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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?

The coronavirus pandemic creates a variety of contractual problems. This article examines the contribution general legal institutions – subsequent impossibility of performance, delay of performance, adaption of contracts under changed circumstances, termination of permanent contracts for a compelling reason – can make to coping with the pandemic and whether Switzerland needs an extraordinary law of contracts in times of pandemic. Based on the central role of the contracting parties, the increasing erosion of the general principle of civil law «pacta sunt servanda» by the legislative, judicial, and executive branch of government is assessed critically.

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1. Introduction to the Law of Contracts and the Coronavirus Pandemic

[1] *Pacta sunt servanda* – agreements must be kept.[1] This general principle of civil law requires that both or all parties to commercial contracts are expected to meet their contractual obligations, at least as long as performance is still possible and circumstances do not change fundamentally, thereby ensuring the efficacy and the efficiency of our system of private ordering. This is important because we can only improve welfare in Europe, including Switzerland, and around the world, if we stand up for what we promise. A promise is thus not just a promise, but also a bind-

[1] For a comprehensive study on this principle in German private law, *see* Marc-Philippe Weller, Die Vertragstreue: Vertragsbindung, Naturalerfüllungsgrundsatz, Leistungstreue (Tuebingen: Mohr Siebeck, 2009). From the perspective of Swiss law in general, *see* Bernd Stauder, Pacta sunt servanda et le droit de repentir des consommateurs, SJ 1982, 481–500; Daniel Leu, Vertragstreue in Zeiten des Wandels: Die *clausula rebus sic stantibus* und das Kriterium der Vorhersehbarkeit, in: Daniel Dédeyan et al. (eds.), Vertrauen, Vertrag, Verantwortung, 21–44 (Zurich: Schulthess, 2007); Pascal Hachem, Die Konturen des Prinzips *Pacta Sunt Servanda*, in: Andrea Büchler & Markus Müller-Chen (eds.), Private Law: national, global, comparative, 647–667 (Berne: Stämpfli, 2011); Arnaud Campi, *Pacta sunt servanda … aut riscindenda* ? L'évolution de notre droit des obligations face au dilemme des conventions lésionnaires, in: Olivier Hari (ed.), Protection de certains groupements de personnes ou de parties faibles versus libéralisme économique : quo vadis ?, 21–44 (Zurich: Schulthess, 2016). With regard to mergers and acquisitions under Swiss law, *see* Heinz Schärer & Balz Gross, *Pacta sunt servanda* – von der Realerfüllung des Unternehmenskaufvertrags und deren prozessualer Durchsetzung, in: Rudolf Tschäni (ed.), Mergers & Acquisitions XVI, 115–171 (Zurich: Schulthess, 2014).

ing commitment supposed to be kept. It is basically a prerequisite for maintaining and increasing our prosperity in a free world, where achievement and performance is rewarded. Nevertheless, as with any general principle of law, there are exceptions to it. The scope of application of this principle and its exceptions are the subject of this article.

[2] In March 2020, however, the rapidly spreading coronavirus outbreak, which was eventually declared a pandemic by the World Health Organization, all of a sudden changed everyday life all over Europe from one day to another. Airlines were cancelling flights, companies were closed down, and consumers were rapidly changing their buying behavior. In addition, many European countries, including Switzerland, enacted emergency decrees, according to which national borders were closed, cities were sealed off, major events with more than a certain number of people were banned, and teaching in schools and universities was suspended, at least for some time. There is no need to say that this situation caused considerable difficulties for all participants in the economy, business enterprises and consumers alike. Under these extraordinary circumstances, a wide range of issues concerning the law of contracts are becoming particularly important, such as whether existing contracts are still valid and binding and, as a result, must be adhered to, or whether performance may be suspended or its acceptance refused.[2]

[3] Against this backdrop, I elaborate on both the remedies for a breach of contract provided by the legislator as well as the adaption and the termination of contracts decided by a competent judge in order to address the question, whether the statutory risk allocation pursuant to the Swiss Code of Obligations is still adequate or not. I do so because these two building blocks form the basis of the statutory risk allocation, which is provided by the law of contracts.[3] It therefore goes without saying that both the legislator and the judge have an important role to play in this game. In contrast, whether the government, including the administration, should intervene in one form or another is still subject of debate in law and politics.

[4] A functional and doctrinal approach is used to unfold and analyze this timeless question from a contemporary perspective. In functional terms, the increasing erosion of the principle of *pacta sunt servanda* occurs on four levels. First, the parties may agree on limits to this principle. It initially remains to be examined, whether the contract contains a *force majeure*, hardship, or material adverse change clause. If so, this could eventually become an issue of contract interpretation, a

2 For a general overview on the allocation of risk in contracts, *see* Benjamin V. Enz, Risikozuordnung 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 of 18 May 2020. For lease contracts, *see* Andrea Haefeli et al., Coronavirus SARS-CoV-2: Klärung mietrechtlicher Fragen, Jusletter of 14 April 2020; Thomas Koller, Corona-Krise und Mietrecht -- Rechtsöffnungsrichter in der Verantwortung, Jusletter of 4 May 2020; David Lachat & Sarah Brutschin, Die Mieten in Zeiten des Coronavirus, mp 2020, 99–143; David Lachat & Sarah Brutschin, Le bail aux temps du coronavirus, SJ 2020 II, 111–151. For employment contracts, *see* Thomas Geiser et al., Klärung arbeitsrechtlicher Fragen im Zusammenhang mit dem Coronavirus, Jusletter of 23 March 2020; Thomas Geiser, Arbeitsrechtliche Regelungen im Zusammenhang mit dem Coronavirus, AJP 2020, 545–551; Isabelle Wildhaber, Das Arbeitsrecht in Pandemiezeiten, ZSR 139 (2020), special issue («Pandemie und Recht»), 157–179; Marina Graber & Christa Kalbermatten, Corona und Arbeitsrecht, EF 2020, 487–492. For contracts for work or services, *see* Benjamin V. Enz & Sarah Mor, Risikozuordnung in Verträgen und die COVID -19 Situation: Teil 2 -- Problemstellungen der COVID-19 Situation im Werkvertragsrecht, Jusletter of 10 August 2020.

3 A similar approach was taken in a doctoral thesis under the supervision of Arthur Meier-Hayoz, *see* Jacques Bischoff, Vertragsrisiko und clausula rebus sic stantibus: Risikozuordnung in Verträgen bei veränderten Verhältnissen (Zurich: Schulthess, 1993), at 91–173 (determination of contractual risk spheres of parties) and 174–237 (risk allocation outside contractual risk spheres of parties by using *clausula rebus sic stantibus*). *See* also Oliver Kälin, Unmöglichkeit der Leistung nach Art. 119 OR und clausula rebus sic stantibus, recht 2004, 246–256, at 246–247 (article 119 of the Swiss Code of Obligations and *clausula rebus sic stantibus* as exceptions to principle of *pacta sunt servanda*).

topic not covered in this article.[4] Second, the legislator may provide for limits to this principle. The remedies for breach of contract include the concepts of subsequent impossibility of performance and delay of performance. Third, the judge may decide on limits to this principle. Each party might ask a court to adapt a contract to changed circumstances or terminate a contract for cause, passing the ball to the judiciary. Forth, the government and the administration may dictate limits to this principle. The coronavirus pandemic has shown that the executive branch of government accumulated quite some power. It is an open issue, whether we need an extraordinary law of contracts. Throughout the article, the applied doctrinal methodology focusses on statutory rules, case law, and legal doctrine in Switzerland, with a few comparative arguments.

2. Remedies for Breach of Contract under the Swiss Code of Obligations

[5] The first building block of the statutory risk allocation pursuant to the Swiss Code of Obligations includes the remedies for breach of contract.[5] The Swiss legislator provides various legal institutions, which are supposed to allocate the risk of a contract between the parties involved. In the age of the coronavirus pandemic, two concepts are of particular importance, namely subsequent impossibility of performance and delay of performance. For practical reasons, I discuss these concepts both in general and for sale contracts in particular, without considering other types of contracts such as lease contracts, employment contracts, or contracts for work or services. From an international comparison, the question may be asked, whether the time is ripe for a uniform breach of contract action in Swiss law.

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

[6] The concept of subsequent impossibility of performance, which is an important exception to the principle of *pacta sunt servanda*, requires that performance of a contract is permanently impossible. This concept becomes particularly important in the age of the coronavirus pandemic.

4 On the contractual risk allocation in mergers and acquisitions, *see* Urs Schenker, Risikoallokation und Gewährleistung beim Unternehmenskauf, in: Rudolf Tschäni (ed.), Mergers & Acquisitions VII, 239–283 (Zurich: Schulthess, 2005), at 273–283; Urs Schenker, Veränderungen des Unternehmens zwischen Signing und Closing, in: Rudolf Tschäni (ed.), Mergers & Acquisitions XVIII, 279–313 (Zurich: Schulthess, 2016). On *force majeure* and hardship clauses in general, *see* Sophia Jung Yang, Force Majeure and Hardship in Chinese Contract Law, in: Andrea Büchler & Markus Müller-Chen (eds.), Private Law: national, global, comparative, 1809–1820 (Berne: Stämpfli, 2011). On material adverse change clauses in mergers and acquisitions, *see* Patrick Schleiffer, No Material Adverse Change, in: Rudolf Tschäni (ed.), Mergers & Acquisitions VI, 54–107 (Zurich: Schulthess, 2004). On contractual adaption clauses in general, *see* Felix Buff, Vertragliche Anpassungsklauseln im schweizerischen Recht (Zurich: Schulthess, 2016).

5 For a general overview on the remedies for breach of contract under Swiss law, *see* Susan Emmenegger et al., Schweizerisches Obligationenrecht: Allgemeiner Teil, vol. II (10th ed., Zurich: Schulthess, 2014), at 79–200; Ingeborg Schwenzer, Schweizerisches Obligationenrecht: Allgemeiner Teil (7th ed., Berne: Stämpfli, 2016), at 449–505; Alfred Koller, Schweizerisches Obligationenrecht: Allgemeiner Teil (4th ed., Berne: Stämpfli, 2017), at 769–1120; Andreas Furrer & Markus Müller-Chen, Obligationenrecht: Allgemeiner Teil (3rd ed., Zurich: Schulthess, 2018), at 525–624; Bernhard Berger, Allgemeines Schuldrecht (3rd ed., Bern: Stämpfli, 2018), at 505–653; Claire Huguenin, Obligationenrecht: Allgemeiner und Besonderer Teil (3rd ed., Zurich: Schulthess, 2019), at 258–317; Pierre Tercier & Pascal Pichonnaz, Le droit des obligations (6th ed., Zurich: Schulthess, 2019), at 279–350.

It is applicable, if, and only if, performance under an existing contract is permanently impossible. In this case, a distinction must be made as to whether the non-performing party is at fault.

2.1.1. General and Specific Rules for Sale Contracts on Subsequent Impossibility without Fault

[7] In some scenarios of a permanent default, which are relevant in the face of the coronavirus pandemic, the non-performing party is not at fault.[6] The general rules on subsequent impossibility without fault are set out in article 119 of the Swiss Code of Obligations, specific rules, governed by article 185 of the Swiss Code of Obligations, apply to sale contracts. Examples of permanently impossible performance without fault of the non-performing party include a birthday party or a wedding, which cannot take place as scheduled due to an official order banning any major events with more than a certain number of people. Other examples include concerts and performing arts such as opera or theatre. It should be safe to assume that 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. If performance is no longer possible due to circumstances attempted by the pandemic, it can be expected that 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, should in any case not be governed by these rules.

[8] Pursuant to article 119 paragraph 1 of the Swiss Code of Obligations, the risk of performance is borne by the creditor, as the debtor is no longer under a duty to perform under the contract, if performance becomes impossible without his or her fault. In addition, pursuant to article 119 paragraph 2 of the Swiss Code of Obligations, the debtor bears the risk of counter-performance, as the creditor is also released from his or her duties under the contract, if it is a bilateral contract. These two rules provide the basic allocation of risk for the performance of contractual obligations. Although clear at first sight, various questions arise, when interpreting these rules.[7] It is in particular controversial, whether only objective impossibility, after which performance is no longer possible by anyone, or also subjective impossibility, after which performance is no longer possible only by the debtor concerned, is covered by article 119. The prevailing doctrine and case law take the position that objective and subjective impossibility are to be treated equally.[8]

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6 For a discussion of this concept in the context of the coronavirus pandemic, *see* Enz (Fn. 2), at notes 26–34, in particular note 31 («zahlreiche als absolute Fixgeschäfte ausgestaltete Einmalschuldverhältnisse», such as «Konzertveranstaltungen»), note 32 («Dauerschuldverträge»), and note 34 («Geschäftmiete»).

7 For a detailed commentary on these provisions, *see* Hermann Becker, in: Hermann Becker (ed.), Berner Kommentar, Obligationenrecht, Allgemeine Bestimmungen, vol. VI/1 (2nd ed., Berne: Stämpfli, 1945), at notes 6–11 on article 119 («Die allgemeine Regel über die Tragung der Gefahr»); Viktor Aepli, in: Peter Gauch (ed.), Zürcher Kommentar, Obligationenrecht, Das Erlöschen der Obligation, vol. V/1 (3rd ed., Zurich: Schulthess, 1991), at notes 17–67 (risk of performance) and notes 68–85 (risk of counter-performance) on article 119; Luc Thévenoz, in: Luc Thévenoz & Franz Werro (eds.), Commentaire romand, Code des obligations, vol. I (2nd ed., Basle: Helbing Lichtenhahn, 2012), at notes 3–9 («risque de la prestation») and notes 10–12 («risque de la contre-prestation») on article 119; Wolfgang Wiegand, in: Corinne Widmer Lüchinger & David Oser (eds.), Basler Kommentar, Obligationenrecht, vol. I (7th ed., Basle: Helbing Lichtenhahn, 2020), at notes 5–10 («Voraussetzungen») and notes 11–18 («Rechtsfolgen») on article 119.

8 For the leading case on subsequently subjective impossibility of performance, *see* BGE 135 III 212, consideration 3.1 (holding: «Subjektive Leistungsunmöglichkeit besteht erst, wenn das Leistungshindernis für den Schuldner geradezu unüberwindbar ist; fehlende Verfügungsmacht über den Leistungsgegenstand führt zu Leistungsunmöglichkeit, wenn aussichtslos erscheint, dass der Schuldner sie zurückerlangen kann»). From the doctrine, *see* Rolf H. Weber, in: Heinz Hausheer (ed.), Berner Kommentar, Obligationenrecht, Die Folgen der Nichterfüllung, vol. VI/1/5 (Berne: Stämpfli, 2000), at notes 119–124 on article 97; Schwenzer (Fn. 5), at 465; Koller (Fn. 5), at 901–902; Wiegand (Fn. 7), at note 13 on article 97 and note 5 on article 119.

According to a minority opinion in the doctrine, to which I concur, the rules on delay of debtor and not subsequent impossibility of performance (without fault) must be observed in case of a subjective impossibility.[9] Further related issues, which are not discussed here in detail, concern the delivery of products or the provision of services that have become economically unreasonable or unaffordable. In general, it can easily be observed that these basic rules on risk allocation pose more problems as regards the requirements than the consequences.

[9] However, there are exceptions to the basic allocation of risks just discussed. Pursuant to article 119 paragraph 3 of the Swiss Code of Obligations, these rules do not apply to cases, in which either the contract between the parties or another statutory rule provide for a different risk allocation.[10] A typical example for such a situation, where the risk possibly passes to the creditor prior to performance, is the sale of goods. Pursuant to article 185 paragraph 1 of the Swiss Code of Obligations, the benefit and the risk of the goods pass to the buyer on conclusion of the contract (*periculum est emptoris*), except where otherwise agreed or dictated by special circumstances.[11] This might eventually lead to a situation, where the buyer has to pay the price, even if he or she never receives the goods. This context-specific rule for the sale of goods, which goes back to the Roman tradition, is certainly not intuitive and still not widely accepted in theory and practice.[12] This is why the courts usually interpret «special circumstances» quite broadly, so that this rule does in most cases not apply.[13] Additional rules in paragraphs 2 and 3 of article 185, which are not discussed here, apply to sale contracts for goods defined only in generic terms or to be shipped and to contracts subject to a condition precedent. For the sale of immovable property, article 220 further presumes that benefits and risks associated with such sale do not pass to the buyer until the date, on which the buyer is to take possession of the property, stipulated in the contract.

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9 Same as here: Emmenegger et al. (Fn. 5), at 90 and 93–99, in particular 98–99, with further references.

10 For a detailed commentary on this provision, *see* Becker (Fn. 7), at notes 12–22 on article 119 («Ausnahmen von der allgemeinen Regel der Risikoverteilung»); Aepli (Fn. 7), at notes 87–102 on article 119 (exceptions); Thévenoz (Fn. 7), at notes 13–16 («transfert des risques») on article 119; Wiegand (Fn. 7), at note 19 on article 119 («Abweichende Vereinbarungen»).

11 For a general overview on subsequent impossibility of performance without fault in the context of sale contracts, *see* Alfred Koller, Schweizerisches Obligationenrecht: Besonderer Teil, vol. I (Berne: Stämpfli, 2012), at 29–34; Jörg Schmid et al., Schweizerisches Obligationenrecht: Besonderer Teil (2nd ed., Zurich: Schulthess, 2016), at 78–80; Heinrich Honsell, Schweizerisches Obligationenrecht: Besonderer Teil (10th ed., Berne: Stämpfli, 2017), at 61–87; Markus Müller-Chen et al., Obligationenrecht: Besonderer Teil (2nd ed., Zurich: Schulthess, 2017), at 28–30; Huguenin (Fn. 5), at 756–765. For a detailed commentary on this provision, *see* Herbert Schönle, in: Peter Gauch (ed.), Zürcher Kommentar, Obligationenrecht, Kauf und Schenkung, vol. V/2/a (3rd ed., Zurich: Schulthess, 1993), at notes 39–78 («Stückkauf») and notes 79–119 («Gattungskauf») on article 185; Silvio Venturi & Marie-Noëlle Zen-Ruffinen, in: Luc Thévenoz & Franz Werro (eds.), Commentaire romand, Code des obligations, vol. I (2nd ed., Basle: Helbing Lichtenhahn, 2012), at notes 6–12 (principle) and notes 13–30 (exceptions) on article 185; Alfred Koller, in: Corinne Widmer Lüchinger & David Oser (eds.), Basler Kommentar, Obligationenrecht, vol. I (7th ed., Basle: Helbing Lichtenhahn, 2020), at notes 13–24 («Distanzkauf»), notes 25–28 («Fernkauf»), notes 29–32 («Platzkauf»), and notes 33–34 («bedingte[r] Kauf») on article 185.

12 *See* the rather recent leading case in BGE 128 III 370, consideration 4 (holding: «Beziehung zwischen der Regel ‹periculum est emptoris› und ihren Ausnahmen»). For a detailed discussion of the Roman origins of this rule based on this leading case, *see* Pascal Pichonnaz, *Periculum emptoris* und das schweizerische Recht: Ein Fall des Rückgriffs auf römisches Recht durch das Schweizerische Bundesgericht, in: Eva Jakab & Wolfgang Ernst (eds.), Kaufen nach Römischem Recht: Antikes Erbe in den europäischen Kaufrechtsordnungen, 183–201 (Berlin: Springer, 2008); Pascal Pichonnaz, Die Gefahrtragung beim Kaufvertrag: Methodologische und Diachronische Elemente, ZSR 139 (2020) I, 7–33.

13 BGE 84 II 158, consideration 1/b (transfer of risk, if the seller has a purchased car sent to him or her at his or her expense); BGE 128 III 370, consideration 4/a (transfer of risk with a contract for delivery by installments). From the doctrine, *see* Venturi & Zen-Ruffinen (Fn. 11), at notes 24–30 on article 185; Emmenegger et al. (Fn. 5), at 93; Honsell (Fn. 11), at 64; Koller (Fn. 11), at notes 35–40 on article 185; Huguenin (Fn. 5), at 758.

[10] With reference to general and specific rules on subsequent impossibility of performance without fault of the non-performing party, in particular based on above examples (birthday party or wedding, concerts and performing arts such as opera or theatre) relating to the coronavirus pandemic, the question arises, whether all these statutory rules are still adequate. The general rules, set forth in article 119 of the Swiss Code of Obligations, are drastic, but fair. In the area of subsequent impossibility, the principle of *pacta sunt servanda* is completely abolished, since the debtor is no longer under a duty to perform under the contract and the creditor is also released from his or her duties under the contract. In view of this rather extreme solution for the allocation of contractual risks, it seems justified to apply these rules only in a very restrictive manner, which means in particular not to include cases of subjective impossibility under these rules. The specific rules for sale contracts, in particular article 185 paragraph 1 of the Swiss Code of Obligations, are similarly drastic, but indeed not always fair. Swiss case law has therefore rightly found a way to put these draconic rules into perspective.

2.1.2. General and Specific Rules for Sale Contracts on Subsequent Impossibility with Fault

[11] In other scenarios of a permanent default, which may be less important during the coronavirus pandemic, the non-performing party is at fault. The general rule on subsequent impossibility with fault of the non-performing party is article 97 paragraph 1 of the Swiss Code of Obligations, specific rules with additional remedies, contained in articles 192 to 210 of the Swiss Code of Obligations, apply to sale contracts. An example of permanently impossible performance with fault in a consumer protection context concerns airlines or other transportation companies that sell air, train, or bus tickets for journeys to a country, whose national borders are closed, or to a city, which is sealed off, regardless of such travel bans. An example from big business is the sale of an industrial product to be manufactured at a fixed (non-postponable) date, despite the company's factory was closed down beyond that date and, contrary to expectations, no substitute product could be procured on the market. More generally, the debtor might be at fault, if he or she concludes a contract after the outbreak of the pandemic, which becomes definitely impossible due to the measures imposed by an official order, which were already in place, when the contract was concluded, but whose continued validity at the time of performance was still uncertain.

[12] Pursuant to article 97 paragraph 1 of the Swiss Code of Obligations, which contains the general rule on liability for breach of contract, a party, who fails to perform a contract, must pay damages to the other party.[14] The requirements for liability under this rule consist of some sort of subsequent impossibility, which is of permanent nature, a damage incurred to the creditor, causality between the damage and the subsequent impossibility, and a fault of the debtor, who is responsible for the subsequent impossibility. As with article 119, it is equally controversial under article 97, whether only objective impossibility or also subjective impossibility is covered by this rule. In this respect, reference can be made to the relevant explanations in the previous

14 For a detailed commentary on this provision in the form of subsequent impossibility of performance, *see* Becker (Fn. 7), at notes 11–25 on article 97 («Unmöglichkeit der Erfüllung»); Weber (Fn. 8), at notes 98–146 on article 97 («Leistungsunmöglichkeit»); Thévenoz (Fn. 7), at notes 5–18 on article 97 («Impossibilité subséquente et définitive imputable au débiteur»); Hans Giger, in: Willi Fischer & Thierry Luterbacher (eds.), Haftpflichtkommentar (Zurich: Dike, 2016), at notes 7–17 on article 97 («Verschiedene Arten der Unmöglichkeit»); Wiegand (Fn. 7), at notes 7–24 on article 97 («Die Nichterfüllung»).

subsection. As a consequence of such liability, the creditor can sue for damages.[15] In other words, the non-performing party is liable for damages, in particular the value of the performance, if such party cannot prove that he or she was not at fault.

[13] Swiss law on the sale of goods does not contain any context-specific rules on subsequent impossibility of performance in the strict sense, but it does contain additional rules on warranty of title and warranty of quality and fitness, which arguably also belong to the category of subsequent impossibility of performance in the broadest sense. If the seller is responsible for the subsequent impossibility, the general rule of article 97 paragraph 1 of the Swiss Code of Obligations applies.[16] Reference can therefore be made to the comments just made in this respect. If the buyer is responsible for the subsequent impossibility, the seller is released from his or her obligations under the contract to deliver a product or provide a service, but the seller retains his or her claim for payment of the purchase price.[17] Pursuant to article 192 paragraph 1 of the Swiss Code of Obligations as regards warranty of title, the seller is obliged to transfer the purchased goods to the buyer free from any rights enforceable by third parties against the buyer.[18] In case of a full dispossession, the contract will be terminated and the buyer has the right to claim damages. In case of a partial dispossession, the buyer may have a right to request the termination of the contract, and may claim damages. Pursuant to article 197 paragraph 1 of the Swiss Code of Obligations as regards warranty of quality and fitness, the seller is liable to the buyer for any breach of warranty of quality and for any defects that would materially or legally negate or substantially reduce the value of the goods (not services) or their fitness for the designated purpose.[19] If the seller is liable for a warranty of quality and fitness, the buyer has three remedies, consisting of a right to cancel the purchase, a right to reduce the purchase price, and a right to claim damages. These specific rules largely supersede the general law of non-performance, although, strictly speaking, these

15 For further details on liability and damages, *see* Emmenegger et al. (Fn. 5), at 146–169; Koller (Fn. 5), at 922–948.

16 On subsequent impossibility of performance with fault of the seller, *see* Koller (Fn. 11), at 25: «Insoweit gelten die allgemeinen Regeln, also etwa Art. 97 und 103 OR»; Huguenin (Fn. 5), at 755–756: «Hat die Verkäuferin die nachträgliche Unmöglichkeit der Leistung zu vertreten [...], richten sich die Rechtsfolgen nach der allgemeinen Regelung von Art. 97 Abs. 1 OR».

17 On subsequent impossibility of performance with fault of the buyer, *see* Huguenin (Fn. 5), at 756: «Falls der Käufer die Unmöglichkeit der [...] Leistung zu vertreten hat, wird diese von ihrer Leistungspflicht befreit» and «Die Verkäuferin behält aber ihren Anspruch auf Gegenleistung, also auf Leistung des Kaufpreises». On subsequent impossibility with fault of the creditor, *see* the leading case in BGE 114 II 274, consideration 4: «Die Lösung besteht darin, dass einerseits der Schuldner der unmöglich gewordenen Leistung seinen Anspruch auf die versprochene Gegenleistung behält, sich jedoch verrechnungsweise den Schadenersatzanspruch des Gläubigers entgegenhalten lassen muss, dass anderseits dieser Anspruch aber in dem Masse zu kürzen ist, als die Ersatzpflicht des Schuldners wegen Umständen, die der Gläubiger zu verantworten hat, zu ermässigen ist» and Emmenegger et al. (Fn. 5), at 101–102; Schwenzer (Fn. 5), at 469–470.

18 For a general overview on warranty of title, *see* Koller (Fn. 11), at 49–64; Schmid et al. (Fn. 11), at 46–51; Honsell (Fn. 11), at 82–87. For a detailled commentary on this provision, *see* Herbert Schönle & Peter Higi, in: Peter Gauch & Jörg Schmid (eds.), Zürcher Kommentar, Obligationenrecht, Kauf und Schenkung, vol. V/2/b (3rd ed., Zurich: Schulthess, 2005), at notes 4–29 (consequences) and notes 30–82 (requirements) on article 192; Venturi & Zen-Ruffinen (Fn. 11), at notes 4–8 on article 192 («Les conditions de fond de la garantie»); Heinrich Honsell, in: Corinne Widmer Lüchinger & David Oser (eds.), Basler Kommentar, Obligationenrecht, vol. I (7th ed., Basle: Helbing Lichtenhahn, 2020), at notes 4–6 («Voraussetzungen») and note 7 («Rechtsfolgen») of article 192.

19 For a general overview on warranty of quality and fitness, *see* Koller (Fn. 11), at 64–109; Schmid et al. (Fn. 11), at 51–78; Honsell (Fn. 11), at 88–141. For a detailled commentary on this provision, *see* Schönle & Higi (Fn. 18), at notes 11–29 («Pflicht zur Gewährleistung»), notes 30–61 («Kaufsache»), and notes 62–112 («Mängel») on article 197; Venturi & Zen-Ruffinen (Fn. 11), at notes 11–16 («Les qualités promises»), notes 17–20 («Les qualités attendues de bonne foi»), and notes 21–22 («La garantie indépendante») on article 197; Honsell (Fn. 18), at notes 2–13 («Sachmangel») and notes 14–20 («Zusicherung von Eigenschaften») on article 197.

are not cases of subsequent impossibility of performance, but rather constitute another form of breach of contract.[20]

[14] With reference to general and specific rules on subsequent impossibility of performance without fault of the non-performing party, in particular based on above examples (air, train, or bus tickets, industrial product to be manufactured) relating to the coronavirus pandemic, the question arises, whether all these statutory rules are still adequate. The general rules, in particular article 97 paragraph 1 of the Swiss Code of Obligations, lead in most cases to an appropriate distribution of risk between contracting parties. In particular, the reversal of the burden of proof, according to which the non-performing party must prove that he or she is not at fault, contributes significantly to this finding. By accepting that it could eventually not be possible to render performance on the date in question, subsequent impossibility must be imputed to the non-performing party and he or she must take responsibility for it. The specific rules for sale contracts are incomplete in this respect, although legal doctrine and case law have already shown a convincing way forward. It is at least interesting to note that the otherwise practically predominant rules on warranty of title and warranty of quality and fitness should not be so relevant during the pandemic.

2.2. Temporary Default of a Non-Performing Party: Delay of Performance

[15] The concept of delay of performance, which is another important exception to the principle of *pacta sunt servanda*, requires that the performance of a contract is only temporarily impossible. This concept is quite important in the age of the coronavirus pandemic. It is applicable, if, and only if, performance under an existing contract is temporarily impossible. In this case, a distinction has to be made, whether the debtor or the creditor is in default.

2.2.1. General and Specific Rules for Sale Contracts on Delay of Debtor

[16] A temporary default of the debtor is probably the most common breach of contract in times of the coronavirus pandemic. The general rules on the delay of a debtor are governed by articles 102 to 109 of the Swiss Code of Obligations, specific rules apply to sale contracts in commercial transactions, regulated in articles 190 and 191 of the Swiss Code of Obligations. To give some examples, a debtor may be affected either directly by an official order or indirectly by the consequences of the coronavirus pandemic. Debtors directly affected by an official order are not permitted to sell goods or provide services during a lockdown period. Debtors indirectly affected by the consequences of the pandemic cannot fulfill the contract as promised because of insufficient staff at the workplace due to coronavirus disease or quarantine measures, delays in global supply chains due to supply shortages and bottlenecks on the part of important suppliers, or simply a collapse of freight transport or other delivery services. It does not matter for the application of these rules, whether a debtor is directly affected by an official order or indirectly affected by the consequences of the pandemic. These rules are essentially triggered by the fact that a debtor has not delivered on time despite the possibility of performance.

20 *See* Koller (Fn. 11), at 26: «Diese Regeln verdrängen das allgemeine Nichterfüllungsrecht weitgehend».

[17] Pursuant to article 102 paragraph 1 of the Swiss Code of Obligations, a delay of the 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.[21] No formal reminder is required pursuant to paragraph 2 of article 102, however, if a deadline for performance of the obligation has been set, as the debtor is automatically in default on expiry of the deadline. In such a situation, the debtor in default is liable for damage for late performance, accidental damage, and excess damage pursuant to articles 103 and 106 of the Swiss Code of Obligations.[22] In addition, a debtor in default on payment of a pecuniary debt must pay default interest in accordance with articles 104 and 105. If the debtor under a bilateral contract is in default, the creditor can basically choose among three options.[23] The first option, according to article 107 paragraph 2 of the Swiss Code of Obligations, is to insist on performance and sue for damages due to the delay. If the creditor choses this option, the debtor is liable for accidental damage, default interest, and excess damage. The second option, according to article 107 paragraph 2 of the Swiss Code of Obligations, is to waive performance and claim damages for non-performance. If the creditor choses this option, the debtor is liable for the value of the performance and damage for late performance. In other words, the creditor must be put in a situation, as if the contract was fulfilled properly. The third option, in accordance with article 107 paragraph 2 and article 109 of the Swiss Code of Obligations, is to waive performance and terminate the agreement altogether. If the creditor choses this option, the debtor is liable for damage for the laps of the contract, but only if he or she is at fault. In other words, the creditor must be put in a situation, as if the contract was never concluded.

[18] Additional context-specific rules apply to the sale of goods. Pursuant to article 190 paragraph 1 of the Swiss Code of Obligations, it is presumed that in commercial transactions the buyer waives performance and claims damages for non-performance, thus chooses the second option briefly outlined above, if the contract specifies a time limit for delivery and the seller is in default.[24] If the buyer prefers to insist on performance, thus going for the first option outlined above, he or she must in accordance with paragraph 2 of article 190 inform the seller without delay on expiry of the time limit. In addition, the general rule of article 107 paragraph 2, after which the seller is liable for damages to the buyer in case of temporary default, is repeated in

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21 On the requirements of delay of debtor, *see* Thévenoz (Fn. 7), at notes 10–32 on article 102; Emmenegger et al. (Fn. 5), at 116–118 and 123–127 (formal reminder); Schwenzer (Fn. 5), at 472–475; Koller (Fn. 5), at 963–974; Huguenin (Fn. 5), at 289–295; Corinne Widmer Lüchinger & Wolfgang Wiegand, in: Corinne Widmer Lüchinger & David Oser (eds.), Basler Kommentar, Obligationenrecht, vol. I (7th ed., Basle: Helbing Lichtenhahn, 2020), at notes 3–12a on article 102.

22 For further details on liability for damage for late performance and excess damage, *see* Thévenoz (Fn. 7), at notes 4–6 on article 103 («Dommages-intérêts de retard»); Emmenegger et al. (Fn. 5), at 118–120; Schwenzer (Fn. 5), at 475; Koller (Fn. 5), at 978–981; Huguenin (Fn. 5), at 296; Widmer Lüchinger & Wiegand (Fn. 21), at notes 4–7 on article 103 («Verspätungsschaden»). For further details on liability for accidental damage, *see* Thévenoz (Fn. 7), at 7–10 on article 103 («Cas fortuit»); Emmenegger et al. (Fn. 5), at 120; Schwenzer (Fn. 5), at 476; Huguenin (Fn. 5), at 296; Widmer Lüchinger & Wiegand (Fn. 21), at notes 8–12 on article 103 («Haftungserweiterung»).

23 On the options of the creditor and the consequences of delay of debtor, *see* Thévenoz (Fn. 7), at notes 26–37 on article 107; Emmenegger et al. (Fn. 5), at 128–141; Schwenzer (Fn. 5), at 479–483; Koller (Fn. 5), at 989–1000 («Insbesondere das Recht zum Leistungsverzicht») and 1000–1012 («Insbesondere die Rechtslage im Falle eines gültigen Leistungsverzichts»); Huguenin (Fn. 5), at 297–304; Widmer Lüchinger & Wiegand (Fn. 21), at notes 12–20 on article 107.

24 For a general overview on this presumption, *see* Schmid et al. (Fn. 11), at 41–42; Honsell (Fn. 11), at 70–71; Huguenin (Fn. 5), at 767–772. For a detailled commentary on this provision, *see* Schönle (Fn. 11), at notes 6–17 (requirements) and notes 18–43 (consequences) on article 190; Venturi & Zen-Ruffinen (Fn. 11), at notes 4–8 on article 190 («Fixgeschäft»); Koller (Fn. 11), at notes 4–6 («Das kaufmännnische Fixgeschäft») and notes 11–14 («Die Vermutung des Fixgeschäfts») on article 190.

article 191 paragraph 1 of the Swiss Code of Obligations. Paragraphs 2 and 3 of article 191 then contain specifications for the calculation of damages in commercial transactions, which are intended to improve the position of the buyer in terms of evidence. Pursuant to those rules, the buyer is entitled to damages in the amount of the difference between the sale price and the price he or she has paid in good faith to replace the goods not delivered to him or her (paragraph 2), or, if a market or stock exchange price exists for the goods, the buyer is entitled to claim damages in the amount of the difference between the contractual sale price and the market price at the time of performance (paragraph 3).[25] As a result, a buyer may insist on or waive performance in accordance with the general rules on delay of debtor, whereas these rules are partially superseded by specific rules in commercial transactions.[26]

[19] With regard to general and specific rules on delay of performance by a debtor, in particular based on above examples (lockdown, insufficient staff, delays in global supply chains, collapse of freight transport or other delivery services) relating to the coronavirus pandemic, the question arises, whether all these statutory rules are still adequate. The general rules, set forth in articles 102 to 109 of the Swiss Code of Obligations, give the creditor various options as to how he or she wishes to proceed. The high flexibility of these rules allows to exert pressure on the debtor, so that performance can be made and the contract be respected after all, but at the same time, it protects the interests of the creditor by allowing him or her to renounce performance, if it has become useless in the meantime. From a welfare economics perspective, this regime actually appears to be a successful compromise. The specific rules for sale contracts, contained in articles 190 and 191 of the Swiss Code of Obligations, take demonstrated needs of commercial transactions into account and thus increase the allocation efficiency in the market through assumptions and procedural rules as well as simplifications in the calculation of damages.

2.2.2. General and Specific Rules for Sale Contracts on Delay of Creditor

[20] A temporary default of the creditor might also be a breach of contract of some importance during the coronavirus pandemic. The general rules on the delay of the creditor are set out in articles 91 to 96 of the Swiss Code of Obligations, specific rules apply to sale contracts according to articles 214 and 215 of the Swiss Code of Obligations. A generic example for a delay of the creditor is a customer, who does no longer need the goods or serviced ordered (and paid in advance) due to a changed buying behavior induced by the pandemic. A diving set ordered from an internet dealer is no longer needed, since holidays abroad are not so attractive anymore. Users of public transportation with annual or monthly subscription may also be inclined to stop using trains and buses and to cancel their subscriptions immediately. An example from public procure-

25 For a general overview on these calculations of damages, *see* Koller (Fn. 11), at 39–42; Schmid et al. (Fn. 11), at 42–43; Honsell (Fn. 11), at 71–73; Huguenin (Fn. 5), at 767–772. For a detailled commentary on these provisions, *see* Schönle (Fn. 11), at notes 10–21 («Differenzmethode und konkrete Schadensberechnung») and notes 22–47 («Differenzmethode und abstrakte Schadensberechnung») on article 191; Venturi & Zen-Ruffinen (Fn. 11), at notes 5–11 («Le calcul concret du dommage») and notes 12–16 («Le calcul abstrait du dommage») on article 191; Giger (Fn. 14), at notes 9–13 («Abstrakte Schadenberechnung beim Deckungskauf») and notes 14–17 («Schadenberechnung beim hypothetischen Deckungskauf») on article 191; Koller (Fn. 11), at notes 7–15 («konkrete Schadensberechnung bei Vornahme eines Deckungskaufs») and notes 16–25 («abstrakte Schadensberechnung über hypothetischen Deckungskauf») on article 191.

26 *See* Koller (Fn. 11), at 34–42 («Lieferungsverzug des Verkäufers»); Schmid et al. (Fn. 11), at 40–43 («Die Erfüllung in zeitlicher Hinsicht insbesondere»); Honsell (Fn. 11), at 69–74 («Verzug [und Nichterfüllung] des Verkäufers»); Huguenin (Fn. 5), at 767–772 («Verzug der Verkäuferin»).

ment is the purchase of respiratory equipment, which (fortunately) is no longer needed, because the situation in hospitals was not as tense as had been feared.

[21] Pursuant to article 91 of the Swiss Code of Obligations, 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 a debtor cannot render performance otherwise.[27] As a consequence of delay of creditor, delay of debtor is no longer possible, the debtor has a right to deposit the object (and a right to take it back) and a right to sell the object in the case of obligations relating to objects, and a right to terminate the contract in the case of all other obligations.[28] Pursuant to article 92 paragraph 1 of the Swiss Code of Obligations, the debtor is entitled to deposit the object at the expense and the risk of the creditor, thereby discharging his or her obligation. If the creditor has not declared that he or she accepts the object deposited, the debtor is entitled to take it back, causing the claim and all accessory rights to become effective again pursuant to paragraph 2 of article 94. In addition, the debtor may dispose of the object – by open sale, if applicable – and deposit the sale proceeds in accordance with article 93 of the Swiss Code of Obligations, if the characteristics of the object or the nature of the business preclude a deposit, or the object is perishable or gives rise to maintenance costs or substantial storage costs. Pursuant to article 95 of the Swiss Code of Obligations, the debtor may terminate the contract in accordance with article 107 paragraph 2 and article 109, the third option outlined in the preceding subsection, when the obligation does not relate to objects. Pursuant to article 96 of the Swiss Code of Obligations, the debtor is entitled to deposit his or her performance or to terminate the contract in accordance with such rules, if performance is prevented for other reasons attributable to the creditor.[29]

[22] Additional context-specific rules apply to the sale of goods. Pursuant to article 214 paragraph 1 of the Swiss Code of Obligations, the seller is entitled to terminate a sale contract without further notice, if the object is to be delivered against advance payment of the price, either in full or in installments.[30] However, if the seller intends to exercise this termination right, he or she must notify the buyer immediately in accordance with paragraph 2 of article 214. Additional

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27 On the requirements of delay of creditor, *see* Denis Loertscher, in: Luc Thévenoz & Franz Werro (eds.), Commentaire romand, Code des obligations, vol. I (2nd ed., Basle: Helbing Lichtenhahn, 2012), at notes 10–16 on article 91; Emmenegger et al. (Fn. 5), at 66–69; Schwenzer (Fn. 5), at 492–495; Koller (Fn. 5), at 1021–1028; Huguenin (Fn. 5), at 306–307; Stefan Leimgruber, in: Corinne Widmer Lüchinger & David Oser (eds.), Basler Kommentar, Obligationenrecht, vol. I (7th ed., Basle: Helbing Lichtenhahn, 2020), at notes 2–6 («Angebot der Leistung und Leistungsbereitschaft») and notes 7–15 («Ungerechtfertigte Annahmeverweigerung durch den Gläubiger») on article 91.

28 On the right to deposit and take back objects, *see* Loertscher (Fn. 27), at notes 4–5 (requirements) and notes 12–14 (consequences) on article 92; Emmenegger et al. (Fn. 5), at 69–70; Schwenzer (Fn. 5), at 492–495; Koller (Fn. 5), at 1032–1034; Huguenin (Fn. 5), at 306–307; Leimgruber (Fn. 27), at notes 2–3 (requirements) and notes 8–10 (consequences) on article 92. On the right to sell objects, *see* Loertscher (Fn. 27), at notes 4–10 (requirements) and notes 11–12 (consequences) on article 93; Emmenegger et al. (Fn. 5), at 70–71; Schwenzer (Fn. 5), at 492–495; Koller (Fn. 5), at 1035–1037; Huguenin (Fn. 5), at 306–307; Leimgruber (Fn. 27), at notes 2–4 (requirements) and notes 7–8 (consequences) on article 93. On the right to terminate the contract, *see* Loertscher (Fn. 27), at notes 4–7 on article 95; Emmenegger et al. (Fn. 5), at 71–72; Schwenzer (Fn. 5), at 492–495; Koller (Fn. 5), at 1040–1043; Leimgruber (Fn. 27), at notes 2–3a on article 95.

29 On the requirements and consequences of performance prevented for other reasons, *see* Loertscher (Fn. 27), at notes 4–8 (requirements) and notes 9–10 (consequences) on article 96; Emmenegger et al. (Fn. 5), at 74–75; Schwenzer (Fn. 5), at 492–495; Koller (Fn. 5), at 1054–1057 («Tatbestand») and 1057–1060 («Rechtsfolgen»); Leimgruber (Fn. 27), at notes 2–4 (requirements) and note 5 (consequences) on article 96.

30 For a general overview on this termination right, *see* Schmid et al. (Fn. 11), at 44 («Pränumerando- [...] und [...] Barkauf») and 45 («Kreditkauf»); Honsell (Fn. 11), at 75–76; Huguenin (Fn. 5), at 773 («Pränumerando- und [...] Barkauf») and 774–775 («Kreditkauf»). For a detailled commentary on these provisions, *see* Venturi & Zen-Ruffinen (Fn. 11), at notes 4–9 on article 214; Koller (Fn. 11), at notes 10–19 on article 214.

restrictions, set out in paragraph 3 of article 214, apply to situations, where the purchased object has already passed into the possession of the buyer prior to payment. Paragraphs 1 and 2 of article 215 then contain specifications for the calculation of damages in commercial transactions, which are largely mirrored to the respective rules in paragraphs 2 and 3 of article 191, already discussed in the preceding subsection. Pursuant to these rules, the seller is entitled to damages in the amount of the difference between the sale price and the price at which he or she has subsequently sold the object in good faith (paragraph 1), or, if a market or stock exchange price exists for the goods, the seller is entitled to claim damages in the amount of the difference between the contractual sale price and the market price at the time of performance (paragraph 3).[31] Consequently, the general rules on waiving performance regarding the payment of the purchase price and the other options in such a situation are partly modified in the law on the sale of goods.

[23] With regard to general and specific rules on delay of performance by a creditor, in particular based on above examples (diving set, public transportation, purchase of respiratory equipment) relating to the coronavirus pandemic, the question arises, whether all these statutory rules are still adequate. The general rules, set forth in articles 91 to 96 of the Swiss Code of Obligations, provide the debtor with several alternatives to fulfill his or her obligations by other means, without bearing the risk of counter-performance. This position allows the debtor to exert pressure, so that a creditor may accept performance and the contract may be honored after all. The specific rules for sale contracts, contained in articles 214 and 215 of the Swiss Code of Obligations, make a default in commercial transactions less attractive.

2.3. Is the Time ripe for a Uniform Breach of Contract Action in Swiss Law?

[24] Is the time ripe for a uniform breach of contract action in Swiss law, as provided for in most modern codifications and model laws? The United Nations Convention on Contracts for the International Sale of Goods, the Draft Common Frame of Reference, the Principles of European Contract Law, and the UNIDROIT Principles of International Commercial Contracts (the UNIDROIT Principles) are all based on a uniform definition of non-performance. The remedies for a breach of contract under the Swiss Code of Obligations, which is based on different causes of default and also differs on fault or non-fault of the non-performing party, does not correspond to these modern codifications and model laws. In addition, a large-scale reform project on the

31 For a general overview on these calculations of damages, *see* Koller (Fn. 11), at 46–49; Schmid et al. (Fn. 11), at 45–46; Honsell (Fn. 11), at 77–79; Huguenin (Fn. 5), at 775–776. For a detailled commentary on these provisions, *see* Venturi & Zen-Ruffinen (Fn. 11), at notes 5–12 («Le calcul concret du dommage») and notes 13–17 («Le calcul abstrait du dommage») on article 215; Giger (Fn. 14), at notes 6–8 («Abstrakte Schadenberechnung») and note 9 («Schadenberechnung aufgrund der Anschaffungskosten») on article 215; Koller (Fn. 11), at notes 8–17 («konkrete Schadensberechnung bei Vornahme eines Deckungskaufs») and notes 18–21 («abstrakte Schadensberechnung über hypothetischen Deckungskauf») on article 215.

modernization of the general part of the Swiss Code of Obligations failed rather recently.[32] An economic and comparative perspective might be helpful in this regard.

[25] Many prominent scholars, such as Jürgen Basedow, Stefan Grundmann, or Ingeborg Schwenzer, argue in favor of a uniform breach of contract action, not only at the European level, but worldwide.[33] The legal systems of France and Germany follow a uniform concept of breach of contract. The French Civil Code – at least before the 2016 and 2018 revisions, using a «unitary concept» of breach of contract – is a good example of such a modern codification.[34] After the revision concerning the modernization of the law of obligations of 2002, the German Civil Code is, in Grundmann's words, «very much a unitary system», at least in terms of legal consequences, but also «a step halfway back to [traditional] models of differentiation, the main legitimation being that a uniform concept of breach was just too diffuse, the pattern not appearing clear enough».[35] However, there are many good reasons for a uniform breach of contract action. A uniform action is not only systematically simpler and clearer, but also more suited than the traditional model of differentiation to developing a coherent system free from inconsistencies. In the current context of the coronavirus pandemic, a uniform breach of contract action would thus help to overcome difficulties of delimitation between subsequent impossibility and delay of performance.

[26] Other scholars, like Roy Kreitner, are quite skeptical about the idea of unifying the remedies for breach of contract.[36] From a law and economics perspective, these discussions even go back

32 *See* articles 118 to 134 of the draft Swiss Code of Obligations 2020, commented by Markus Müller-Chen, in: Claire Huguenin & Reto M. Hilty (eds.), Schweizer Obligationenrecht 2020: Entwurf für einen neuen allgemeinen Teil (Zurich: Schulthess, 2013). *See* also postulate 13.3217 «Für ein modernes Obligationenrecht» of Pirmin Bischof and postulate 13.3226 «Für ein modernes Obligationenrecht» of Andrea Caroni of 21 March 2013; report «Modernisierung des Allgemeinen Teils des Schweizerischen Obligationenrechts» of the Swiss Federal Council of 31 January 2018, available at https://www.bj.admin.ch/bj/de/home/publiservice/publikationen/berichte-gutachten/2018-01-31.html.

33 *See* Jürgen Basedow, Towards a Universal Doctrine of Breach of Contract: The Impact of the CISG, IntRevLEcon 25 (2005), 487–500, at 490–492 (interpreting the lack of coordination in various continental jurisdictions and the almost worldwide acceptance of the new approach of common law countries as a rapprochement of traditional civil law countries to the common law); Stefan Grundmann, The Architecture of European Codes of Contract Law – A Survey of Structures and Contents, in: Stefan Grundmann & Martin Schauer (eds.), The Architecture of European Codes and Contract Law, 3–30 (Alphen aan den Rijn: Kluwer Law International, 2006), at 11–12 (finding that a considerable amount of general rules on performance and breach can be formulated and criticizing the large number of distinctions, which are based mainly on theory and not on practical relevance). On the need for a uniform contract law in general, *see* Ingeborg Schwenzer, Global Unification of Contract Law, UnifLRev 21 (2016) 1, 60–74, at 60–64.

34 On the structural elements of the French Civil Code, *see* Pauline Rémy-Corlay, Structural Elements of the French Civil Code, in: Stefan Grundmann & Martin Schauer (eds.), The Architecture of European Codes and Contract Law, 33–55 (Alphen aan den Rijn: Kluwer Law International, 2006), at 50 («no distinction between the types of obligations, no distinction between the types of breach»).

35 On the structural elements in the contract law parts of the German Civil Code, *see* Stefan Grundmann, Structural Elements in the Contract Law Parts of the German Civil Code, in: Stefan Grundmann & Martin Schauer (eds.), The Architecture of European Codes and Contract Law, 57–81 (Alphen aan den Rijn: Kluwer Law International, 2006), at 80 (concluding that «while German law seems to adhere to a model of a differentiated system of different kinds of breach of contract even today, in fact, for instance in terms of legal consequences, it is now very much a unitary system»). On the revision concerning the modernization of the law of obligations of 2002 in general, *see* Stefan Grundmann, Germany and the Schuldrechtsmodernisierung 2002, ERCL 1 (2005) 1, 129–148 (arguing that «German law now follows a uniform concept of breach and distinguishes quite convincingly with respect to three major remedies»). On the claim for damages under the contract in particular, *see* Stefan Grundmann, Der Schadenersatzanspruch aus Vertrag: System und Perspektiven, AcP 204 (2004) 5, 569–605 (arguing that the differentiation according to the type of breach is practically no longer relevant, although it was «rehabilitated» [as Wilhelm Canaris put it] in 2001).

36 *See* Roy Kreitner, Multiplicity in Contract Remedies, in: Nili Cohen & Ewan McKendrick (eds.), Comparative Remedies for Breach of Contract, 19–49 (Oxford: Hart, 2004), at 19–20 (arguing that any attempts aimed at reconstructing the lost unity of the remedies for breach of contract are fundamentally flawed and doomed to failure, that they exist at a level of abstraction more likely to be an obstacle to understanding contract and solving contract

to Fuller and Perdue's work on the reliance interest in contract damages.[37] For instance, the legal systems of both Austria and Switzerland are still based on a differentiating approach. The Austrian Civil Code, with its differentiating approach, is still in this spirit.[38] As discussed in detail in the previous two sections, the same is true for the Swiss Code of Obligations. There are, of course, also many good reasons for a differentiating approach. As a popular proverb goes, «if it ain't broke, don't fix it». A fundamental reform should only be initiated, if the existing law is not working properly and a revision would bring about significant improvements. In the Swiss context, the Swiss Federal Council had this clarified for the general part of the Swiss Code of Obligations and found that a cost-benefit analysis could not justify such a fundamental reform.[39] The lack of practical need for renewal and the considerable loss of legal certainty that such a reform would entail were particularly significant in the context of this analysis.

[27] Considering all these arguments, I tend to conclude that the time is not (yet) ripe for a uniform breach of contract action in Swiss law. Although there are many good reasons for a uniform breach of contract action, there are also many good reasons for a differentiating approach. So far, the traditionalist camp has had the upper hand over the modern reformers. The coronavirus pandemic could, however, lead to a shift in the balance of these two camps. The main reason, why the pendulum could perhaps swing back in the future, is the difficult demarcation between permanent and temporary default, especially in the early stages of the pandemic. This demarcation is important because different legal consequences are attached to it. As long as these two groups of cases can be clearly distinguished, the course set by the legislator is working. But as soon as this distinction is no longer manageable in practice, there is an issue of legislative market failure that must be corrected. Time will tell, whether the coronavirus pandemic can justify such an extensive system change regarding the remedies for breach of contract.

problems than to aid in those tasks, and that only an understanding of contract that respects the multiplicity of interests at stake can productively link contract thinking with the practices of contracting parties and the courts).

37 *See* Lon L. Fuller & William R. Perdue, The Reliance Interest in Contract Damages: 1, YaleLJ 46 (1936) 1, 52–96 (presenting an analysis of the motives, which may lead a court to grant legal sanctions against one, who has broken a promise, distinguishing between three contract «interests» [expectation interest, restitution interest, and reliance interest], the protection of which may furnish the basis for judicial intervention); Lon L. Fuller & William R. Perdue, The Reliance Interest in Contract Damages: 2, YaleLJ 46 (1937) 3, 373–420 (attempting to bring together for comparative study a series of situations, in which judicial intervention has been limited to a protection of what they have called «the reliance interest»). For a rather critical contemporary perspective, *see* Richard Craswell, Against Fuller and Perdue, UChiLRev 67 (2000) 1, 99–161 (concluding that «Fuller and Perdue's three-way classification [...] is no longer a useful analytic tool, and [offering] some suggestions as to what might replace their classification»).

38 On the structural elements of the Austrian Civil Code, *see* Martin Schauer, Structural Elements of the Austrian Civil Code, in: Stefan Grundmann & Martin Schauer (eds.), The Architecture of European Codes and Contract Law, 83–103 (Alphen aan den Rijn: Kluwer Law International, 2006), at 99: «It has become apparent that Austrian law, with its differentiating approach, does not follow the more modern system which has only one uniform type of breach of contract».

39 *See* the report «Modernisierung des Allgemeinen Teils des Schweizerischen Obligationenrechts» of the Swiss Federal Council of 31 January 2018, available at https://www.bj.admin.ch/bj/de/home/publiservice/publikationen/berichte-gutachten/2018-01-31.html, at 14: «Auch wenn es im Allgemeinen Teil des OR sicherlich Bestimmungen gibt, die redaktionell oder allenfalls auch inhaltlich verbessert werden könnten: Solange nicht nachgewiesen ist, dass Revisionsbedarf besteht, sollte von einer aufwendigen und riskanten Revision abgesehen werden» and «Dieser Nachweis ist beim Allgemeinen Teil des OR nach Ansicht des Bundesrates nicht erbracht».

3. Adaption and Termination of Contracts under the Swiss Code of Obligations

[28] The second building block of the statutory risk allocation pursuant to the Swiss Code of Obligations concerns the adaption and the termination of contracts.[40] Based on both case law and legal doctrine, a competent judge may be asked to step in and adapt a contract to changed circumstances or terminate the contract altogether. In the age of the coronavirus pandemic, the concepts of *clausula rebus sic stantibus* and termination, for a compelling reason, of permanent contracts become increasingly important. From an international comparison, the question might be asked, whether the Swiss should go German, when it comes to adaption and termination of contracts.

3.1. Adaption due to a Change of Circumstances: Clausula rebus sic stantibus

[29] The *clausula rebus sic stantibus* is an important exception to the principle of *pacta sunt servanda*. According to this concept, a competent judge, upon the request of at least one party to the contract, may adapt a contract between two or more parties, if circumstances have changed significantly since the conclusion of the contract.[41] The *clausula* exists in almost all civil law legal systems, which descend from Roman law. It is worth noting, however, that in Swiss law, there are no general rules, but only a few context-specific rules on the adaption of contracts due to a change of circumstances.

3.1.1. No General Rules on Adaption of Contracts under Changed Circumstances

[30] The adaption of contracts under changed circumstances is 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 because they are not needed anymore and thus not useful during the coronavirus pandemic.[42] One example is the useless delivery of oranges or flowers to

40 For a general overview on adaption of contracts under Swiss law, *see* Jörg Schmid et al., Schweizerisches Obligationenrecht: Allgemeiner Teil, vol. I (10th ed., Zurich: Schulthess, 2014), at 325–331; Schwenzer (Fn. 5), at 276–280; Koller (Fn. 5), at 497–519; Berger (Fn. 5), at 397–416; Huguenin (Fn. 5), at 100–105 and 257. For a general overview on termination of contracts under Swiss law, *see* Koller (Fn. 5), at 497–519; Huguenin (Fn. 5), at 252–257; Tercier & Pichonnaz (Fn. 5), at 243–248.

41 From the Swiss literature, *see* Pierre Tercier, La «clausula rebus sic stantibus» en droit suisse des obligations, JdT 1979 I, 194–212; Martin Burkhardt, Vertragsanpassung bei veränderten Umständen in der Praxis des schweizerischen Privatrechts: Vertragsgestaltung, Schiedsgerichtspraxis und Praxis des Bundesgerichts (Berne: Haupt, 1997); Pascal Pichonnaz, La modification des circonstances et l'adaptation du contrat, in: Pascal Pichonnaz & Franz Werro (eds.), La pratique contractuelle 2, 21–54 (Zurich: Schulthess, 2011); Ernst A. Kramer, Neues zur clausula rebus sic stantibus, SJZ 110 (2014), 273–287; Benjamin V. Enz, Clausula rebus sic stantibus – Insbesondere im Spiegel der Rechtsprechung (Zurich: Schulthess, 2018). For a doctrinal analysis from a German perspective, *see* Ralf Köbler, Die «clausula rebus sic stantibus» als allgemeiner Rechtsgrundsatz (Tuebingen: Mohr Siebeck, 1991). For a historical analysis from a German perspective, *see* Georg Gieg, Clausula rebus sic stantibus und Geschäftsgrundlage: Ein Beitrag zur Dogmengeschichte (Aachen: Shaker, 1994). For a historical and comparative analysis from an Austrian perspective, *see* Caroline Mokrejs, Die clausula rebus sic stantibus – die antiken Quellen und ihre moderne Rezeption (Vienna: Universität Wien, 2011).

42 For a discussion of this concept in the context of the coronavirus pandemic, *see* Enz (Fn. 2), at notes 3–25, in particular note 7 (distinguishing between «Einmalschuldverhältnisse» and «Dauerschuldverhältnisse»), note 21 («Einmalschuldverträge», such as «Beispiel des Kaufvertrages über 1000 Würste»), and note 22 («Dauerschuldverträge», such as «einen auf drei Jahre geschlossenen Bierliefervertrag»).

various carnival societies for the purpose of the famous carnival of Basle, which finally had to be cancelled due to the pandemic. Another example is a beer supply contract for a restaurant in the city of Basle, especially during a lockdown period. Although there are still no general rules on *clausula rebus sic stantibus* in Swiss law, this concept is meanwhile widely acknowledged in both legal doctrine and case law.[43]

[31] The *clausula rebus sic stantibus* is a concept, which has its origins in the Roman tradition, but did not emerge until the Middle Ages.[44] In the 16th and 17th centuries, the *clausula* was perceived as a general principle of law, but, due to the resulting legal uncertainty, it lost much of its importance towards the end of the 18th century. The *clausula* finally experienced a renaissance during First World War, as intensive military conflicts and associated economic turbulences evoked an unpredictable change of circumstances, which led the courts to take corrective action. As a matter of fact, German case law and legal doctrine clearly pointed the way forward for Switzerland. After First World War, the German Court of the Empire begun to recognize cases of economic impossibility, if contractual obligations turned out to be totally different than the original agreement as a result of the changed circumstances.[45] Based on this leading case and prior work of Bernhard Windscheid, Paul Oertmann developed his own theory on the elimination of the basis of the transaction («Wegfall der Geschäftsgrundlage»).[46] This theory, based on the principle of good faith, was finally taken up and adopted by the German Court of the Empire in the midst of hyperinflation and became established in the case law of the Court of the Empire (before Second World War) and the Federal Court of Justice (after Second World War).[47] In 2002, this

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43 From the case law of the Swiss Federal Supreme Court, *see* BGE 60 II 205 (lease contract), consideration 1; BGE 97 II 390 (energy supply contract), consideration 6; BGE 100 II 345 (commercial [interest-bearing] loan contract), consideration 2/b; BGE 107 II 343 (building rights contract), consideration 2; BGE 122 III 97 (maintenance obligation), consideration 3/a; BGE 127 III 300 (building rights contract), considerations 5 and 6; BGE 135 III 1 (general terms and conditions), consideration 2.4; BGE 138 V 366 (occupational benefits contract), consideration 5. For a general overview on this concept, *see* Schmid et al. (Fn. 40), at 327–331; Schwenzer (Fn. 5), at 278–280; Koller (Fn. 5), at 507–519; Berger (Fn. 5), at 399–401; Huguenin (Fn. 5), at 100–105 and 257. For a detailled commentary on this concept, *see* Ernst A. Kramer & Bruno Schmidlin, in: Arthur Meier-Hayoz (ed.), Berner Kommentar, Obligationenrecht, Allgemeine Einleitung in das schweizerische Obligationenrecht und Kommentar zu Art. 1–18 OR, vol. VI/1/1 (Berne: Stämpfli, 1986), at notes 272–359 on article 18; Bénédict Winiger, in: Luc Thévenoz & Franz Werro (eds.), Commentaire romand, Code des obligations, vol. I (2nd ed., Basle: Helbing Lichtenhahn, 2012), at notes 193–215 on article 18; Peter Jäggi et al., in: Peter Gauch & Jörg Schmid (eds.), Zürcher Kommentar, Obligationenrecht, Auslegung, Ergänzung und Anpassung der Verträge; Simulation (4th ed., Zurich: Schulthess, 2015), at notes 710–789 on article 18; Christoph Müller, in: Regina Aebi-Müller & Christoph Müller (eds.), Berner Kommentar, Obligationenrecht, Art. 1–18 mit allgemeiner Einleitung in das Schweizerische Obligationenrecht (Berne: Stämpfli, 2018), at notes 633–726 on article 18; Wiegand (Fn. 7), at notes 95–125a on article 18.

44 For further references, *see* Andreas Thier, Legal History, in: Ewoud Hondius & Christoph Grigoleit (eds.), Unexpected Circumstances in European Contract Law, 15–32 (Cambridge: Cambridge University Press, 2011), at 15 («the *clausula rebus sic stantibus* doctrine [...] has its roots in Roman philosophy and was developed as a normative rule during the Middle Ages»).

45 For the leading case of the German Court of the Empire, *see* RGZ 98, 18 (20) (holding: «Zur Frage des Einflusses der wirtschaftlichen Folgen der Revolution auf die Wirksamkeit eines Werkvertrags, der während des Krieges geschlossen und nach dem Friedensschlusse zu erfüllen ist»).

46 *See* Paul Oertmann, Die Geschäftsgrundlage: Ein neuer Rechtsbegriff (Leipzig: Deichert, 1921). *See* also Bernhard Windscheid, Die Lehre des römischen Rechts von der Voraussetzung (Düsseldorf: Buddeus, 1850).

47 From the case law of the German Court of the Empire, *see* RGZ 103, 328 (331–332) (holding: «Genügt unter Umständen auch eine durch die Geldentwertung erfolgte erhebliche Verschiebung des Wertverhältnisses zwischen Leistung und Gegenleistung, um den Einwand der veränderten Umstände zu rechtfertigen?»); RGZ 106, 7 (10) (holding: «Rechtfertigt auch eine infolge der Geldentwertung eingetretene erhebliche Verschiebung des Wertverhältnisses zwischen Leistung und Gegenleistung den Einwand der veränderten Umstände?»); RGZ 122, 200 (203) (first holding: «Welchen Einfluss auf die Wirksamkeit eines Vergleichs hat ein Irrtum über die Geschäftsgrundlage, in dem beide Parteien bei Abschluss des Vergleichs befangen waren?» and second holding: «Auf welcher Grundlage ist das Auseinandersetzungsguthaben des stillen Gesellschafters zu berechnen, wenn die Auflösung

form of the *clausula*, referred to as interference with the basis of the transaction, was codified in article 313 of the German Civil Code. To compare current developments in Switzerland with these milestones, Martin Burkhardt, at the turn of the millennium, delivered an impressive study on the adaption of contracts under changed circumstances in the practice of Swiss private law.[48] The main result of his study is that both the problem and the solutions of adaption under changed circumstances are quite different in contract drafting, arbitration practice, and the practice of the Swiss Federal Supreme Court. Despite further efforts to create a statutory basis for the *clausula*, including a large-scale reform project on the general part of the Swiss Code of Obligations, which unfortunately failed rather recently, this concept is still not codified in Swiss law.[49]

[32] The most important requirement for the application of this concept is a change of circumstances, which is relevant for the contract in question, meaning that reality does not correspond to what the parties had in mind, when they concluded the contract. It must be noted, however, that a breach of contract does not qualify as a change of circumstances within the meaning of this doctrine.[50] According to well-established case law of the Swiss Federal Supreme Court, any recourse to this concept presupposes that the change in the contractual relationship was neither foreseeable nor avoidable, when the contract was concluded, and leads to a significant equivalence disorder between performance and consideration.[51] In a previous practice of the Court, which derived this concept from the prohibition of abuse of rights pursuant to article 2 paragraph 2 of the Swiss Civil Code, but meanwhile seems to be overruled, judicial intervention at the debtor's request is only permissible, if the relationship between performance and consideration is

der Gesellschaft in die Zeit der Geldentwertung fiel?»); RGZ 141, 212 (216–217) (holding: «Welchen Einfluss hat der Sturz des englischen Pfundes auf Lieferungsverträge zwischen Deutschen in Deutschland, wenn der Kaufpreis in englischer Währung ausgedrückt worden ist?»). From the case law of the German Federal Court of Justice, *see* BGHZ 2, 176 (188–189) (third holding: «Zur Frage einer etwaigen Anwendung der Grundsätze vom Fortfall der Geschäftsgrundlage auf allgemein verbindliche Normenverträge» and forth holding: «Der Wegfall des Kriegssachschadensanspruchs gegen das Reich führt weder unter dem Gesichtspunkt einer einschränkenden Auslegung des EMV § 11 noch unter dem Gesichtspunkt des Fortfalls der Geschäftsgrundlage zu einer Freistellung des Mieters von seiner Haftung für den Untergang des Geräts»); BGHZ 84, 1 (9) (holding: «Zu den Voraussetzungen, unter denen im Wege der ergänzenden Auslegung einem zur Abwendung einer drohenden Enteignung geschlossenen Grundstücksübertragungsvertrag bei Wegfall des Verwendungszwecks ein Anspruch des früheren Eigentümers auf Rückübereignung entnommen werden kann»).

48 For the doctoral thesis, written under the supervision of Ernst A. Kramer, *see* Burkhardt (Fn. 41), at 341–343 («Folgerungen aus der Kautelarjurisprudenz»), 343–345 («Folgerungen aus der Schiedsgerichtspraxis»), 345–347 («Folgerungen aus der Bundesgerichtspraxis»), and 347–348 («Folgerungen für die Dogmatik des Vertragsrechts»).

49 *See* article 19 of the draft Swiss Code of Obligations 2020, commented by Hans-Ueli Vogt, in: Claire Huguenin & Reto M. Hilty (eds.), Schweizer Obligationenrecht 2020: Entwurf für einen neuen allgemeinen Teil (Zurich: Schulthess, 2013). *See* also postulate 13.3217 «Für ein modernes Obligationenrecht» of Pirmin Bischof and postulate 13.3226 «Für ein modernes Obligationenrecht» of Andrea Caroni of 21 March 2013; report «Modernisierung des Allgemeinen Teils des Schweizerischen Obligationenrechts» of the Swiss Federal Council of 31 January 2018, available at https://www.bj.admin.ch/bj/de/home/publiservice/publikationen/berichte-gutachten/2018-01-31.html.

50 Same as here: Schmid et al. (Fn. 40), 325 («Ausgeklammert bleiben Vertragsverletzungen»).

51 BGE 135 III 1, consideration 2.4: «Voraussetzung für eine richterliche Vertragsanpassung nach der ‹clausula rebus sic stantibus› ist, dass die Verhältnisänderung beim Abschluss des Vertrags weder voraussehbar noch vermeidbar war». Similar, although with additional requirements, BGE 127 III 300, consideration 5/b: «Ein richterlicher Eingriff in einen Vertrag aufgrund veränderter Umstände setzt [...] voraus, dass die Verhältnisänderung weder vorhersehbar noch vermeidbar war, für Fälle wie den vorliegenden eine gravierende Äquivalenzstörung zur Folge hat und der Vertrag nicht vorbehaltslos erfüllt wurde»; BGE 138 V 366, consideration 5.1: «Eine vertragliche Vereinbarung kann gegen den Willen einer Partei angepasst werden, wenn infolge einer [...] unvorhersehbaren und unvermeidbaren grundlegenden und ausserordentlichen Veränderung der Umstände eine gravierende Störung der Äquivalenz von Leistung und Gegenleistung eintritt».

so disturbed that the creditor's insistence on his or her contractual claim appears abusive.[52] The prevailing doctrine likewise requires an unforeseeable an unavoidable change of circumstances as well as a significant equivalence disorder for the application of this concept.[53] Other prominent scholars, namely Alfred Koller, pursue another approach, which draws on the law on defects in consent, in particular the concept of fundamental error pursuant to article 24 paragraph 1 item 4 of the Swiss Code of Obligations, which is not further discussed here.[54] The determination of the consequences of the *clausula* are largely left to the judge, at least as long as the contract between the parties or statutory law does not provide otherwise.[55] Consequently, the judge has to decide, whether and to what extent a contract has to be adapted to changed circumstances. The spectrum of possible solutions includes a modification of the duration or the content of a contract or a termination of the contract.[56] With regard to the decision on the consequences by a competent judge, it is certainly worth noting that Ingeborg Schwenzer is rather critical of a court order for renegotiation based on the *clausula*.[57]

[33] In the absence of general rules on adaption under changed circumstances of all contracts, in particular based on above examples (useless delivery of oranges or flowers, beer supply contract) relating to the coronavirus pandemic, the question arises, whether the lack of such general rules for all contracts is still adequate. The *clausula rebus sic stantibus* is meanwhile widely acknowledged in both legal doctrine and case law, although there are still no general rules on this

52 BGE 97 II 390, consideration 6: «Nach Art. 2 Abs. 2 ZGB hat der Richter einen Vertrag dann zu ändern oder aufzuheben, wenn durch nachträgliche, nicht voraussehbare Umstände ein derart offenbares Missverhältnis zwischen Leistung und Gegenleistung eingetreten ist, dass das Beharren einer Partei auf ihrem Anspruch als missbräuchlich erscheint»; BGE 100 II 345, consideration 2/b: «Ein richterlicher Eingriff auf Verlangen einer Partei ist gestützt auf Art. 2 ZGB nur zulässig, wenn die Verhältnisse von Leistung und Gegenleistung infolge ausserordentlicher Änderung der Umstände so gestört sind, dass die sich aus dem Vertrag ergebende Risikoverteilung für die eine Partei nicht mehr tragbar und das Festhalten der Gegenpartei an ihrem Anspruch nach den gesamten Umständen missbräuchlich ist»; BGE 107 II 343, consideration 2: «Ein richterlicher Eingriff auf Verlangen des Schuldners ist gestützt auf Art. 2 ZGB nur zulässig, wenn das Verhältnis von Leistung und Gegenleistung infolge ausserordentlicher Änderung der Umstände so gestört ist, dass das Beharren des Gläubigers auf seinem Vertragsanspruch geradezu eine wucherische Ausbeutung des Missverhältnisses und damit einen offenbaren Rechtsmissbrauch darstellt, der nach Art. 2 Abs. 2 ZGB keinen Rechtsschutz findet». *See* also BGE 122 III 97, consideration 3/a (analogous application of *clausula rebus sic stantibus* to a maintenance obligation).

53 *See* Schmid et al. (Fn. 40), at 330 (no foreseeability, no insignificance of equivalence disorder); Schwenzer (Fn. 5), at 279–280 (risk of changed circumstances, unforeseeable, gross disproportion); Huguenin (Fn. 5), at 102–103 (subsequent change of circumstances, significant disorder, lack of foreseeability, no contradictory behavior).

54 *See* Koller (Fn. 5), at 507–513: «Die *Clausula* ist eine Irrtumsregel» (requiring a defect in consent that is subjectively and objectively significant).

55 For further details on subsidiarity of contract adaption, *see* Kramer & Schmidlin (Fn. 43), at notes 276–296 («Vertragliche Anpassungsregeln»), notes 299–321 («Gesetzliche Anpassungsregeln»), and notes 322–359 («Füllung der Anpassungslücke durch richterliche Vertragsanpassung») on article 18; Winiger (Fn. 43), at notes 203–207 («Règles contractuelles d'adaption»), notes 208–209 («Règles légales d'adaption»), and notes 210–215 («Adaption judiciaire») on article 18; Jäggi et al. (Fn. 43), at notes 655–709 («Rechtslage nach Vertrag und Gesetz») and notes 710–789 («Anpassung des Vertrags durch das Gericht») on article 18; Müller (Fn. 43), at notes 575–604 («Vertragliche Anpassungsregeln»), notes 605–632 («Gesetzliche Anpassungsregeln»), and notes 633–726 («Gerichtliche Vertragsanpassung») on article 18; Wiegand (Fn. 7), at notes 108–113 («Vertragliche Anpassungsregeln»), notes 114–115 («Gesetzliche Anpassungsregeln»), and notes 116–117 («Richterliche Anpassungsregeln») on article 18.

56 *See* Schmid et al. (Fn. 40), at 325–326: «Die mögliche Anpassung des Vertrags kann bestehen in einer Verkürzung oder Verlängerung der Vertragsdauer oder in einer Änderung des Vertragsinhalts ohne Änderung der Dauer»; Koller (Fn. 5), at 514–519, in particular 516–518 («Insbesondere das Auflösungsrecht») and 518–519 («Insbesondere das Änderungsrecht»); Huguenin (Fn. 5), at 105 (orientation towards the hypothetical will of the parties and an appropriate solution).

57 *See* Schwenzer (Fn. 5), at 280: «Einer Neuverhandlungspflicht, wie sie in jüngerer Zeit in zunehmendem Masse diskutiert wird [...], sollte nicht das Wort geredet werden, da sie einmal nicht durchgesetzt werden könnte und zum anderen konstruktive (Neu-)verhandlung nur auf der Basis der Freiwilligkeit denkbar erscheint».

concept. Despite the fact that legal doctrine and case law largely agree on the requirements and consequences of the *clausula*, some questions still remain open. In my view, however, this concept should be codified because it is already a general principle of law and will become even more important in times of pandemic. A codification would create legal certainty, without the legislator assuming the competence of the judge, who is considerably better equipped to resolve such cases, taking into account the situation of each individual case.

3.1.2. Specific Rules on Adaption of Contracts for Work or Services

[34] In the law on contracts for work and services, especially in construction law, the adaption of contracts to changed circumstances is particularly relevant during the coronavirus pandemic.[58] In Switzerland, for instance, the government has issued an order, according to which all employers in the construction industry are required to comply with the recommendations of the Federal Office of Public Health regarding hygiene (such as hand-washing) and social distancing. The implementation of these measures can lead to disruption of the construction process, failure to meet deadlines, and additional costs. To give a concrete example, the construction of a single-family house could become more than five percent more expensive than anticipated and agreed due to pandemic-related developments. For such situations, Swiss law provides a context-specific rule regarding the adaption under changed circumstances for a contract for work or services. This rule, article 373 paragraph 2 of the Swiss Code of Obligations, is to be interpreted as *lex specialis* to the *clausula rebus sic stantibus* and thus supersedes this concept. Although Swiss law also contains other specific rules on the adaption of contracts, I focus on article 373 paragraph 2, arguably the most important context-specific rule from a practical perspective.[59]

[35] Pursuant to article 373 paragraph 2 of the Swiss Code of Obligations, the court, at its discretion, may authorize an increase in the price of the work or the termination of the contract, where performance was prevented or seriously hindered by extraordinary circumstances that were unforeseeable or excluded according to the conditions assumed by both parties.[60] This rule thus requires exceptional circumstances, which could not have been foreseen and which prevent or seriously hinder performance by the contractor. The Swiss Federal Supreme Court sets high standards for the requirement of unforeseeability because, in the words of the Court, every execution

58 For a discussion of this concept in the context of the coronavirus pandemic, *see* Enz & Mor (Fn. 2), at notes 41–51.

59 *See* Schmid et al. (Fn. 40), at 327 («Das Gesetz enthält [...] eine Reihe positiver und negativer Anpassungsregeln»), with further references.

60 From the case law of the Swiss Federal Supreme Court, *see* BGE 104 II 314, considerations a and b; BGE 109 II 333, consideration 3; BGE 113 II 513, considerations 2 and 3; BGE 116 II 315, consideration 3; BGE 143 III 545, consideration 4.4. For a general overview on this rule, *see* Alfred Koller, Schweizerisches Werkvertragsrecht (Zurich: Dike, 2015), at 334–338 (requirements) and 338–342 (consequences); Schmid et al. (Fn. 40), at 262; Honsell (Fn. 11), at 327–328; Müller-Chen et al. (Fn. 11), at 239; Huguenin (Fn. 5), at 1061; Peter Gauch, Der Werkvertrag (6th ed., Zurich: Schulthess, 2019), at 505–542. For a detailled commentary on this rule, *see* Georg Gautschi, in: Arthur Meier-Hayoz (ed.), Berner Kommentar, Obligationenrecht, Der Werkvertrag, vol. VI/2/3 (Berne: Stämpfli, 1967), at notes 4a-f on article 373; Theodor Bühler, in: Wilhelm Schönenberger et al. (eds.), Zürcher Kommentar, Obligationenrecht, Der Werkvertrag, vol. V/2d (3rd ed., Zurich: Schulthess, 1998), at notes 19–52 on article 373; François Chaix, in: Luc Thévenoz & Franz Werro (eds.), Commentaire romand, Code des obligations, vol. I (2nd ed., Basle: Helbing Lichtenhahn, 2012), at notes 13–31 on article 373; Gaudenz G. Zindel & Bertrand G. Schott, in: Corinne Widmer Lüchinger & David Oser (eds.), Basler Kommentar, Obligationenrecht, vol. I (7th ed., Basle: Helbing Lichtenhahn, 2020), at notes 14–33 on article 373.

of a work at a fixed price contains a speculative element, which must be considered as a risk.[61] In addition, according to relevant case law, a considerable disproportion between performance and consideration is required by this rule, so that compliance with the agreed fixed price cannot be demanded in good faith.[62] As a consequence, a competent judge, at his or her own discretion, may increase the price of the work or terminate the contract. In times of pandemic, the question therefore becomes, whether or not the Coronavirus pandemic qualifies as «extraordinary circumstances», which were either unforeseeable or excluded according to the conditions assumed by both parties, and thus prevented or seriously hindered performance of the work. There should be a good amount of evidence that the Coronavirus pandemic will be qualified as extraordinary circumstances by the court. Although the authorities were well aware of the potential threat of a pandemic for several years already, the intensity and force, with which this pandemic struck Europe and the rest of the world, was unprecedented. It is thus fair to say that the pandemic was unforeseeable.

[36] In respect of this specific rule on adaption under changed circumstances of contracts for work or services, in particular based on above example (construction of a single-family house) relating to the coronavirus pandemic, the question arises, whether such specific rule for contracts for work or services is still adequate. As article 373 paragraph 2 of the Swiss Code of Obligations is a statutory emanation of the concept of *clausula rebus sic stantibus*, the same considerations should also apply here. The wording of this rule, however, only covers an increase, but not a decrease in price. It is therefore too narrow, as these two cases are quite comparable. Otherwise, it appears problematic that the judicial risk allocation of contract adaption will be unilaterally imposed on one party only, in this case the customer.

3.2. Termination for Cause: Termination, for a Compelling Reason, of Permanent Contracts

[37] Another exception to the principle of *pacta sunt servanda* is the termination, for a compelling reason, of permanent contracts. Although Swiss law does not contain any general rules on this, various context-specific rules, in particular with regard to lease contracts, employment contracts, or partnerships, provide for a termination for cause. It is, however, generally accepted in both legal doctrine and case law that each contracting party may ask a competent judge to terminate the agreement for cause.[63]

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61 BGE 104 II 314, consideration b: «Das Erfordernis der Unvoraussehbarkeit ist vom Standpunkt des sachkundigen und sorgfältigen Unternehmers aus und nach eher strengen Massstäben zu beurteilen, da jede Werkausführung zu festen Pauschal- oder Einheitspreisen ein spekulatives Element enthält, das auch als Risiko zu berücksichtigen ist».

62 *See* BGE 104 II 314, consideration b: «Erforderlich ist ein krasses, offenbares Missverhältnis zwischen dem Wert der erbrachten Leistung des Unternehmers und der versprochenen Gegenleistung des Bestellers». *See* also BGE 113 II 513, consideration 3/b: «Non imputabili al comportamento dell'appaltatore, le ‹circostanze straordinarie› devono esplicare effetti tali sul contratto da non potersi pretendere in buona fede il rispetto dei prezzi offerti».

63 For the leading case on termination of permanent contracts for cause, *see* BGE 128 III 428 (Erika Bertschinger Eicke [Uriella]), considerations 3 and 4. *See* also the discussion of this case by Benedikt Maurenbrecher, Das Darlehen als Dauerschuldverhältnis – Zugleich eine Besprechung von BGE 128 III 428 ff. («Fiat Lux»), recht 2003, 180–192. *See* in particular the groundbreaking monography of Peter Gauch, System der Beendigung von Dauerverträgen (Fribourg: Universitätsverlag Freiburg Schweiz, 1968). For more recent monographies, *see* Ivan Cherpillod, La fin des contrats de durée (Lausanne: Université de Lausanne, 1988); Marie-Noëlle Venturi Zen-Ruffinen, La résiliation pour justes motifs des contrats de durée (Zurich: Schulthess, 2007). For an overview, *see* Meinrad Vetter & Roman Gutzwiller, Voraussetzungen und Rechtsfolgen der ausserordentlichen Beendigung

3.2.1. No General Rules on Termination of Permanent Contracts with or without Notice

[38] The termination of permanent contracts, either with notice (ordinary termination) or without notice (extraordinary termination), could become more important during the coronavirus pandemic, but is most probably only of limited help to the contracting parties.[64] One example are subscriptions for public transportation. Users of public transport with annual or monthly subscription might be inclined to stop using trains and buses and would therefore prefer to cancel their subscription immediately. Another example is gym membership. As these contracts usually run on a yearly or monthly prepaid-basis, gym members might want to terminate their membership in times of pandemic. This not only applies to consumer contracts, but also to commercial contracts, in particular to purchase and remuneration obligations in energy supply contracts, to give a concrete example. Swiss law does still not contain any general rules on termination, for a compelling reason, of permanent contracts. However, this concept, for quite some time already, is well accepted in both legal doctrine and case law.[65]

[39] The concept of termination for cause of permanent contracts is a subset of the concept of *clausula rebus sic stantibus*.[66] This distinction is not uncontroversial, however, as the Swiss Federal Supreme Court draws this line differently, in particular by using the demarcation criterion of a significant equivalence disorder.[67] One reference case of the Swiss Federal Supreme Court dates back to the mid-1990ies, a series of other reference cases even to the late 1960ies and early 1970ies.[68] While the Swiss Federal Supreme Court initially sought the dogmatic basis of termination for cause in the protection of personality, it has now rightly clarified that article 27 paragraph 2 of the Swiss Civil Code on excessive contractual commitment, a concept not further discussed

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von Dauerschuldverhältnissen, AJP 2010, 699–714. From a German perspective, *see* Hartmut Oetker, Das Dauerschuldverhältnis und seine Beendigung: Bestandsaufnahme und kritische Würdigung einer tradierten Figur der Schuldrechtsdogmatik (Tuebingen: Mohr Siebeck, 1994).

64 For a general overview on termination of permanent contracts, *see* Huguenin (Fn. 5), at 253–256, in particular 254–255 (ordinary termination) and 255–256 (extraordinary termination). For a comprehensive study on termination of permanent contracts, *see* Gauch (Fn. 63), at 35–62 (ordinary termination) and 63–199 (extraordinary termination). For a discussion of this concept in the context of the coronavirus pandemic, *see* Enz (Fn. 2), at notes 35–36.

65 From the case law of the Swiss Federal Supreme Court, *see* BGE 128 III 428 ([non-interest-bearing] loan agreement), considerations 3 and 4; BGE 133 III 360 (license agreement), considerations 7 and 8; BGE 138 III 304 (trademark delimitation agreement), considerations 6, 7, and 11; BGE 143 III 480 (shareholders' agreement), considerations 4 and 5. For a general overview on this concept, *see* Schwenzer (Fn. 5), at 278; Koller (Fn. 5), at 498–502; Berger (Fn. 5), at 402; Huguenin (Fn. 5), at 255–256. For a detailled commentary on this concept, *see* Jäggi et al. (Fn. 43), at notes 689–691, note 785, and notes 791–792 on article 18; Müller (Fn. 43), at notes 615–619 on article 18.

66 Same as here: Wiegand (Fn. 7), at note 97 on article 18 («die Kündigung aus wichtigem Grund, die allerdings nur einen Unterfall der *clausula rebus sic stantibus* darstellt»).

67 BGE 128 III 428, consideration 3/c: «Die *clausula* setzt Veränderungen der äusseren Umstände voraus, von denen alle Vertragsparteien gleichermassen betroffen sind, und die zu einer gravierenden Äquivalenzstörung geführt haben» (*clausula rebus sic stantibus*), whereas «Im Gegensatz dazu hat die Kündigung aus wichtigem Grund keine Äquivalenzstörung zur Voraussetzung» (termination, for a compelling reason, of permanent contracts). Particularly critical of this distinction: Jäggi et al. (Fn. 43), at note 691 on article 18; Müller (Fn. 43), at note 617 on article 18.

68 BGE 92 II 299 (license agreement), consideration 3/b: «Aussi convient-il de reconnaître à chacun le droit de résilier le contrat lorsque sa continuation ne peut être raisonnablement exigée, soit pour de justes motifs, même en raison de circonstances dont le partenaire ne répond pas»; BGE 96 II 154 (license agreement), consideration 2: «Le contrat de licence [...] s'apparente à la société simple et il est susceptible de résiliation pour de justes motifs par une application analogique de l'art. 545 ch. 7 CO»; BGE 99 II 308 (exclusive agency agreement), consideration 5/a: «C'est à juste titre que l'autorité cantonale qualifie de convention de représentation exclusive le contrat de base conclu pour dix ans par les parties et qu'il reconnaît à celles-ci le droit de le résilier pour de justes motifs aux conditions de l'art. 352 aCO»; BGE 122 III 262 (lease contract), consideration 2/a/aa: «Dieses ausserordentliche Kündigungsrecht entspricht dem allgemeinen Grundsatz, dass Dauerschuldverhältnisse aus wichtigen Gründen vorzeitig beendet werden dürfen».

here, is in fact no case of application of termination for cause.[69] In addition, Peter Gauch delivered his groundbreaking doctoral thesis on the system for terminating permanent contracts in 1968.[70] Based on the termination of permanent contracts regulated in the Swiss Code of Obligations on both ordinary and extraordinary grounds, he developed a theory for the termination of permanent contracts under Swiss law that is still valid today. According to this theory, all permanent contracts, whether specifically regulated in the law or not, may be terminated for a compelling reason. Unfortunately, a large-scale reform project, which was intended to modernize the general part of the Swiss Code of Obligations, did not go through. In this reform project, the termination for cause of permanent contracts finally would have been regulated, as Gauch had demanded earlier.[71] The law of contracts is different in Germany, however, where a similar concept on termination, for a compelling reason, of contracts for the performance of a continuing obligation has been codified in article 314 of the German Civil Code since 2002.

[40] In order to be applicable, the concept of termination for cause of permanent contracts under Swiss law basically requires a compelling reason.[72] According to the relevant case law, a compelling reason for the termination of a contract for the performance of a continuing obligation exists, if a commitment to the contract has become generally unreasonable for the party due to changed circumstances, not only from an economic point of view, but also from other aspects affecting the personality of contracting parties.[73] More precisely, each contracting party has the right to terminate a permanent contract without notice and thus with immediate effect, if such party cannot reasonably be expected to await the end date of a fixed-term contract or the expiry of a notice period of an indefinite contract.[74] Case law further indicates that a compelling reason

69 Initially (2002) still incorrect in BGE 128 III 428, consideration 3/c: «Nach heutigem Verständnis steht dagegen bei der vorzeitigen Kündigung von Dauerschuldverhältnissen aus wichtigem Grund der Schutz der Persönlichkeit im Sinne von Art. 27 ZGB im Vordergrund». Now (2017) again correct in BGE 143 III 480, consideration 4.2: «Grundsätzlich besteht jedoch ein Unterschied darin, dass sich der wichtige Grund für die Kündigung eines Dauerschuldverhältnisses regelmässig aus einer Veränderung der objektiven Vertragsgrundlagen oder einer Veränderung in den persönlichen Verhältnissen einer Vertragspartei ergibt [...], während sich die übermässige Bindung i.S.v. Art. 27 Abs. 2 ZGB (‹Knebelungsvertrag›) vor allem aus der Vertragsgestaltung selber in Kombination mit der Bindungsdauer ergibt». For further details on excessive contracting, *see* BGE 143 III 480, consideration 5.4, with further references.

70 Gauch (Fn. 63), at 35–62 (discussing ordinary grounds of termination in the Swiss Code of Obligations), 63–199 (discussing extraordinary grounds of termination in the Swiss Code of Obligations), and 234–240 (arguing for a statutory regulation of termination «for a compelling reason» in the general part of the Swiss Code of Obligations).

71 *See* articles 144 to 147 of the draft Swiss Code of Obligations 2020, commented by Reto M. Hilty & Tina Purtschert, in: Claire Huguenin & Reto M. Hilty (eds.), Schweizer Obligationenrecht 2020: Entwurf für einen neuen allgemeinen Teil (Zurich: Schulthess, 2013). *See* also postulate 13.3217 «Für ein modernes Obligationenrecht» of Pirmin Bischof and postulate 13.3226 «Für ein modernes Obligationenrecht» of Andrea Caroni of 21 March 2013; report «Modernisierung des Allgemeinen Teils des Schweizerischen Obligationenrechts» of the Swiss Federal Council of 31 January 2018, available at https://www.bj.admin.ch/bj/de/home/publiservice/publikationen/berichte-gutachten/2018-01-31.html.

72 On the requirements of termination for cause of permanent contracts, *see* BGE 92 II 299, consideration 3/b; BGE 96 II 154, consideration 2; BGE 99 II 308, consideration 5/a; BGE 122 III 262, consideration 2/a/aa; BGE 128 III 428, consideration 3; BGE 138 III 304, consideration 7. *See* also Vetter & Gutzwiller (Fn. 63), at 703–706.

73 BGE 128 III 428, consideration 3/c: «Im Vordergrund steht vielmehr die Frage, ob das Gebundensein an den Vertrag für die Partei wegen veränderter Umstände ganz allgemein unzumutbar geworden ist, also nicht nur unter wirtschaftlichen, sondern auch unter anderen die Persönlichkeit berührenden Gesichtspunkten»; BGE 138 III 304, consideration 7: «Ein wichtiger Grund zur Auflösung eines Dauerschuldverhältnisses liegt nach der Rechtsprechung vor, wenn die Bindung an den Vertrag für die Partei wegen veränderter Umstände ganz allgemein unzumutbar geworden ist, also nicht nur unter wirtschaftlichen, sondern auch unter anderen die Persönlichkeit berührenden Gesichtspunkten».

74 BGE 138 III 304, consideration 7 («Vorliegen eines wichtigen Grundes, nach dem einer Partei eine Weiterführung des Vertrags nicht mehr zugemutet werden kann»).

is regularly affirmed in the case of a rather serious breach of contract, although, under certain circumstances, even a less serious breach of contract might make continuation of the contract unacceptable to the other party.[75] The legal consequences of this concept are rather simple: a permanent contract is terminated. Additional questions, which are not further discussed here, arise with regard to an extraordinary termination in the absence of a compelling reason.[76]

[41] In the absence of general rules on termination for cause of permanent contracts, in particular based on above examples (subscriptions for public transportation, gym membership, energy supply contracts) relating to the coronavirus pandemic, the question arises, whether the lack of such general rules for permanent contracts is still adequate. The concept of termination, for a compelling reason, of permanent contracts, for quite some time, is well accepted in both legal doctrine and case law. However, Swiss law does not contain any general rules on this concept. Although the criteria developed in legal doctrine and case law are convincing, some points are still undiscussed or undecided. It is not the role of the legislator, but the role of the judge, to remove such ambiguities. A codified rule, however, could contribute a great deal to achieving this goal. Moreover, termination for cause of permanent contracts is already a general principle of law, but it might become even more important in times of pandemic. A codification would help to clarify the limits of this concept, so that it is not overstretched during the pandemic.

3.2.2. Specific Rules on Termination of Lease Contracts, Employment Contracts, or Partnerships

[42] Certain areas of the legal system are particularly vulnerable during the Coronavirus pandemic, which arguably makes a termination for cause particularly relevant. This mainly concerns lease contracts and employment contracts, but also partnership agreements. The laws on lease and employment contracts are each characterized by a strong degree of social protection. In partnership law, the same as in the rest of company law, membership-based concepts and ideas play an important role. One example that has been widely discussed in both public and political spheres in Switzerland concerns the payment of rent for business premises that could not be used during an officially imposed lockdown period.[77] Another example, which has been debated, concerns employment contracts during the pandemic, for example, when an employee is absent due to some sort of coronavirus-induced illness or has to go into quarantine, either on his or her own fault or not.[78] The same applies to partnerships, which are generally designated for the long

75 BGE 138 III 304, consideration 7: «Bei besonders schweren Vertragsverletzungen ist ein wichtiger Grund regelmässig zu bejahen» (rather serious breach of contract) and «Auch weniger gravierende Vertragsverletzungen können aber eine Fortsetzung des Vertrags für die Gegenpartei unzumutbar machen, wenn sie trotz Verwarnung oder Abmahnung immer wieder vorgekommen sind, so dass nicht zu erwarten ist, weitere Verwarnungen würden den Vertragspartner von neuen Vertragsverletzungen abhalten» (less serious breach of contract).

76 *See* BGE 133 III 360, considerations 7 and 8 (holding: «Wirkungen einer nicht durch wichtige Gründe gerechtfertig[t]en Vertragskündigung nach schweizerischem Recht»). *See* also Vetter & Gutzwiller (Fn. 63), at 708–713.

77 *See* for example Haefeli et al. (Fn. 2), at notes 6–35 (concluding, based on general principles of contract law, that business tenants are in principle obliged to pay the agreed rent during a lockdown period); Koller (Fn. 2), at notes 1–10, in particular note 10: «Verantwortungsbewusste [...] Rechtsöffnungsrichterinnen und Rechtsöffnungsrichter sollten bei solchen Streitigkeiten nur mit grösster Zurückhaltung provisorische Rechtsöffnung erteilen»; Lachat & Brutschin (Fn. 2), at 118–120 («Mietzinsherabsetzung oder Mietzinserlass?»); Lachat & Brutschin (Fn. 2), at 129–128 («Dispense ou réduction de loyer?»).

78 *See* for example Geiser et al. (Fn. 2), at notes 33–35 («Arbeitsunfähigkeit aufgrund persönlicher Erkrankung») and notes 36–38 («Arbeitsverhinderung bei Selbstisolation und Selbstquarantäne»); Geiser (Fn. 2), at 547–548 («Erkrankte Arbeitnehmer und Quarantäne»); Wildhaber (Fn. 2), at 164 («Erkrankte Arbeitnehmer») and 164–165 («Arbeitnehmer in Quarantäne»).

term, but can be just as hard hit by the pandemic. In all these areas, Swiss law provides for certain context-specific rules on termination for cause, notably in articles 226*g* (lease contracts), 337 (employment contracts), and 545 (partnerships) of the Swiss Code of Obligations.[79]

[43] Pursuant to article 266*g* paragraph 2 of the Swiss Code of Obligations, the court is in charge to determine the financial consequences of early termination, for a compelling reason, of a lease contract, taking due account of all circumstances.[80] Paragraph 1 of article 266*g* further stipulates that each party to a lease contract, both landlord and tenant, may terminate such contract, for a compelling reason, by giving the legally prescribed notice expiring at any time, if performance of the contract becomes unreasonable to them. In accordance with prevailing doctrine and case law, only circumstances that are unknown, unforeseeable, and extraordinarily serious at the time of the conclusion of the contract may be considered as compelling reasons within the meaning of this rule.[81] However, there is an interesting, albeit older case, according to which a change in the economic situation, through which the amount of rent has become an unbearable burden, might also be an important reason for early termination of the lease contract.[82] Consequently, a lease contract, either for a residential lease or for a commercial lease, should not be terminable simply because of the pandemic. However, if an official order prohibits the operation of a business such as a restaurant, the business operator should be allowed to terminate his or her commercial lease contract, if the prohibition lasts for at least a certain period (say, as a rule of thumb, more than two months). Another interesting debate relates to the relationship of article 266*g* of the Swiss Code of Obligations to the concept of *clausula rebus sic stantibus*, namely the question, whether article 266*g* leaves room for a judicial adaption of contracts.[83] While scholarship is divided on this question, I think that there are good reasons to let the *clausula* play its game also with regard

79 Other specific rules, which are not further discussed here, include articles 297 (usufructuary lease contracts), 346 paragraph 2 (apprenticeship contracts), 418*r* paragraph 1 (commercial agency contracts), and 527 (lifetime maintenance contracts).

80 From the case law of the Swiss Federal Supreme Court, *see* BGE 122 III 262, consideration 2. For a general overview on this rule, *see* Koller (Fn. 11), at 249–250; Thomas Oberle, Mietrecht heute (5th ed., Herisau: Hauseigentümerverband Schweiz), at 104–105; Irène Spirig, in: Mieterinnen- und Mieterverband Deutschschweiz (ed.), Mietrecht für die Praxis (9th ed., Berne: Stämpfli, 2016), at 733–737 (extraordinary termination by the landlord) and 767–770 (extraordinary termination by the tenant); Schmid et al. (Fn. 40), at 166–167; Honsell (Fn. 11), at 253–254; Müller-Chen et al. (Fn. 11), at 150–151; Huguenin (Fn. 5), at 958–960. For a detailled commentary on this rule, *see* Peter Higi, in: Peter Gauch & Jörg Schmid, Zürcher Kommentar, Obligationenrecht, Die Miete, vol. V/2/b (4th ed., Zurich: Schulthess, 1995), at notes 29–53 (requirements) and notes 63–84 (consequences) on article 266*g*; David Lachat, in: Luc Thévenoz & Franz Werro (eds.), Commentaire romand, Code des obligations, vol. I (2nd ed., Basle: Helbing Lichtenhahn, 2012), notes 1–7 on article 266*g*; Jürg P. Müller, in: SVIT Schweiz (ed.), Kommentar, Das schweizerische Mietrecht (4th ed., Zurich: Schulthess, 2018), at notes 17–41 (requirements) and notes 42–51 (consequences) on article 266*g*; Roger Weber, in: Corinne Widmer Lüchinger & David Oser (eds.), Basler Kommentar, Obligationenrecht, vol. I (7th ed., Basle: Helbing Lichtenhahn, 2020), notes 5–5b (requirements) and notes 6–9 (consequences) on article 266*g*.

81 BGE 122 III 262, consideration 2a/aa: «[Bei Art. 266*g* Abs. 1 OR] gilt es zu beachten, dass die Unzumutbarkeit der Erfüllung eines Mietvertrages nur bejaht werden kann, wenn die angerufenen Umstände bei Vertragsschluss weder bekannt noch voraussehbar waren und nicht auf ein Verschulden der kündigenden Partei zurückzuführen sind». *See* Higi (Fn. 80), at notes 29–53 on article 266*g*; Koller (Fn. 11), at 249; Schmid et al. (Fn. 40), at 166–167; Honsell (Fn. 11), at 254; Huguenin (Fn. 5), at 959; Weber (Fn. 80), at note 5 on article 266*g*.

82 BGE 60 II 205, considerations 3 and 4 (first holding: «Die unrichtige Beurteilung der Konjunktur schliesst die Berufung auf Art. 269 OR nicht von vorneherein aus, da die zukünftige Entwicklung der wirtschaftlichen Lage nicht mit der genügenden Bestimmtheit voraussehbar ist» and second holding: «Die zufolge der Veränderung der wirtschaftlichen Lage zur unerträglichen Last gewordene Höhe des Mietzinses kann ein wichtiger Grund sein; *in casu* ist dies der Fall»).

83 For a recent discussion of this question in the context of the coronavirus pandemic, *see* Lachat & Brutschin (Fn. 2), at 128–130 («Lässt Art. 266*g* OR Raum für eine richterliche Vertragsanpassung?»), with further references; Lachat & Brutschin (Fn. 2), at 137–139 («L'art. 266*g* CO laisse-t-il une place à l'adaption du contrat par le juge?»), with further references.

to lease contracts, as this corresponds to the principle of proportionality, according to which a milder remedy should be preferred to a highly incisive intervention such as the termination of a contract. However, it cannot be denied that termination for cause is unlikely to be invoked in commercial lease contracts, as the Swiss Parliament decided in June 2020 that commercial tenants are only liable for 40 percent of the agreed rent during a lockdown period, with landlords liable for the remaining 60 percent. This deal, which was approved by the Swiss Federal Council in July 2020, applies only to commercial premises, which were directly affected by a lockdown, and to monthly rents up to an amount of 20,000 Swiss Francs.

[44] Pursuant to article 337 paragraph 3 of the Swiss Code of Obligations, the court determines, at its own discretion, whether there is a compelling reason, after a contracting party, either employer or employee, terminated the employment contract for cause with immediate effect, giving his or her reasons in writing at the other party's request.[84] The law itself specifies in paragraph 2 of article 337 that a compelling reason may consist of any circumstances, which render the continuation of the employment relationship unreasonable to expect on the part of the party giving notice. According to legal doctrine and case law, a compelling reason usually consists of a (serious) breach of contract by the other party.[85] In a rather recent case, however, the Swiss Federal Supreme Court ruled that, under certain conditions, immediate termination of an employment contract may also be justified on the grounds of an incident, which does not constitute a breach of contract.[86] In articles 337*b* to 337*d* of the Swiss Code of Obligations, statutory law further specifies the consequences of a justified or unjustified termination.[87] Generally speaking, it is only

84 From the case law of the Swiss Federal Supreme Court, *see* BGE 104 II 28, considerations 1 and 2; BGE 108 II 301, consideration 3; BGE 108 II 444, consideration 2; BGE 129 III 380, considerations 2 and 3; BGE 121 III 467, considerations 3 to 5; BGE 124 III 25, consideration 3; BGE 129 III 380, considerations 2 and 3; BGE 130 III 28, considerations 3 and 4; BGE 130 III 213, consideration 3; BGE 137 III 303, consideration 2.1; BGE 142 III 579, considerations 4.2 and 4.3. For a general overview on this rule, *see* Schmid et al. (Fn. 40), at 231–232; Thomas Geiser et al., Arbeitsrecht in der Schweiz (4th ed., Berne: Stämpfli, 2019), at 269–273; Wolfgang Portmann & Isabelle Wildhaber, Schweizerisches Arbeitsrecht (4th ed., Zurich: Dike, 2020), at 223–236. For a detailled commentary on this rule, *see* Gabriel Aubert, in: Luc Thévenoz & Franz Werro (eds.), Commentaire romand, Code des obligations, vol. I (2nd ed., Basle: Helbing Lichtenhahn, 2012), notes 1–14 on article 337; Ullin Streiff et al., Praxiskommentar, Arbeitsvertrag (7th ed., Zurich: Schulthess, 2012), note 2 (requirements) and note 24 (consequences) on article 337; Manfred Rehbinder & Jean-Fritz Stöckli, in: Heinz Hausheer & Hans Peter Walter (eds.), Berner Kommentar, Der Arbeitsvertrag (2nd ed., Berne: Stämpfli, 2014), at notes 1–14 on article 337; Adrian Staehelin, in: Jörg Schmid (ed.), Zürcher Kommentar, Der Arbeitsvertrag, vol. V/2c (4th ed., Zurich: Schulthess, 2014), notes 2–29 on article 337; Wolfgang Portmann & Roger Rudolph, in: Corinne Widmer Lüchinger & David Oser (eds.), Basler Kommentar, Obligationenrecht, vol. I (7th ed., Basle: Helbing Lichtenhahn, 2020), notes 1–5 (requirements) and notes 6–14 (consequences) on article 337.

85 BGE 130 III 213, consideration 3.1: «[Besonders schwere Verfehlungen des Arbeitnehmers] müssen einerseits objektiv geeignet sein, die für das Arbeitsverhältnis wesentliche Vertrauensgrundlage zu zerstören oder zumindest so tief greifend zu erschüttern, dass dem Arbeitgeber die Fortsetzung des Vertrags nicht mehr zuzumuten ist» and «Andererseits wird vorausgesetzt, dass sie tatsächlich zu einer entsprechenden Zerstörung oder Erschütterung des gegenseitigen Vertrauens geführt haben» (serious breach of contract), whereas «Sind die Verfehlungen weniger schwerwiegend, müssen sie trotz Verwarnung wiederholt vorgekommen sein» (other breach of contract); BGE 137 III 303, consideration 2.1.1: «En règle générale, seule une violation particulièrement grave des obligations contractuelles peut justifier une telle résiliation, mais d'autres incidents peuvent également justifier une telle mesure; ainsi, une infraction pénale commise au détriment de l'autre partie constitue en règle générale un motif justifiant la résiliation immédiate». *See* Streiff et al. (Fn. 84), at note 2 on article 337; Schmid et al. (Fn. 40), at 231; Geiser et al. (Fn. 84), at 268–269; Portmann & Wildhaber (Fn. 84), at 227–229; Portmann & Rudolph (Fn. 84), at note 2 on article 337.

86 BGE 129 III 380, considerations 2 and 3 (holding: «Eine sofortige Vertragsauflösung kann sich auch wegen eines Vorfalls rechtfertigen, in dem keine Vertragsverletzung liegt, sofern damit bei Vertragsbegründung nicht zu rechnen war und dadurch eine untragbare Situation entstanden ist, bei der dem Arbeitgeber eine Fortsetzung des Arbeitsverhältnisses bis zum nächsten Kündigungstermin nach den konkreten Umständen objektiv nicht mehr zumutbar erscheint»).

87 For further details on consequences of extraordinary termination, *see* Streiff et al. (Fn. 84), at note 3 on article 337*b* («Volle Schadenersatzpflicht bei einseitig verschuldeter Auflösung»), note 2 on article 337*c* («Anspruch auf

difficult to imagine that the coronavirus crisis could justify such a compelling reason. If an employee falls ill with the Coronavirus, this should not constitute a compelling reason for dismissal with or without notice, even if the infection was self-inflicted.[88] However, the behavior of an employee, who does not comply with instructions provided by the employer in this regard, and who may infect other employees as a result, is problematic and most likely a compelling reason for immediate dismissal.[89] In this context, there are of course many other questions that cannot be discussed here.

[45] Pursuant to article 545 paragraph 1 item 7 and paragraph 2 of the Swiss Code of Obligations, the partnership may be dissolved by court judgment in case of a dissolution for a compelling reason.[90] According to legal doctrine, compelling reasons can be based on both the person of a partner or external circumstances.[91] A review of relevant case law shows that in the vast majority of all cases, in which a dissolution of the partnership by the judge was requested, the reason was found in the person of the partner.[92] This observation does not yet rule out the possibility of relying on external circumstances. The case statistics may show that a dissolution due to external circumstances is often not in the interest of the parties involved. It is therefore appropriate to set the requirements for this action of dissolution particularly high, when the compelling reason is situated in external circumstances. This view is further supported by the fact that other statutory grounds for dissolution such as a purpose of the partnership, which becomes impossible to achieve (item 1), or the death or a partner (item 2), represent extremely serious threats to the ex-

Ersatz des hypothetischen Verdienstes»), and note 2 on article 337*d* («Vertragsbruch durch den Arbeitnehmer»); Geiser et al. (Fn. 84), at 270–273; Portmann & Wildhaber (Fn. 84), at 231–233 («Gerechtfertigte ausserordentliche Kündigung») and 233–236 («Ungerechtfertigte ausserordentliche Kündigung»). *See* BGE 112 II 41, consideration 2; BGE 118 II 312, consideration 2; BGE 121 V 277, consideration 3; BGE 133 III 657, consideration 3; BGE 135 III 405, consideration 3.

88 On temporary protection against dismissal due to illness or accident without fault of employee, *see* Geiser (Fn. 2), at 548: «Dass diese Sperrfrist [Art. 336*c* Abs. 1 Bst. b OR] besteht, wenn ein Arbeitnehmer an COVID-19 erkrankt ist, steht ausser Zweifel» (illness), whereas «Weniger klar ist dies, wenn der Arbeitnehmer ausschliesslich unter Quarantäne steht, nicht aber selbst krank ist» (quarantine). On the obligation to continue to pay wages by employer, if employee is prevented from working or employer fails to accept performance, *see* Wildhaber (Fn. 2), at 164 (illness) and 164–165 (quarantine).

89 Same as here: Geiser et al. (Fn. 2), at note 80: «Die Arbeitgeberin ihrerseits könnte nach erfolgter Abmahnung einem Arbeitnehmer fristlos künden, wenn dieser sich nicht an die Hygieneweisungen hält».

90 From the case law of the Swiss Federal Supreme Court, *see* BGE 94 II 119, considerations a and b. For a general overview on this rule, *see* Schmid et al. (Fn. 40), at 381–382; Harald Bärtschi, in: Peter Jung et al. (eds.), Gesellschaftsrecht (2nd ed., Zurich: Schulthess, 2018), at 308–309; Arthur Meier-Hayoz et al., Schweizerisches Gesellschaftsrecht (12th ed., Berne: Stämpfli, 2018), at 379–383. For a detailled commentary on this rule, *see* Lukas Handschin & Reto Vonzun, in: Jörg Schmid (ed.), Zürcher Kommentar, Die einfache Gesellschaft, vol. V/4a (4th ed., Zurich: Schulthess, 2009), at notes 145–169 on articles 545–547; Daniel Staehelin, in: Heinrich Honsell et al. (eds.), Basler Kommentar, Obligationenrecht, vol. II (5th ed., Basle: Helbing Lichtenhahn, 2016), notes 30–34 on articles 545/546; François Chaix, in: Pierre Tercier et al. (eds.), Commentaire romand, Code des Obligations, vol. II (2nd ed., Basle: Helbing Lichtenhahn, 2017), notes 25–30 on articles 545–547.

91 *See* in particular Staehelin (Fn. 90), at note 30 on articles 545/546: «[Wichtige Gründe] liegen vor, ‹wenn die wesentlichen Voraussetzungen persönlicher oder sachlicher Natur, unter denen der Gesellschaftsvertrag eingegangen wurde, nicht mehr vorhanden sind, sodass die Erreichung des Gesellschaftszweckes in der bei der Eingehung der Gesellschaft beabsichtigten Art nicht mehr möglich, wesentlich erschwert oder gefährdet wird› und dem Gesellschafter ‹die Fortsetzung der Gesellschaft nicht mehr zugemutet werden kann›» (with reference to earlier case law of the Swiss Federal Supreme Court). *See* also, with reference to a recent (unpublished) case of the Swiss Federal Supreme Court, Bärtschi (Fn. 90), at 308; Meier-Hayoz et al. (Fn. 90), at 380.

92 BGE 20 I 572, consideration 5; BGE 24 II 186, consideration 3; BGE 30 II 453, consideration 8. For a rather comprehensive overview, *see* Handschin & Vonzun (Fn. 90), at note 159 («Schweizerische Gerichte haben beim Vorliegen folgender Umstände wichtige Gründe angenommen») and note 160 («Abgelehnt wurde die Anerkennung eines wichtigen Grundes in den folgenden Fällen») on articles 545–547; Staehelin (Fn. 90), at note 31 («Folgende Beispiele hat die Praxis als wichtige Gründe anerkannt») and note 32 («Keine wichtigen Gründe sind») on articles 545/546.

istence of the partnership. As long as the purpose of the partnership is not impossible to achieve due to the coronavirus or one of the partners dies from the consequences of a coronavirus disease, hardly any case constellation could lead to a termination of the partnership.

[46] In respect of these specific rules on termination for cause of lease contracts, employment contracts, and partnerships, in particular based on above examples (payment of rent for business premises, absent employees, absent partners) relating to the coronavirus pandemic, the question arises, whether such specific rules for lease contracts, employment contracts, and partnerships are still adequate. In all these areas, there is no urgent need for action, as the legislator has carefully weighed and balanced the interests involved. It seems justified that very high requirements apply to termination for cause in all these areas.

3.3. Should the Swiss go German, when it comes to Adaption and Termination of Contracts?

[47] Should the Swiss go German, when it comes to adaption and termination of contracts, namely by incorporating such concepts into their law? On 1 January 2002, the German Statute on the Modernization of the Law of Obligations became law in Germany.[93] Among many other changes, the reform touches on the codification of case law as the German Civil Code now expressly recognizes the private law version of *clausula rebus sic stantibus*, the so-called interference with the basis of the transaction («Wegfall der Geschäftsgrundlage»), and the right to terminate permanent contracts for a compelling reason.[94] As already mentioned, the Swiss reform proposals were not successful to this end.[95] A historical and comparative perspective, which refers to the codification dispute in German legal history of modern times, is particularly promising in this regard.

[48] In 1814, Anton Friedrich Justus Thibaut articulated his desire for codification and unification of law in the German legal system.[96] In a statement entitled «Ueber die Nothwendigkeit eines allgemeinen bürgerlichen Rechts für Deutschland», which caused a great stir and sparked a controversial discussion, he called for the adoption of a uniform civil code for the entire German region, which was supposed to be simple and comprehensible. In a more international context, the word «codification» was invented and promoted by Jeremy Bentham.[97] In 1817, he published

93 For a detailed analysis of this reform, *see* Wolfgang Ernst & Reinhard Zimmermann (eds.), Zivilrechtswissenschaft und Schuldrechtsreform: zum Diskussionsentwurf eines Schuldrechtsmodernisierungsgesetzes des Bundesministeriums (Tuebingen: Mohr Siebeck, 2001). For a discussion of the three substantive law parts of this reform, *see* Grundmann (Fn. 35), at 132–143 (breach of contract), 143–144 (limitation), and 144–147 (sales and works contracts).

94 *See* Barbara Dauner-Lieb, Kodifikation von Richterrecht, in: Wolfgang Ernst & Reinhard Zimmermann (eds.), Zivilrechtswissenschaft und Schuldrechtsreform: zum Diskussionsentwurf eines Schuldrechtsmodernisierungsgesetzes des Bundesministeriums, 305–328 (Tuebingen: Mohr Siebeck, 2001), at 321–323 («Wegfall der Geschäftsgrundlage»). On the origins of this concept, *see* Fn. 46 above.

95 *See* Fn. 49 (change of circumstances) and Fn. 71 (termination of permanent contracts) above. From a contemporary perspective, *see* Jan Dirk Harke & Karl Riesenhuber (eds.), OR 2020 – Die schweizerische Schuldrechtsreform aus vergleichender Sicht (Tuebingen: Mohr Siebeck, 2016). *See* in particular Jan Dirk Harke, Willensmängel und Geschäftsgrundlage, in: Jan Dirk Harke & Karl Riesenhuber (eds.), OR 2020 – Die schweizerische Schuldrechtsreform aus vergleichender Sicht, 101–120 (Tuebingen: Mohr Siebeck, 2016), at 123–126.

96 *See* Anton Friedrich Justus Thibaut, Ueber die Nothwendigkeit eines allgemeinen bürgerlichen Rechts für Deutschland (Heidelberg: Mohr und Zimmer, 1814).

97 *See* Jeremy Bentham, Papers relative to Codification and Public Instruction: including Correspondence with The Russian Emperor, and Divers Constituted Authorities in The American United States (London: J. M'Creery, 1817). For a legal-historical analysis of the codification process, *see* Jean-Louis Halpérin, The Age of Codification and Le-

a book entitled «Papers relative to Codification and Public Instruction», in which he gathered letters he had addressed to the President of the United States of America, to the Tsar of Russia, Alexander I, and to different authorities in Geneva, Spain, Portugal, and South America. In comparison with that, the claim I would like to make here is rather modest. From a comparative perspective, I take the position that it simply makes sense to write into the law the general principles of law that have crystallized over time in practice, at least in so far as they have a certain permanence, also and above all in terms of time. The German law of contracts, which has codified both inference with the basis of the transaction and termination, for a compelling reason, of contracts for the performance of a continuing obligation in articles 313 and 314 of the German Civil Code, could well serve as a promising role model for Swiss law.

[49] Later in 1814, Friedrich Carl von Savigny published a counter-statement entitled «Vom Beruf unsrer Zeit für Gesetzgebung und Rechtswissenschaft», arguing against a rapid codification of German private law.[98] In his view, it is not the task of the legislator, but the judge, to create law because legislation runs at risk to hinder the further development of the law. Even today, there are still contemporary voices that are very critical of codification, especially in the area of European private law.[99] Without going into further details, it must be borne in mind that codification certainly only makes sense, if generally valid principles can be crystallized, which can be laid down in this way. It is open to dispute, however, whether this brings any added value at all, as it does not change the existing legal system.[100]

[50] Taking all these arguments into account, I tend to conclude that the Swiss should indeed go German, when it comes to adaption and termination of contracts. Germany took an encouraging step in 2002, when it codified the concepts of *clausula rebus sic stantibus* (interference with basis of transaction) and termination for cause (termination of contracts for performance of continuing obligation). Although the practice of the courts and discussions in legal scholarship has brought much clarity to these issues, still many problems remain unsolved. In my view, a codification would be appropriate because these two concepts most likely become even more important in the near future, and the quality of judicial decisions certainly benefit from uniform standards, when ruling on these very important questions of our time.

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gal Modernization in Private Law, in: Heikki Pihlajamäki et al. (eds.), The Oxford Handbook of European Legal History, 907–926 (Oxford: Oxford University Press, 2018), at 907 («The word ‹codification› was invented and promoted by Jeremy Bentham»).

98 *See* Friedrich Carl von Savigny, Vom Beruf unsrer Zeit für Gesetzgebung und Rechtswissenschaft (Heidelberg: Mohr und Zimmer, 1814).

99 *See* for example Leone Niglia, The Struggle for European Private Law: A Critique of Codification (Oxford: Hart, 2015), at 4 (explaining that «the attempt to replace national private [de-codified] law with a European code architecture is contingent less on the vicissitudes of the legislative process [the capacity of the European Commission to win consensus before the European legislative institutions over its agenda for unifying private law via codification] and more on the outcome of the struggles among the jurisprudential forces over an organisation of private law based on monistic [code] or pragmatic [balancing] techniques»).

100 For a rather critical assessment of article 19 of the draft Swiss Code of Obligations 2020 on adaption of contract due to a change of circumstances, *see* Vogt (Fn. 49), at note 11 on article 19: «Mit Art. 19 OR 2020 werden die grundlegenden Voraussetzungen, welche Lehre und Rechtsprechung aufgestellt haben, kodifiziert» and «An ihnen will Art. 19 OR 2020 nichts ändern». For a quite favorable assessment of articles 144 to 147 of the draft Swiss Code of Obligations 2020 on termination of permanent contracts, *see* Hilty & Purtschert (Fn. 71), at note 3 on preliminary remarks to articles 144–147: «Mithin scheint es angesichts des unbestrittenen Bedarfs nach generell anwendbaren Regeln zur Kündigung von Dauerverträgen ebenso gerechtfertigt wie erforderlich, solche Regeln losgelöst von sonderrechtlichen Spezifika in einem allgemeinen Teil zu platzieren».

4. Do we need an Extraordinary Law of Contracts in Times of Pandemic?

[51] Do we need an extraordinary law of contracts in times of pandemic, as recently proposed by Pascal Pichonnaz? In his recent contribution on the rescue of the judicial system through an extraordinary law of contracts, Pichonnaz argues that an individualistic approach, based on the statutory rules on default, adaption, and termination, is partially unsatisfactory, given the systemic issues at stake and the risk that the burden of all individual actions would be borne by the judicial system.[101] In his contribution, he highlights the importance of a duty of renegotiation between the parties, based on the rules of good faith in commercial transactions, requiring a dynamic approach, inspired by historical experience. He essentially proposes a set of substantive and procedural rules under an extraordinary law of contracts in order to address typical contractual imbalances of a systematic nature. Pichonnaz suggests to offer a systematic solution for resolving the issue of allocating contractual risks between the parties, namely by creating an extraordinary law of contracts to specifically address the economic consequences on contracts affected by the coronavirus pandemic.[102] The idea of such an emergency legal order inevitably leads to a shift of power to the executive branch of government and the administration, which would call into question and further relativize, what the parties agreed, what the statutory rules provided by the legislator propose, and how a judge hearing the case would have ruled. According to this philosophy, he proposes four key elements, how contractual problems relating to a perceived imbalance of interests between the parties should be regulated in times of pandemic. The four elements of his proposal for an extraordinary law of contracts during the coronavirus pandemic are critically discussed in this section.

4.1. First Element: Mandatory Renegotiation Duties for Contracting Parties

[52] The first element of a recent proposal is to oblige the parties to the contract to renegotiate their existing agreements. Taking into account a «relational» approach to the contract, Pichonnaz seeks to impose mandatory renegotiation duties between the parties to the contract in order to distribute the economic consequences of the measures suffered as a result of the pandemic equally between all parties.[103] In his contribution, he presents various concepts from international model law, national private law, legal theory, and Roman law tradition, which could eventually guide the

101 *See* Pascal Pichonnaz, Un droit contractuel extraordinaire ou comment régler les problèmes contractuels en temps de pandémie, ZSR 139 (2020), special issue («Pandemie und Recht»), 137–155, at 147–148: «Pour assurer le fonctionnement de solutions généralisées et négociées, il faut ainsi deux composantes fondamentales: (i) la mise en œuvre de règles impératives imposées à tous et (ii) une négociation gérée non par les seules parties contractuelles, mais par des groupes représentatifs (agrégés) des parties concernées, c'est l'aspect procédural».

102 *See* Pichonnaz (Fn. 101), at 153: «Notre thèse est ainsi qu'à un impact économique systémique de la pandémie, on doit offrir une solution systémique de résolution des problèmes d'allocation du risque contractuel survenue» and 153–154: «Cela impose de relativiser ce que les parties avaient convenu ou que les règles dispositives ordinaires proposent afin de mettre en place un droit contractuel extraordinaire permettant de régler de manière spécifique les conséquences économiques sur les contrats de la pandémie du COVID-19».

103 *See* Pichonnaz (Fn. 101), at 143–146 («Un devoir de renégociation sérieux»), 149: «Les mesures impératives à prévoir pour assurer une plus grande solidarité contractuelle peuvent ainsi passer par une obligation de renégociation et une obligation de chercher de bonne foi des solutions transactionnelles», and 154: «Obliger les parties au contrat à renégocier leur accord».

parties, including the more or less random nature of the contract, the sharing of risks provided for in the contract, and the possibility of a current discount linked to a potential future benefit.[104]

[53] Pichonnaz refers to article 6.2.3 paragraph 1 of the UNIDROIT Principles, according to which the disadvantaged party is entitled to request renegotiations in case of «hardship», defined in article 6.2.2 of the UNIDROIT Principles as a concept, «where the occurrence of events fundamentally alters the equilibrium of the contract».[105] Although the UNIDROIT Principles are well respected all over the word, they constitute a non-binding codification or «restatement» of the general part of international contract law and thus most often do not serve as legal authority, at least as long as they do not form part of the contract. This should not blind us to the fact, however, that in modern international commercial practice, requesting renegotiations in light of changed circumstances is perhaps not that unusual after all. This claim is further confirmed by the fact that the French law, which was initially not favorable to the concept of hardship, allows a private law contract to be modified in case of a change of circumstances.[106] Pursuant to article 1195 of the French Civil Law, a party to the contract may request the other party to renegotiate the contract, if a change in circumstances unforeseeable at the time of conclusion of the contract makes performance excessively onerous for a party, who had not agreed to bear the risk.

[54] In the context of Swiss law, Pichonnaz invokes article 2 paragraph 1 of the Swiss Civil Code, which requires that every person must act in good faith in the performance of his or her obligations.[107] It is worth noting that powerful voices interpret this general clause to contain a duty of the parties to a contract to renegotiate their agreement before asking the judge to adopt their contract at his or her own discretion.[108] This is true, if the concept of adaption due to a change of circumstances is not understood as an abuse of rights, as it is interpreted by the Swiss Federal Supreme Court, but as some sort of acting in good faith.[109] In my view, the principle of acting in good faith has enormous potential in contemporary legal theory, and we are just at the beginning of our journey about grasping, where this path will lead us. For my taste, however, it would certainly be a step in the wrong direction to subsume mandatory renegotiation duties under this heading, thereby flipping the relationship between the rule (*pacta sunt servanda*), which should, without any doubt, come first, and the exception (*clausula rebus sic stantibus*), including possible duties of renegotiations, which may only claim less room, into the opposite.

104 For further details, *see* Pichonnaz (Fn. 101), at 146–147 («Les éléments importants pour la renégociation»).

105 On international model law, *see* Pichonnaz (Fn. 101), at 143.

106 *See* Ingeborg Schwenzer & Edgardo Muñoz, Duty to Renegotiate and Contract Adaption in Case of Hardship, UnifLRev 24 (2019) 1, 149–174, at 151 (foray into French law) and 160–165 (substantiated analysis about the desirability and the necessity of a duty to renegotiate).

107 On national private law, *see* Pichonnaz (Fn. 101), at 144.

108 *See* Pichonnaz (Fn. 41), at 37–38 («Le passage obligé par la renégociation») and 38–41 («Le rôle subsidiaire du juge»); Tercier & Pichonnaz (Fn. 5), at 248: «Les exigences de la bonne foi en affaires exigent toutefois qu'il impose au préalable aux parties qu'elles renégocient entre elles leur contrat afin de l'adapter». For a rather critical appraisal of mandatory renegotiation duties, *see* Schwenzer (Fn. 5), at 280, and Fn. 57 above. For a more detailed account on the duty to renegotiate, *see* Schwenzer & Muñoz (Fn. 106), at 160–165.

109 BGE 97 II 390, consideration 6; BGE 107 II 343, consideration 2; BGE 122 III 97, consideration 3/a; BGE 138 V 366, consideration 5.1. Different, and for good reasons: Kramer (Fn. 41), at 274–278; Schmid et al. (Fn. 40), at 329–330; Schwenzer (Fn. 5), at 278; Koller (Fn. 5), at 503–505; Huguenin (Fn. 5), at 100–101. Same as here: Pichonnaz (Fn. 41), at 37.

[55] Drawing on contract theory, Pichonnaz then surprisingly argues with Ian R. Macneil, the father of relational contracts.[110] Understanding contracts from a dynamic perspective, the normative force of a contract is the result of an evolutionary process, rather than a process that stops all of a sudden at the conclusion of the contract. In accordance with this view, a duty of renegotiation might be imposed on the parties in the event of a temporary default such as delay of performance, before the parties can rely on the remedies provided by the statue. Although this story sounds quite attractive from a theoretical perspective, this would inevitably and to a large extent undermine the statutory remedies for breach of contract, which are particularly sophisticated in this area, but do not provide for such a mechanism at all. Therefore, legitimate doctrinal concern could be raised against this theory and its application.

[56] In another line of argument, which is most interesting, Pichonnaz takes his inspiration from Roman law tradition.[111] Using the situation of a farmer, who had no or only a very low harvest because of a drought, for illustration, he points out that the duty to renegotiate already existed in Roman law, at least in very specific situations, which are in some sense, interestingly enough, similar to the coronavirus pandemic. In such a situation, the Roman jurists required the lessor to hand over all or part of the lease (*remissio mercedis*), which was based on the idea that the farmer had to cultivate the land in order to be able to pay his or her rent. The peculiarity of the Roman solution was that if, in later years, the farmer had an abundance of crops (*uberitas*), he or she would have to give a larger share than expected to the lessor to compensate for this arrangement. These considerations might indeed inform the current dispute over commercial rents during a lockdown period, which has already been discussed in a previous subsection (specific rules on termination of lease contracts). It is conceivable that landlords and tenants are making such agreements within their capacity as participants in a free market economy. However, it remains to be seen, whether such tenants are actually prepared to pay a higher rent than agreed at a later date.

[57] Considering all arguments, it is fair to say that mandatory renegotiation duties cannot solve the problem, but rather accentuate and exacerbate it. A duty to renegotiate all contracts would create more harm than do good, as transaction costs would be sky-high. More importantly, it seems obvious that a duty to renegotiate is not enforceable in practice because it is neither possible to require the parties by law to renegotiate their contract nor is it possible to verify, whether they are renegotiating in good faith. The general principle of *pacta sunt servanda* should always come first, followed by exceptions to it, in particular renegotiation duties attached to the concept of *clausula rebus sic stantibus*. We must not reverse the relationship between principle and exception, not even in exceptional times like the coronavirus pandemic.[112] Anything else would deprive the parties of their hard-won position in the market, which is not easily justified in a free market economy.[113]

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110 On legal theory, *see* Pichonnaz (Fn. 101), at 144. For an overview on relational contract theory, *see* Ian R. Macneil, Relational Contract Theory: Challenges and Queries, NorthwestUnivLRev 94 (2000) 3, 877–908.

111 On Roman law tradition, *see* Pichonnaz (Fn. 101), at 144–145.

112 On the relationship between principle of *pacta sunt servanda* and exception of termination for cause of lease contracts, *see* BGE 60 II 205, consideration 1: «Die entscheidende Frage ist nun die, wo die Abgrenzung von Regel und Ausnahme zu ziehen sei, d.h. inwieweit und unter welchen Voraussetzungen die Ausnahme die Wirkung der Regel ausschaltet».

113 On the underlying constitutional problems regarding economic freedom, competition policy, and consumer protection, *see* Pichonnaz (Fn. 101), at 147–149 («Les justifications d'une intervention de la Confédération dans la relation contractuelle»).

4.2. Second Element: Protective Measures against Abuse of Contractual Power

[58] The second element of a recent proposal is to take measures to avoid any abuse of contractual power. It seems to be a persistent concern to Pichonnaz that a powerful contractual position could allow a party to abuse its power in the renegotiation or oppose such renegotiation altogether.[114] For this purpose, he proposes to set up, to the extent possible, a system of indirect sanctions, such as making the granting of additional liquidity to distressed companies by the government conditional upon the willingness of the beneficiary party to act jointly and severally in his or her contractual relations.[115]

[59] In the words of Pichonnaz, the abusive exercise of a powerful contractual position must be neutralized in order to ensure a fair solution in a renegotiation.[116] What is important to note in this respect is that not every powerful position as such must be controlled by the law, but only an abuse of such position. It is thus not status or identity, but a certain market behavior that eventually becomes scrutinized. This is a fine line, but an important distinction for the application of general principles of law such as acting in good faith or abuse of rights. Pichonnaz seems to concur to this distinction, when he adds that the behavior of a powerful contractual party, who opposes the negotiation, must be sanctioned.[117] In his view, however, this is not always possible by means of specific sanctions, which is why he advocates an extraordinary law of contracts to be implemented more collectively, namely as a system of group negotiations and group transactions, another element to be discussed in the following subsection.

[60] In the context of the coronavirus pandemic, Pichonnaz puts forward various hypothesis of the abusive exercise of a powerful contractual position.[118] One example is a party that has already received the amount of the rent during a lockdown period, who could therefore easily oppose any renegotiations. Another example is a party, who has received his or her consideration in advance for a service, which could not be provided during a lockdown period, for example an airline or a gym. In his contribution, the solution proposed to address these situations is the possible use of mediation. Besides these examples, a more structural problem would consist of a dominant market participant, who may exert pressure to obtain full payment of the sums contractually owed to it, when consumers or small and medium enterprises are individual and isolated entities facing only one major contractual partner. In my view, however, this constellation would be a problem for competition law, not an extraordinary law of contracts. Therefore, it is not appropriate to conclude that an extraordinary law of contracts must be based on a concern

114 *See* Pichonnaz (Fn. 101), at 147 («Les risques d'abus d'une position contractuelle forte») and 154: «Prendre des mesures pour éviter les abus de pouvoirs contractuels».

115 For further details, *see* Pichonnaz (Fn. 101), at 149: «Le législateur peut alors prévoir de sanctionner le refus de négociation ou de solutions transactionnelles équilibrées en faisant un lien direct avec certaines mesures proposées», specifying that compensation under a government scheme, including an extension of financial support or protection against bankruptcy, could be made conditional on a transactional agreement.

116 *See* Pichonnaz (Fn. 101), at 147: «Pour assurer une solution équitable lors d'une renégociation, il faut neutraliser l'exercice abusif d'une position contractuelle forte, comme c'est le cas également lors de la conclusion d'un contrat».

117 *See* Pichonnaz (Fn. 101), at 150: «Il faut évidemment sanctionner le comportement de la partie contractuelle qui est forte et qui s'opposerait à la négociation».

118 *See* Pichonnaz (Fn. 101), at 147.

for balance and economic protection of all contracting parties. But this is not how Pichonnaz sees the world, when he makes his case for the abuse of contractual power.[119]

[61] Based on these observations, I find it very difficult to see, why we need an extraordinary law of contracts for all these matters. It is almost always the case that one party to the contract is stronger than the other. But this does not mean that the stronger party is necessarily abusing its position and the weaker party needs to be protected by the law. It might also be the weaker party that is abusing his or her rights in some way or another. General statements about who is right and who is wrong are obviously difficult to make in the abstract. This not only applies to the legislator, but also and in particular to the government and the administration. These and all related considerations of similar nature should thus be left to the judges, who are well equipped to do so. In addition, various other areas of the legal system are already today dealing with precisely these issues. The coronavirus pandemic has not changed anything in a way, which could eventually justify such a government intervention in free markets.

4.3. Third Element: Collective Agreements of Relatively Binding Nature

[62] The third element of a recent proposal is to offer a system of group negotiations and group transactions with a relatively binding result. Pichonnaz argues that an individual resolution of the issues could run at risk of not achieving a satisfying solution from a systematic point of view, either due to a powerful position of one contractual party or because of a large number of similar contractual relationships.[120] For these reasons, he proposes a negotiation system for groups or sectors, which is capable of addressing those issues at a large scale. He also puts forward the idea of a mediator («médiateur COVID-19») for facilitating these transactions.

[63] From a procedural perspective, the extraordinary law of contracts proposed by Pichonnaz essentially builds on an institution within the executive branch of the government, according to his conception, the State Secretariat for Economic Affairs, which is supposed to approve or reject the result of a group negotiation leading to a collective agreement, including the appointment of a mediator for this purpose, if necessary.[121] The basis for such approval or rejection should take certain predetermined criteria into consideration, such as the relative representativeness of the organizations interested in negotiating an agreement, the scope of application of the agreement, the content of the agreement, and the communication and transparency of the final agreement. In an ideal world, the parties to the contract could refer to the result of the collective settlement agreement reached, without pleading in front of a judicial or administrative authority. In the event of a dispute on the application of this agreement, however, the parties could still refer the matter to a competent judge in a simplified procedure. This judge could find that the contract in issue is or is not covered by such group negotiations and, at the request of a party, render a decision applying the principles of the resulting collective agreements to the specific contract.

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119 On some minimum mandatory measures of substantive nature, *see* Pichonnaz (Fn. 101), at 150: «Ce ‹droit contractuel extraordinaire› doit reposer sur un souci d'equilibre et de protection économique de toutes les parties contractuelles».

120 *See* Pichonnaz (Fn. 101), at 150–153 («Une mise en œuvre collective ou de groupe») and 154: «Offrir un système de négociation de group, au résultat relativement obligatiore».

121 *See* Pichonnaz (Fn. 101), at 150–152 («Une solution négociée collective»), in particular 150 («il faut prévoir un régime de négociation collective») and 151–152 (introducing the institutions of «négociation collective COVID-19» and «médiateur COVID-19»).

[64] In addition, Pichonnaz clarifies that all these group transactions would only be relatively mandatory, in that it should always remain possible to contracting parties to find other transactional solutions.[122] In his view, the parties could refer to the results of the negotiation of the group or sector and require their implementation, if necessary in a simplified legal procedure.[123] Although this conception, which is based on the principle of subsidiarity, seems desirable, it may be difficult to implement in practice, especially if the weaker party to a contract takes advantage of its position of power and insists on judicial review. Such abuse of contractual power by the weaker party, however, certainly needs to be addressed as well.

[65] Finally, Pichonnaz supports rather specific measures to ensure that limitation and expiry periods, which expire during the measures taken by the Swiss Federal Council, are to be suspended on an extraordinary basis (between 15 March and 15 July 2020), namely by introducing a new article 134*a* to the Swiss Code of Obligations.[124] As we have already passed this point in time, this reform proposal becomes superfluous. After all, one can ask oneself, whether this is the way to do things in the future. Anyhow, such measures are not mandatory, as recent experience has shown that we are capable and willing to manage the crisis without suspending limitation and expiry periods.

[66] In my view, the procedural regime, which was briefly described here, constitutes the most dangerous step in the wrong direction. From a functional perspective, the fate of existing contracts affected by the coronavirus pandemic would no longer be in the hands of the parties, not even in those of the legislator or the courts, but in the hands of the government and the administration. Andreas Kley, among many others, has described impressively and convincingly, why this is so problematic from a public law perspective.[125] In a private law context, where everything revolves around the autonomy of the parties and contractual freedom, a similar logic applies. It is not only dangerous, but also cumbersome and not target-oriented to transfer the decision on the allocation of risks related to the coronavirus pandemic to either the government or the administration. Such a system does not pay sufficient tribute to the concern for case-by-case justice and an independent judiciary.

122 *See* Pichonnaz (Fn. 101), at 151: «Les parties à un contrat pourront toujours s'entendre sur une solution différente, pour autant que l'accord soit libre et équilibré, mais chacune pourra insister pour obtenir [...] que la solution négociée s'applique à leur contrat») and 154 («[l]es solutions transactionnelles obtenues ne seraient que relativement obligatoires»).

123 For further details, *see* Pichonnaz (Fn. 101), at 152 («les parties au contrat pourraient se référer au résultat de la transaction collective obtenue», «les parties pourraient saisir un juge compétent en matière de procédure simplifiée»).

124 *See* Pichonnaz (Fn. 101), at 153 («il faut prévoir un art. 134*a* CO qui suspend les délais de prescription et de péremption qui échoient jusqu'à fin juin 2020») and 154 («les délais de prescription et de péremption qui échoient durant les mesures [...] soient suspendus de manière extraordinaire»).

125 *See* Andreas Kley, «Ausserordentliche Situationen verlangen nach ausserordentlichen Lösungen» – Ein staatsrechtliches Lehrstück zu Art. 7 EpG und Art. 185 Abs. 3 BV, ZBl 121 (2020), 268–276. *See* also Andreas Kley, Notrecht und Demokratie – Was darf der Bundesrat?, NZZ, number 82 of 7 April 2020, 7 (referring to Montesquieu: «Es ist eine ewige Erfahrung, dass jeder, der Macht hat, ihrem Missbrauch geneigt ist: Er geht so weit, bis er auf Schranken stösst»); Andreas Kley, Pandemie und exekutive Selbstermächtigung, NZZ, number 114 of 18 May 2020, 8 (referring to Giorgio Agamben: «der Ausnahmezustand als Paradigma des Regierens»).

4.4. Forth Element: General Applicability of Collective Agreements

[67] The forth element of a recent proposal is to allow an extension of the relatively binding character of group transactions. As with the declaration of general applicability of collective labor agreements, Pichonnaz envisages giving the Swiss Federal Council the power to extend the scope of application of group transactions to an entire sector, as far as they relate to a resolution of coronavirus-related disputes, duly announced by the competent authorities such as the State Secretariat for Economic Affairs.[126]

[68] Pichonnaz argues that it should be envisaged that the Swiss Federal Council extends the scope of application of group transactions, which have been agreed among all representatives of the relevant groups, or, in the absence of such an agreement, impose an appropriate rule, which is applicable everywhere, unless the parties have freely agreed otherwise.[127] His main motivation for proposing such a regime, avoiding courts having jurisdiction in matters such as commercial lease contracts being overwhelmed with requests that are broadly similar, appears quite convincing at a first glance. This fear no longer seems justified, however, since the Swiss Parliament and the Swiss Federal Council have meanwhile found a solution for commercial rent contracts directly affected by a lockdown period due to the coronavirus pandemic. According to the forthcoming emergency legislation, which is currently (that is, in August 2020) being drafted, 40 percent of rent will be paid by commercial tenants during the lockdown period, and the remaining 60 percent by landlords.

[69] In practical terms, it would be key to limit the power of the government to extent the results of group transactions to problems related to the coronavirus pandemic. Taking into account the abuse of the rules and regulations adopted so far to overcome the coronavirus pandemic, no reliable cost-benefit impact analysis can be conducted.[128] Only in a few years' time will it become clear, what has gone right and what has not.

5. Conclusions for the Adequacy of the Statutory Risk Allocation

[70] The title-giving question of this article is whether the statutory risk allocation pursuant to the Swiss Code of Obligations is still adequate or not. The on-going coronavirus pandemic, which currently dominates almost all parts of Europe, including Switzerland, might serve as a natural experiment on how well the general and specific rules on remedies for breach of contract or adaption and termination of contracts work in practice, and what challenges a court might face, when deciding those and related issues. The principle of *pacta sunt servanda*, which serves as fundamental pillar of the law of contracts, is of pivotal importance for ensuring the efficacy and

126 *See* Pichonnaz (Fn. 101), at 152–153 («Une décision d'application relativement obligatoire») and 154: «Permettre l'extension du caractère obligatoire».

127 *See* Pichonnaz (Fn. 101), at 152–153: «Dans la perspective d'un droit contractuel extraordinaire [...], on doit envisager que le Conseil fédéral étende la validité de la transaction de groupe arrêtée entre les représentants des groupes concernés, ou, en l'absence d'un tel accord, impose une règle COVID-19 applicable partout, sauf dérogation librement consentie entre les parties».

128 On the abuse of coronavirus-related bridging loans granted to companies in Switzerland, *see* Benjamin Märkli & Moritz Gut, Missbrauch von Krediten nach COVID-19-Solidarbürgschaftsverordnung, AJP 2020, 722–738; Marc Jean-Richard-dit-Bressel/Andrea Jug-Höhener, Die Profiteure der Krise: Ein Betrug der besonders verwerflichen Art -- Strafbarkeit des Missbrauchs von Corona-Krediten aus einer Praxisperspektive, Jusletter of 3 August 2020.

the efficiency of our system of private ordering. However, as with any general principle of law, there are also exceptions to it. Given current developments, it may be expected that the rapidly spreading coronavirus outbreak, which caused considerable difficulties for all participants in the economy, redefines this relationship between principle and exception. Using a functional and doctrinal approach from a contemporary perspective, this article in particular covers the increasing erosion of the principle of *pacta sunt servanda* in the age of the coronavirus pandemic.

[71] The first building block of the statutory risk allocation pursuant to the Swiss Code of Obligations includes the remedies for breach of contract provided by the legislator. The Swiss legislator provides, amongst others, the concepts of subsequent impossibility of performance and delay of performance, which are of particular importance in the age of the coronavirus pandemic. While the general rules on subsequent impossibility without fault are drastic, but fair, the relevant specific rules for sale contracts are similarly drastic, but indeed not always fair. The general rules on subsequent impossibility with fault lead in most cases to an appropriate distribution of risk between contracting parties, whereas the relevant specific rules for sale contracts are incomplete in this respect. The general rules on delay of debtor give the creditor various options as to how he or she wishes to proceed, whereas the relevant specific rules for sale contracts take demonstrated needs of commercial transactions into account. The general rules on delay of creditor provide the debtor with several alternatives to fulfill his or her obligations by other means, whereas the relevant specific rules for sale contracts make a default in commercial transactions less attractive. In view of the solid and reasonable justification of this differentiating approach, I tend to conclude that the time is not (yet) ripe for a uniform breach of contract action in Swiss law. There is no clear evidence that the current regime is not working properly, even in times of pandemic. To the extend rules are ambiguous or questions are not resolved, both legal doctrine and case law have found ways, how to put things in perspective. This seems appropriate, at least if it encourages performance.

[72] The second building block of the statutory risk allocation pursuant to the Swiss Code of Obligations concerns the adaption and the termination of contracts decided by a competent judge. In accordance with the concepts of *clausula rebus sic stantibus* and termination, for a compelling reason, of permanent contracts, which become increasingly important in the age of the coronavirus pandemic, a competent judge may be asked to step in and adapt a contract to changed circumstances or terminate the contract altogether. Since there are still no general rules on adaption of contracts under changed circumstances, this concept should be codified. Moreover, the wording of the specific rule on adaption of contracts for work and services is too narrow. Because Swiss law does further not contain any general rules on termination, for a compelling reason, of permanent contracts, codification could help to clarify the limits of this concept. After all, there is no urgent need for action regarding the specific rules on termination of lease contracts, employment contracts, or partnerships. In view of the predominant arguments in favor of codification, I tend to conclude that the Swiss should indeed go German, when it comes to adaption and termination of contracts. A codification of these concepts would not lead to a system change, but to an anchoring of existing practice in legal doctrine and case law. Since the current pandemic shows quite vividly, how concepts of adaption and termination of contracts become more and more important, it perfectly makes sense to give more guidance to courts, even if they have to make the call in the end.

[73] A third building block of the statutory risk allocation pursuant to the Swiss Code of Obligations deals with the need for an extraordinary law of contracts in times of pandemic dictated

by the government and the administration. The four key elements of a recent proposal for an extraordinary law of contracts during the coronavirus pandemic consist of a set of substantive and procedural rules, aiming to address typical contractual imbalances of a systematic nature. The first element of this proposal is to oblige the parties to the contract to renegotiate their existing agreement. It is fair to say, however, that mandatory renegotiation duties cannot solve the problem, but rather accentuate and exacerbate it. In addition, we must not reverse the relationship between principle and exception. The second element of this proposal is to take measures to avoid any abuse of contractual power. However, a stronger party is not necessarily abusing its position and a weaker party not always needs to be protected by the law. In addition, various other areas of the legal system are already today dealing with precisely these issues. The third element of this proposal is to offer a system of group negotiations and group transactions with a relatively binding result. This procedural regime, however, constitutes the most dangerous step in the wrong direction. It is not only dangerous, but also cumbersome and not target-oriented to transfer the decision on the allocation of risks related to the coronavirus pandemic to either the government or the administration. The forth element of this proposal is to allow an extension of the relatively binding character of group transactions. However, it is difficult to limit the power of the government to extent the results of group transactions to problems related to the coronavirus pandemic. In my view, therefore, no extraordinary law of contracts is needed in times of pandemic. Our problems are not solved by further postponing them into the future. We must be very careful that we do not use the pandemic as an excuse to reshuffle cards and change the once agreed risk allocation between contracting parties as we might see fit.

[74] A possible answer to the title-giving question of this article, which seems reasonable to me, is therefore that the statutory risk allocation pursuant to the Swiss Code of Obligations is still adequate, even and in particular in times of pandemic. This does not mean, however, that everything is perfectly fine as it is. The law of contracts, as any other branch of the law, steadily evolves over time and has to be adjusted and renewed to the extent necessary and useful. Given the increasing importance of well-established concepts such as *clausula rebus sic stantibus* or termination for cause of permanent contracts in the near and far future, it might be about time to think about giving those concepts their well-deserved place in all our civil codes, so that they are able to live up to their full potential. For the reasons set out above, this solution is clearly preferable to the creation of an extraordinary law of contracts in times of pandemic.

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