

Contractual Performance, Breach of Contract and Contractual Obligations in Times of Crisis: On the Need for Unification and Codification in European Contract Law

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Abstract: The sanctity of contracts, a guiding principle of contract law in civil law systems, requires that both or all contracting parties be expected to meet their contractual obligations, thereby ensuring efficacy and efficiency of private ordering. Under extraordinary circumstances, however, legal systems provide for mechanisms, which may excuse contractual performance or lead to adaption or termination of contractual obligations. Since the coronavirus pandemic, these mechanisms have clearly gained traction. Drawing on five important civil law jurisdictions (Germany, Austria, Switzerland, France, Italy), this article elaborates on excuses of contractual performance and remedies for breach of contract and on adaption or termination of contractual obligations. The article aims to address the fundamental questions, whether these excuses and remedies and institutions on adaption or termination still serve their purpose in times of pandemic or whether and to what extent a uniform breach of contract action or a codification of such institutions is needed in European Contract Law. A functional and comparative approach is used to unfold and analyse these timeless questions from a contemporary perspective.

Résumé: La fidélité contractuelle, un principe directeur du droit des contrats dans les systèmes de droit civil, exige que l'on attende des deux ou de toutes les parties contractantes qu'elles remplissent leurs obligations contractuelles, garantissant ainsi l'efficacité et l'efficience de l'ordre économique privé. Dans des circonstances extraordinaires, cependant, les systèmes juridiques prévoient des mécanismes qui peuvent excuser l'exécution du contrat ou conduire à l'adaptation ou à la résiliation des obligations contractuelles. Depuis la pandémie de coronavirus, ces mécanismes ont pris un essor considérable. S'inspirant de cinq juridictions de droit civil importantes (Allemagne, Autriche, Suisse, France, Italie), cet article traite des excuses de l'exécution contractuelle et des recours en cas de rupture de contrat et d'adaptation ou de résiliation des obligations contractuelles. L'article vise à répondre aux questions fondamentales de savoir si ces excuses et recours et les institutions en cours d'adaptation ou de résiliation remplissent toujours leur fonction en temps de pandémie ou si et dans quelle mesure une action uniforme en matière de rupture de contrat dans le Droit européen des contrats est nécessaire. Une approche fonctionnelle et comparative est utilisée pour développer et analyser ces questions intemporelles dans une perspective contemporaine.

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Zusammenfassung: Die Vertragstreue, ein Leitprinzip des Vertragsrechts in Zivilrechtssystemen, erwartet von beiden oder allen Vertragsparteien, dass diese ihren vertraglichen Verpflichtungen nachkommen, wodurch die Wirksamkeit und Effizienz der privaten Wirtschaftsordnung gewährleistet wird. Unter ausserordentlichen Umständen sehen die Rechtssysteme jedoch Mechanismen vor, welche von der Vertragserfüllung entbinden oder zur Anpassung oder Beendigung von vertraglichen Verpflichtungen führen. Seit der Coronavirus-Pandemie haben diese Mechanismen deutlich an Zugkraft gewonnen. Dieser Artikel stützt sich auf fünf wichtige zivilrechtliche Rechtsordnungen (Deutschland, Österreich, Schweiz, Frankreich, Italien) und geht auf die Entbindung von der Vertragserfüllung und Rechtsmittel bei Vertragsverletzungen und auf die Anpassung oder Beendigung von vertraglichen Verpflichtungen ein. Der Artikel zielt auf die grundlegenden Fragestellungen ab, ob diese Entbindungen und Rechtsmittel und die Institutionen zur Anpassung oder Beendigung auch in Zeiten einer Pandemie ihren Zweck erfüllen oder ob und inwiefern im Europäischen Vertragsrecht ein einheitliches Leistungsstörungenrecht oder eine Kodifikation dieser Institutionen erforderlich ist. Mit einem funktionalen und vergleichenden Ansatz werden diese zeitlosen Fragestellungen aus einer zeitgenössischen Perspektive entfaltet und analysiert.

1. Introduction

1. The sanctity of contracts, a guiding principle of contract law in civil law systems, requires that both or all contracting parties be expected to meet their contractual obligations, thereby ensuring efficacy and efficiency of private ordering.¹ Consequently, the principle of *pacta sunt servanda*, according to which agreement must be kept, serves as a general principle of civil law. This

1 For a comprehensive study on this principle in German private law, see M.-P. WELLER, *Die Vertragstreue: Vertragsbindung, Naturalerfüllungsgrundsatz, Leistungstreue* (Tübingen: Mohr Siebeck 2009). From an Austrian perspective, see J. NOLL, 'Pacta sunt servanda & clausula rebus sic stantibus: Der Wert der Vertragstreue', *AnwBl (Österreichisches Anwaltsblatt)* 2002, p 260. From the perspective of Swiss law in general, see B. STAUDER, 'Pacta sunt servanda et le droit de repentir des consommateurs', *SJ (Semaine Judiciaire)* 1982, p 481; D. LEU, 'Vertragstreue in Zeiten des Wandels: Die clausula rebus sic stantibus und das Kriterium der Vorhersehbarkeit', in D. Dédeyan et al. (eds), *Vertrauen, Vertrag, Verantwortung* (Zürich; Schulthess 2007), p 21; P. HACHEM, 'Die Konturen des Prinzips Pacta Sunt Servanda', in A. Büchler & M. Müller-Chen (eds), *Private Law: national, global, comparative* (Bern: Stämpfli 2011), p 647; A. CAMPI, 'Pacta sunt servanda ... aut rescindenda? L'évolution de notre droit des obligations face au dilemme des conventions lésionnaires', in O. Hari (ed.), *Protection de certains groupements de personnes ou de parties faibles versus libéralisme économique: quo vadis?* (Zürich; Schulthess 2016), p 21. With regard to mergers and acquisitions under Swiss law, see H. SCHÄRER & B. GROSS, 'Pacta sunt servanda - von der Realerfüllung des Unternehmenskaufvertrags und deren prozessualer Durchsetzung', in R. Tschäni (ed.), *Mergers & Acquisitions XVI* (Zürich; Schulthess 2014), p 115. From a French perspective, see J. BÄRMANN, 'Pacta sunt servanda: Considérations sur l'histoire du contrat consensuel', *RDIDC (Revue de droit international et de droit comparé)* 1961, p 18. From an Italian perspective, see G. DE NOVA, 'Il contratto ha forza di legge tra le parti', in P. Cendon (ed.), *Scritti in onore di Rodolfo Sacco II* (Milano: Giuffrè 1994), p 315.

principle dominates the law of contracts. One justification for this dominant role can be traced back to legal certainty and economic efficiency, the other lies in the fact that contracting parties are free to include specific clauses in their contract for allocating the distribution of risks between them. In commercial practice, the contractual risk allocation may occur through *force majeure*, hardship or material adverse change clauses.

2. Under extraordinary circumstances, however, legal systems provide for mechanisms, which may excuse contractual performance or lead to adaption or termination of contractual obligations.² From a public policy perspective, nobody should be legally committed to do or to refrain from doing something that is impossible. An important distinction to be made is whether an act or omission is indeed permanently impossible or only temporarily impossible. The first case concerns the legal institution of subsequent impossibility (*nachträgliche Unmöglichkeit*, *impossibilité d'exécuter*, *force majeure*, *impossibilità sopravvenuta*), the second that of delay, either by the debtor (*Verzug des Schuldners*, *demeure du débiteur*, *mora del debitore*) or by the creditor (*Verzug des Gläubigers*, *demeure du créancier*, *mora del creditore*). The principle of *clausula rebus sic stantibus* (hardship) adds another dimension to this issue. Under various institutions of civil law, contracts may be adapted or terminated not only under changed circumstances

2 For an international comparison of contract law in Europe, see T. RÜFNER, 'Change of Circumstances', in N. Jansen & R. Zimmermann (eds), *Commentaries on European Contract Laws* (Oxford: Oxford University Press 2018), p 899. For a historical and comparative account, see R. ZIMMERMANN, "'Heard melodies are sweet, but those unheard are sweeter ...': *Conditio tacita*, implied condition and the Fortbildung des europäischen Vertragsrechts", in 193. *AcP (Archiv für die zivilistische Praxis)* 1993, p 121; A. THIER, 'Legal History', in E. Hondius & C. Grigoleit (eds), *Unexpected Circumstances in European Contract Law* (Cambridge: Cambridge University Press 2011), p 15. For a doctrinal analysis from a German perspective, see R. KÖBLER, *Die 'clausula rebus sic stantibus' als allgemeiner Rechtsgrundsatz* (Tübingen: Mohr Siebeck 1991). For a historical analysis from a German perspective, see G. GIEG, *Clausula rebus sic stantibus und Geschäftsgrundlage: Ein Beitrag zur Dogmengeschichte* (Aachen: Shaker 1994). For a historical analysis from an Austrian perspective, see C. MOKREJS, *Die clausula rebus sic stantibus – die antiken Quellen und ihre moderne Rezeption* (Wien: Universität Wien 2011). From a Swiss perspective, see P. TERCIER, 'La "clausula rebus sic stantibus" en droit suisse des obligations', *JT (Journal des Tribunaux)* I 1979, p 194; M. BURKHARDT, *Vertragsanpassung bei veränderten Umständen in der Praxis des schweizerischen Privatrechts: Vertragsgestaltung, Schiedsgerichtspraxis und Praxis des Bundesgerichts* (Bern: Stämpfli 1997); P. PICHONNAZ, 'La modification des circonstances et l'adaptation du contrat', in P. Pichonnaz & F. Werro (eds), *La pratique contractuelle 2* (Zürich: Schulthess 2011), p 21; E.A. KRAMER, 'Neues zur clausula rebus sic stantibus', 110. *SJZ (Schweizerische Juristen-Zeitung)* 2014, p 273; B.V. ENZ, *Clausula rebus sic stantibus – Insbesondere im Spiegel der Rechtsprechung* (Zürich: Schulthess 2018). On the occurrence and rejection of the principle *rebus sic stantibus* under French law, see L. THIBIERGE, *Le contrat face à l'imprévu* (Paris: Economica 2011), paras 194–215. From an Italian perspective, see P. GALLO, 'Revisione e rinegoziazione del contratto', in R. Sacco (ed.), *Digesto delle discipline privatistiche: Sezione civile* (Torino: Utet 1988), p 804.

(*Störung der Geschäftsgrundlage, imprévision, presupposizione*), but also for cause (*Kündigung von Dauerschuldverhältnissen aus wichtigem Grund, caducité, eccessiva onerosità*).

3. Since the coronavirus pandemic, these mechanisms have clearly gained traction.³ In view of various coronavirus-related impediments – prohibitions such as a lockdown or other government restrictions and difficulties related to the pandemic such as supply shortages or demand shocks – contracting parties, business enterprises and customers alike, were faced with the problem, whether existing contracts are still valid and binding, and thus must be adhered to, or whether performance may be suspended or its acceptance refused. It is therefore practically relevant, whether contractual performance may be excused and contractual obligations adapted or terminated. Although there are structural differences in how different legal systems address coronavirus-related impediments, there are arguably similar end results in how legal regimes address such impediments. There is therefore a demonstrated interest in identifying and comparing similarities and differences of selected European jurisdictions in this regard.

3 From an international perspective, see F.T. SCHWARZ et al., ‘Introduction’, in F.T. Schwarz et al. (eds), *Contractual Performance and COVID-19: An In-Depth Comparative Law Analysis* (28 Apr. 2020), paras 1–3, 5–13; 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 (ed.), *Law in the Time of COVID-19* (20 Apr. 2020); G. WAGNER, ‘Corona Law’, *ZEuP (Zeitschrift für Europäisches Privatrecht)* 2020, p 531. From a German perspective, see S. LORENZ, ‘Allgemeines Leistungsstörungenrecht und Veranstaltungsrecht’, in H. Schmidt (ed.), *COVID-19: Rechtsfragen zur Corona-Krise* (München: C.H. Beck 2020), p 1. For a first interpretative note under Austrian law, see M. UITZ & H. PARSCHE, ‘Vertragsverstöße aufgrund COVID-19’, *CuRe (COVID-19 und Recht)*, no. 1 (25 Mar. 2020). On the risk allocation in contracts under Swiss law, see B.V. ENZ, ‘Risikoordnung in Verträgen und die COVID-19 Situation: Teil 1 – Anwendungsbereich der clausula rebus sic stantibus, der Unmöglichkeit nach Art. 119 OR und der Kündigung aus wichtigem Grund’, *Jusletter* (18 May 2020); B.V. ENZ & S. MOR, ‘Risikoordnung in Verträgen und die COVID-19 Situation: Teil 2 – Problemstellungen der COVID-19 Situation im Werkvertragsrecht’, *Jusletter* (10 Aug. 2020); V. JENTSCH, ‘The Law of Contracts in the Age of the Coronavirus Pandemic: Is the Statutory Risk Allocation pursuant to the Swiss Code of Obligations still adequate?’, *Jusletter* (7 Sept. 2020), paras 5–50. On contract adaption under Swiss law, see A. HAEFELI et al., ‘Anpassung privatrechtlicher Verträge infolge von COVID-19’, in *COVID-19: Ein Panorama der Rechtsfragen zur Corona-Krise* (Basel: Helbing Lichtenhahn 2020), p 1. For a preliminary assesement under French law, see L. LANDIVAUX, ‘Contrats et coronavirus: un cas de force majeure? Ça dépend ...’, *Dalloz actualité* (20 Mar. 2020); C. VERRONST-VALLIOT & S. PELLETIER, ‘L’impact du covid-19 sur les contrats de droit privé’, *Dalloz actualité* (9 June 2020). On the eternal conflict between the principles of *pacta sunt servanda* and *rebus sic stantibus* from an Italian perspective, see A.S.M. ROSETI, ‘Il COVID-19 riaccende l’eterno conflitto tra il principio pacta sunt servanda e il principio rebus sic stantibus’, *Diritto del Risparmio* (17 Aug. 2020).

4. Drawing on five important civil law jurisdictions (Germany, Austria, Switzerland, France, Italy), this article elaborates on excuses of contractual performance and remedies for breach of contract and on adaption or termination of contractual obligations. The article aims to address the fundamental questions, whether these excuses and remedies and institutions on adaption or termination still serve their purpose in times of pandemic or whether and to what extent a uniform breach of contract action or a codification of such institutions is needed in European Contract Law. A functional and comparative approach is used to unfold and analyse these timeless questions from a contemporary perspective.

2. Excuses of Contractual Performance and Remedies for Breach of Contract

2.1. *Permanent Default of Non-Performing Party: Subsequent Impossibility of Performance*

5. The legal institution of subsequent impossibility generally applies to a situation, where contractual performance becomes permanently impossible. In such a situation, which may arise from a pandemic, all jurisdictions under examination excuse performance and counter-performance, at least if no party is responsible for the impediment, and provide for remedies such as damages, if a party is responsible for the impossibility. Switzerland and France are exceptions in this respect, not excusing parties from their duties, if they are at fault. In addition, impossibility is defined very broadly in Austria, for instance.

6. In Germany, section 275 of the German Civil Code applies to subsequent impossibility of performance. According to section 275(1), the claim for performance is excluded to the extent performance is impossible for the debtor or any other person. As impossibility is not defined in the statute, legal doctrine⁴ and case law⁵ have interpreted this rule to include ‘objective impossibility’, ‘subjective impossibility’ and ‘legal impossibility’. In all these cases, the debtor is excused

4 See R. SCHWARZE, *Das Recht der Leistungsstörungen* (Berlin: De Gruyter 2017) pp 37–66; H.P. WESTERMANN, in H.P. Westermann et al. (eds), *Erman Handkommentar zum Bürgerlichen Gesetzbuch* (Köln: Otto Schmidt 2017), § 275 paras 5–6, 15–16; A. STADLER, in R. Stürner (ed.), *Jauernig Kommentar zum Bürgerlichen Gesetzbuch* (München: C.H. Beck 2018), § 275 paras 4–23; W. ERNST, in F.J. Säcker et al. (eds), *Münchener Kommentar zum Bürgerlichen Gesetzbuch: Schuldrecht – Allgemeiner Teil I* (München: C.H. Beck 2019), § 275 paras 34–70; T. RIEHM, in B. Gsell et al. (eds), *beck-online Grosskommentar zum Bürgerlichen Gesetzbuch* (1 Feb. 2020), § 275 paras 86–141; S. LORENZ, in W. Hau & R. Poseck (eds), *Beck’scher Online-Kommentar zum Bürgerlichen Gesetzbuch* (1 Aug. 2020), § 275 paras 19–56.

5 On objective impossibility, see BGH, 13 Jan. 2011, III ZR 87/10, in *BGHZ* 188, 71; BGH, 8 May 2014, VII ZR 203/11, in *NJW (Neue Juristische Wochenschrift)* 2014, p 3365. On subjective impossibility, see BGH, 25 Oct. 2012, VII ZR 146/11, in *BGHZ* 195, 195. On legal impossibility, see BGH, 8 June 1983, VIII ZR 77/82, in *NJW* 1983, p 2873; BGH, 14 Nov. 1991, III ZR 145/90,

from performance by operation of law, irrespective of whether he or she is responsible for the impossibility. In contrast, ‘economic impossibility’ does not fall under this rule. Sections 275(2) and 275(3) deal with ‘practical impossibility’ and ‘personal impossibility’.⁶ In both of these cases, the debtor has a right to withhold performance, if he or she can establish impossibility. In all cases of impossibility, the creditor is released from rendering counter-performance pursuant to sections 275(4) and 326(1) of the German Civil Code.⁷ Depending on the debtor’s responsibility, the creditor may be able to claim damages and reimbursement of futile expenses in accordance with sections 280, 283, 284 and 311a of the German Civil Code.

7. In Austria, subsequent impossibility of performance is governed by section 1447 of the Austrian Civil Code. This provision applies, if performance has become permanently impossible so that it is virtually certain for a reasonable person in the relevant industry that an obligation cannot be performed now or in the future. After the prevailing legal doctrine, this concept includes not only ‘factual impossibility’, consisting of ‘objective impossibility’ and ‘personal impossibility’, and ‘legal impossibility’, but also – and this is quite exceptional in international comparison – ‘economic impossibility’.⁸ Initially, courts only recognized economic impossibility in cases, in which insisting on performance would result in the financial ruin of the debtor.⁹ Decisions that are more recent require insisting on performance to be

in *NJW* 1992, p 904; BGH, 11 Dec. 1991, VIII ZR 4/91, in *BGHZ* 116, 268; BGH, 17 May 1995, VIII ZR 94/94, in *NJW* 1995, p 2026; BGH, 25 Nov. 1998, XII ZR 12-97, in *NJW* 1999, p 635.

6 See R. SCHWARZE, *Leistungsstörungen*, pp 67–89; H.P. WESTERMANN, *Erman Handkommentar*, § 275 paras 20–29; A. STADLER, *Jauernig Kommentar*, § 275 paras 24–29; W. ERNST, *Münchener Kommentar*, § 275 paras 73–124; T. RIEHM, *beck-online Grosskommentar*, § 275 paras 187–228, 265–286; S. LORENZ, *Beck’scher Online-Kommentar*, § 275 paras 57–64.

7 See R. SCHWARZE, *Leistungsstörungen*, pp 67–89; H.P. WESTERMANN, *Erman Handkommentar*, § 326 paras 4–10; A. STADLER, *Jauernig Kommentar*, § 326 paras 4–12; W. ERNST, in F.J. Säcker et al. (eds), *Münchener Kommentar zum Bürgerlichen Gesetzbuch: Schuldrecht – Allgemeiner Teil II* (München: C.H. Beck 2019), § 326 paras 8–34; C. HERRESTHAL, in B. Gsell et al. (eds), *beck-online Grosskommentar zum Bürgerlichen Gesetzbuch* (1 June 2020), § 326 paras 53–162; H. SCHMIDT, in W. Hau & R. Poseck (eds), *Beck’scher Online-Kommentar zum Bürgerlichen Gesetzbuch* (1 Aug. 2020), § 326 paras 4–11.

8 See A. HEIDINGER, in M. Schwimann & G. Kodek (eds), *Praxiskommentar zum Allgemeinen bürgerlichen Gesetzbuch* (Wien: LexisNexis 2016), § 1447 paras 7–11; I. GRISS & P. BYDLINSKI, in H. Koziol et al. (eds), *Kurzkomentar zum Allgemeinen bürgerlichen Gesetzbuch* (Wien: Österreich 2017), § 1447 paras 4–5; R. REISCHAUER, in P. Rummel & M. Lukas (eds), *Kommentar zum Allgemeinen bürgerlichen Gesetzbuch* (Wien: Manz 2018), § 920 paras 3–20; A. HOLLY, in A. Kletecka & M. Schauer (eds), *Online-Kommentar zum Allgemeinen bürgerlichen Gesetzbuch* (1 Aug. 2019), § 1447 paras 18–27/4.

9 See OGH, 21 Nov. 1951, 3 Ob 589/51, in *EvBl (Evidenzblatt der Rechtsmittelentscheidungen)* 1952, no. 103. From an international perspective, see F.T. SCHWARZ et al., ‘Austria’, in F.T. Schwarz et al. (eds), *Contractual Perfomance and Covid-19: An In-Depth Comparative Law Analysis* (8 June 2020), para. 36.

commercially unreasonable and pointless.¹⁰ As a result, the affected obligations of the debtor are dissolved by operation of law, the creditor also does not have to perform its counter-performance and any performance already rendered can be claimed back. If the debtor is at fault, he or she will further be liable for damages for non-performance pursuant to sections 920 and 921 of the Austrian Civil Code.

8. In Switzerland, Article 119 of the Swiss Code of Obligations deals with subsequent impossibility of performance, which is not attributable to the debtor. Pursuant to Article 119(1), the debtor is no longer under a duty to perform. This provision includes ‘factual impossibility’ and ‘legal impossibility’, but neither ‘temporary impossibility’ nor ‘economic impossibility’. Most scholars,¹¹ including the Swiss Federal Supreme Court,¹² do not subsume ‘subjective impossibility’ under this provision. Pursuant to Article 119(2), the creditor is also released from his or her duties. According to Article 119(3), this basic allocation of risk does not apply to cases, in which the contract or another statutory rule provide for a different risk allocation. Article 185(1) of the Swiss Code of Obligations provides such a different risk allocation (*periculum est emptoris*), except where it is otherwise agreed or dictated by exceptional circumstances. Swiss courts interpret ‘exceptional circumstances’ quite broadly, so that this rule does in most cases not apply.¹³ If the debtor is at fault, however, he or she will further be released from his or her

10 See OGH, 20 Mar. 1963, 7 Ob 70/63, in *SZ* 36, no. 44; OGH, 30 Apr. 1963, 8 Ob 102/63, in *OIZ* (*Österreichische Immobilien-Zeitung*) 1963, p 367. See also OGH, 14 Feb. 2007, 7 Ob 255/06k, in *SZ* 82, no. 25.

11 See R.H. WEBER, in H. Hausheer (ed.), *Bern Kommentar zum Obligationenrecht: Die Folgen der Nichterfüllung* (Bern: Stämpfli 2000), Art. 97 paras 119–124; I. SCHWENZER, *Schweizerisches Obligationenrecht: Allgemeiner Teil* (Bern: Stämpfli 2016), p 465; A. KOLLER, *Schweizerisches Obligationenrecht: Allgemeiner Teil* (Bern: Stämpfli 2017), pp 901–902; W. WIEGAND, in C. Widmer Lüchinger & D. Oser (eds), *Basler Kommentar zum Obligationenrecht* (Basel: Helbing Lichtenhahn 2020), Art. 97 para. 13, Art. 119 para. 5. For the minority opinion, to which I concur, see S. EMMENEGGER et al., *Schweizerisches Obligationenrecht: Allgemeiner Teil II* (Zürich: Schulthess 2014), pp 90, 93–99, in particular 98–99.

12 See BGer, 15 Jan. 2009, 4A_394/2008, in *BGE* 135 III 212, pp 218–219.

13 See BGer, 18 Apr. 1958 (*Garage Place Claparède SA v. Barambon*), in *BGE* 84 II 158, pp 161–162; BGer, 12 Mar. 2002, 4C.336/2000, in *BGE* 128 III 370, pp 371–372. For a detailed discussion of the Roman origins of this rule based on *BGE* 128 III 370, see P. PICHONNAZ, ‘Periculum emptoris und das schweizerische Recht: Ein Fall des Rückgriffs auf römisches Recht durch das Schweizerische Bundesgericht’, in E. Jakab & W. Ernst (eds), *Kaufen nach Römischen Recht: Antikes Erbe in den europäischen Kaufrechtsordnungen* (Berlin: Springer 2008), p 183; P. PICHONNAZ, ‘Die Gefahrtragung beim Kaufvertrag: Methodologische und Diachronische Elemente’, 139. *ZSR (Zeitschrift für Schweizerisches Recht)* I 2020, p 7.

obligations, but be liable for damages pursuant to Article 97(1) of the Swiss Code of Obligations.¹⁴

9. In France, Articles 1351 and 1351-1 of the French Civil Code deal with subsequent impossibility of performance (*impossibilité d'exécuter*), referring to the concept of *force majeure*. Although codified only with the 2016 reform, this concept had been recognized by French courts for a long time before that.¹⁵ Pursuant to the new Article 1218 of the French Civil Code, *force majeure* is defined and its consequences arranged.¹⁶ It is required that the event preventing performance is external (*extériorité*), it has not been reasonably foreseeable (*imprévisibilité*) and its effects on performance were unavoidable (*irrésistibilité*). So far, French courts have been reluctant to accept an outbreak of an infectious disease as *force majeure*.¹⁷ Government or administrative measures are more often recognized as *force majeure*, but courts are quite strict as well.¹⁸ If the impediment is permanent, the contract may be terminated by operation of law and parties discharged from their obligations, unless the debtor has agreed to perform or has been given prior notice of default by the creditor. If the impediment is temporary,

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- 14 See H. BECKER, in H. Becker (ed.), *Bern Kommentar zum Obligationenrecht: Allgemeine Bestimmungen* (Bern: Stämpfli 1945), Art. 97 paras 11-25; R.H. WEBER, *Bern Kommentar*, Art. 97 paras 98-146; L. THÉVENOZ, in L. Thévenoz & F. Werro (eds), *Commentaire romand du Code des obligations* (Basel: Helbing Lichtenhahn 2012), Art. 97 paras 5-18; H. GIGER, in W. Fischer & T. Luterbacher (eds), *Haftpflichtkommentar* (Zürich: Dike 2016), Art. 97 paras 7-17; W. WIEGAND, *Basler Kommentar*, Art. 97 paras 7-24.
- 15 See Cass. 1re civ., 9 Mar. 1994, 91-17459, 91-17464, in I *Bulletin*, no. 91; Com., 1 Oct. 1997, 95-12435, in IV *Bulletin*, no. 240; Cass. 2e civ., 18 Mar. 1998, 95-22014, in II *Bulletin*, no. 97; Cass. 1re civ., 16 Nov. 2002, 99-21203, in I *Bulletin*, no. 258; Cass. 1re civ., 30 Oct. 2008, 07-17134, in I *Bulletin*, no. 243.
- 16 See G. CHANTEPIE & M. LATINA, *La réforme du droit des obligations: Commentaire théorique et pratique dans l'ordre du Code civil* (Paris: Dalloz 2016), paras 617-626; F. GRÉAU, 'Force majeure', in *Répertoire de droit civil* (Paris: Dalloz 2017), paras 26-84; D. HOUTCIEFF, *Droit des contrats* (Bruxelles: Bruylant, 2018), paras 1013-1022; P. MALAURIE et al., *Droit des obligations* (Paris: LGDJ 2018), paras 952-957; A. BÉNABENT, *Droit des obligations* (Paris: LGDJ 2019), paras 347-363; B. FAGES, *Droit des obligations* (Paris: LGDJ 2019), paras 322-324; M. FABRE-MAGNAN, *Droit des obligations: Contrat et engagement unilatéral* (Paris: Presses Universitaires de France 2019), paras 982-990.
- 17 See Cour d'appel, Nancy, 22 Nov. 2010, 09-00003; Cour d'appel, Basse-Terre, 17 Dec. 2018, 17-00739; Cour d'appel, Besançon, 8 Jan. 2014, 12-02291; Cour d'appel, Paris, 17 Mar. 2016, 15-04263; Cour d'appel, Paris, 29 Mar. 2016, 15-05607. See also P. GUIOMARD, 'La grippe, les épidémies et la force majeure en dix arrêts', *Dalloz actualité* (4 Mar. 2020); F.T. SCHWARZ et al., 'France', in F.T. Schwarz et al. (eds), *Contractual Performance and Covid-19: An In-Depth Comparative Law Analysis* (8 June 2020), para. 23.
- 18 See Cass. 3e civ., 11 Oct. 1989, 87-19490; Cour d'appel, Nancy, 6 Nov. 2001, 2001-184443; Cass. 1re civ., 18 May 2005, 01-16243; Com., 31 Jan. 2006, 04-15164; Cass. 3e civ., 28 Nov. 2007, 06-17758, in III *Bulletin*, no. 213; Cass. 3e civ., 1 June 2011, 09-70502, in III *Bulletin*, no. 89. See also F.T. Schwarz et al., France, para. 24.

performance of the obligations are suspended, unless the resulting delay justifies termination of the contract.

10. In Italy, subsequent impossibility of performance is governed by Articles 1218, 1256 and 1463 of the Italian Civil Code (*impossibilità sopravvenuta*). According to Italian legal doctrine, these provisions include only ‘permanent impossibility’ and ‘objective impossibility’ that is not attributable to the debtor, but not ‘personal impossibility’ or ‘subjective impossibility’.¹⁹ Pursuant to Article 1256(1), the debtor is released from the relevant obligations, if he or she is not responsible for the impossibility.²⁰ If the impossibility is only temporary, however, Article 1256(2) provides that the debtor shall not be liable for the delay in performance and not be released from his or her obligations.²¹ Article 1463 further provides that the creditor shall be released from his or her duty to deliver counter-performance and performance already rendered must be reversed.²² In addition, according to Article 1218, the debtor who did not perform his or her obligation due to an impossibility resulting from a cause not attributable to him or her is not liable for damages.²³ Additional rules, set forth in Articles 1464, 1465 and 1466 of the Italian Civil Code, apply to ‘partial impossibility’, permanent contracts and multi-party obligations.

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- 19 See G. OSTI, ‘Impossibilità sopravveniente’, in A. Azara & E. Eula (eds), *Novissimo digesto italiano* (Torino: Utet 1962), p 287; F. GALGANO, *Trattato di diritto civile: Le obbligazioni in generale, Il contratto in generale, I singoli contratti* (Padova: Antonio Milani 2010), paras 16, 115; G. ALPA, *Il contratto in generale: Principi e problemi* (Milano: Giuffrè 2014), pp 169–170; M.C. DIENER, *Il contratto in generale* (Milano: Giuffrè 2015), para. 16.10; A. CATAUDELLA, *I contratti: Parte generale* (Torino: G. Giappichelli 2019), para. 44.
- 20 See L. CIAFARDINI, in L. Ciarfardini & F. Izzo (eds), *Codice civile: annotato con la giurisprudenza* (Milano: Simone 2013), Art. 1256 § 2; A. ZACCARIA, in G. Cian (ed.), *Commentario breve al Codice civile* (Padova: Antonio Milani 2014), Art. 1256 I; A. BARENGHI, in P. Rescigno (ed.), *Codice civile: le fonti del diritto italiano* (Milano: Giuffrè 2018), Art. 1256 para. 1; A. CALABRESE, in M. Franzoni & R. Rolli (eds), *Codice civile: commentato con dottrina e giurisprudenza* (Torino: G. Giappichelli 2018), Art. 1256 para. 1. See also Cass., 22 Oct. 1982, 5496; Cass., 28 Jan. 1995, 1037.
- 21 See L. CIAFARDINI, *Codice civile*, Art. 1256 § 2; A. ZACCARIA, *Codice civile*, Art. 1256 II; A. BARENGHI, *Codice civile*, Art. 1256 para. 2; A. CALABRESE, *Codice civile*, Art. 1256 para. 2. See also Cass., 6 Feb. 1979, 794.
- 22 See L. CIAFARDINI, *Codice civile*, Art. 1463 §§ 3, 4; A. ZACCARIA, *Codice civile*, Art. 1463 IV; C. DEL FEDERICO, in M. Franzoni & R. Rolli (eds), *Codice civile: commentato con dottrina e giurisprudenza* (Torino: G. Giappichelli 2018), Art. 1463 para. 2; G. MAURO PELLEGRINI, in P. Rescigno (ed.), *Codice civile: le fonti del diritto italiano* (Milano: Giuffrè 2018), Art. 1463 para. 1. See also Cass., 14 Jan. 1992, 360; Cass., 28 Jan. 1995, 1037.
- 23 See L. CIAFARDINI, *Codice civile*, Art. 1218 §§ 3, 5; A. ZACCARIA, *Codice civile*, Art. 1218 II, III; A. BARENGHI, *Codice civile*, Art. 1218 para. 3; R. FORNASARI, in M. Franzoni & R. Rolli (eds), *Codice civile: commentato con dottrina e giurisprudenza* (Torino: G. Giappichelli 2018), Art. 1218 paras 1–4. See also Cass., 14 Nov. 2011, 23728.

11. Examples of permanently impossible performance in the context of the coronavirus pandemic include a birthday party or a wedding, concerts and performing arts. In all five countries under examination, commercial and consumer contracts directly affected by an official order fall under these rules, but only in case of absolute fixed-date obligations to be performed during a lockdown period. Contracts only indirectly affected by the pandemic are generally not covered by these rules. Contracts that are still possible, but no longer make economic sense, are not governed by these rules, except in Austria.

2.2. Temporary Default of Non-Performing Party

2.2.1. Debtor's Delay of Performance

12. The legal institution of delay of debtor is applicable to situations, where contractual performance is only temporarily impossible due to a default of the debtor. In general, no prevention, but only a suspension of contractual performance may result from such situations. Damages are in some cases owed regardless of debtor's fault, in other cases only if the debtor is at fault. In addition, creditors have various remedies at their disposal, which indeed vary from one jurisdiction to another. In all jurisdictions examined, this institution is important during a pandemic as it provides debtors with an incentive to perform a contract.

13. In Germany, section 286 of the German Civil Code deals with delay of debtor (*Verzug des Schuldners*). Pursuant to section 286(1), a debtor is in delay, if he or she fails to perform despite a warning notice from the creditor made after performance is due.²⁴ Under certain conditions, specified in section 286(2), no warning notice is required. However, according to section 286(4), the debtor is not in delay as long as performance is not made as a result of circumstances he or she is not responsible for. In contrast, section 323(1) of the German Civil Code, which also covers situations of delayed performance and entitles the creditor to revoke the contract, is applicable regardless of whether the debtor is at fault.²⁵ As a general rule, the creditor can only resort to this remedy, if he or she grants a

24 See R. SCHWARZE, *Leistungsstörungen*, pp 424–443; J. HAGER, in H.P. Westermann et al. (eds), *Erman Handkommentar zum Bürgerlichen Gesetzbuch* (Köln: Otto Schmidt 2017), § 286 paras 18–50; A. STADLER, *Jauernig Kommentar*, § 286 paras 13–40; W. ERNST, *Münchener Kommentar*, § 286 paras 20–76; T.W. DORNIS, in B. Gsell et al. (eds), *beck-online Grosskommentar zum Bürgerlichen Gesetzbuch* (1 Mar. 2020), § 286 paras 98–225; S. LORENZ, *Beck'scher Online-Kommentar*, § 286 paras 3–38. From an international perspective, see F.T. SCHWARZ et al., 'Germany', in F.T. Schwarz et al. (eds), *Contractual Performance and Covid-19: An In-Depth Comparative Law Analysis* (8 June 2020), paras 22–25.

25 See H.P. WESTERMANN, *Erman Handkommentar*, § 323 paras 10–24; A. STADLER, *Jauernig Kommentar*, § 323 paras 5a–14; W. ERNST, *Münchener Kommentar*, § 323 paras 45–132; D. LOOSCHELDERS, in B. Gsell et al. (eds), *beck-online Grosskommentar zum Bürgerlichen Gesetzbuch* (1 Feb. 2020), § 323 paras 83–218; H. SCHMIDT, *Beck'scher Online-Kommentar*, § 323 paras 4–38.

grace period for the debtor. It is to be decided at the time the impediment occurs, if the debtor can rectify non-performance (delay) or not (impossibility). In addition, the debtor is liable for damages pursuant to section 325 of the German Civil Code.²⁶ Pursuant to the second sentence of section 280(1), the debtor is not liable, if he or she is not at fault. Section 275(4) states that this also applies, if he or she is excused from performance.

14. In Austria, the requirements and consequences of delay of debtor are addressed in section 918 of the Austrian Civil Code. Pursuant to section 918(1), delay of debtor is defined as a situation, in which the debtor does not perform his or her contractual obligation at the agreed time, at the proper place or in the agreed manner.²⁷ According to section 918(1), the creditor can choose whether to insist on future performance and claim damages for the delay or declare the contract terminated after a reasonable grace period and claim expectation damages.²⁸ Austrian law notably distinguishes between ‘objective delay’ and ‘subjective delay’ of debtor.²⁹ This distinction is important because the debtor is only liable for damages, if he or she is at fault. Consequently, delayed performance due to temporary impossibility without debtor’s fault leads to a suspension of the due date either for the duration of the impediment or for the duration of a reasonable grace period.³⁰ In some cases such as a delay of performance relating to fixed-term contracts, however, Austrian law allows a creditor to resort to the remedies of (permanent) impossibility even in cases, in which only a temporary impediment to performance exists.³¹

15. In Switzerland, Articles 102 to 109 of the Swiss Code of Obligations govern delay of debtor (*Verzug des Schuldners*). Pursuant to Article 102(1), a delay of

26 See R. SCHWARZE, *Leistungsstörungen*, pp 447–461; H.P. WESTERMANN, *Erman Handkommentar*, § 325 paras 3–5; A. STADLER, *Jauernig Kommentar*, § 325 para. 2; W. ERNST, *Münchener Kommentar*, § 325 paras 4–21; C. HERRESTHAL, *beck-online Grosskommentar*, § 325 paras 64–116; H. SCHMIDT, *Beck’scher Online-Kommentar*, § 325 paras 8–20.

27 See A. REIDINGER, in M. Schwimann & G. Kodek (eds), *Praxiskommentar zum Allgemeinen bürgerlichen Gesetzbuch* (Wien: LexisNexis 2014), § 918 paras 4–26; P. BYDLINSKI, in H. Koziol et al. (eds), *Kurzkommentar zum Allgemeinen bürgerlichen Gesetzbuch* (Wien: Österreich 2017), § 918 paras 4–7; R. REISCHAUER, *Kommentar*, § 918 paras 2–6; M. GRUBER, in A. Kletecka & M. Schauer (eds), *Online-Kommentar zum Allgemeinen bürgerlichen Gesetzbuch* (1 Aug. 2019), § 918 paras 4–20, 50–51.

28 See A. REIDINGER, *Praxiskommentar*, § 918 paras 27–95; P. BYDLINSKI, *Kurzkommentar*, § 918 paras 8–19; R. REISCHAUER, *Kommentar*, § 918 paras 9, 11–71, 138–154; M. GRUBER, *Online-Kommentar*, § 918 paras 21–49, 52–62.

29 See R. REISCHAUER, *Kommentar*, § 918 para. 7; M. GRUBER, *Online-Kommentar*, § 918 paras 4–62.

30 See R. REISCHAUER, *Kommentar*, § 918 paras 141–154; M. GRUBER, *Online-Kommentar*, § 918 paras 53–59, § 921 paras 3–14. From an international perspective, see F.T. SCHWARZ et al., *Austria*, paras 48–49.

31 See P. BYDLINSKI, *Kurzkommentar*, § 918 para. 13; R. REISCHAUER, *Kommentar*, § 918 paras 25–33. From an international perspective, see F.T. SCHWARZ et al., *Austria*, para. 50.

debtor requires a default of such party, despite the possibility of performance, a contractual claim that is due, a formal reminder from the creditor (if necessary) and non-performance must be in breach of a duty.³² No formal reminder is required pursuant to Article 102(2), if a deadline for performance of the obligation has been set. In such a situation, the debtor in default is liable for damages for late performance, accidental damage and excess damage pursuant to Articles 103 and 106.³³ In addition, a debtor in default on payment of a pecuniary debt must pay default interest in accordance with Articles 104 and 105. Pursuant to Articles 107(2) and 109, the creditor has three options.³⁴ The first option is to insist on performance and sue for damages due to the delay. The second option is to waive performance and claim damages for non-performance. The third option is to waive performance and terminate the agreement altogether. The creditor is thus not entitled to claim immediate performance or damages from the debtor for the duration of the impediment.³⁵

16. In France, delay of debtor (*mise en demeure du débiteur*) is today governed by Articles 1344 to 1344-2 of the French Civil Code. French law modernized this institution in its 2016 reform.³⁶ Pursuant to Article 1344, a debtor can be put in default to pay by a formal notice, either in the form of a summons or a sufficient act

32 See L. THÉVENOZ, Commentaire romand, Art. 102 paras 10-32; S. EMMENEGGER et al., Obligationenrecht, pp 116-118, 123-127; I. SCHWENZER, Obligationenrecht, p 475; A. KOLLER, Obligationenrecht, pp 963-974; C. HUGUENIN, *Obligationenrecht: Allgemeiner und Besonderer Teil* (Zürich: Schulthess 2018), pp 289-295; C. WIDMER LÜCHINGER & W. WIEGAND, in C. Widmer Lüchinger & D. Oser (eds), *Basler Kommentar zum Obligationenrecht* (Basel: Helbing Lichtenhahn 2020), Art. 102 paras 3-12a.

33 On liability for damages for late performance and excess damage, see L. THÉVENOZ, Commentaire romand, Art. 103 paras 4-6; S. EMMENEGGER et al., Obligationenrecht, pp 118-120; I. SCHWENZER, Obligationenrecht, p 475; A. KOLLER, Obligationenrecht, pp 978-981; C. HUGUENIN, Obligationenrecht, p 296. On liability for accidental damage, see L. THÉVENOZ, Commentaire romand, Art. 103 paras 7-10; S. EMMENEGGER et al., Obligationenrecht, p 120; I. SCHWENZER, Obligationenrecht, p 476; C. HUGUENIN, Obligationenrecht, p 296; C. WIDMER LÜCHINGER & W. WIEGAND, *Basler Kommentar*, Art. 103 paras 8-12.

34 See L. THÉVENOZ, Commentaire romand, Art. 107 paras 26-37; S. EMMENEGGER et al., Obligationenrecht, pp 128-141; A. KOLLER, Obligationenrecht, pp 989-1012; C. HUGUENIN, Obligationenrecht, pp 297-304; C. WIDMER LÜCHINGER & W. WIEGAND, *Basler Kommentar*, Art. 107 paras 12-20.

35 From an international perspective, see F.T. SCHWARZ et al., 'Switzerland', in F.T. Schwarz et al. (eds), *Contractual Performance and Covid-19: An In-Depth Comparative Law Analysis* (8 June 2020), paras 31-33.

36 See C. CHANTEPIE & M. LATINA, Commentaire théorique et pratique, para. 976; B. GRIMONPREZ, 'Mise en demeure', in *Répertoire de droit civil* (Paris: Dalloz 2017), para. 2; D. HOUTCIEFF, *Droit des contrats*, paras 965-968; P. MALAURIE et al., *Droit des obligations*, paras 973-975; A. BÉNABENT, *Droit des obligations*, para. 767; B. FAGES, *Droit des obligations*, para. 285; M. FABRE-MAGNAN, *Droit des obligations*, para. 930.

of interpellation.³⁷ No formal notice is required, if the contract provides for a fixed due date. In obligations relating to pay a sum of money, Article 1344-1 further provides that the formal notice causes default interest at the statutory rate to accrue.³⁸ In addition, the formal notice may also cause contractually agreed interest to become payable. In obligations relating to an object, Article 1344-2 provides that the formal notice puts the risk of accidental loss on the debtor, if it is not already borne by the debtor.³⁹ This provision derogates from the general rule on risk allocation provided for in Article 1196, according to which the owner bears the risk of the object, thereby worsening the debtor's position and thus sanctioning his or her late performance. In such a situation, the creditor may, in accordance with Article 1217 of the French Civil Code, choose among various remedies.⁴⁰

17. In Italy, delay of debtor is in particular regulated in Articles 1219 (*costituzione in mora*) and 1221 (*effetti della mora sul rischio*) of the Italian Civil Code. The concept of delay of debtor under Italian law requires a claim due, a formal notice and unjustified non-performance by the debtor. Pursuant to Article 1219(1), the creditor may put the debtor in default by a formal notice or request in writing.⁴¹ In certain cases specified in Article 1219(2), no notice of default is necessary. As a consequence of default, the debtor shall compensate the damage resulting from the delay in accordance with Articles 1218 and 1223 to 1229, shall pay default interest in accordance with Article 1224 and will be burdened by the risk of the perishment of the object in accordance with Article 1221, even if not attributable to him or her. Pursuant to Article 1221(1), the debtor, whose performance is delayed without his or her fault, is not released from contractual obligations, unless he or she proves that the creditor would have assessed the situation equally.⁴² Article 1221(2) further

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- 37 See C. CHANTEPIE & M. LATINA, *Commentaire théorique et pratique*, paras 977-978; B. GRIMONPREZ, *Mise en demeure*, paras 22-37. See also Cass. 3e civ., 31 Mar. 1971, 69-12294, in III *Bulletin*, no. 230; Cass. 3e civ., 19 Mar. 1997, 95-17070; Cass. 3e civ., 1 June 2011, 09-70502, in III *Bulletin*, no. 89.
- 38 See C. CHANTEPIE & M. LATINA, *Commentaire théorique et pratique*, para. 979; B. GRIMONPREZ, *Mise en demeure*, paras 47-77.
- 39 See C. CHANTEPIE & M. LATINA, *Commentaire théorique et pratique*, para. 979; B. GRIMONPREZ, *Mise en demeure*, paras 78-80.
- 40 See C. CHANTEPIE & M. LATINA, *Commentaire théorique et pratique*, paras 612-616; D. HOUTCIEFF, *Droit des contrats*, paras 936-937; P. MALAURIE et al., *Droit des obligations*, para. 872; A. BÉNABENT, *Droit des obligations*, paras 365-366; B. FAGES, *Droit des obligations*, paras 282-284; M. FABRE-MAGNAN, *Droit des obligations*, paras 991-992.
- 41 See F. GALGANO, *Trattato di diritto civile*, para. 12; L. CIAFARDINI, *Codice civile*, Art. 1219 §§ 2-4; A. ZACCARIA, *Codice civile*, Art. 1219 III; A. BARENGHI, *Codice civile*, Art. 1219 para. 3; G. SICCHIERO, in M. Franzoni & R. Rolli (eds), *Codice civile: commentato con dottrina e giurisprudenza* (Torino: G. Giappichelli 2018), Art. 1219 para. 1. See also Cass., 24 Feb. 1978, 959, in *MFI (Massimario del Foro italiano)* 1978, no. 959; Cass., 12 Oct. 1998, 10090, in *GC (Giustizia civile)* I 1999, p 422; Cass., 3 Dec. 2002, 17157, in *MFI* 2002, no. 105.
- 42 See L. CIAFARDINI, *Codice civile*, Art. 1221 §§ 1-2; G. SICCHIERO, *Codice civile*, Art. 1221 para. 1. See also Cass., 13 Apr. 1987, 3654.

clarifies that the destruction or unlawful removal of an object does not release the person, who is responsible for this, from his or her obligation to return its value.

18. A debtor may be affected either directly or indirectly by the coronavirus pandemic. Debtors directly affected by an official order are not permitted to sell goods or provide services during a lockdown period, which concerns in most countries restaurants, at least for some time, but also gyms. Debtors indirectly affected by the consequences of the pandemic cannot fulfil the contract as promised, in particular because of insufficient staff at the workplace or delays in global supply chains. With regard to the application of all these rules in each jurisdiction examined, this distinction, however, is not relevant.

2.2.2. *Creditor's Delay of Performance*

19. The legal institution of delay of creditor is also applicable to situations, where contractual performance is only temporarily impossible, but in this case, the impossibility of performance is due to a default of the creditor. Under certain conditions, the debtor may excuse contractual performance, while the creditor remains bound by the contract. As a delay of creditor does not lead to a breach of contract, but to specific negative consequences, creditors are generally not liable for damages. In all jurisdictions examined, this institution is important during a pandemic as it makes creditors accept performance and cooperate.

20. In Germany, sections 293 to 304 of the German Civil Code cover delay of creditor (*Verzug des Gläubigers*). Section 293 contains the main provision for a default in acceptance. Together with sections 294 to 296, this provision puts forth the requirements for this particular form of default caused by the creditor. A delay of creditor requires that a debtor's delay in performance is due to the creditor's failure to accept the performance duly offered to him or her or to refrain from taking any cooperative action necessary for performance.⁴³ Other than delay of debtor, delay of creditor is not a breach of duty and thus triggers no damages.⁴⁴ A delay of creditor may only lead to a mitigation of liability in favour of the debtor in accordance with sections 300(1), 301 and 302, to a shift of the risk of performance and price risk to the debtor in accordance with section 300(2) and the second sentence of section 326(2) and to a claim for reimbursement of

43 See R. SCHWARZE, *Leistungsstörungen*, pp 592–622; J. HAGER, *Erman Handkommentar*, § 293 paras 1–7; A. STADLER, *Jauernig Kommentar*, § 293 paras 4–5; W. ERNST, *Münchener Kommentar*, § 293 paras 7–22; S. DÖTTERL, in B. Gsell et al. (eds), *beck-online Grosskommentar zum Bürgerlichen Gesetzbuch* (15 July 2020), § 293 paras 55–98; S. LORENZ, *Beck'scher Online-Kommentar*, § 293 paras 2–11.

44 See R. SCHWARZE, *Leistungsstörungen*, p 622; S. DÖTTERL, *beck-online Grosskommentar*, § 293 para. 113; S. LORENZ, *Beck'scher Online-Kommentar*, § 293 para. 13.

expenses by the debtor in accordance with section 304 of the German Civil Code.⁴⁵ However, defaults in performance, which are based on an obligation of acceptance or cooperation on the part of the creditor, are not covered by these provisions on delay of creditor.

21. In Austria, the provision on delay of creditor is section 1419 of the Austrian Civil Code. According to this provision, specific negative consequences (*widrige Folgen*) fall upon the creditor, if he or she is in delay in accepting performance.⁴⁶ First, the creditor is required to perform under the contract, also if the debtor is released from his or her contractual obligations. Second, the creditor must bear additional costs that the debtor incurs due to the fact that the creditor does not accept performance in time. Third, the creditor has no right to claim damages from the debtor, if goods to be delivered are damaged due to ordinary negligence. The debtor has a duty to store the goods in such a situation. Pursuant to section 1425 of the Austrian Civil Code, the debtor can render performance of its own contractual obligation by means of judicial deposit (*gerichtliche Hinterlegung*).⁴⁷ In commercial contracts, the debtor can also resort to a self-help sale (*Selbsthilfeverkauf*) in accordance with section 373 of the Austrian Commercial Code.⁴⁸ However, if the creditor does not accept performance due to a permanent impediment outside his or her control, the rules on impossibility and not those on delay of creditor apply.⁴⁹

45 See R. SCHWARZE, *Leistungsstörungen*, pp 622–635; J. HAGER, *Erman Handkommentar*, § 300 paras 1–9; A. STADLER, *Jauernig Kommentar*, § 293 paras 6–7; W. ERNST, *Münchener Kommentar*, § 300 paras 2–4, § 301 paras 2–3, § 302 paras 2–3, § 304 paras 2–4; S. DÖTTERL, *beck-online Grosskommentar*, § 293 paras 99–121; S. LORENZ, *Beck'scher Online-Kommentar*, § 293 paras 12–13.

46 On the requirements, see A. HEIDINGER, *Praxiskommentar*, § 1419 paras 2–12; H. KOZIOL & M. SPITZER, in H. Koziol et al. (eds), *Kurzkomentar zum Allgemeinen bürgerlichen Gesetzbuch* (Wien: Österreich 2017), § 1419 paras 1–2; R. REISCHAUER, *Kommentar*, § 1419 para. 1; J. STABENTHEINER, in A. Kletecka & M. Schauer (eds), *Online-Kommentar zum Allgemeinen bürgerlichen Gesetzbuch* (1 July 2018), § 1419 paras 2–3. On the consequences, see A. HEIDINGER, *Praxiskommentar*, § 1419 paras 13–19; H. KOZIOL & M. SPITZER, *Kurzkomentar*, § 1419 paras 4–10; R. REISCHAUER, *Kommentar*, § 1419 para. 8; J. STABENTHEINER, *Online-Kommentar*, § 1419 para. 4. From an international perspective, see F.T. SCHWARZ et al., *Austria*, paras 52–55.

47 See A. HEIDINGER, *Praxiskommentar*, § 1425 paras 4–22, 29–39; H. KOZIOL & M. SPITZER, *Kurzkomentar*, § 1425 paras 3–10, 12–13; R. REISCHAUER, *Kommentar*, § 1425 paras 1–11, 25–24e; J. STABENTHEINER, *Online-Kommentar*, § 1425 paras 5–17, 32–39.

48 See F. KERSCHNER, in P. Jabornegg & E. Artmann (eds), *Kommentar zum Unternehmensgesetzbuch* (Wien: Springer 2010), § 373 paras 8–14, 17–41; C. FELTL, in C. Feldt (ed.), *Kommentar zum Unternehmensgesetzbuch* (Wien: Manz 2018), § 373 paras 109–136; B. ZÖCHLING-JUD, in U. Torggler (ed.), *Kommentar zum Unternehmensgesetzbuch* (Wien: Linde 2019), §§ 373, 374 paras 9–36; S. NITSCH, in C. Zib & M. Dellinger (eds), *Grosskommentar zum Unternehmensgesetzbuch* (Wien: LexisNexis 2020), §§ 373, 374 paras 12–24, 29–68.

49 See R. WELSER & B. ZÖCHLING-JUD, *Grundriss des bürgerlichen Rechts II: Schuldrecht Allgemeiner Teil, Schuldrecht Besonderer Teil, Erbrecht* (Wien: Manz 2020), para. 301.

22. In Switzerland, Articles 91 to 96 of the Swiss Code of Obligations concern delay of creditor (*Verzug des Gläubigers*). Pursuant to Article 91, a delay of creditor requires that a party in default refuses, without good cause, to accept performance properly offered to him or her or to carry out such preparations as he or she is obligated to make as the debtor cannot render performance otherwise.⁵⁰ As a consequence of delay of creditor, delay of debtor is no longer possible. In the case of obligations relating to objects, the debtor has a right to deposit the object at the expense and the risk of the creditor pursuant to Article 92(1), thereby discharging his or her obligation, and a right to take it back pursuant to Article 94(2), causing the claim and all accessory rights to become effective again. In some cases, the debtor has a right to sell the object and dispose the sale proceeds in accordance with Article 93. In the case of all other obligations, the debtor has a right to terminate the contract pursuant to Article 95.⁵¹ Pursuant to Article 96, the debtor is also entitled to deposit his or her performance or to terminate the contract, if performance is prevented for other reasons attributable to the creditor.⁵²

23. In France, delay of creditor (*mise en demeure du créancier*) is now governed by Articles 1345 to 1345-3 of the French Civil Code. The revision of French contract law in 2016 introduced this concept to French law.⁵³ If the creditor refuses the payment on the due date and without legitimate reasons, pursuant to Article 1345(1), the debtor

50 See D. LOERTSCHER, in L. Thévenoz & F. Werro (eds), *Commentaire romand du Codes des obligations* (Basel: Helbing Lichtenhahn 2012), Art. 91 paras 10-16; S. EMMENEGGER et al., *Obligationenrecht*, pp 66-69; I. SCHWENZER, *Obligationenrecht*, pp 492-495; A. KOLLER, *Obligationenrecht*, pp 1021-1028; C. HUGUENIN, *Obligationenrecht*, pp 306-307; S. LEIMGRUBER, in C. Widmer Lüchinger & D. Oser (eds), *Basler Kommentar zum Obligationenrecht* (Basel: Helbing Lichtenhahn, 2020), Art. 91 paras 2-15.

51 On the right to deposit and take back objects, see D. LOERTSCHER, *Commentaire romand*, Art. 92 paras 4-5, 12-14; S. EMMENEGGER et al., *Obligationenrecht*, pp 69-70; I. SCHWENZER, *Obligationenrecht*, pp 492-495; A. KOLLER, *Obligationenrecht*, pp 1032-1034; C. HUGUENIN, *Obligationenrecht*, pp 306-307; S. LEIMGRUBER, *Basler Kommentar*, Art. 92 paras 2-3, 8-10. On the right to sell objects, see D. LOERTSCHER, *Commentaire romand*, Art. 93 paras 4-12; S. EMMENEGGER et al., *Obligationenrecht*, pp 70-71; I. SCHWENZER, *Obligationenrecht*, pp 492-495; A. KOLLER, *Obligationenrecht*, pp 1035-1037; C. HUGUENIN, *Obligationenrecht*, pp 306-307; S. LEIMGRUBER, *Basler Kommentar*, Art. 93 paras 2-4, 7-8. On the right to terminate the contract, see D. LOERTSCHER, *Commentaire romand*, Art. 95 paras 4-7; S. EMMENEGGER et al., *Obligationenrecht*, pp 71-72; I. SCHWENZER, *Obligationenrecht*, pp 492-495; A. KOLLER, *Obligationenrecht*, pp 1040-1043; S. LEIMGRUBER, *Basler Kommentar*, Art. 95 paras 2-3a.

52 See D. LOERTSCHER, *Commentaire romand*, Art. 96 paras 4-10; S. EMMENEGGER et al., *Obligationenrecht*, pp 74-75; I. SCHWENZER, *Obligationenrecht*, pp 492-495; A. KOLLER, *Obligationenrecht*, pp 1054-1060; S. LEIMGRUBER, *Basler Kommentar*, Art. 96 paras 2-5.

53 See C. CHANTEPIE & M. LATINA, *Commentaire théorique et pratique*, para. 980; B. GRIMONPREZ, *Mise en demeure*, para. 3; A. BÉNABENT, *Droit des obligations*, para. 768; B. FAGES, *Droit des obligations*, para. 502; M. FABRE-MAGNAN, *Droit des obligations*, para. 931. See also C. ROBIN, 'La mora creditoris', *RTDCiv (Revue trimestrielle de droit civil)* 1998, p 607.

may give a formal notice to the creditor to accept performance offered or to allow it to be performed.⁵⁴ It is further specified in Article 1345(2) that the creditor's notice of default shall determine the rate of interest due by the debtor and shall allocate the risks relating to the object to the creditor, unless this person acts with gross negligence or wilful misconduct. In addition, Article 1345-1(1) provides that the debtor may either consign (*consigner*) the sum of money in question or sequester (*séquestrer*) the object in question with a professional custodian.⁵⁵ In case a sequestration of the object is impossible or too costly, a competent judge may authorize a private sale or a public auction, consigning the price after deduction of the costs pursuant to Article 1345-1(2). Article 1345-1(3) clarifies that the consignment or sequestration shall discharge the debtor from his or her obligations.

24. In Italy, delay of creditor (*mora del creditore*) is governed by Articles 1206 to 1217 of the Italian Civil Code. Pursuant to Article 1206, the creditor is in default, when he or she does not receive the payment offered to him or her in the manner specified by the law or does not do what is necessary for the debtor to fulfil its obligation.⁵⁶ The concept of delay of creditor has a number of consequences unfavourable to the creditor. Pursuant to Article 1207(1), the impossibility of performance for reasons not attributable to the debtor shall be borne by the creditor, no more interest is owed and the fruits of the object that has not been received by the debtor cannot be collected.⁵⁷ Pursuant to Article 1207(2), the creditor must compensate the damage caused by his or her default and bear the costs of storage and preservation of the object.⁵⁸ According to Article 1210(1), the debtor can make a deposit, if the creditor refuses to accept the actual offer or declares that he or she is not willing and prepared to receive the object(s) offered to him or her by notice.⁵⁹ In the case of perishable or wasteful custody, the debtor may

54 See C. CHANTEPIE & M. LATINA, Commentaire théorique et pratique, paras 981-985; B. GRIMONPREZ, Mise en demeure, paras 38-44. See also Com., 9 Oct. 2001, 99-10974, in IV *Bulletin*, no. 163.

55 See C. CHANTEPIE & M. LATINA, Commentaire théorique et pratique, paras 986-988; B. GRIMONPREZ, Mise en demeure, paras 81-87.

56 See F. GALGANO, Trattato di diritto civile, para. 15; L. CIAFARDINI, Codice civile, Art. 1206 §§ 1-2; A. ZACCARIA, Codice civile, Art. 1206 II, III; G. BORRACCIA, in P. Rescigno (ed.), *Codice civile: le fonti del diritto italiano* (Milano: Giuffrè 2018), Art. 1206 paras 1-2; C. DEL FEDERICO, Codice civile, Art. 1206 paras 2-6. See also Cass., 21 Jan. 1986, 376, in *GC I* 1986, p 1933; Cass., 8 Feb. 1986, 809, in *GC I* 1986, p 1928; Cass., 18 Jan. 1995, 522.

57 See L. CIAFARDINI, Codice civile, Art. 1207 §§ 1-3; A. ZACCARIA, Codice civile, Art. 1207 III, IV; G. BORRACCIA, Codice civile, Art. 1206 paras 1-3; C. DEL FEDERICO, Codice civile, Art. 1207 paras 2-3. See also Cass., 25 May 1984, 3228; Cass., 13 Jan. 1995, 367.

58 See L. CIAFARDINI, Codice civile, Art. 1207 § 4; A. ZACCARIA, Codice civile, Art. 1207 V; G. BORRACCIA, Codice civile, Art. 1206 para. 4; C. DEL FEDERICO, Codice civile, Art. 1207 para. 4. See also Cass., 21 Jan. 1985, 202.

59 See L. CIAFARDINI, Codice civile, Art. 1210 § 1; A. ZACCARIA, Codice civile, Art. 1210 I; G. BORRACCIA, Codice civile, Art. 1210 para. 2; C. DEL FEDERICO, Codice civile, Art. 1210 para. 2. See also Cass., 27 Nov. 1973, 3249; Cass., 27 Jan. 1983, 743.

obtain permission from the court to sell them in accordance with Article 1211 and deposit the price.⁶⁰

25. A generic example of delay of creditor is a customer, who does no longer need goods or services ordered, and paid in advance, due to changed buying behaviour induced by the coronavirus pandemic. To give a few concrete examples, a diving set ordered from an internet dealer is no longer needed, users of public transportation are inclined to stop using trains and busses and to cancel their subscription immediately, or large amounts of respiratory equipment purchased are (fortunately) no longer needed. For all of these cases in each jurisdiction examined, customers cannot step back from such contracts.

2.3. *Case against Unification in European Contract Law*

26. With regard to default of performance under a contract, this article deals with the question, whether excuses of contractual performance and remedies for breach of contract still serve their purpose in times of pandemic or whether and to what extent a uniform breach of contract action is needed in European Contract Law. Using a functional and comparative approach, similarities and differences of all these excuses and remedies in five important civil law jurisdictions are analysed and compared in order to answer this question. The analysis has in particular shown that, despite structural differences, the application of those excuses and remedies largely leads to similar end results.⁶¹ This finding notably implies that there is no need for a uniform breach of contract action with regard to permanent or temporary default in European Contract Law, not even in times of pandemic.

27. Although the requirements and consequences of legal institutions on breach of contract differ quite a bit in various European countries, their main mechanisms are ultimately the same: contractual obligations are either permanently prevented or temporarily suspended and – if applicable, in case of fault – damages are triggered. In Germany, Austria and Switzerland, the institutions of subsequent impossibility and delay of performance, either of the debtor or of the creditor, are relevant. In France and Italy, the concept of subsequent impossibility provides for separate legal consequences, depending whether impediments are of permanent or only of temporary nature. This is exemplary and would also be worth considering in the German, Austrian and Swiss legal systems. As a side note, Italy has even adopted an emergency provision, which requires taking compliance with coronavirus-containment measures into consideration, when assessing debtor's liability and deadlines or liquidated damages for non-performance.⁶²

60 See G. BORRACCIA, Codice civile, Art. 1211 para. 1; C. DEL FEDERICO, Codice civile, Art. 1211 para. 1.

61 From an international perspective, see F.T. SCHWARZ et al., Introduction, paras 20-35.

62 See Art. 91(1) of Decreto-Legge, 17 Mar. 2020, no. 18, 'Misure di potenziamento del Servizio sanitario nazionale e di sostegno economico per famiglie, lavoratori e imprese connesse all'emergenza epidemiologica da COVID-19', GU 161, no. 70. For a discussion and analysis of various

28. In the good old days (which is only a few years back from now), German, Austrian and Swiss law – the legal systems in the German-speaking jurisdictions – were all based on a differentiating concept of breach of contract, whereas French and Italian law – the Roman civil codes – were both following a uniform concept of breach of contract.⁶³ In more recent years, however, this dichotomy has been somewhat relativized, bringing both conceptions closer together. In 2002, the Germans modernized their law of obligations considerably, leading to a situation, where the German Civil Code is ‘very much a unitary system’, at least in terms of legal consequences.⁶⁴ Later, in 2016 (and 2018), the French, although still based on a ‘unitary concept’ of breach of contract, introduced different legal consequences for various breaches of contract.⁶⁵ It seems therefore appropriate to speak of diversity that is united at its core, reaffirming that no uniform breach of contract action is needed in European Contract Law.

29. Because of such common core, it is safe to conclude that there is no need for unification in European Contract Law in this regard. The distinction between permanent and temporary default of performance is convincing as it allows different situations to be treated differently, paired with appropriate incentives. Subsequent impossibility should be assumed restrictively, at least if the law provides no separate legal consequences for such temporary impediments. As a result, remedies of delay rather than those of impossibility should be claimed during the coronavirus pandemic.⁶⁶ Doing so pays tribute to the sanctity of contracts, a guiding principle of European Contract Law, namely by keeping contractual obligations alive. This is why the distinction between permanent and temporary default should not be abolished, but reinforced.

extraordinary measures taken by European governments during the coronavirus pandemic, see V. JENTSCH, ‘Government Responses on Corona and Contracts: Extraordinary Measures in Times of Crisis’, *EBLR (European Business Law Review)* 2021, p 1067.

63 See K. ZWIEGERT & H. KÖTZ, ‘Einführung in die Rechtsvergleichung’ (Tübingen: Mohr Siebeck 1996), pp 486–501.

64 See S. GRUNDMANN, ‘Structural Elements in the Contract Law Parts of the German Civil Code’, in S. Grundmann & M. Schauer (eds), *The Architecture of European Codes and Contract Law* (Alphen aan den Rijn: Kluwer 2006), p (57) at 80. See also S. GRUNDMANN, ‘Der Schadenersatzanspruch aus Vertrag: System und Perspektiven’, 204. *AcP* 2004, p 569; S. GRUNDMANN, ‘Germany and the Schuldrechtsmodernisierung 2002’, *ERCL (European Review of Contract Law)* 2005, p 129.

65 See P. RÉMY-CORLAY, ‘Structural Elements of the French Civil Code’, in S. Grundmann & M. Schauer (eds), *The Architecture of European Codes and Contract Law* (Alphen aan den Rijn: Kluwer 2006), p (33) at 50. See also U. BABUSIAUX & C. WITZ, ‘Das neue französische Vertragsrecht – Zur Reform des Code civil’, 72. *JZ (JuristenZeitung)* 2017, p (496) at 505–507.

66 For a functional and doctrinal analysis under Swiss law, see V. JENTSCH, *Law of Contracts*, paras 6–23.

3. Adaption or Termination of Contractual Obligations

3.1. *Adaption and Termination of Contracts under Changed Circumstances*

30. It is generally accepted in all five jurisdictions under examination that a change of circumstances, which renders contractual performance impossible, may release a party from his or her obligations to perform under a contract. Those jurisdictions evaluate it differently, however, whether economic disadvantages or mere impracticability arising from a pandemic also have an effect on releasing the party from his or her contractual obligations. Germany and France have such institutions already codified in their civil codes. Austria, Switzerland and Italy have not, but similar institutions are widely recognized here.

31. In Germany, section 313 of the German Civil Code contains the concept of interference with the basis of the transaction (*Störung der Geschäftsgrundlage*), an emanation of the *clausula rebus sic stantibus*. This concept was developed by legal doctrine⁶⁷ and case law⁶⁸ in the early 19th century and ultimately codified in 2002. The application of this concept requires a real, a hypothetical and a normative element.⁶⁹ First, circumstances, which have become the basis of a contract, must have changed seriously after the conclusion of a contract. Second, the parties would not have concluded the contract at all or only with a different content, if they had foreseen the change. Third, adherence to the contract must be unreasonable for one of the parties. If these requirements are met, such party may request adaption or, as a last resort, termination of a contract.⁷⁰ Moreover, section 242 of the German Civil Code, according to which each party to a contract has a duty to perform according to the requirement of good faith,

67 See P. OERTMANN, *Die Geschäftsgrundlage: Ein neuer Rechtsbegriff* (Leipzig: Deichert 1921). See also B. WINDSCHEID, *Die Lehre des römischen Rechts von der Voraussetzung* (Düsseldorf: Buddeus 1850).

68 See RG, 3 Feb. 1922, II 640/21, in *RGZ* 103, 328, pp 331–332; RG, 6 Jan. 1923, V 246/22, in *RGZ* 106, 7, p 10; RG, 30 Oct. 1928, II 28/28, in *RGZ* 122, 200, p 203; RG, 21 June 1933, I 54/33, in *RGZ* 141, 212, pp 216–217; BGH, 23 May 1951, II ZR 71/50, in *BGHZ* 2, 176, pp 188–189; BGH, 29 Apr. 1982, III ZR 154/80, in *BGHZ* 84, 1, p 9. See also RG, 2 Dec. 1919, VII 303/19, in *RGZ* 98, 18, p 20.

69 See L. BÖTTCHER, in H.P. Westermann et al. (eds), *Erman Handkommentar zum Bürgerlichen Gesetzbuch* (Köln: Otto Schmidt 2017), § 313 paras 11–39; A. STADLER, Jauernig Kommentar, § 313 paras 14–26; T. FINKENAUER, in F.J. Säcker et al. (eds), *Münchener Kommentar zum Bürgerlichen Gesetzbuch: Schuldrecht – Allgemeiner Teil II* (München: C.H. Beck 2019), § 313 paras 54–80; S.A.E. MARTENS, in B. Gsell et al. (eds), *beck-online Grosskommentar zum Bürgerlichen Gesetzbuch* (1 July 2020), § 313 paras 48–120.2; S. LORENZ, Beck’scher Online-Kommentar, § 313 paras 23–81.

70 See L. BÖTTCHER, *Ermann Handkommentar*, § 313 paras 40–44; A. STADLER, Jauernig Kommentar, § 313 paras 27–30; T. FINKENAUER, *Münchener Kommentar*, § 313 paras 81–123; S.A.E. MARTENS, *beck-online Grosskommentar*, § 313 paras 121–153; S. LORENZ, Beck’scher Online-Kommentar, § 313 paras 82–91.

taking customary practice into consideration, might play a role in this context. Although this is not undisputed in legal doctrine⁷¹ and case law,⁷² a duty to renegotiate an existing contract might be based on this principle.

32. Austrian law does not contain a general provision on *clausula rebus sic stantibus*. However, section 936 of the Austrian Civil Code touches on this with regard to preliminary contracts. More generally, Austrian legal scholars⁷³ and courts⁷⁴ accept and acknowledge the concept of a *clausula*. This concept operates as last resort (*ultima ratio*), applying to exceptional cases only. In its case law, the Austrian Supreme Court developed three requirements. First, the parties have made an assumption about circumstances and those, interrupting the contractual equilibrium, change so seriously that insisting on performance becomes intolerable or unreasonable.⁷⁵ Second, the risk that the change of circumstances at issue may occur has not been allocated to one of the parties by law or by the contract

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- 71 See H.P. WESTERMANN, Erman Handkommentar, introduction to § 241 para. 18; L. KÄHLER, in B. Gsell et al. (eds), *beck-online Grosskommentar zum Bürgerlichen Gesetzbuch* (15 July 2020), § 242 paras 750–820. See also C. SCHUBERT, in F.J. Säcker et al. (eds), *Münchener Kommentar zum Bürgerlichen Gesetzbuch: Schuldrecht – Allgemeiner Teil I* (München: C.H. Beck 2019), § 242 para. 531. From an international perspective, see F.T. SCHWARZ et al., Germany, paras 35–37.
- 72 See BGH, 12 May 2006, V ZR 97/05, in *NJW* 2006, p 2843; BGH, 30 Sept. 2011, V ZR 17/11, in *NJW* 2012, p 373. See also BVerfG, 7 Feb. 1990, 1 BvR 26/84, in *BVerfGE* 81, 242, p 255; BVerfG, 19 Oct. 1993, 1 BvR 567, 1044/89, in *BVerfGE* 89, 214, pp 229, 231–235; BVerfG, 6 Feb. 2001, 1 BvR 12/92, in *BVerfGE* 103, 89, pp 101–102; BVerfG, 29 May 2006, 1 BvR 240/98, in *VersR (Versicherungsrecht)* 2006, p (961) at 962.
- 73 For a general overview, see A. RIEDLER, ‘Zivilrecht I: Allgemeiner Teil’, in A. Riedler (ed.), *Studienkonzept Zivilrecht* (Wien: LexisNexis 2018), para. 25/4; A. KLETECKA et al., *Grundriss des bürgerlichen Rechts I: Allgemeiner Teil, Sachenrecht, Familienrecht* (Wien: Manz 2018), para. 510. From an international perspective, see F.T. SCHWARZ et al., Austria, para. 56.
- 74 See OGH, 13 July 1955, 3 Ob 330/55; OGH, 12 Feb. 1970, 1 Ob 24/70, in *EvBl* 1970, no. 203; OGH, 15 Sept. 1970, 8 Ob 181/70; OGH, 12 May 1977, 7 Ob 564/77; OGH, 28 June 1979, 7 Ob 509/79; OGH, 23 Oct. 1986, 6 Ob 650/86; OGH, 4 Nov. 1986, 14 Ob 176/86; OGH, 5 Mar. 1987, 7 Ob 522/87, in *SZ* 60, no. 42; OGH, 1 Mar. 2012, 1 Ob 22/12k; OGH, 17 June 2015, 3 Ob 104/15p.
- 75 See OGH, 9 May 1962, 6 Ob 79/62, in *SZ* 35, no. 47; OGH, 14 Jan. 1981, 1 Ob 725/80, in *SZ* 54, no. 4; OGH, 9 Sept. 1986, 2 Ob 626/85; OGH, 15 Jan. 1987, 6 Ob 627/87; OGH, 25 June 1987, 6 Ob 627/87; OGH, 1 Sept. 1987, 2 Ob 2/87; OGH, 20 July 1989, 8 Ob 585/88; OGH, 13 Dec. 1990, 8 Ob 665/89; OGH, 15 Dec. 1993, 3 Ob 502/94; OGH, 19 Aug. 1998, 9 ObA 180/98f; OGH, 28 May 1999, 7 Ob 355/98a; OGH, 9 Mar. 2000, 8 Ob 232/99x; OGH, 2 Oct. 2007, 5 Ob 355/98a; OGH, 16 Sept. 2008, 1 Ob 95/08i; OGH, 19 Dec. 2012, 7 Ob 192/12d, in *SZ* 87, no. 144; OGH, 17 Dec. 2012, 5 Ob 136/12d; OGH, 17 Dec. 2013, 5 Ob 117/13m; OGH, 21 May 2014, 7 Ob 66/14b; OGH, 9 July 2014, 2 Ob 67/14p; OGH, 25 Sept. 2014, 9 Ob 46/14a; OGH, 29 June 2015, 6 Ob 68/15s; OGH, 30 Mar. 2016, 6 Ob 46/16g; OGH, 27 Feb. 2017, 1 Ob 17/17g.

(*Doppellücke*).⁷⁶ Third, the change in circumstances must have been unforeseeable for the party relying on it.⁷⁷ Because previous court practice has not always been entirely consistent, scholars have pointed out that there remains quite some uncertainty.⁷⁸ In addition, the concept of good faith, which corresponds to ‘practice of fair dealing’, referred to in section 914 of the Austrian Civil Code, might impose a duty to renegotiate a contract.⁷⁹

33. Swiss law does not codify the concept of *clausula rebus sic stantibus* in general, although it is accepted in both legal doctrine⁸⁰ and case

76 See OGH, 17 Dec. 1974, 8 Ob 246/74, in *EvBl* 1975, no. 206; OGH, 14 Mar. 1989, 2 Ob 509/89, in *JBl* (*Juristische Blätter*) 1989, p 650; OGH, 26 July 2000, 7 Ob 163/00x; OGH, 19 Aug. 1998, 9 ObA 180/98f.

77 See OGH, 17 Mar. 1970, 8 Ob 60/70, in *NZ* (*Österreichische Notariats-Zeitung*) 1970, p 92; OGH, 3 Feb. 1976, 5 Ob 243/75, in *SZ* 49, no. 13; OGH, 14 Jan. 1981, 1 Ob 725/80, in *SZ* 54, no. 4; OGH, 20 Dec. 1984, 5 Ob 576/83, in *SZ* 57, no. 208; OGH, 25 Jan. 1985, 8 Ob 615/84; OGH, 22 Jan. 1986, 3 Ob 609/85, in *SZ* 59, no. 17; OGH, 8 July 1986, 7 Ob 537/86; OGH, 6 Nov. 1986, 7 Ob 656/86; OGH, 6 Nov. 1986, 7 Ob 537/86; OGH, 6 Nov. 1986, 7 Ob 656/86; OGH, 7 July 1987, 2 Ob 613/86, in *EvBl* 1987, no. 176; OGH, 15 Sept. 1987, 4 Ob 542/87; OGH, 20 July 1989, 8 Ob 585/88; OGH, 27 Oct. 1989, 8 Ob 684/89, in *RdW* (*Österreichisches Recht der Wirtschaft*) 1990, p 249; OGH, 11 Apr. 1991, 8 Ob 46/89, in *wbl* (*wirtschaftsrechtliche blätter*) 1991, p 243; OGH, 25 Mar. 1994, 3 Ob 513/94; OGH, 7 Oct. 1997, 4 Ob 255/97x; OGH, 15 Dec. 1997, 1 Ob 2342/96k; OGH, 22 Dec. 1998, 5 Ob 285/98t; OGH, 23 Mar. 1999, 1 Ob 340/98a; OGH, 11 Mar. 1999, 2 Ob 47/99x; OGH, 28 May 1999, 7 Ob 355/98a; OGH, 19 Oct. 1999, 1 Ob 234/99i; OGH, 9 Nov. 2000, 8 ObA 30/00w; OGH, 20 Feb. 2003, 6 Ob 154/02v; OGH, 24 June 2005, 1 Ob 47/05a; OGH, 13 May 2008, 6 Ob 148/07v; OGH, 2 Oct. 2007, 5 Ob 121/07s; OGH, 29 June 2015, 6 Ob 68/15s; OGH, 25 June 2020, 6 Ob 225/19k.

78 See S. LAIMER & M. SCHICKMAIR, ‘Ausgewählte zivilrechtliche Probleme in der COVID-19-Krise’, in R. Resch (ed.), *Das Corona-Handbuch: Österreichs Rechtspraxis zur aktuellen Lage* (Wien: Manz 2020), p (253) at Ch. 11 paras 29, 56. See also F.T. SCHWARZ et al., Austria, para. 58.

79 See M. BINDER & W. KOLMASCH, in M. Schwimann & G. Kodek (eds), *Praxiskommentar zum Allgemeinen bürgerlichen Gesetzbuch* (Wien: LexisNexis 2014), § 914 paras 236–242; R. BOLLENBERGER, in H. Koziol et al. (eds), *Kurzkommentar zum Allgemeinen bürgerlichen Gesetzbuch* (Wien: Österreich 2017), § 914 paras 8–11; P. RUMMEL, in P. Rummel & M. Lukas (eds), *Kommentar zum Allgemeinen bürgerlichen Gesetzbuch* (Wien: Manz 2018), § 914 paras 20–41; H. HEISS, in A. Kletecka & M. Schauer (eds), *Online-Kommentar zum Allgemeinen bürgerlichen Gesetzbuch* (1 Aug. 2019), § 914 para. 99. See also OGH, 14 Feb. 2007, 7 Ob 255/06k, in *JBl* 2007, p 716.

80 See E.A. KRAMER & B. SCHMIDLIN, in A. Meier-Hayoz (ed.), *Bern Kommentar zum Obligationenrecht: Allgemeine Einleitung in das schweizerische Obligationenrecht und Kommentar zu Art. 1–18 OR* (Bern: Stämpfli 1986), Art. 18 paras 272–359; B. WINIGER, in L. Thévenoz & F. Werro (eds), *Commentaire romand du Code des obligations* (Basel: Helbing Lichtenhahn 2012), Art. 18 paras 193–215; J. SCHMID et al., *Schweizerisches Obligationenrecht: Allgemeiner Teil I* (Zürich: Schulthess 2014), pp 327–331; P. JÄGGI et al., in P. Gauch & J. Schmid (eds), *Zürcher Kommentar zum Obligationenrecht: Auslegung, Ergänzung und Anpassung der Verträge; Simulation* (Zürich: Schulthess 2015), Art. 18 paras 710–789; I. SCHWENZER, *Obligationenrecht*, pp 278–280; A. KOLLER, *Obligationenrecht*, pp 507–519; B. BERGER, *Allgemeines Schuldrecht* (Bern: Stämpfli 2018), pp 399–401; C. HUGUENIN, *Obligationenrecht*, pp 100–105, 257; C. MÜLLER, in R. Aebi-Müller & C. Müller (eds), *Bern Kommentar zum Obligationenrecht: Art. 1–18 mit*

law⁸¹ in Switzerland. Article 373(2) of the Swiss Code of Obligations contains a context-specific rule on the adaption of construction contracts under changed circumstances. More generally, the application of the *clausula* requires three elements. First, a change in circumstances must lead to a serious disruption of the contractual equilibrium (*gravierende Äquivalenzstörung*).⁸² Second, such change of circumstances must occur after the conclusion of the contract. Third, the changed circumstances must not be foreseeable for the parties at the time of contract formation.⁸³ It is disputed in scholarship, however, whether this concept entitles a party to request its counterparty to renegotiate the contractual terms in good faith before asking a court to adapt or terminate the agreement. Some scholars argue that under Swiss law, the duty of good faith, which is enshrined in Article 2 of the Swiss Civil Code, includes a duty to renegotiate and adapt contractual terms to significantly changed circumstances that the parties had not foreseen at the time they entered into the contract.⁸⁴

34. In France, the concept of *imprévision*, which was incorporated into French law by a reform in 2016, is now contained in Article 1195 of the French Civil Code. The provision allows contracting parties to request renegotiation or termination of contracts, if three requirements are met.⁸⁵ First, there must be a change of circumstances that was not reasonably foreseeable at the time of contract formation

allgemeiner Einleitung in das Schweizerische Obligationenrecht (Bern: Stämpfli 2018), Art. 18, paras 633–792; W. WIEGAND, *Basler Kommentar*, Art. 18 paras 95–125a.

81 See BGer, 29 May 1934 (*Rogenmoser v. Tiefengrund AG*), in *BGE* 60 II 205, pp 209–210; BGer, 7 Dec. 1971 (*Neumühle AG v. Stadtgemeinde Chur*), in *BGE* 97 II 390, pp 398–399; BGer, 26 Sept. 1974 (*Incommerz AG v. X*), in *BGE* 100 II 345, pp 348–349; BGer, 18 Sept. 1981 (*Baumann v. Rohr*), in *BGE* 107 II 343, pp 347–348; BGer, 21 Mar. 1996 (*G v. B*), in *BGE* 122 III 97, pp 98–99; BGer, 24 Apr. 2001 (*A v. Migros-Genossenschafts-Bund*), in *BGE* 127 III 300, pp 302–309; BGer, 28 Oct. 2008, 4A_299/2008, in *BGE* 135 III 1, pp 9–10; BGer, 31 July 2012, 9C_88/2012, in *BGE* 138 V 366, pp 371–372.

82 See BGer, 13 June 1975 (*A v. G*), in *BGE* 101 II 17, p 19. See also BGer, 7 Dec. 1971 (*Neumühle AG v. Stadtgemeinde Chur*), in *BGE* 97 II 390, pp 398–399.

83 See BGer, 22 Nov. 2010, 4A_375/2010. See also BGer, 24 Apr. 2001 (*A v. Migros-Genossenschafts-Bund*), in *BGE* 127 III 300, pp 304–306.

84 See P. PICHONNAZ, modification, p (21) at 37–41; P. TERCIER & P. PICHONNAZ, *Le droit des obligations* (Zürich: Schulthess 2019), p 248; P. PICHONNAZ, ‘Un droit contractuel extraordinaire ou comment régler les problèmes contractuels en temps de pandémie’, 139. *ZSR* 2020 (Sondernummer), p (137) at 147–148.

85 See C. CHANTEPIE & M. LATINA, *Commentaire théorique et pratique*, paras 522–530; P. ANCEL, ‘Imprévision’, in *Répertoire de droit civil* (Paris: Dalloz 2017), paras 55–119; D. HOUTCIEFF, *Droit des contrats*, paras 831–842-1; P. MALAURIE et al., *Droit des obligations*, paras 758–763; A. BÉNABENT, *Droit des obligations*, paras 308–311; B. FAGES, *Droit des obligations*, para. 351; M. FABRE-MAGNAN, *Droit des obligations*, paras 774–780. From an international perspective, see F.T. SCHWARZ et al., *France*, paras 34–45.

and that is beyond the control of the parties.⁸⁶ Second, the changed circumstances must render performance excessively onerous for one of the parties. Third, the party seeking to rely on this concept must not have tacitly or explicitly accepted the risk that materializes in the changed circumstance. In the event of *imprévision*, the disadvantaged party shall first approach its counter-party to engage in good faith negotiations. Only if parties fail to reach an agreement, they may jointly request a judge to adapt the contract. If such a joint request is not possible, the judge may, at the request of a party, adapt the contract or terminate it. Additional duties may be derived from Article 1104 of the French Civil Code, providing that contracts under French law must be negotiated, formed and executed in good faith.⁸⁷

35. Other than the concept of excessive burdensomeness, which will be discussed in the next section, Italian law does not contain a positivized *clausula rebus sic stantibus*. Italian courts⁸⁸ have so far been rather reluctant to accept such concept, although it is already well developed in legal scholarship⁸⁹ in Italy. However, the institution of presupposition (*presupposizione*), a supplementary remedy of jurisprudential origin, which is closely related to this concept, could be relevant.⁹⁰ According to this institution, a party to a contract may request its termination, if the presupposition, which was implicitly taken into account at the time of contract conclusion, is no longer valid during contract execution. In addition, the general rules on fairness and good faith may trigger a renegotiation of the contract, which eventually leads to an adaption of the contract.⁹¹ The rules of fairness of debtor and creditor in

86 See L. THIBIERGE, *contrat*, paras 17-303, 305-502. See also P. ANCEL, 'Imprévision', para. 27. For the famous - but quite old - leading case on this issue, see Civ., 6 Mar. 1876 (*Canal de Craponne*), in *D (Recueil Dalloz)* 1876, p 193. For a detailed discussion of this leading case, see F. TERRÉ & Y. LEQUETTE, *Les grands arrêts de la jurisprudence civile II: Obligations, Contrats spéciaux, Sûretés* (Paris: Dalloz 2015), no. 165. For more recent decisions, see Com., 17 Feb. 2015, 12-29550, 13-18956, 13-20230. See also Cour d'appel, Reims, 4 Sept. 2012, 11/01602.

87 See L. THIBIERGE, *contrat*, paras 796-808, in particular 796. See also C. CHANTEPIE & M. LATINA, *Commentaire théorique et pratique*, paras 102-112.

88 See Cass., 6 July 1971, 2104, in *GI (Giurisprudenza italiana)* I 1973, p 1; Cass., 9 May 1981, 3074, in *GI* I 1983, p 1; Cass., 11 Nov. 1986, 6584, in *NGCC (La nuova giurisprudenza civile commentata)* I 1987, p 683; Cass., 31 Oct. 1989, 4554.

89 See G. OSTI, 'Clausola rebus sic stantibus', in A. Azara & E. Eula (eds), *Novissimo digesto italiano* (Torino: Utet 1959), p 353; T. GALLETTTO, 'La clausola "rebus sic stantibus"', in R. Sacco (ed.), *Digesto delle discipline privatistiche: Sezione civile* (Torino: Utet 1988), p 383.

90 See F. GIRINO, 'Presupposizione', in A. Azara & E. Eula (eds), *Novissimo digesto italiano* (Torino: Utet 1966), p (775) at 776-784; F. MACIOCE, 'La presupposizione', in G. Alpa & M. Bessone (eds), *I contratti in generale* (Torino: Utet 1991), p 487; F. GALGANO, *Trattato di diritto civile*, para. 119.2; M. MAGGIOLO, 'Presupposizione e premesse del contratto', *GC* 2014, p 867. See also Cass., 21 Nov. 2001, 14629; Cass., 14 June 2013, 15025; Cass., 13 Oct. 2016, 20620; Cass., 20 Apr. 2018, 9909; Cass., 5 Mar. 2018, 5112.

91 See M.A. LIVI, in P. Rescigno (ed.), *Codice civile: le fonti del diritto italiano* (Milano: Giuffrè 2018), Art. 1375 para. 6; G. MERUZZI, in M. Franzoni & R. Rolli (eds), *Codice civile: commentato con*

general can be found in Article 1175, those with regard to contract integration in particular in Article 1374 of the Italian Civil Code. Articles 1337, 1366 and 1375 of the Italian Civil Code enshrine the principles of good faith in different stages of contractual relations such as negotiation and formation, interpretation and performance.

36. In all jurisdictions under examination, relevant legal institutions aimed at adapting and terminating contracts under changed circumstances are particularly important for the delivery of goods and the provision of services, which, although still possible, no longer make sense from an economic point of view. Typical examples include the delivery of fresh food to a restaurant or an ongoing beer supply contract for a bar. The rules in those jurisdictions differ considerably as French law has a differentiated, three-step problem-solving procedure, namely to renegotiate, to adapt and to terminate a contract.

3.2. *Termination of Permanent Contracts for Cause*

37. The extraordinary termination of permanent contracts for cause is firmly established in the German-speaking jurisdictions. This institution was codified in Germany, while legal doctrine and case law in Austria and Switzerland generally recognize it without being codified there. Termination for cause leads to the dissolution of a permanent contract for the future, whereas performance already rendered is not affected by such termination. The relevant institutions in France and Italy only lead to similar results in some cases, but often not. These institutions, nevertheless, may serve as a last resort in a pandemic.

38. In Germany, section 314 of the German Civil Code is about termination, for a compelling reason, of contracts for the performance of a continuing obligation (*Kündigung von Dauerschuldverhältnissen aus wichtigem Grund*). This concept of extraordinary termination of permanent contracts was codified back in 2002. Pursuant to the first sentence of section 314(1), each party may terminate a contract for the performance of a continuing obligation for a compelling reason without a notice period.⁹² The second sentence of section 314(1) defines compelling reasons as a situation, in which the terminating party, taking into account all the circumstances of the specific case and weighing the interests of both parties, cannot be expected to continue the contractual

dottrina e giurisprudenza (Torino: G. Giappichelli 2018), Art. 1375 para. 9. See also A.A. DOLMETTA, 'Il problema della rinegoziazione (ai tempi del coronavirus)', *GC* 2020 (speciale no. 3), p 319.

⁹² See L. BÖTTCHER, *Ermann Handkommentar*, § 314 paras 3a-3c; A. STADLER, *Jauernig Kommentar*, § 314 para. 4; R. GAIER, in F.J. Säcker et al. (eds), *Münchener Kommentar zum Bürgerlichen Gesetzbuch: Schuldrecht – Allgemeiner Teil II* (München: C.H. Beck 2019), § 314 paras 6-12; S. A.E. MARTENS, *beck-online Grosskommentar*, § 314 paras 12-22; S. LORENZ, *Beck'scher Online-Kommentar*, § 314 paras 4-6.

relationship until the agreed end or until the expiry of a notice period.⁹³ If the compelling reason consists in the breach of a duty under the contract, the additional rules of section 314(2) apply.⁹⁴ In such a case, extraordinary termination is generally only possible after the expiry without result of a period specified for relief or after a warning notice without result. If these requirements are met, the contract may be terminated by a court. In addition, damaged may be owed.⁹⁵

39. Austrian law contains no general provision on the termination of permanent contracts for cause. Austrian law, however, provides various context-specific rules on termination for cause, in particular sections 171 (service contracts of minors), 987 (loan contracts), 1117 and 1118 (rent and lease contracts), 1162 (employment contracts) and 1210 (partnership contracts) of the Austrian Civil Code. More generally, it is well accepted in Austrian legal doctrine⁹⁶ and case law⁹⁷ that long-term contracts can be terminated without any grace period, if there is a compelling reason. The Austrian Supreme Court emphasized that termination for cause may only be invoked as a last resort (*ultima ratio*).⁹⁸ Extraordinary termination of long-term contracts allows a

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- 93 See L. BÖTTCHER, *Ermann Handkommentar*, § 314 paras 4–5; A. STADLER, *Jauernig Kommentar*, § 314 para. 5; R. GAIER, *Münchener Kommentar*, § 314 paras 16–22; S.A.E. MARTENS, *beck-online Grosskommentar*, § 314 paras 26–52.1; S. LORENZ, *Beck’scher Online-Kommentar*, § 314 paras 7–17. See also BGH, 7 Oct. 2004, I ZR 18/02, in *ZIP (Zeitschrift für Wirtschaftsrecht)* 2005, p 534; BGH, 9 Mar. 2010, VI ZR 52/09, in *NJW* 2010, p 1874; BGH, 11 Nov. 2010, III ZR 57/10, in *NJW-RR (NJW Rechtsprechungs-Report Zivilrecht)* 2011, p 916; BGH, 7 Mar. 2013, III ZR 231/12, in *NJW* 2013, p 2021; BGH, 4 May 2016, XII ZR 62/15, in *NJW* 2016, p 3718.
- 94 See L. BÖTTCHER, *Ermann Handkommentar*, § 314 paras 6–9; A. STADLER, *Jauernig Kommentar*, § 314 para. 6; R. GAIER, *Münchener Kommentar*, § 314 paras 18, 23–28; S.A.E. MARTENS, *beck-online Grosskommentar*, § 314 paras 53–67; S. LORENZ, *Beck’scher Online-Kommentar*, § 314 paras 18–21. See also BGH, 20 May 2009, IV ZR 274/06, in *NJW-RR* 2009, p 1189.
- 95 See L. BÖTTCHER, *Ermann Handkommentar*, § 314 para. 19; A. STADLER, *Jauernig Kommentar*, § 314 para. 9; R. GAIER, *Münchener Kommentar*, § 314 paras 35–36; S.A.E. MARTENS, *beck-online Grosskommentar*, § 314 paras 84–87.1; S. LORENZ, *Beck’scher Online-Kommentar*, § 314 para. 29.
- 96 See R. REISCHAUER, *Kommentar*, Vor §§ 918ff paras 57–75; M. GRUBER, in A. Kletecka & M. Schauer (eds), *Online-Kommentar zum Allgemeinen bürgerlichen Gesetzbuch* (1 May 2018), § 918 paras 15–18.
- 97 See OGH, 30 June 1987, 2 Ob 652/86, in *SZ* 60, no. 125; OGH, 24 Sept. 1987, 7 Ob 646/87, in *JBl* 1988, p 446; OGH, 15 Dec. 1987, 5 Ob 591/87; OGH, 24 Jan. 1989, 5 Ob 504/89; OGH, 30 Oct. 1998, 1 Ob 252/98k; OGH, 6 Oct. 2000, 1 Ob 101/00k; OGH, 25 June 2001, 8 Ob 311/00v; OGH, 8 June 2005, 7 Ob 40/05s; OGH, 31 May 2006, 7 Ob 77/06h; OGH, 22 Feb. 2007, 3 Ob 13/07v; OGH, 28 Aug. 2007, 5 Ob 166/07h; OGH, 28 July 2010, 9 Ob 36/10z; OGH, 27 Mar. 2013, 7 Ob 15/13a; OGH, 22 May 2014, 2 Ob 163/13d, 2 Ob 163/13d; OGH, 23 Oct. 2015, 6 Ob 196/15i; OGH, 22 Mar. 2018, 4 Ob 34/18f; OGH, 26 Sept. 2018, 1 Ob 155/18b.
- 98 See OGH, 10 July 1986, 7 Ob 585/86, in *JBl* 1987, p 180; OGH, 26 Nov. 1987, 6 Ob 671/87; OGH, 10 Dec. 1987, 6 Ob 719/87; OGH, 15 June 1989, 7 Ob 719/87; OGH, 25 June 1996, 4 Ob 2142/96w; OGH, 25 Feb. 1997, 4 Ob 44/97t; OGH, 14 Oct. 1997, 1 Ob 210/97g; OGH, 15 Oct. 1998, 8 Ob 171/98z; OGH, 28 May 1999, 6 Ob 42/99s; OGH, 25 July 2000, 1 Ob 24/00m; OGH, 22 Apr. 2003, 9 Ob 24/03z; OGH, 21 May 2003, 6 Ob 93/03z; OGH, 23 Oct. 2006, 7 Ob 235/06v; OGH, 29 Aug. 2007, 7 Ob 158/07x; OGH, 24 June 2014, 4 Ob 81/14m; OGH, 25 Feb. 2016,

party to terminate an agreement, if a situation materializes that renders it intolerable to perform its contractual obligations from the perspective of a reasonable party. In Austria, courts have so far taken a nuanced approach.⁹⁹ In previous court practice, long-term agreements were allowed to be terminated, if legal circumstances relevant for the contractual performance changed significantly or if insisting on performance would have led to the impending financial ruin of a party.¹⁰⁰

40. Swiss law does not contain general rules on termination of permanent contracts for cause. Swiss law, however, contains several context-specific rules on termination for cause, notably in Articles 226g (lease contracts), 297 (usufructuary lease contracts), 337 (employment contracts), 346(2) (apprenticeship contracts), 418r(1) (commercial agency contracts), 527 (lifetime maintenance contracts) and 545 (partnership contracts) of the Swiss Code of Obligations. It is widely accepted in Swiss legal doctrine¹⁰¹ and case law¹⁰² that parties to long-term contracts are entitled to terminate such contracts with immediate effect, if there is a compelling reason (*wichtiger Grund*). Under Swiss law, a compelling reason requires three elements.¹⁰³ First, the terminating party cannot be expected to remain bound by its contractual obligations (*Unzumutbarkeit*), from both a subjective and an objective perspective. Second, there are no contractually agreed or specific statutory grounds for termination that can be invoked. Third, the party intending to terminate the contract must notify its counterparty immediately after occurrence of the compelling reason. If these requirements are met, each party may opt to terminate the contract.

41. In France, the concept of *caducité*, which was incorporated into French law by a reform in 2016, is now contained in Articles 1186 and 1187 of the French Civil Code. Pursuant to Article 1186(1), a validly formed contract can be terminated, if one of its essential elements disappears.¹⁰⁴ The disappearance of the essential

2 Ob 20/15b, in *SZ* 91, no. 22; OGH, 6 Apr. 2016, 7 Ob 201/15g; OGH, 22 Feb. 2017, 8 Ob 89/16w; OGH, 31 July 2019, 5 Ob 91/19x.

99 See OGH, 27 Nov. 2002, 3 Ob 274/02v, in *SZ* 77, no. 160. See also F.T. SCHWARZ et al., Austria, para. 66.

100 See OGH, 11 June 1971, 6 Ob 92/71; OGH, 17 Oct. 1973, 7 Ob 201/73, in *RZ (Österreichische Richterzeitung)* 1974, no. 59; OGH, 10 Mar. 1988, 8 Ob 527/88; OGH, 14 Sept. 2010, 1 Ob 143/10a, in *JBl* 2011, p 173. See also OGH, 28 Nov. 2013, 6 Ob 182/13b.

101 See P. JÄGGI et al., *Zürcher Kommentar*, Art. 18 paras 689–691, 785, 791–792; I. SCHWENZER, *Obligationenrecht*, p 278; A. KOLLER, *Obligationenrecht*, pp 498–502; B. BERGER, *Schuldrecht*, p 402; C. HUGUENIN, *Obligationenrecht*, pp 255–256; C. MÜLLER, *Bern Kommentar*, Art. 18 paras 615–619.

102 See BGer, 3 Apr. 2002, 4C.175/2001, in *BGE* 128 III 428, pp 429–434; BGer, 6 Mar. 2007, 4P.243/2006, in *BGE* 133 III 360, pp 363–366; BGer, 5 Apr. 2012, 4A_589/2011, in *BGE* 138 III 304, pp 317–322; BGer, 27 June 2017, 4A_45/2017, in *BGE* 143 III 480, pp 483–494.

103 From an international perspective, see F.T. SCHWARZ et al., Switzerland, paras 41–46.

104 See C. CHANTEPEIE & M. LATINA, *Commentaire théorique et pratique*, paras 493, 498–499; D. HOUTCIEFF, *Droit des contrats*, paras 594–594-3, 596; P. MALAURIE et al., *Droit des obligations*,

element must be beyond the parties' control. If one of the contracting parties is responsible for the disappearance, this would lead to a breach of contract. In lack of a statutory definition of essential elements, French courts understand this statutory term to refer to circumstances relating to both validity and content of a contract.¹⁰⁵

Essential elements will thus relate either to essential motives of the parties for entering into the agreement and the purpose that the agreement is designed to serve or to the subject matter of the contract. This concept may apply to many different situations. However, in accordance with Articles 1186(2) and 1186(3), *caducité* is particularly relevant in the context of interdependent contracts or of a group of contracts.¹⁰⁶ Therefore, if a contract that is part of the overall transaction ceases to exist under certain conditions, it may lead to the termination of the remaining contracts.

42. In Italy, the concept of excessive burdensomeness (*eccessiva onerosità*) is set forth in Articles 1467 to 1469 of the Italian Civil Code. Pursuant to Article 1467(1), the party in charge of performance that has become overly burdensome due to the occurrence of extraordinary and unforeseeable events may request termination of a contract for continuous or periodic performance.¹⁰⁷ Under Italian law, a party can request a court to terminate a contract, if four requirements are met.¹⁰⁸ First, there must be a long-term agreement or an agreement providing postponed obligations. Second, one of the obligations becomes excessively burdensome compared to the other, or, in case of an obligation of only one party, such obligation has become excessively burdensome. Third, this obligation has not been entirely performed. Fourth, such 'excessive burdensomeness' results from an

para. 668; A. BÉNABENT, *Droit des obligations*, paras 332-334; B. FAGES, *Droit des obligations*, para. 215; M. FABRE-MAGNAN, *Droit des obligations*, para. 744. From an international perspective, see F. T. SCHWARZ et al., *France*, paras 46-50, 54.

105 See Com., 3 Mar. 2004, 02-12905, in IV *Bulletin*, no. 42; Cass. 1re civ., 7 Nov. 2006, 05-11775, in I *Bulletin*, no. 457; Com., 30 Oct. 2008, 07-17646, in I *Bulletin*, no. 241.

106 See C. CHANTEPIE & M. LATINA, *Commentaire théorique et pratique*, paras 494-496, 498-499; D. HOUTCIEFF, *Droit des contrats*, paras 595-595-8, 596; P. MALAURIE et al., *Droit des obligations*, para. 668; A. BÉNABENT, *Droit des obligations*, paras 332-334; B. FAGES, *Droit des obligations*, para. 215; M. FABRE-MAGNAN, *Droit des obligations*, para. 745. From an international perspective, see F.T. SCHWARZ et al., *France*, paras 46-47, 51-54.

107 See F. GALGANO, *Trattato di diritto civile*, para. 116; L. CIAFARDINI, *Codice civile*, Art. 1467 §§ 1-5; A. ZACCARIA, *Codice civile*, Art. 1467 IV, VI; G. MAURO PELLEGRINI, *Codice civile*, Art. 1467 paras 3-8; C. DEL FEDERICO, *Codice civile*, Art. 1467 paras 3-7.

108 See A. BOSELLI, 'Eccessiva onerosità', in A. Azara & E. Eula (eds), *Novissimo digesto italiano* (Torino: Utet 1960), p (331) at 334-338; F. GALGANO, *Trattato di diritto civile*, para. 116. See also Cass., 9 Oct. 1971, 2815; Cass., 20 Jan. 1976, 167; Cass., 8 Apr. 1981, 1996; Cass., 27 Apr. 1982, 2615; Cass., 31 Oct. 1989, 4554; Cass., 29 Jan. 1990, 531; Cass., 4 Aug. 1990, 7876; Cass., 21 Feb. 1994, 1649; Cass., 3 Nov. 1994, 9060; Cass., 13 June 1997, 5337; Cass., 4 Mar. 2004, 4423; Cass., 19 Apr. 2011, 8994.

extraordinary and unforeseeable event. In addition, as set forth in Articles 1467(1) and 1458(1), the effects of termination do not extend to performance already rendered.¹⁰⁹ However, in accordance with Article 1467(3), the party against whom performance is requested may avoid such termination by offering an adequate modification of the terms of the contract.

43. In the German-speaking jurisdictions and Roman civil codes examined, termination of permanent contracts, either with (ordinary termination) or without (extraordinary termination) notice, could become more important during or after the coronavirus pandemic, but is most probably only of limited help to contracting parties. One practical example of this concept are subscriptions for public transportation, another example is gym membership. The fact of a pandemic alone, however, will hardly ever constitute a compelling reason for extraordinary termination in the absence of other aggravating circumstances.

3.3. *Case for Codification in European Contract Law*

44. With regard to modifications of a contract, this article deals with the question, whether institutions on adaption or termination of contractual obligations still serve their purpose in times of pandemic or whether and to what extent a codification of such institutions is needed in European Contract Law. Using a functional and comparative approach, similarities and differences of all these institutions in five important civil law jurisdictions are analysed and compared in order to answer this question. The analysis has in particular shown that, despite – or because of – structural differences, the application of those institutions leads partly to largely similar end results, but partly also to quite different end results.¹¹⁰ This finding notably implies that there is, indeed, need for a codification of such institutions in European Contract Law, also and in particular in times of pandemic.

45. Since the outbreak of the coronavirus pandemic almost two years ago, the practical importance of all related institutions on adaption or termination of contractual obligations has steadily increased. In Germany, voices are growing louder

in favour of solving hard and typical cases with the concept of interference with the basis of the transaction.¹¹¹ This debate has also been vitalised in Austria and

109 See L. CIAFARDINI, Codice civile, Art. 1458 §§ 1–4; A. ZACCARIA, Codice civile, Art. 1458 IV; G. MAURO PELLEGRINI, Codice Civile, Art. 1458 para. 2; G. SICCHIERO, Codice civile, Art. 1458 para. 2.

110 From an international perspective, see F.T. SCHWARZ et al., Introduction, paras 20–35.

111 See G. WAGNER, Corona Law, p (531) at 536–539, in particular 539. See also S. JUNG, ‘Systemkrisen und das Institut der Störung der (grossen) Geschäftsgrundlage: Eine Betrachtung am Beispiel der Corona-Krise’, 75. JZ 2020, p 715; A. SCHALL, ‘Corona-Krise: Unmöglichkeit und Wegfall der

Switzerland, but in a different tone.¹¹² In France, notably the concept of *imprévision* is being pursued, which could possibly serve as a role model for many other countries.¹¹³ The reason of this is the triage of renegotiations, an adaption of the contract and its termination, in that order. A novelty, which has been widely criticised in scholarship, but will potentially still influence the future development of the law, concerns parties' renegotiation duties.¹¹⁴ In Italy, the concept of *eccessiva onerosità* is apparently often invoked, which provides, as a general rule, for the termination of a contract and, only exceptionally, for its adaption.¹¹⁵

46. It is further worth mentioning that codification history of these institutions has been quite different in various European jurisdictions.¹¹⁶ Italy, for instance, codified the concept of *eccessiva onerosità*, which is about termination of permanent contracts, in 1942 already.¹¹⁷ In addition, the Italians developed judicial law, *presupposizione*, which may also lead to the termination of a contract. Germany has codified both *Störung der Geschäftsgrundlage* and *Kündigung von Dauerschuldverhältnissen aus wichtigem Grund* in 2002.¹¹⁸ France codified not only

Geschäftsgrundlage bei gewerblichen Miet- und Pachtverträgen', 75. *JZ* 2020, p 388; C. WARMUTH, '§ 313 BGB in Zeiten der Corona-Krise – am Beispiel der Gewerberaumiete', *COVuR (COVID-19 und Recht)* 2020, p 16. For a rather prudent assessment, see S. LORENZ, *Leistungsstörungenrecht*, paras 29–32, in particular 32.

112 For Austria, see C. GRÜNZWEIG, 'Vertragsbindung in Zeiten von Covid-19', *CuRe*, no. 51 (22 Apr. 2020). For Switzerland, see B.V. ENZ, *Risikozuordnung*, paras 3–25, 37.

113 See H. BARBIER, 'Le contrat face aux circonstances extraordinaires', *RTDCiv* 2020, p 363; L. VOGEL & J. VOGEL, 'Possibilités, limites et exclusions du recours à l'imprévision dans la crise du Covid-19', *AJ Contrat (Actualité Juridique Contrat)* 2020, p 275.

114 For a contemporary critique from an international perspective, see I. SCHWENZER & E. MUÑOZ, 'Duty to Renegotiate & Contract Adaptation in Case of Hardship', 24. *ULR (Uniform Law Review)* 2019, p (149) at 160–165; I. SCHWENZER & E. MUÑOZ, 'Duty to Re-negotiate & Contract Adaptation in Case of Hardship', *IHR (Internationales Handelsrecht)* 2020, p (150) at 155–158. On the debate under Swiss law, see PICHONNAZ, *Droit contractuel extraordinaire*, pp 143–146; V. JENTSCH, *Law of Contracts*, paras 52–57.

115 See P. SIRENA, 'L'impossibilità ed eccessiva onerosità della prestazione debitoria a causa dell'epidemia di CoViD-19', *NGCC* 2020, p 73. For a rather critical account, see A. GENTILI, 'Una proposta sui contratti d'impresa al tempo del coronavirus', *GC* 2020 (speciale no. 3), p 383.

116 From an international perspective, see F. RANIERI, *Europäisches Obligationenrecht: Ein Handbuch mit Texten und Materialien* (Wien: Springer 2009), pp 815–852.

117 See A. BOSELLI, *Eccessiva onerosità*, pp 332–334; C.G. TERRANOVA, in P. Schlesinger (ed.), *Il Codice civile, commentario: L'eccessiva onerosità nei contratti* (Milano: Giuffrè 1995). On the recent reform proposal no. 1151/2019, see P. SIRENA, 'Eccessiva onerosità sopravvenuta e rinegoziazione del contratto: verso una riforma del codice civile?', *Jus (Rivista di scienze giuridiche)* 2020, p 205.

118 See W. ERNST & R. ZIMMERMANN (eds), *Zivilrechtswissenschaft und Schuldrechtsreform* (Tübingen: Mohr Siebeck 2001); R. SCHULZE & H. SCHULTE-NÖLKE (eds), *Die Schuldrechtsreform vor dem Hintergrund des Gemeinschaftsrechts* (Tübingen: Mohr Siebeck 2001). See also S. GRUNDMANN, *Schadenersatzanspruch*, p 569; S. GRUNDMANN, *Schuldrechtsmodernisierung*, p 129.

force majeure, but also *imprévision* and *caducité* in 2016 (and 2018).¹¹⁹ Austria and Switzerland, however, have not codified any of those institutions on adaption or termination of (permanent) contracts under changed circumstances or for cause, although these institutions have always been widely accepted in both theory and practice. Given their increasing importance, it can be argued that a codification of these institutions is needed in European Contract Law.

47. Although diversity is united at its core, there is a need for codification in European Contract Law in this regard, both at the national and at the supranational level. Because adaption and termination of contracts will become more important in the future and the quality of judicial decisions will further benefit from clear requirements and consequences, Member States should codify these institutions, if not already done.¹²⁰ The relationship between different instruments, starting with renegotiations between the parties, continuing with the adaption of the contract and ending with its termination, should be elevated to the *acquis communautaire*. In addition, the *acquis* should further provide for a rather narrow interpretation of termination for cause. This would contribute to respect the sanctity of contracts, which is and must remain a guiding principle of European Contract Law.

4. Conclusions

48. Using a functional and comparative approach, this article elaborates on excuses of contractual performance and remedies for breach of contract and on adaption or termination of contractual obligations. Driven by the research question, whether these excuses and remedies and institutions on adaption or termination still serve their purpose in times of pandemic, the article aims to address the sub-questions, whether and to what extent a uniform breach of contract action or a codification of such institutions is needed in European Contract Law.

49. With regard to default of performance under a contract, the article concludes that there is no need for unification in European Contract Law. The article argues that the distinction between permanent and temporary default of performance is convincing as it allows different situations to be treated differently, paired with appropriate incentives. Consequently, remedies of delay rather than those of impossibility should be claimed during the coronavirus pandemic.

50. With regard to modifications of a contract, the article concludes that there is a need for codification in European Contract Law, both at the national and at the supranational level. In the spirit of providing transaction-cost efficiency and orderliness, the article suggests and supports three reform proposals. First, Member

119 See H. BARBIER, 'Les grands mouvements du droit commun des contrats après l'ordonnance du 10 février 2016', *RTDCiv* 2016, p. 247; U. BABUSIAUX & C. WITZ, *Vertragsrecht*, p. 496.

120 On the suggestion that the Swiss should go German, see V. JENTSCH, *Law of Contracts*, paras 47–50.

States should codify institutions on adaption or termination, if not already done. Second, the relationship between different instruments should be elevated to the *acquis communautaire*, starting with renegotiations between the parties, continuing with the adaption of the contract and ending with its termination. Third, the *acquis* should further provide for a rather narrow interpretation of termination for cause.

51. From a doctrinal perspective, this article deals with the *alpha* (unification) and the *omega* (codification) in European Contract Law. In case of default of performance, the rules on subsequent impossibility are to be applied restrictively, at least insofar as the legislator – other than in France and Italy, for instance – does not provide for separate legal consequences for permanent impossibility and temporary impossibility. When adapting or terminating contracts, the order of individual legal consequences is to be reconsidered in terms of subsidiarity. Both of these guiding principles contribute to make European Contract Law more crisis resilient.