almost all of the articles on contract law had remained completely untouched, making this the first re-examination of the subject in over 200 years."
[33] *see* Rowan, *supra* note 26 at 4.
[34] *see* Rowan, *supra* note 26 at 4:
"A final important factor behind the reforms was a recognition that French contract law was materially less attractive as a choice of law for cross-border contracts than the equivalent regimes of some common law countries."
[35] Angela Carpi, L'inadempimento importante nel sistema francese. Uno studio di diritto comparato 125, 126 (2010).

(an external cause[36]), not imputed to him provided, moreover, the absence of bad faith on his part.[37]
Additionally, article 1148 precises that in case of *force majeure* or *cas fortuit* (fortuitous event) there is no ground for the payment of damages or interest.[38] Nonetheless, the definitions and precise requirements of the abovementioned exemption of responsibility were not provided, but rather progressively shaped by judicial decisions and doctrine. It must be noted that the theoretical distinction between *force majeure* and *cas fortuit* (imprecise and controversial already in Roman sources[39]) currently has little practical importance for contractual matters in French Law since both lead to the same legal effects.[40] Actually, the former tends to prevail over and even assimilate the former in the civil domain[41]; they can be seen as synonyms.[42]
Force majeure relates to an event which is deemed unforeseeable, irresistible and external to the person affected, which makes the performance impossible.[43] Traditionally, the concerning event should fulfil all of them at once. Also, they should be interpreted as absolute unforeseeability and irresistibility.[44] About those requirements, two remarks could be convenient.
First, despite the rigid interpretation of the provision, the development of case law brought some mitigation by stating that a predictable but irresistible event was considered sufficient to characterize the occurrence of force majeure (as long as external to the person).[45] This

[36] For the terms and provisions of Civil Code after the Reform, this article adopts the translations made by John Cartwright, Bénédicte Fauvarque-Cosson and Simon Whittaker. The integral text (including revisions made by Loi nº 2018-87) is available at https://www.justice.gouv.fr/sites/default/files/migrations/textes/art_pix/Translationrevised2018final.pdf (last visited Apr. 1, 2024);
For the terms and provisions of Civil Code before the Reform (articles 1147 and 1148), the translation adopted is the one made by David W. Gruning. The integral text (in force in 1st July, 2013) is available at:
https://web.archive.org/web/20191020172634/https://www.legifrance.gouv.fr/content/download/7754/105592/version/4/file/Code_civil_20130701_EN.pdf (last visited Apr. 1, 2024);
Gordley translates *cause étrangère*, *force majeure* and *cas fortuit* respectively as “extrinsic cause”, “irresistible force” and “chance event”, *see* Gordley, *supra* note 15 at 517.
[37] Code civil [C. civ.] [Civil Code] art. 1147 (Fr.): Le débiteur est condamné, s’il y a lieu, au paiement de dommages et intérêts, soit à raison de l’inexécution de l’obligation, soit à raison du retard dans l’exécution, toutes les fois qu’il ne justifie pas que l’inexécution provient d’une cause étrangère qui ne peut lui être imputée, encore qu’il n’y ait aucune mauvaise foi de sa part.
[38] Code civil [C. civ.] [Civil Code] art. 1148 (Fr.): Art. 1148. Il n’y a lieu à aucuns dommages et intérêts lorsque, par suite d’une force majeure ou d’un cas fortuit, le débiteur a été empêché de donner ou de faire ce à quoi il était obligé, ou a fait ce qui lui était interdit.
[39] *see* Robaye, *supra* note 8 at 310-312.
[40] However, for extracontractual liability (torts), the distinction might be significant.
[41] Muriel Fabre-Magnan, Droit des obligations: Contrat et engagement unilatéral 262 (6th ed. 2021): “La force majeure évoque l´idée d´insurmontabilité d´un événement, alors qu´un cas fortuit vise un événement survenu de façon inattendue et imprévisible, ce qui est le plus souvent le cas des faits de la nature (cyclone, tempête, etc.). En droit civil, on parle plutôt de force majeure.”
[42] *see* Malinvaud, Mekki, & Seube, supra note 27 at 739; *see* also François Chénedé, Droit des obligations et des contrats: consolidations, innovations, applications 577 (3rd ed. 2023): “Aujourd´hui les deux termes de cas fortuit et force majeure sont devenus synonymes.”
[43] *see* Fabre-Magnan, *supra* note 41 at 263.
[44] *see* Malinvaud, Mekki, & Seube, *supra* note 27 at 505.
[45] Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., Nov. 6, 2002, Bull. civ. I, No. 258 p. 201 (Fr.): “Attendu que pour faire droit à la demande de Mme Y..., le jugement retient que la

was the position that had been adopted by the 1st Civil Chamber[46] of the *Cour de Cassation* ("Court of Cassation", the supreme court of the French judicial system), followed by its Commercial Chamber[47] and the Labour Chamber[48].

The dissent between the 1st and 2nd Civil Chambers seems to be overcome since the Reform of the Civil Code expressly demands unpredictable nature for characterizing *force majeure* (as we will see).

Second, the "external" condition led to a debate about a sickness, which is an internal event in the organic sense. Nonetheless, it was lately recognized external, for the characterization of *force majeure*, leading to the clarification that, more precisely, it should be interpreted as "out of the control" of the contracting party.[49]

b. Hardship (Théorie d´Imprévision)

It was already mentioned that the Napoleonic Code did not espouse any provision related to *imprévision*.[50] *Cour de Cassation* reaffirmed the principle of *pacta sunt servanda* in the famous case *Canal de Craponne* (1876)[51], holding that tribunals were not competent to modify the terms of the agreement in order to restore the conditions found in the moment the agreement had been negotiated.

However, *Conseil d´Etat* (Council of State, the supreme court of the French administrative system)[52]authorized the judicial review of the terms of the agreement in order to restore the economic balance of the obligations through the landmark case *Gaz de Bordeaux* (1916)[53], under the ground of the continuity of the public service. Of course, the scope of application was limited to public contracts. When it comes to private contracts, only in the 90´s the decisions of *Cour de Cassation* depart from the rigid previous case law. Indeed, in the case *Huard* (1992)[54] the Court stated the obligation of renegotiation, on the ground of good faith. The Court did not ascribe itself the power to renegotiate the balance: it rather imposed on the party the obligation to do so.

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maladie d'une personne âgée n'est pas imprévisible; Qu'en statuant ainsi alors que la seule irresistibilité de l'événement caractérise la force majeure, le tribunal a violé le texte susvisé. "

[46] Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., Mar. 9, 1994, Bull. civ. I, No. 91 p. 70 (Fr.).

[47] Cour de cassation [Cass.] [supreme court for judicial matters] com., Oct. 1, 1997, Bull. civ. IV, No. 240 p. 209 (Fr.).

[48] Cour de cassation [Cass.] [supreme court for judicial matters] soc., Feb. 12, 2003, Bull. civ. V, No. 50 p. 43 (Fr.).

[49] Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., Feb. 10, 1998, Bull. civ. I, No. 53 p. 34 (Fr.).

[50] Article 900-2 of the Civil Code, which states a judicial review of conditions and charges encumbering donation or legacy (not contracts in general) in case of *imprévision*, was only inserted in 1984.

[51] Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., Mar. 6, 1876, D. 1876, I, 193.

[52] In France we have the dual jurisdictional system, split in judicial and administrative.

[53] Conseil d'État, [CE] [highest administrative court] Mar. 30, 1916, 59.928, Rec. Lebon 125.

[54] Cour de cassation [Cass.] [supreme court for judicial matters] com., Nov. 3, 1992, Bull. civ. IV, No. 338 p. 241 (Fr.).

2.1.2. *After the Reform of French Law of Obligations*

a. Impossibility (Force Majeure and Cas Fortuit)

The original dispositions set up by the Napoleonic Code concerning *cause étrangère* (art. 1147) as well as *force majeure* and *cas fortuit* (art. 1148) went through meaningful changes. Indeed, in contrast to the previous structure, now article 1218 only refers to *force majeure*[55], whose requirements are set in the legal provision.[56] It also distinguishes, in paragraph 2, between temporary and permanent impossibility and the respective effects.

The event must be beyond debtor´s control, not reasonably foreseen by him, who could not avoid the effects by appropriate measures. In short, the requirements can be summed up as *imprévisibilité*, *irrésistibilité* and *extériorité* (unforeseeability, irresistibility[57] and exteriority) – and so have been applied by *Cour de Cassation*[58]. In this sense, the three criteria forged by the Court before the Reform have been codified, and also restored the original condition of fulfillment of all of them at once in order to characterize the occurrence of *force majeure*.[59]

It is convenient to remark that now the requirement of unforeseeability is not anymore taken in an absolute, objective view, rather it is conceived as reasonable unforeseeability[60], or in other words, in a relative, subjective perspective. Reasonability implies that many natural phenomena – such as earthquakes, floods, tsunamis, meteorite or comet falls, volcanic eruptions and pandemics – are usually deemed not foreseeable. Indeed, although History has been pervaded by these phenomena, and Science disposes of instruments to render their occurrence more and more predictable, in general it cannot achieve the point that it should reasonably expected that parties could take their occurrence and effects into account when concluding a contract. Also, some human actions – like wars, labour strikes and also *fait du prince* (decisions taken by public authorities)[61] – can be reasonably unforeseeable.

If it amounts to a temporary impossibility, the consequence is normally the suspension of the performance or even the termination of the contract, depending on the period of delay. Accordingly, if it is the case of permanent impossibility, the contract is terminated by force of law.

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[55] *Cas fortuit* is still stated in other articles of the Civil Code.

[56] However, this does not mean that the new art. 1218 of the French Civil Code is the corresponding provision to art. 1147 and 1148 which deal with contractual liability in the case of non-performance. Rather, art. 1218 represents the new main provision referring to *force majeure*. Regarding contractual liability in the case of non-performance we find the corresponding statutory provision in art. 1231-1, where it is stated that debtor is condemned to pay for damages for non-performance, unless he justifies this on the ground that performance was prevented by *force majeure*, for which one can then again refer to art. 1218.

[57] French Ministry of Justice, *Rapport au Président de la République relatif à l'ordonnance n° 2016-131 du 10 février 2016 portant réforme du droit des contrats, du régime général et de la preuve des obligations,* JORF (Journal officiel “Lois et Décrets”) n° 0035 du 11 février 2016 (2016): “irrésistible, tants dans sa survenance (inévitable) que dans ses effets (insurmontable)”.

[58] *see* Cour de cassation [Cass.] [supreme court for judicial matters] 3e civ., Dec. 7, 2022, 21-19.793 (Fr.), https://www.legifrance.gouv.fr/juri/id/JURITEXT000046727257 (last visited Aug. 1, 2024).

[59] Despite the fact that the *Rapport* cocerning the Reform states that exteriority would not be a requirement anymore, *see* Chénedé, *supra* note 42 at 159.

[60] *see* Malinvaud, Mekki, & Seube, *supra* note 27 at 507.

[61] *see* Malinvaud, Mekki, & Seube, *supra* note 27 at 739.

Furthermore, decisions rendered by *Cour de Cassation* have brought some particularities regarding *force majeure* under article 1218, restricting its application both under the personal and material perspective. First, it can only be invoked by the debtor, the creditor cannot.[62] The reasoning, by the way, proceeds from the wording of the article: "beyond the control of the debtor", instead of "beyond the control of the party".[63] Second, in a case arisen for the payment of alleged impact of COVID-19, the Court held that the performance – since the obligation consisted in payment of an amount – did not become impossible, but rather merely more difficult or onerous, thus *force majeure* is not applicable in case of monetary obligation[64], the so-called *force majeure financière* (economic *force majeure*).[65]

b. Hardship (Théorie d´Imprévision)

Moreover, the Reform innovated substantially in art. 1195, by enshrining the *théorie d´imprévision* to private contracts. Indeed, art. 1195 states that, in case of an unforeseeable change of circumstances resulting in excessively onerous performance, one of the parties can ask the other to renegotiate the contract. They can even agree on termination and, without agreement, one of the parties can bring a claim before courts, in order to "revise the contract or put an end to it".

The keystone here is the unforeseeability – just like one of the three requirements for *force majeure*. The provision at stakes applies only when the party "had not accepted the risk of such a change", i.e., it excludes the aleatory contracts, as such defined by art. 1108.[66] The last part of art. 1195 states that the affected party shall continue to perform his obligation during the renegotiation of the contract.

[62] *see* Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., Nov. 25, 2020, 19-21.060 (Fr.), https://www.legifrance.gouv.fr/juri/id/JURITEXT000042619557?isSuggest=true (last visited Apr. 1, 2024): "le créancier qui n'a pu profiter de la prestation à laquelle il avait droit ne peut obtenir la résolution du contrat en invoquant la force majeure"

[63] *see* Chénedé, *supra* note 42 at 160.

[64] *see* Cour de cassation [Cass.] [supreme court for judicial matters] 3e civ., Jun. 15, 2020, 21-10.119 (Fr.), https://www.legifrance.gouv.fr/juri/id/JURITEXT000047737790?init=true&page=1&query=21-10.119&searchField=ALL&tab_selection=all (last visited Apr. 1, 2024)
Actually, one should note that the case would better fit the hypothesis of imprévision, not force majeure, as it will be explained in the following topic.

[65] *see* Jean-Sébastien Borghetti, *Non-Performance and the Change of Circumstances under French Law*, *in* Coronavirus and the Law in Europe 506, 516 (Ewoud Hondius, Marta Santos Silva, Andrea Nicolussi, Pablo Salvador Coderch, Christiane Wendehorst, Fryderyk Zoll eds., 2021): "The technical reason for this is that, while the debtor of such an obligation may be de facto incapable of paying what she owes, there can be no radical impossibility to perform as long as there is money in the economy. The fundamental reason behind this technical explanation is that insolvency cannot be regarded as a cause of discharge of contract, lest the whole economy be put at risk."

[66] Code civil [C. civ.] [Civil Code] art. 1109 (Fr.) - A contract is commutative where each of the parties undertakes to provide a benefit to the other which is regarded as the equivalent of what he receives.
It is aleatory where the parties agree that the effects of the contract— both as regards its resulting benefits and losses—shall depend on an uncertain event.

2.3 *Application during the coronavirus pandemic*

At this point, the focus turns to COVID-19 and its applicability in the light of the instruments forged by the French legal system to the unexpected change of circumstances. Indeed, COVID-19 may justify the application of *force majeure* or *théorie d´imprévision*.

However, such conclusion must emerge only from the concrete elements that arise in any given case. In other words, in each *given case*, examining the substantial fulfillment of statutory criteria found in the Civil Code as they as interpreted by courts, specially the supreme courts of the judicial and administrative, which case law, although deprived of formal binding force of precedents (unlike Common Law), can be seen as guiding light to the judgments rendered by lower courts.[67]

For that, the first remark concerns the extension or depth of the shift to the performance. Minor changes clearly fall out of the scope. French case law requires that the non-performance shall present *une certaine gravité* ("a certain gravity or importance"), in order to trigger the application of the concerning legal remedies. More precisely, it corresponds to the non-performance that deprives the creditor from *le bénéfice essentiel du contrat* ("the essential benefit of the contract"), which should be carefully assessed by the judge.[68]

As a consequence, in a given case, the change must be deemed quite significant, relevant, i.e., one that "renders performance excessively onerous" (for *imprévision*) as for art. 1195, or even "prevents the performance" (for *force majeure*), according to art. 1218. In both cases, the Civil Code precises "at the time of the conclusion of the contract": this is the reference, the parameter for the assessment, that shall be compared to the time of expected performance.

The date of the contract can raise another distinction, depending on whether it was before or after the Reform of the Civil Code entered into force (October 1, 2016), according to the famous maxim *tempus regit actum* ("Time rules events")[69], that is to say, the law in force at the time of the conclusion of the contract will be the one prevailing.

Nevertheless, it must be mentioned that the Civil Code provides rules for contracts in general and also those for some specific contracts. Prof. Borghetti recalls the emergency legislative measures that were adopted in France, only for specific contracts: i) tourism (travels and holiday), as well as ii) bills (water, gas, electricity) and rental owed by professional and commercial premises[70]. Indeed, Ordonnance n° 2020-315[71] allows touristic providers to offer *un avoir* (a credit note, a "voucher") as alternative to *le remboursement de l'intégralité des paiements effectués (the full refund in cash)* for resolution of contracts notified between March 1, 2020 and September 15, 2020[72]; Ordonnance nº 2020-

[67] *see* Rowan, *supra* note 26 at 24.

[68] *see* Carpi, *supra* note 35 at 22-25.

[69] Fellmeth & Horwitz, *supra* note 9 at 287.

[70] *see* Borghetti, *supra* note 65 at 510-511.

[71] *Ordonnance n° 2020-315 du 25 mars 2020 relative aux conditions financières de résolution de certains contrats de voyages touristiques et de séjours en cas de circonstances exceptionnelles et inévitables ou de force majeure.* Available at : https://www.legifrance.gouv.fr/loda/id/JORFTEXT000041755833/ (last visited Apr. 1, 2024).

[72] More recently, in June 2023, through a preliminary ruling addressed by *Conseil d´Etat*, the European Court of Justice (ECJ) found that this provision (refund by credit note instead of cash) is contrary to

316[73] declares unenforceable penalties and other sanctions during the health state emergency declared in France (*pénalités financières ou intérêts de retard, de dommages-intérêts, d'astreinte, d'exécution de clause résolutoire, de clause pénale ou de toute clause prévoyant une déchéance, ou d'activation des garanties ou cautions, en raison du défaut de paiement de loyers ou de charges locatives afférents à leurs locaux professionnels et commerciaux*).

Furthermore, reasonable unforeseeability is a common requirement for both *force majeure* and the theory of *imprévision* – despite the fact that it is found explicitly only in article 1218 (that belongs to *force majeure*).[74] The outbreak of pandemics is a phenomenon quite common in History, though it cannot be reasonably expected that parties could suppose the occurrence of COVID, specially the dimension of its effects worldwide – when concluding a contract.

When it comes to COVID-19, the temporal aspect does not confine to that stated above (before or after the Reform), since the date of the conclusion is not only decisive for establishing the legal regime applicable to the contract, but also can be determinant to set the degree of unforeseeability, according to the growing knowledge regarding the disease and the timeline of the events, since the first news about a new disease, passing by its spread, the classification as pandemic and so on. Yet the measures undertaken by public authorities varied significantly from a region or country to another, specially on the activities classified as non-essentials.[75] In France a strict lockdown was imposed twice in 2020: from March 17 to May 11 and from October 30 to December 15.[76]

Moreover, awareness of COVID-19 should not automatically lead to assessment of its impact. Even the term "pandemic" was employed by WHO for the first time in a declaration only on March 11, 2020, circumstance that weakens the assumption that, before that date, parties could properly assess the dimension of COVID-19 as a global pandemic.

Finally, as already exposed, the discharge due to *force majeure* only benefits the debtor and as long as it is concerned a non-monetary obligation. These restrictions have not – at least, so far – put for the amendment of terms due to *imprévision*.

To sum up, COVID-19 may characterize a significant change of circumstances that triggers the application of legal mechanisms existent in the French legal system, as long as

Directive (EU) 2015/2302 and national legislations are precluded from from derogatin that norm… (C-407/21)

[73] *Ordonnance n° 2020-316 du 25 mars 2020 relative au paiement des loyers, des factures d'eau, de gaz et d'électricité afférents aux locaux professionnels des entreprises dont l'activité est affectée par la propagation de l'épidémie de covid-19.* Available at : https://www.legifrance.gouv.fr/loda/id/JORFTEXT000041755842 (last visited Apr. 1, 2024).

[74] *see* Cosson Bénédicte Fauvarque, *Does Review on the Ground of Imprévision Breach the Principle of the Binding Force of Contracts?*, 1 Revija Kopaoničke škole prirodnog prava 11, 24 (2019): "It was surprising that, while article 1195 requires that the change in circumstances be unforeseeable, article 1218 on force majeure is limited to an event which could not 'reasonably' have been foreseen. Harmonizing the two provisions either by using the adverb 'reasonably' in article 1195 (to give an objective connotation to the test that the court will have to implement), or by deleting it from article 1218, would have been logical, even if, in practice, this would have had only a cosmetic function."

[75] The criteria of the classification were not uniform.

[76] *see* Borghetti, *supra* note 65 at 511.

such an event is significant, reasonably unforeseeable and irresistible (externality goes without saying).
Despite the particularities dictated by the Civil Code as interpreted by French courts, the fundamental legal point concerns the concrete material impact brought to the contractual obligation, making its performance reasonably and humanly[77] impossible or merely more difficult or onerous. In the first case, the impossibility can lead to the full discharge of the obligation, (*force majeure*). In the second one, the hardness implies the modification of the obligation (*imprévision*).

III. GERMAN LEGAL SYSTEM

3. *The German approach to unexpected changes*

Turning now to the legal system on the other side of the Rhine, it should first be underlined that the development of the German approach to unexpected circumstances had taken a different course in comparison to France, since it is strongly based on *impossibility*[78] and can look back on a long history (at least in the jurisdiction) regarding its own iteration on *hardship*, centered around the "foundations of the transaction" (*Geschäftsgrundlage).*[79]
Moreover, the German system of civil liability, whether contractual or non-contractual, is based on the fault principle (*Verschuldensprinzip*), meaning that usually at least negligence is required for being held liable, precisely what is not present in *force majeure* constellations.[80]
Because of the abovementioned, it is evident that with regard to unpredictable events, such a rich legal culture regarding *force majeure* does not exist, at least not in statutory law.[81]
This becomes apparent, if one takes a look at the Civil Code in Germany, the *Bürgerliches Gesetzbuch*[82]*,* which was finally completed and adopted in 1896 and came into force on the symbolic date of January 1, 1900, ushering the new century with a new codification.[83]

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[77] Patrick Wéry, Droit des obligations. Volume 1 . Théorie générale du contrat 599 (3rd ed. 2021).
[78] Martin Schmidt-Kessel & Christina Möllnitz, *Particular Corona Contract Law in Germany: Why Does General Contract Law Not Suffice?*, *in* Coronavirus and the Law in Europe 699, 700 (2021).
[79] Klaus Peter Berger & Daniel Behn, *Force Majeure and Hardship in the Age of Corona: A Historical and Comparative Study* 6 *McGill J. Disp. Resol.* 78, 115, 117, 120 (2020).
[80] Günter Weick, *Force Majeure - Rechtsvergleichende Untersuchung und Vorschlag für eine einheitliche europaische Lösung*, Zeitschrift für europäisches Privatrecht 282, 283 (2014); Philip Ridder & Marc-Philippe Weller, *Unforeseen Circumstances, Hardship, Impossibility and Force Majeure under German Contract Law*, European Review of Private Law 371, 373 (2014);
[81] In this respect, it is also said that force majeure "leads a shadowy existence" in German statutory law Weick, *supra* note 80, at 282.
[82] The codification is and was, as the last big reform (*Schuldrechtsmodernisierung)* in 2002 also showed, the main source of private law in Germany. It is composed of five different books: The General part (Sections 1-240), the law of obligations (Sections 241-853), the law of property (Sections 854-1296), the family law (Sections 1297-1921) and, finally, the law of succession (Sections 1922-2386) of which the General part in particular is the most important part as it contains the general provisions of the German doctrine of legal transactions and the concept of contract, whereas for example, the specific types of contract to which the rules of the first book apply can be found further down in the second part. *see* Marin Keršić, *Conceptions of Contract in German and English Law and Their Legal Traditions*, *in* Common Law and Civil Law Today-Convergence and Divergence 363, 366 (Marko Novakovic ed., 2019).
[83] *see* James Gordley, Hao Jiang & Arthur Taylor von Mehren, *Introductory Readings*, *in* An Introduction to the Comparative Study of Private Law: Readings, Cases, Materials 3, 25 (2021).

Here we see that, regarding the occurrence of *force majeure* in statutory provisions, the individual sections that actually refer to *höhere Gewalt*, the German equivalent for *force majeure*, are in most cases peripherical provisions[84] or special laws outside the scope of the German Civil Code dealing with *strict liability*, such as the provisions which can be found in the Road Traffic Act (*Straßenverkehrsgesetz*).[85] In such cases, where fault is not required by law as a prerequisite for liability, exceptions for *force majeure* constellations are necessary, as otherwise one would also be exposed to liability in these situations.[86] At the same time, however, it should be emphasized that the little significance *force majeure* has in German statutory law stands, without doubt, in stark contrast to general commercial transactions, in which force majeure clauses were already common before the Corona pandemic.[87]

3.1 *Impossibility (Section 275)*

If situations occur, that may constitute a case of *force majeure* in other legal systems, the first question that arises under German statutory law is whether this may represent a case of *impossibility* within the contractual relationship, for which the corresponding provision in the German Civil Code is Section 275, composed by four paragraphs.[88]

From the wording of the first paragraph of Section 275 BGB it can be inferred that a claim for performance is excluded to the extent that performance is impossible for the obligor or any other person.[89] Here, a distinction can be made between physical or factual impossibility and legal impossibility. The latter covers, for example situations in which the performance would violate private, criminal or public law restrictions[90], though it is factually possible to perform.[91]

With regard to the period of time, the performance must always be permanently impossible, unless there is a case of only temporary impossibility, where the time of performance is so fundamental, that a late performance would be seen as an equivalent of a permanent impossibility.[92] In cases of temporary impossibility which do not fall under

[84] For example, in a statutory provision on the statute of limitations (section 206 of the German Civil Code), in a staturoy provision on the liability of the innkeeper (section 701 of the German Civil Code) and in a statutory provision in loan law (section 484 of the German Civil Code).

[85] Weick, *supra* note 80, at 284-285.

[86] Ridder & Weller, *supra* note 80 at 371, 373.

[87] Weick, *supra* note 80, at 284-285.

[88] Assuming that no contractual clause has been agreed on for this purpose.
Yvonne Bezer & Philipp Hoffmann*, COVID-19 als Act of God/Force Majeure/Höhere Gwalt? Rechtliche Implikationen der Corona-Krise auf bestehende Verträge, insbesondere Liefer- und VOB/B-Bauverträge*, Neue Juristische Onlinezeitschrift, 609, 611 (2020).

[89] *see* Bach, *supra* note 22 at 207.

[90] Roland Schwarze, Das Recht der Leistungsstörungen 42 (3rd ed. 2021).

[91] Additionally, the impossibility may already exist at the time the contract is concluded, also called initial impossibility (*anfängliche Unmöglichkeit*), but it may also occur later, therefore a case of subsequent impossibility (*nachträgliche Unmöglichkeit)*
Dirk Looschelders, Schuldrecht Allgemeiner Teil 162 (21st ed. 2023)

[92] *see* Bach, *supra* note 22 at 207-208; Looschelders, *supra* note 91 at 173.
The most well-known case is here probably the decision of the Federal Court of Justice (*Bundesgerichtshof*) in which a contract was concluded for the construction of a technical plant in Iran, in which the construction could not be carried out for an unforeseeable period of time due to the political situation that arose after the contract was concluded

this category, the performance is not excluded but might be suspended until it becomes possible again.[93] However, in this context the creditor may be entitled to claim damages for delay in accordance with the Sections 280 and 286 of the German Civil Code, provided that the debtor is legally responsible for the obstacle causing the temporary impossibility.[94] Additionally, there are cases in which the exact moment for performance, for example in the case of a delivery, is of enormous importance. Such a situation, in which the performance owed – by its nature or by the content of the obligation – can only be provided at a specific time, is termed an absolute fixed obligation (*absolute Fixschuld*).[95]
In summary, it can therefore be said that Section 275 (1) BGB is relatively strict in its meaning, with the result that, if performance is still achievable under highly challenging and onerous circumstances, the provision may not apply.[96]
However, in such a case Section 275 (2) BGB may apply, if the specific performance would be so onerous for the debtor, that it might be seen as a case of a so-called "factual impossibility".[97] Due to the fact, that here the performance is still possible but more burdensome, hardship constellations might fall within the scope of Section 275 (2) BGB.[98] Section 275 (2) BGB requires in this respect though a gross disproportion between the effort of the debtor to perform and creditor's interest in performance, taking into account the subject matter of the obligation and the requirement of acting in good faith.[99] From the second sentence it can be inferred that, for determining which efforts reasonably may be required of the debtor, it also is to be taken into account whether they are responsible for the impediment preventing performance. Furthermore, in comparison to Section 275 (1) BGB the legal effect of this provision does not occur *ipso jure* but needs to be invoked as a plea in court[100], as Section 275 (2) BGB represents a so-called right to refuse performance (*Leistungsverweigerungsrecht*).[101]
However, if one considers the intention of the legislator and the reference made to the gross disproportion, it becomes clear that Section 275 (2) BGB is merely an exceptional provision, that does not cover a general, comprehensive approach to deal with hardship constellations.[102] This becomes apparent if we think about situations in which there is a price shift regarding the delivery of goods, where the ratio between the creditor and the

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Bundesgerichtshof [BGH] [Federal Court of Justice] Mar. 11, 1982, 83 Entscheidungen des Bundesgerichtshof in Zivilsachen [BGHZ] 197 ff. (Ger.).
[93] Bach, *supra* note 22 at 208.
[94] Schwarze, *supra* note 90 at 57.
[95] Long term-contracts are usually also classified as cases of *absolute fixed obligation*
Looschelders, *supra* note 91 at 173.
[96] In academic discourse, the case of a ring falling to the bottom of the sea before being handed over is often used as an example to illustrate a scenario in which performance would be still possible but only under extremely difficult conditions.
see Looschelders, *supra* note 91 at 39.
[97] Bach, *supra* note 22 at 212; Ridder & Weller, *supra* note 80 at 371, 374.
[98] Bach, *supra* note 22 at 212; Ridder & Weller, *supra* note 80 at 371, 375.
[99] Looschelders, *supra* note 91 at 174.
[100] Ridder & Weller, *supra* note 80 at 371, 375.
[101] Here, this would cover indeed cover the abovementioned case of the ring falling to the bottom of the sea before being handed over, since the effort required is disproportionate to the interest of the creditor, which does not change.
Looschelders, *supra* note 91 at 174.
[102] Looschelders, *supra* note 91 at 174-175.

debtor's interests is taken into account and not just the value ratio, which leads to the result that the interest of a creditor often increases to the corresponding degree in the case of supply contracts where the market price of products rises.[103] Nevertheless, an adjustment of the respective obligations of both parties under Section 313 can be considered here, which we will address further on.

The third paragraph of Section 275 BGB describes the rather rare case of so-called personal unreasonableness (*persönliche Unzumutbarkeit*), in which the debtor may refuse performance if he is to render the performance in person – and having weighed the impediment preventing performance by them against the creditor's interest in performance – performance cannot reasonably be required of the debtor.[104]

The last paragraph of the provision concerning impossibility, Section 275 (4) BGB refers to other sections concerning the rights of the creditor and states that the exclusion of the obligation to perform does not indicate whether the impossibility also excludes the possibility of a claim for compensation and that the release from the obligation to perform may result in the rescission of the contract.[105]

Concerning the mirror-inverted obligation of the creditor to remunerate for the cases that fall under a provision of Section 275 BGB, one can find the general legal consequence in Section 326 (1) BGB, which is also referred to in Section 275 (4) BGB and states that the creditor is exempt from his obligation to pay.[106] Furthermore, this legal consequence also occurs *ipso jure*, which can be inferred from the wording, unless there is a case of Section 275 (2) or (3) BGB, since the right to refuse performance must be invoked, as described before.[107] Among the following paragraphs within Section 326 BGB one needs to consider especially Section 326 (2) BGB, according to which the obligation to remunerate remains to exist, when the creditor is solely or predominantly responsible, or if this circumstance for which the debtor is not responsible occurs at a time when the creditor is in delay of acceptance. In this case the debtor shall retain the right to claim for remuneration.

In sum, coming back to Section 275 BGB, it can be noticed that, to a certain extent, a large gap is created for the scenarios in which the performance of the obligation of a party is still possible, but only under aggravating or more onerous conditions, which cannot be overcome by the previously presented system of provisions, also not Section 275 (2) and Section 275 (3).

[103] Constantin Willems, *Das Allgemeine Vertragsrecht in den Zeiten der Corona-Pandemie,* Zeitschrift Für Das Juristische Studium 183, 186 (2020).

[104] Wolfgang Ernst, in Münchner Kommentar zum Bürgerlichen Gesetzbuch § 275 paras 121-122 (9th ed. 2022).

[105] Wolfgang Ernst, in Münchner Kommentar zum Bürgerlichen Gesetzbuch § 275 para. 6 (9th ed. 2022).

[106] This is also plausible, as it is logical that no payment has to be made without the benefit being received, unless there are special circumstances.

[107] Schwarze, *supra* note 90 at 192-194.

3.2 *Hardship (Section 313)*

Whereas we had already observed that German statutory law does not properly classify *force majeure*, we now see that the German law system can look back on a long history regarding its own iteration on hardship[108], called *Störung der Geschäftsgrundlage*[109], which has its origin in German case law and developed in this area over decades, now more than a century. The corresponding provision in the German Civil Code is Section 313, which was introduced with the Reform of the law of obligation in 2002 (*Schuldrechtsmodernisierung*).[110]

At the same time, however, it should be emphasized that during the drafting process of the German Civil Code, which took more than twenty years and involved three different commissions[111], there was criticism of a possible insertion of the *clausula rebus sic stantibus* principle, so that the first version (when the German Civil Code came into force) did not include a section corresponding to such a provision[112], also because it was feared that the incorporation would generate a certain degree of legal uncertainty, which is why they did not want to open the floodgates to this.[113]

The turning point in this respect was to come a full twenty years after the German Civil Code came into force, when the hyperinflation caused prices to rise dramatically over a period of two years, affecting all private contracts. This prompted the former Supreme Court of Germany, the *Reichsgericht*, after first trying to respond to this with the impossibility, to develop and establish the *Störung der Geschäftsgrundlage*, applying the principle of good faith in accordance with Section 242 of the German Civil Code[114], after several decisions in the two years prior to this had already indicated a change of direction here.[115] If one examines the decision of the court precisely, one also finds the reference made to *Oertmann*[116], who was the originator of the concept of the *Störung der Geschäftsgrundlage*.[117] However, who was not mentioned in the decision, was *Windscheid*, who was already a member of the first commission drafting the German Civil Code[118], who was

[108] For the sake of simplicity and for the purpose of a comparative legal analysis, this article uses the term hardship, which originates from common law. The German *Störung der Geschäftsgrundlage* is referred to as a variant, iteration or approach to it.

[109] With regard to the terminology, the *Störung der Geschäftsgrundlage,* which we can find in Section 313, is referred to in English as both *Disturbance of Foundation of Contract*, or *Disappearance of the contractual basis*, although there is no difference in terms of content. Apparently no consensus has yet been reached here, as the term of *collapse of the underlying basis of transaction* is also used. *see* Rössler, *supra* note 21 at 483, 488.

[110] 26.11.2001 BGBI. I p. 3138, 3150.

[111] Gordley, Hao Jiang, and Taylor von Mehren, *supra* note 83 at 24-25; Tobias Lutzi, *Introducing Imprévision into French Contract Law – A Paradigm Shift in Comparative Perspective*, *in* The French Contract Law Reform: a Source of Inspiration? 89, 100 (Sophie Stijns & Sanne Jansen eds., 2017)

[112] Berger & Behn, *supra* note 79 at. 120-122.

[113] Lutzi, *supra* note 110 at 100.

[114] Reichsgericht [RG] [Supreme Court of the German Empire] Feb. 3, 1922, 103 Entscheidungen des Reichsgerichts in Zivilsachen [RGZ] 328, 328-333 (Ger.).

[115] Lutzi, *supra* note 111 at 100.

[116] Reichsgericht [RG] [Supreme Court of the German Empire] Feb. 3, 1922, 103 Entscheidungen des Reichsgerichts in Zivilsachen [RGZ] 328, 332 (Ger.).

[117] Schwarze, *supra* note 90 at 89.

[118] Gordley, Hao Jiang, and Taylor von Mehren, *supra* note 83 at 24, 25.

unable to push through his idea of introducing his own approach to *clausula rebus sic stantibus*[119], but nevertheless had an impact on the arising of the *Störung der Geschäftsgrundlage.*
Today, Section 313 BGB consists of three paragraphs, of which the most crucial is the first one, which describes the facts or the conditions that must prevail for the provision to apply.[120] In this regard we can distinguish between three elements, which have emerged from case law. Firstly, the factual element (I.), i.e. the change of circumstances that became the basis of a contract (*Geschäftsgrundlage)* since the contract was concluded. Secondly, the hypothetical element (II.) i.e. the examination of the hypothetical will of the parties as to whether the parties would have concluded the contract or would have Concluded it differently if they had foreseen it. And thirdly, the normative element (III) for risk allocation and reasonableness according to which the change must be so severe, that one of the parties cannot reasonably be expected to maintain the contract without adaptation.[121]
Regarding the term basis of the contract (*Geschäftsgrundlage)*, which is not defined in Section 313 BGB, courts interpret it as the common ideas of both contracting parties, which were not incorporated into the contract but which came to light when the contract was concluded, or to put it in a different way, the ideas of one of the contracting parties, which are recognizable to the other party and not objected to by him, regarding the existence, future occurrence or continuation of certain circumstances on which the parties' business intentions are based.[122] Accordingly, the basis of the contract can only be what the parties have not expressly or impliedly agreed as the content[123].
Section 313 (1) further requires that the circumstances that have become the basis of the contract have changed seriously after the conclusion of the contract. In this respect the change must, on the one hand, be of some significance and, on the other hand, not only exist by itself but also have a concrete effect on the contractual relationship[124], causing, for example, an equivalence or rendering the object of performance unusable.[125] Regarding the normative element, when determining unreasonableness, the contractual and statutory

[119] Lutzi, *supra* note 111 at 100.
[120] The second paragraph extends the scope of application to situations in which a change in circumstances is deemed to have occurred if fundamental ideas that formed the basis of the contract turn out to be incorrect.
[121] Thomas Finkenauer, in Münchner Kommentar zum Bürgerlichen Gesetzbuch § 313 para. 56 (9th ed. 2022)
[122] In addition to this subjective formula, which has been shaped by case law, there is also the objective formula, according to which all circumstances whose existence or continuation is necessary for the contract to still exist as a meaningful provision in accordance with the intentions of both contracting parties are to be understood as such.
Astrid Stadler, *in* Jauernig, Kommentar Zum BGB, § 313 para. 3-4 (19th ed. 2023).
[123] Looschelders, *supra* note 91 at 296.
[124] Regarding the effect of the disturbance of the basis of the contract, a distinction is made between the so-called large contractual basis (*große Geschäftsgrundlage*), which includes fundamental changes in political, economic or social circumstances such as revolutions, inflation and natural distasters and the small contractual basis (*kleine Geschäftsgrundlage*) which is usually based on changes that are only relevant for the respective contract.
Astrid Stadler, *in* Jauernig, Kommentar Zum BGB, § 313 para. 5 (19th ed. 2023);
[125] Looschelders, *supra* note 91 at 296.

distribution of risk is of particular importance and the interests of both parties in the individual case need to be weighed up.[126]
With regard to the legal consequences of Section 313 BGB, a distinction is made between two alternatives: an adjustment of the contract according to Section 313 (1) BGB can be demanded and, if not possible or not reasonably acceptable, rescission or termination in the case of long-term obligations.[127]

4. *Application during the coronavirus pandemic*
4.1 *General measures in civil law to mitigate the consequences of the pandemic*
The first law to mitigate the consequences of the COVID-19 pandemic was passed on March 25, 2020 in the German Bundestag and on March 27, 2020 in the Bundesrat.[128] This law, that introduced the new article 240 of the Introductory Act to the Civil Code (EGBGB)[129], which consisted, initially, of four temporal paragraphs concerning contractual relationships with regard to long-term contracts, which were limited in time and of which the first and most important Section was labeled as "moratorium".
The so-called moratorium (Art. 240 Sec. 1 para. 1) gave consumers and small entrepreneurs a right to refuse performance in the case of "essential long-term contracts"[130] (*wesentliche Dauerschuldsverhältnisse*) provided that the contract was concluded before March 8, 2020 and that the circumstances of the incapacity to perform were based on the consequences of the pandemic and the provisions of the service would endanger their livelihood or, in the case of the small entrepreneurs, that the enterprise is unable to provide the service or that the enterprise would not be able to provide the service without jeopardizing the economic basis of its business.
An exception to both rules was also inserted (Art. 240 Sec. 1 para. 3) which applied if the performance of the right to refuse was unacceptable for the other contracting party. In such constellations, at least the possibility of termination for the debtor remained.
Rental and lease contracts were deliberately excluded from the basic rule (Art. 240 Sec. 1 para. 4) of the first paragraph, as a separate rule had been established in the second section, according to which a tenant could not be terminated if they were unable to pay between April 1 and June 30, 2020 due to the pandemic. The third paragraph contained provisions

[126] Looschelders, *supra* note 91 at 300.
[127] Looschelders, *supra* note 91 at 295.
[128] Jonas Rehn, *Maßnahmen wider (der heiligen) Corona: Änderungen im Zivilrecht durch Art. 5 des Gesetzes zur Abmilderung der Folgen der COVID-19-Pandemie im Zivil-, Insolvenz- und Strafverfahrensrecht (COVFAG),* 30 *Deutsche Zeitschrift für Wirtschafts- und Insolvenzrecht* 277, 277 (2020); Publication of the Bundestag on the Internet, https://www.bundestag.de/dokumente/textarchiv/2020/kw13-de-corona-recht-688962.
[129] The Introductory Act to the Civil Code regulates, among other things, private international law and the scope of individual statutory provision contained in the German Civil Code in terms of time and territory
Franz Jürgen Säcker, *in* Münchner Kommentar zum Bürgerlichen Gesetzbuch, Vorbemerkung (Vor Art. 1 EGBGB) paras 1-2 (9th ed. 2024).
[130] The definition for "essential long-term contracts" (*wesentliche Dauerschuldverhältnisse)* can also be found in the moratorium (Art. 240 Sec. 1 para. 1 & 2) and was a modified for the respective addressees. In this respect "essential long-term contracts" for consumers were those that were required to cover common basic services whereas for small entrepreneurs those that are required to cover services for the appropriate continuation of business operations.

on loan law, which we will not go into here, and the fourth contained the possibility for the federal government to extend the measures.

In summary, the initial aim was to intercept the provisions of the German Civil Code (BGB) in particular, which give right to terminate long-term contracts in accordance with Sections 314 and 323 BGB, creating "a bridge" for contracts before the pandemic, with the aim of preserving as many contracts as possible in accordance with the principle of "pacta sunt servanda" while at the same time protecting consumers. Nevertheless, it should be emphasized that, at this point, the regulations did not contain any provisions regarding a possible adjustment of the contract, nor did they refer to Section 313 BGB, for example.

4.2. *The Introduction of Art. 240 Section 7 EGBGB*

An interesting question that the first amendment to Art. 240 EGBGB had left out was the fact that, although the created Section 2 provided protection against termination for a certain period of time, there was no possibility to adjust the contract, although most of the commercial premises could no longer be used to their full extent, if not at all, in accordance with their purpose due to the various coronavirus regulations.[131]

These issues were finally addressed at the very end of 2020 through an insertion of Section 7[132], which applied to commercial leases and came into force on December 31, 2020.[133]

The newly introduced Section 7 consisted of two paragraphs and referred to Section 313 BGB. The first paragraph states that if rented land or rented premises that are not residential premises can´t be used for the tenants business or can only be used with significant restrictions as a result of government measures to combat the COVID-19 pandemic, it is assumed that a circumstance within the meaning of Section 313 (1) of the German Civil Code, which has become the basis of the contract (*Geschäftsgrundlage*), has changed significantly after the contract.

First of all, it can be seen from the Section that only commercial rent is covered, which makes sense in view of the above-mentioned relationship to the income of a business. Furthermore, it can be inferred from the provision that the introduction of Art. 240 Sec. 7 EGBGB was not intended to change the regulatory content of Section 313 BGB itself. Rather, the provision only affects existing doubts regarding the existence of the conditions. Accordingly, Art. 240 Sec. 7 EGBGB merely established the statutory presumption that a serious change in a circumstance that has become the basis of the rental agreement has occurred in the event of a business restriction caused by government measures.[134] It is therefore evident that the real problem with the application of Section

[131] In other words, they were effectively unable to use the rented units in order to finance their business.

[132]After three further amendments had been made within Art. 240 EGBGB in the meantime, establishing Section 5 & 6 which, however, concerned vouchers for leisure events and the package travel law. 15.05.2020 BGBI. I p. 948; 10.07.2020 BGBI p. 1643.; 06.08.2020 BGBI. I p. 1870.

[133] 22.12.2020 BGBI. I p. 3328.

[134] However, this rebuttable presumption does not apply to all elements of Section 313 BGB. In this regard, returning to the previously presented requirements of Section 313 BGB, only the factual or real element (I.) of Section 313 (1) BGB should by covered by this rebuttable presumption. Consequently, the party invoking Section 313 BGB must also provide evidence of the normative (II.) and hypothetical

313 BGB to commercial leases during the pandemic lay in the third and final element, unreasonableness (III.).
In this respect, it must have been unreasonable for one party to uphold the contract without alteration according to Section 313 (1) BGB.
This point had already been discussed in detail in legal journals and articles before the first court ruling, and the question arose as to whether this element could be categorized at all or whether a guideline for assessment could be created.
Thus, the unreasonableness of closure orders and other restrictions on operations is based on the legal and contractual distribution of risk, foreseeability, the nature of the business and possible personal responsibility. It was therefore more than questionable whether f.e. so-called case groups could be formed for this purpose. It was already clear before the introduction of Art. 240 Sec. 7 EGBGB that this problem would arise in the application of Section § 313 (1) BGB, as many voices in the literature initially spoke out in favor of applying the German provision for hardship, as a worldwide pandemic with subsequent operating restrictions and changes in economic transactions is similar to, for example, the Spanish flu, the world wars and hyperinflation, which already has been mentioned before.

4.3 *Judgement no. XII ZR 8/21 of the German Federal Court of Justice*

It was now a question of how the German courts would deal with these new provisions added to the EGBGB. In the first decisions of the German Higher Regional Courts concerning commercial premises rents, the applicability of Section 313 (1) BGB was initially affirmed, but with different justifications regarding unreasonableness and the approach to contract adjustment.
In addition to this, most of the German courts refused the approach of dealing with governmental restrictions to premises as defect in the rental object (*Mietmängel*), which would leave the door open for rent reduction under German law. In fact this solution was widely discussed before in the academic world and seen as a convenient way to deal with these issues within rental law.[135]
A good example of the different handling of this issue is the decision of the Dresden Higher Regional Court (*Oberlandesgericht Dresden*), in which the court of second instance, after the court of first instance had taken the view that the commercial rent had to be paid in full despite the restriction and losses, took the view that the risk of the pandemic, since it could not be allocated to the parties in principle, had to be borne equally by then and accordingly an adjustment to 50% of the rent had to made for the period, even leaving open the question of the extent to which state aid payments must be included in the review and calculation.[136]

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element (III.) At the same time, it can generally be assumed that the parties could not have assumed pandemic-related restrictions and closures and would not have concluded the contract in this way or under different conditions if they had been aware of this. In this sense, it can be assumed with the introduction of Art. 240 Sec. 7 EGBGB that the hypothetical element should not raise major concerns Christian Schmitt, *Mietreduktion wegen coronabedingter Geschäftsschließung – Anmerkungen aus Sicht eines Insolvenzpraktikers*, *Neue Zeitschrift für Insolvenz- und Sanierungsrecht* 159, 160-162 (2022).

[135] This approach is f.e. discussed in: Silvio Sittner, *Mietrechtspraxis unter Covid-19 Neue Juristische Wochenschrift*. 1169-1174 (2020).

[136] OLG Dresden, 24 Feb. 2021, 5 U 1782/20, *Neue Justiz (NJ)* 2021, 170 et seq.

This case was later brought to the Federal Court of Justice (*Bundesgerichtshof*), which gave its ruling on the matter.[137] The highest court of ordinary jurisdiction in Germany initially agreed with the prevailing opinion that the corona-related closures did not constitute a rental defect (*Mietmangel)* within the meaning of German rental law. Furthermore, the issue of whether this might constitute a case of impossibility according to German law, was addressed. The Federal Court of Justice rejected this blanket solution, which would lead to an exemption from the obligation to pay[138] and stated in a relatively succinct manner that the duty to grant the use of the rented object and maintain it in these conditions as contractually agreed, was not made impossible by the fact that the rented property could not be used due to government restrictions, as the creditor was able to provide its contractually obligated performance since the further use of the rented object is subject to the risk of the debtor. [139].

Concerning the most important question, the scope of Section 313 BGB, it was stated that the lower court correctly affirmed its application but did not take certain points into account. The court stated that the various restrictions during the pandemic concerned a so-called "large contractual basis" (*große Störung der Geschäftsgrundlage*) and referred to the newly created Art. 240 Sec. 7 EGBGB, which has retroactive effect. After brief explanations regarding the assumption of risks[140], the judgement explains that the mere existence of the real element within Section 313 BGB does not itself trigger a claim for adjustment, which is nothing new in this respect. The criterion frequently described in this article and referred to as the hypothetical element of the review of Section 313 BGB is affirmed relatively quickly by the court.[141]

Regarding the unreasonableness the explanations differ in particular from those of the previous court. First, the court states that, in principle, the turnover of a commercial property falls within the scope of risk of the commercial operator or tenant. However, if the loss of profit is due to government measures, this goes beyond the actual usage risk (*Verwendungsrisiko*). This falls into the category of ordinary risks of life (*Allgemeines Lebensrisiko*), which cannot be attributed to any individual contracting party. With regard to unreasonableness, however, the individual case must be taken into account, so that a generic solution, such as dividing the risk equally, is ruled out.[142] Furthermore, it is important for the assessment, what disadvantages the tenant has suffered as a result of the closure of the business and its duration and to what extent this could have been mitigated.

[137] BGH, 12.01.2022 – XII ZR 8/21, NZM 2022, 99-107.

[138] According the interplay between Section 275 and Section 326 German Civil Code which was described beforehand.

[139] BGH, 12.01.2022 – XII ZR 8/21, NZM 2022, 103.
At this point, the distinction between cases of impossibility and those concerning the interference with the basic of the transaction (*Geschäftsgrundlage)* becomes very clear. Essentially the latter one does not concern conditions that are contractually owed.

[140] in German law this is often referred to as usage risk in rent law (*Verwendungsrisiko*)

[141] In this respect, it can be assumed that the parties would have concluded the rental agreement with a different content if they had foreseen and considered the possibilities of a pandemic and the associated risk of a government ordered business closure when concluding the agreement in 2013.

[142] And at this point the Federal Court of Justice decides against the view of the court of the former instance, who opted for dividing the risk and therefore the adjustment equally between the parties.

In addition, an adjustment should not result in overcompensation, so that the financial benefits, such as state aid and insurance payments, but not, for example state loans, must also be taken into account in the assessment.
Overall, this judgement can be seen as a guideline for the handling of Section 313 BGB in rental law, as it was the first major decision of the Federal Court of Justice in this regard. This jurisdiction was confirmed in the following judgements of the twelfth senate, which is to have the competence for commercial rents, in which the court applied Section 313 BGB in similar situations and was able to specify the exact requirements more precisely.[143]
In a recent judgement the ruling of a Regional Court was rejected, which had taken the view that the payment obligation in a charter contract for a yacht could be waived due to impossibility, as it could not be used during the pandemic because of restrictions on accommodation and overnight stays. This court had also not relied on Section 313 BGB, so the case was referred back to the Regional court by the Federal Court of Justice for a new decision.[144]

CONCLUSION

The question of significance and usefulness of Comparative Law was exposed to much criticism in the early years. In this respect it was brought out that there is no clear aim when comparing legal solutions in order to archive mere knowledge.[145] With regard to the added value of such a comparative law study, it can be said that – by reviewing the presumably most influential civil law codifications and legal systems – the outcome may serve, on the one hand, to a better understanding of the legal systems in the case of unification projects and, on the other hand, to a better understanding of the origins of the concepts.
Regarding hardship, the introduction of *théorie d´imprévision*, through article 1195 of the Civil Code, demanded a long and complex process in the French legal system, bringing it in line with European and International frameworks.[146] It promotes alternative means of dispute resolution, but consenting, if necessary, judicial review of the terms of private contracts rendered unbalanced due unexpected events that affect performance.
Still, *théorie d´imprévision* differs from *Geschäftsgrundlage*, since the latter focuses on the performance being rendered excessively onerous whereas the German approach is broader and goes further and requires in this respect that the basis of the contract has undergone a serious change since the contract was concluded.[147]

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143 *see* here for example: BGH, 16.02.2023 – XII ZR 17/21, NZM 2022, 292-295; BGH, 13.07.2023 – XII ZR 75/12, NJW-RR 2022, 1307.
144 BGH, 11.10.2023 – XII ZR 87/22, MDR 2024, 20-22.
145 *see* for the general discussion of the justification and the purposiveness of Comparative Law Rodolfo Sacco, *Legal Formants: A Dynamic Approach to Comparative Law (Instllment I of II)*, 39 The American Journal of Comparative Law 1-34 (1991).
146 *see* Cosson Bénédicte Fauvarque, *Does Review on the Ground of Imprévision Breach the Principle of the Binding Force of Contracts?*, 1 Revija Kopaoničke škole prirodnog prava 11, 12 (2019):
"In the French reform, there was neither slavish copying, nor the 'myth of the foreign legislator',4 nor acculturation or intrusion of European law. Article 1195 is one of the most striking illustrations of the phenomena of hybridization across legal families and is also a testimony to legal pluralism within Europe. It draws its inspiration from the European and international environment, whilst differentiating itself from them in several respects."
147 Berger & Behn, *supra* note 79 at 117-120.

As far as impossibility is concerned, we will inevitably have to accept that there will be no alignment between the two systems in the near future: *force majeure* in French Civil Code has been moved to a different position, from art. 1148 to 1218, and its three requirements – once forged by case law – are now present. Unforeseenability is qualified by reasonability, characterizing a relative, subjective view. From the German side, no changes are be expected here either to *höhere Gewalt*, at most with regard to the use as a contractual clause, especially now more frequently due to the recent pandemic, as it would not be possible to amend or insert an exception for the cases of *force majeure* without a complete overhaul of German contract law and the provision regarding the impossibility. However, this reform would not be neither necessary nor advisable, as the current system has managed well without such a provision.

We could see that both France and Germany resorted to the enactment of emergency legislation: in France, restricted to specific contracts of tourism, bills and rental of professional and commercial establishments, whilst in Germany the introduction of Article 240 EGBGB and its moratorium, as the culmination of this development in Germany, allowed generous exceptions for long term obligations of consumers, which usually could have been ended by termination, in order to preserve a large number of contracts.

Such a strong response to the situation (created by the pandemic itself but also due to restrictions issued by the same governments) was necessary, as the existing and established provisions for contractual relationships would have led to problems of interpretation and application by the courts, causing protracted legal disputes and less legal certainty. Nevertheless, the European Court of Justice (ECJ) more recently ruled against the French emergency legislation adopted during the pandemic[148], holding that it was contrary to EU Law – what shows that many contracts, also in other EU countries, can be re-examined, thus partially hinding the envisaged aim of avoiding long-lasting legal disputes and legal uncertainty.

COVID-19 was a great challenge to human society, an example of social crisis on a global scale, bringing about millions of deaths around the world in the course of few months. Health systems were unable to properly deal with the hundreds of millions of cases. Nor did EU legal systems, for which the coronavirus was a "stress test".[149] When it comes particularly to France and Germany, despite the differences between the legal concepts, the statutory mechanisms of impossibility and hardship could not deal with the dimensions of the crisis, at least without the "bridge" brought by emergency legislation – initiative that is now under check. This weakness is quite alarming, since massive social crisis can occur: new pandemics are likely in the near future, according to many epidemiologists' conjectures.

[148] France: C-407/21. Also Slovakia: C-540/21.

[149] Christian Twigg-Flesner, *The Covid-19 Pandemic – a Stress Test for Contract Law?*, 9 Journal of European Consumer and Market Law 89-92 (2020).