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"Material change in circumstance, force majeure, and impossibility. A comparative law and economics evaluation of the impact of recent shocks on private contracting."

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Key Terms: Contracts, Excuse of Performance, Risk Preference, Frustration, Impossibility, Force Majeure, Imprevision, Comparative Law, Law and Economics.

Abstract

This research addresses how shocks to markets impact private contracting. We compare how private contracting, and judicial systems have responded to the Brexit, Covid 19 and the war in Ukraine. The UK, the US, France and Germany are compared in terms of the legal doctrines which excuse performance due to some form of shock which impacts markets. We broadly look at how material change in circumstance, improvision, force majeure, frustration of purpose and impossibility have been viewed by courts in response to Brexit, Covid-19, and the war in Ukraine. These shocks to markets frustrated the performance of some types of contracts and have resulted in judicial intervention when a party claims an excuse from performance of a contract.

We consider the economic impact of the use of doctrines which excuse performance of contractual duties and look specifically at how risk preference is reflected in private contracting and judicial applications of these doctrines. This analysis shows how distinct risk preferences related to individuals and firms influence contract drafting and contract performance. Additionally, we suggest that states have adopted risk preferences which are reflected in the development and judicial applications of these doctrines.

When there is a systemwide shock to markets, private parties may face significantly changed economic outlook related to the contracts they have entered. Systemic shocks such as political devolution, health pandemics, and war may make some contracts impossible to perform, economically wasteful to perform, or asymmetrically risky to perform. Private parties and states can adjust their approach to contracting and contract enforcement in order to limit the impacts of shock on markets and private contracting. When looking at this decision to adopt a specific approach, ex ante and ex post responses must be weighed against each other. This analysis relates to ex ante risk evaluations by individuals, firms, and states, how much information asymmetry is present in the negotiation stage, transaction costs due to shocks and in anticipation of shocks, the ability of court systems to efficiently function, and the functioning of free markets, and ex post applications of these doctrines which excuse performance.

By considering private and public responses to Brexit, Covid 19 and the war in Ukraine we identify how risk preferences my play a role in party's decisions. We consider 1. A private parties ex ante decision to enter into and negotiate contracts and allocate potential future risks

between contracting parties before they materialize, 2. How private parties make decisions ex post, after a shock representing a risk has occurred which creates economic uncertainty and an associated increase of performance costs, 3. How states ex ante develop doctrines related to the impact of shocks on private contracting which can be expressed through the law, which itself reflects risk preference, and 4. judicial interpretations of these doctrines when they are being asserted by private parties seeking an excuse from performance allocates risk between parties to a contract. We consider the relevant statutory and case law in France, Germany, the UK, the US, to demonstrate how legal systems use doctrines related to excuse of performance. Additionally, we identify how these doctrines have been reinforced or refined through the courts and legislation when states are faced with pressure from shocks and the corresponding impact on private business.

- Add thoughts on (mandatory) mediation in the various jurisdictions, such as 278 ZPO in Germany
    - https://beck-online.beck.de/?vpath=bibdata%2Fkomm%2FMuekoZPO_7_Band1%2FZPO%2Fcont%2FMuekoZPO%2EZPO%2Ep278%2EglVI%2Ehtm
    -

1. Introduction.

Private parties should consider the risk associated with the performance of the contracts they enter into. There are, however, some risks which can be said to be unforeseeable, impossible, or prohibitively expensive to anticipate. According to Cenini, Luppi, and Parisi,"[w]hen unexpected contingencies occur during the performance of a contract, there may be a divergence between what parties have expressly agreed upon in the contract and what they have implicitly assumed was their contractual obligation in terms of assumption of risk."[1] Parties can, and should, negotiate ex ante over the allocation of risk of nonperformance between the parties and include terms which explicitly allocate the risk of nonperformance between the parties. Conversely, if the parties have asymmetric information about future risks which impact their contracts and the ability of a party to perform, then the law may impose an allocation of risk between the parties through the use of doctrines which excuse performance. According to Posner, "if a risk of loss is known to only one party to the contract, the other party is not liable

[1] M. Cenini, B. Luppi and F. Parisi, 'The Comparative Law and Economics of Frustration in Contracts' in E. H. Hondius and C. Grigoleit (eds.), *Unexpected circumstances in European contract law*, The common core of European private law, 1. publ (Cambridge: Cambridge Univ. Press, 2011), pp. 33–52.

for the loss if it occurs" which "induces the party with knowledge of the risk either to take appropriate precautions himself or, if he believes that the other party might be the more efficient preventer or spreader (insurer) of the loss, to reveal the risk to that party and pay himself to assume it" which incentives parties "allocate the risk in the most efficient manner" between them.[2] If the courts must intervene in the event of nonperformance due to an unforeseeable event, the courts are imposing a risk allocation on the parties. This paper explores the way in which courts impose a systemic risk preference on parties through the doctrines of material change in circumstance, improvision, force majeure, frustration of purpose and impossibility.

By examining how courts respond to judicial appeals to excuse performance, we identify a variation of risk preferences between states. From looking at shocks, such as Brexit, Covid 19 and the war in Ukraine, which can be described as unforeseen, this divergence can be categorized under ex ante allocation of risk by the state which burdens parties to negotiate for contingencies for unforeseen events and ex post reallocation of risk by the state to incentivize parties to renegotiate contracts once an unforeseen event has occurred which impacts performance. Before negotiations are complete, the parties' bargain in the "shadow of the law" over the allocation of unforeseen events materializing. Given that each state has a risk preference related to doctrines of excuse which is reflected through the law, parties must negotiate in the shadow of the risk preferences expressed in the law. If unforeseen events materialize which impact the performance of the contract, then the law can intervene by reallocating risk between the parties. If the judicial intervention leads to the excuse of nonperformance of the contract this can be seen as the state imposing a risk preference on the parties, which future contracting parties must consider in their ex-ante risk allocation provisions for unforeseen future events when contracting.

The research questions this article addresses are: what are the doctrines which Western democracies use when parties seek judicial intervention to excuse performance? How have selected states applied these doctrines which excuse performance due to Brexit, COVID-19, and the Ukraine war? What are the economic factors which individuals, firms and states consider when contracting over risk and seeking an excuse of performance?

The article has the following structure

In section 2 we make a detailed description of the doctrines which allow for excuse of performance based on exogenous events. In Section 3, a comparison of the law related to excuse of performance in France, German, the UK, and the US. In Section 4 the issue of The economics of private contracting and risk preference. In section 5 we consider the law and

[2] Posner 2011, P. 158.

economics of private contracting and excuse of performance. In section 6, we have some concluding remarks about excuse of performance in light of the research objectives.

2. Doctrines related to shocks and excuses of performance.

Generally, contract law deals with shocks and excuses of performances, using two different approaches. For one, most, if not all, legal systems have developed at least one judicial doctrine. These can be derived both from statutory law and judge-made law, depending on the relevant circumstances of the jurisdiction. They need not only create a claim in court for parties to assert, but these doctrines are also a way for legal systems to indicate what risk preferences and risk allocation is favored in the case of an unforeseen, material change in circumstances surrounding the contract.

Secondly, if commercial actors are benefitting from sound legal advice, then, depending on the risks associated with the business transaction, they might make use of contractual regimes and provisions that deal with unforeseen events. While it is impossible to plan for any and all possible changes in circumstances surrounding the contract – indeed if that were the case those circumstances might not be unexpected or unforeseen on a purely logical interpretation – it is still sensible to at least agree as to what steps parties need to undertake in case performance is stymied by something or someone outside of their respective control. Those clauses also, ideally, offer the maximum amount of clarity and security to the contracting parties.

a. material change in circumstance,

Material change in circumstances often refers to situations of a serious, significant or substantial change which affects a legal relationship. This broad term may refer to situations of family law (i.e. child custody agreements), government procurement and construction bids, immigration status, or contractual relationships. In this context we only focus on the doctrine as it relates to contractual relationships. This is highly related to the concept of material adverse effect, which is common when looking at mergers and acquisitions, as well as loan agreements and facility agreements, but can also be contained in contractual language covering other commercial contracts.

As MAC clauses:

Material change in circumstances can be addressed by so called material adverse effect or material adverse change (MAC-) clauses, which in contrast to force majeure clauses usually do not require outright (practical) impossibility of performance. Instead they are triggered at an earlier point, namely when performance of contractual duties has become more onerous or

difficult. Depending on how the clause is drafted, various forms of hardship might trigger such a clause.[3]

In contrast to force majeure clauses, MAC-clauses usually do not require that the specified MAC-event is outside of the realm of control of the party.[4] Additionally, MAC-clauses often give the parties involved the opportunity to adapt or renegotiate parts of the contract related to performance, or might as an ultima ratio offer the party whose performance is not affected the opportunity to discharge the contract outright.

The reason to include MAC-clauses into one's contractual language is the flexibility it allows the parties to determine under which set of circumstances they are willing to adhere to the contractual provisions negotiated, and when it would be more beneficial for the mutual relationship to renegotiate or alter some of the specifications of performance. This is in recognition that forcing the other party into strict adherence to the contract will not necessarily be beneficial to the other party, when this might make the business relationship harder to bear going forward.

b. imprévision,

The doctrine of imprévision (which translates from French to "unpredictability") is a judicial/ statutory doctrine that has been prevalent in many Middle Eastern countries for years[5] and has recently also been introduced into French private law, after having already been a doctrine of French administrative law for decades. It applies to events that make performance under the terms of the contract for one party excessively more burdensome than it was originally intended by the parties.

As a general doctrine of law the trigger events; i.e. the unforeseeable change of circumstances; are not clearly defined and require both knowledge of prior interpretations by the courts as well as sufficient knowledge about the relevant impact as to the ability to perform on the other party.

The doctrine, once triggered, mandates the parties to enter into a multiple step procedure: If an unexpected change of circumstances triggers the doctrine, the party whose performance is affected by the change of circumstances may ask the other party to renegotiate the contract. Upon refusal or failure of the renegotiation process, the parties can then agree to terminate the contract or to seek judicial intervention by a court. If there is not any agreement, neither on

[3] see M. Huertas, *Making sense of MAC and force majeure clauses in the time of tariffs*. https://legal.pwc.de/en/news/articles/making-sense-of-mac-and-force-majeure-clauses-in-the-time-of-tariffs.
[4] S. Vogenauer, 'Hardship clauses und verwandte Klauseln in internationalen Handelskäufen (III)', *IWRZ* (2021), 112–8, at 117.
[5] B. Al Majed and A. AlMajed, 'Frustration v Imprévision, Why Frustration is so 'Frustrating': The Lack of Flexibility in the English Doctrine's Legal Consequence', *The Liverpool law review* (2023), 1–24.

renegotiated terms nor on termination, within a reasonable time, then either party can petition the court for adaptation or termination of the contract.[6]

This makes the doctrine markedly different from many other judicial doctrines dealing with unexpected shock events. It specifically contains a duty to renegotiate and thus formally obliges the parties to act in a reasonable, economical manner before turning to judicial intervention as an ultima ratio. It should be noted, that similar expectations or duties to renegotiate do also exist in other jurisdictions – such as Italy – although the procedure mandated by law is different to imprévision.[7]

Finally, the option for the court to make reasonable amendments to the contract in light of the unforeseen change of circumstances also adds a certain flexibility, that some other doctrines dealing with shocks and similar events lack.[8]

c. force majeure (clauses),

The term "*force majeure*" is derived from French law and means unexpected or unforeseeable events beyond the control of the parties which render performance of either party of the contract impossible.[9] The consequence is usually the exclusion of liability for non-performance of the contract due to the circumstances that created the force majeure event.

Force majeure as a concept exist for the most part in *force majeure* clauses in private contracting. That is, the ex-ante exclusion of liability for non-performance arises from a contractual allocation of risk, which is notably different to some of the judicial doctrines covered herein. This also means force majeure is built on the central feature of private law that all Western democracies share: the freedom of contract and freedom to contract.[10]

Since the ex-ante creation of force majeure clauses takes place in the shadow of the law, the ex-post enforcement of that clause against the other party to exclude liability for a party's own non-performance is oftentimes the more crucial step.[11] In order to get the contractual clauses recognized and interpreted by the courts in the way the parties intended, best practices,

[6] A&O Shearman, *Force Majeure And Imprévision Under French Law*. https://www.aoshearman.com/en/insights/force-majeure-and-imprevision-under-french-law (25 September 2025).
[7] M. Kovac and C. Poncibò, 'Towards a Theory of Imprévision in the EU?', *European Review of Contract Law* 14 (2018), 344–73, 356.
[8] Al Majed and AlMajed, 'Frustration v Imprévision, Why Frustration is so 'Frustrating': The Lack of Flexibility in the English Doctrine's Legal Consequence', 21.
[9] C. Pejovic, 'Civil Law and Common Law: Two Different Paths Leading to the Same Goal', *Victoria University of Wellington Law Review* 32 (2001), 817–42, p 823.
[10] See Study Group on a European Civil Code et al, Draft Common Frame of Reference (DCFR), Art. II.-1:102 Comments.
[11] D. Foxton, '"When Everything Changes": adapting contracts to fundamental changes in circumstance - the 2024 Jill Poole Memorial Lecture', *Journal of Business Law* 2025, 161–78.

recommendations by law firms and standard-clauses have developed.[12] A carefully drafted contractual force majeure regime needs to be detailed as to what events are covered, as well as what the parties' intended next steps are. Depending on the domestic law which is applicable, parties may need to adapt their force majeure-regime.[13] Some clauses merely exclude liability for non-performance caused by the external event, most clauses will go into further detail as to what steps need to be undertaken by a party to save the contract at large (such as requiring good faith renegotiation, or reasonable endeavors by the non-performing party).[14] As McKendrick recognized, "it is this flexibility which makes it difficult, if not impossible, to define exactly what is meant by a force majeure clause".[15]

d. frustration of purpose

The doctrine of frustration of purpose deals with the heart of the issue dealt with in this article. Chitty on Contract defines frustration as: "A contract may be discharged on the ground of frustration when something occurs after the formation of the contract which renders it physically or commercially impossible to fulfil the contract or transforms the obligation to perform into a radically different obligation from that undertaken at the moment of entry into the contract."[16] Although this definition describes the English doctrine of frustration, the main components are similar in legal systems that recognize frustration, or similar equivalent doctrines.

In contrast to other modern-day legal doctrines, frustration cannot be directly traced back to Roman law, at least not as a general rule, as Roman law had a preference for individual solutions.[17] The continental European Ius commune however then developed the "clausula rebus sic stantibus"[18] as an implied condition, even though that doctrine was once again

[12] G. Weick, 'Force Majeure - Rechtsvergleichende Untersuchung und Vorschlag für eine einheitliche europäische Lösung', *ZEuP* (2014), 281, pp. 296-299.
[13] E.g. issues with renegotiations of contracts and the doctrine of consideration in English contract law: "For the moment, I would simply observe that the fact that these difficulties present themselves provides a sound basis for questioning whether we should be applying the doctrine of consideration to the renegotiation by parties of an existing contract, rather than leaving the issues of contractual intention, interpretation/implication and economic duress to rule the field." in Foxton, '"When Everything Changes": adapting contracts to fundamental changes in circumstance - the 2024 Jill Poole Memorial Lecture', 170–1.
[14] See for example RTI Ltd v MUR Shipping BV [2024] UKSC 18; and its discussion from various perspectives such as C. Hose, 'You get what you pay for: reasonable endeavours and force majeure', *Cambridge Law Journal* (2024), 433–6; C. Dingeldey, N. Romberg and J. H. Wagner, 'Force-Majeure-Klauseln im deutschen und englischen Recht', *ZEuP* (2025), 385, at 389–400.
[15] E. McKendrick and A. Rogers, *Force majeure and frustration of contract / edited by Ewan McKendrick; foreword by Andrew Rogers*, Lloyd's commercial law library, 2nd ed. (Abingdon: Informa law from Routledge, 2013), p. 10.
[16] *Chitty on Contracts: General Principles*, 32.th edn. (Sweet & Maxwell, 2015), 23-001.
[17] S. Martens, '§ 313' in B. Gsell, W. Krüger, S. Lorenz and C. Reymann (eds.), *beck-online.GROSSKOMMENTAR BGB* (München: C.H.BECK, 2025), at 13.1.
[18] C.f. among others Bartolus, Commentaria, D. 12,4,8 § Quod Servius, 3.

abandoned, at least by the 19th century in continental Europe. Under English common law, the rule was "[o]nce a party had assumed an obligation he was 'bound to make it good' (Paradine v Jane (1647) Aleyn 26, 27)."[19] The doctrines of frustration and impossibility[20] were introduced into the common law through the decision of *Taylor v Caldwell.*[21] Continental European civil law adopted general doctrines of frustration in the later part of the 19th and the early 20th century.[22]

Most contract law systems of Europe have one or more doctrines, be they statutory, such as in Germany[23], or judicial doctrines, such as in England[24] or in Switzerland[25], that can roughly be translated to frustration of purpose, or frustration of the basis of the contract. There are distinctions regarding the judicial explanation of when the purpose of the contract is frustrated, and different tests apply.[26] This does not meaningfully change the outcome of most cases. Major differences exist as to the consequences of frustration. There are two distinct solutions: In the first approach, a judicial system might take the view that if frustration occurs, and the party have not under e.g. a force majeure-clause ex ante decided on an individual allocation of risk, then the only avenue for a judicial solution to the frustration is a termination of the contractual obligations on both sides.[27] A second approach is to allow the parties, or the court, to make amendments or adaptations to the contract to conform the contract to the original intentions of the contracting parties again.[28]

e. impossibility

The doctrine of impossibility is closely related to unexpected changes in circumstances and the occurrence of system wide shocks, although the doctrine can also deal with other issues relating to the inability of performance. Usually, upon entering a contract, both parties will assume that they are capable of performance to the economic benefit of both. The doctrine, broken down to its essence, states that impossible performance cannot be demanded; that if performance is impossible, the party whose duty it is to perform, naturally,[29] must be excused from specific

[19] E. McKendrick, *Contract Law*, Hart Law Masters Series, 16th ed. (London: Bloomsbury Publishing Plc, 2025), p. 369.
[20] See below
[21] Taylor v. Caldwell (1863) 122 Eng. Rep. 309 (K.B.). QUOTE
[22] Martens, '§ 313'. QUOTE
[23] See later, also c.f. §§ 313, 314 BGB Translation from https://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html; ibid.
[24] See later, also c.f. *Chitty on Contracts*, Chapter 23.
[25] See later, also c.f. BGE 101 II 17 (19); Martens, '§ 313', 31.
[26] CITE
[27] e.g. *Chitty on Contracts*, 23-071. ADD QUOTE
[28] See e.g. Martens, '§ 313', 124–42. ADD QUOTE
[29] T. Riehm, '§ 275' in B. Gsell, W. Krüger, S. Lorenz and C. Reymann (eds.), *beck-online.GROSSKOMMENTAR BGB* (München: C.H.BECK, 2023), para 390.

performance. Impossibility, in one form or another, is – and has been[30] – recognized by most legal systems of contract law.

Historically, the common law in contrast to civil law did not recognize such a doctrine. Being based on strict liability, performance is owed under the terms of the contract, if no explicit exemption of liability is in the contract. After the introduction of the doctrine of frustration in the 19th century in the case of *Taylor v Caldwell,* was absolute impossibility recognized as an excuse for non-performance.[31] Meanwhile in civilian legal systems, the doctrine in principle had been preserved through Roman and later canon law.[32]

Differences between the various common and civil law legal systems arise, when looking at whether impossibility applies when performance is absolutely, objectively impossible, or only subjectively, personally impossible to the promisor. Furthermore, some legal systems draw a distinction between initial impossibility and subsequent impossibility.[33]

3. Comparative Analysis of France, Germany, the UK and the US.

a. France

i. force majeure

Under article 1218 of the French Civil Code, there are provisions for force majeure. Under art. 1218 "[f]orce majeure occurs… when an event beyond the debtor's control, which could not reasonably have been foreseen… and… which cannot be avoided… prevents the debtor from performing his obligation".[34] Under the provision of art. 1218, a temporary impediment will suspend performance "unless the resulting delay justifies termination of the contract". [35] On the other hand, "[i]f the impediment is definitive, the contract is terminated ipso jure and the parties are released from their obligations".[36] Art. 1218 has been revised, as the previous version was changed in 2016 which had "defined force majeure as an external, unpredictable

[30] "impossibilium nulla est obligatio", Dig. 50.17.185 (Celsus)
[31] Taylor v. Caldwell (1863) 122 Eng. Rep. 309 (K.B.); see among others C. Bruce, 'An Economic Analysis of the Impossibility Doctrine', *Journal of Legal Studies* (1982), 311, 323, .
[32] CITATION
[33] For a detailed comparative analysis of the doctrines in France, Germany, the UK and the US see J. Gordley, 'Impossibility and Changed and Unforeseen Circumstances', *The American Journal of Comparative Law* Summer (2004), 513–30.
[34] French Civil Code art. 1218. Translation from French-business-law.com, https://french-business-law.com/french-legislation-art/article-1218-of-the-french-civil-code/
[35] French Civil Code art. 1218. Translation from French-business-law.com, https://french-business-law.com/french-legislation-art/article-1218-of-the-french-civil-code/
[36] French Civil Code art. 1218. Translation from French-business-law.com, https://french-business-law.com/french-legislation-art/article-1218-of-the-french-civil-code/

and irresistible element."[37] The concept of force majeure under French law needs to be distinguished from the contractual clauses labeled as force majeure in common law private contracting, which although similar can be thought of as a distinct form of legal transplant which relates to private contracting.[38] The force majeure provisions of art 1218 can be thought of as a "short-hand expression for the defense of "impossibility," a defense arising by operation of law under the Code Civil" whereby it is applicable "when three basic conditions are satisfied: irrésistibilité, imprévisibilité, and extériorité."[39] It is also important to distinguish that the French provisions for force majeure under art. 1218 are distinguishable from "impracticability and frustration… except in a broad functional sense."[40]

ii. imprévision

Under art. 1195 of the French Civil Code, "If a change in circumstances unforeseeable at the time the contract was concluded makes performance excessively onerous for a party who had not agreed to assume the risk, that party may ask its co-contractor to renegotiate the contract."[41] Art. 1195 "brought into the Code, for the first time in French legislative history, the doctrine of "changed circumstances" or imprévision."[42] According to Pédamon, "[h]istory traces the theory of imprevision back to the 12th and 13th centuries in the Roman rule - *contractus qui habent tractum successivum et dependiam de future rebus sic stantibus intelliguntur* - that set limits to contractual sanctity because of economic instability."[43] The adoption of the rules for imprévision can be seen as resulting from the influence of European and International private law.[44] The enactment of the imprévision statute is also seen as a reaction to judicial hostility to

[37] Kang, Cindy, et al. "The Applicability of Force Majeure Clause During the Covid-19 Pandemic in Indonesia and France." Jurnal Komunikasi Hukum (JKH) 7.2 (2021): 907-923. P. 917.

[38] According to Palmer "The expression force majeure does not denote a common law doctrine", rather "[t]he term is nevertheless widely used and well-known because courts are frequently called upon… to interpret so-called "force majeure clauses"." Additionally, "[s]uch clauses are strictly construed by the courts" and "usually enumerate a list of supervening circumstances that the parties agree will excuse performance" which in effect "supersedes the requirements of the common law." Palmer 2022, p. i72.

[39] Palmer 2002, p. i73.

[40] Palmer 2002, p. i73.

[41] French Civil Code art. 1195. Translation from French-business-law.com, https://french-business-law.com/french-legislation-art/article-1195-of-the-french-civil-code/

[42] Palmer 2022, p. i73

[43] Pedamon, Catherine. (2017). The Paradoxes of the Theory of Imprevision in the New
French Law of Contract: Judicial Deterrent?. Amicus Curiae, 112, 10.

[44] According to Pedamon, "Article 1195 CC reflects the influence of other European country responses to unforeseen circumstances, including the German Wegall der GeschUJtsgrundlage or the Italian eccessiva onerosita sopravvenuta, and international legal projects, such as the Principles of European Contract Law (PECL) and the Unidroit Principles of International Commercial Contracts (Unidroit Principles)." Pedamon, Catherine. (2017). The Paradoxes of the Theory of Imprevision in the New
French Law of Contract: Judicial Deterrent?. Amicus Curiae, 112, 10.

the doctrine.[45] The application of art. 1195 can be seen as a default rule, which enables contracting parties to negotiate agreements which specifically work around the art. 1195 provisions, if they so choose.[46]

The concept of imprévision envisioned in art. 1195 operates "in circumstances similar to force majeure to excuse performance when unforeseeable events make performance "excessively onerous" even when it may still be possible."[47] The possibility of renegotiations of the contract makes it possible the parties can adjust their agreement to take into account the change in circumstances, and thus seek to maximize the gains of trade from the contract in light of the changed circumstances. The renegotiation is seen as a way for the court system to avoid having to litigate contract disputes, as parties which do renegotiate will not need to litigate, although it may still require judicial intervention into the review of contracts. This can also be seen as a mechanism which promotes the continuation of long-term contractual relationships.[48] The provisions of art. 1195 are also seen as a way to "encourage parties to resolve disputes arising out of changed circumstances themselves."[49]

iii. Covid 19 in France

The French provisions of force majeure and improvision were certainly at play during the Covid 19 pandemic, but the enactment of Ordonnance 2020-306 in March of 2020 provided some relief from parties pressing courts to apply the code provisions for force majeure and improvision. The ordonnance was considered an emergency ordinance in that it temporarily suspended some obligation in private contracting during the duration of the emergency. Ali addressed how France "suspended several contractual remedies and passed an Ordinance No. 2020-306" in the initial response to Covid 19, and "the effects of penalty clauses and periodic penalty payments, termination clauses, and forfeiture provisions penalising non-performance that applied before or during the period between March 12, 2020, and June 23, 2020, were also

[45] According to Pedamon, "The judicial rejection of the theory of imprevision can be traced back to the seminal decision of Canal de Craponne (Civ 6 Mach 1876, DP 1876. 1. 193)." Pedamon, Catherine. (2017). The Paradoxes of the Theory of Imprevision in the New
French Law of Contract: Judicial Deterrent?. Amicus Curiae, 112, 11.

[46] Pedamon comments that "Article 1195 CC is furthermore a default rule that is commonly set aside in sophisticated and complex commercial contracts that provide for hardship terms or indexation clauses, thus leaving the applicability of this article mainly to smaller commercial contracts as well as standard and non-commercial contracts." Pedamon, Catherine. (2017). The Paradoxes of the Theory of Imprevision in the New French Law of Contract: Judicial Deterrent?. Amicus Curiae, 112, 13.

[47] Palmer 2022, p. i73.

[48] Pedemon explains that "Parties in an ongoing longterm relationship - the usual situation here - have a strong incentive to work out disagreements amicably rather than see the relationship destroyed by litigation." Pedamon, Catherine. (2017). The Paradoxes of the Theory of Imprevision in the New French Law of Contract: Judicial Deterrent?. Amicus Curiae, 112, 16.

[49] Pedamon, Catherine. (2017). The Paradoxes of the Theory of Imprevision in the New French Law of Contract: Judicial Deterrent?. Amicus Curiae, 112, 17.

postponed by the Government until after that time."[50] The adoption of these emergency measures were not unprecedented in French history, and the enacted Ordinance no. 2020-306 were directly modeled on previous emergency measures.[51]

b. Germany - Wegfall der Geschäftsgrundlage (Purpose), Impossibility, Deficiency,

Under German statutory law, when a sudden shock or material change in circumstances occurs, it can be dealt with in multiple different ways under the provisions of the BGB:

i. deficiency

If a material change in circumstances alters the condition of the object of the contract in a material, or legal way, a court could find a breach of contract due to the object of the contract being deficient, with the other party's performance being wholly, or partly excused.[52] There are individual provisions depending on the type of contract, for leases § 536 (1) BGB states that "If the leased property at the time it is made available to the lessee for their use has a defect which removes its suitability for the contractually agreed use, or if such a defect arises during the lease period, then the lessee is exempted from paying the rent for the period during which suitability is removed", and "[f]or the period of reduced suitability, the lessee need only pay reasonably reduced rent."[53] § 536 ss (3) BGB clarifies further that "If the lessee is fully or partially deprived by a third-party right of the use of the leased property, then subsections (1) and (2) apply accordingly."[54] Similar rules apply to other forms of contracts[55] which lead to the right of recission from the contract under §§ 323, 346 BGB, to the right of reduction of its own performance under specific provisions depending on the type of contract,[56] or to damages for breach of contract under § 280 (1) BGB.[57] Whether or not those deficiencies create a specific claim further depends on whether the promisor is found to be at fault, for our purposes due to the contractual or statutory distribution of risk.[58] In general, it should be observed here, that German contractual liability law puts a very strong emphasis on the element of fault per se,

[50] Ali, Mahnoor. "COVID-19 and European Contract Law." Available at SSRN 4729153 (2024).
[51] According to Deshayes, "In drafting this ordonnance, the French Government was helped by a precedent. Immediately after the May 1968 crisis, which resulted in a disorganization of the country, a "Loi n°68-696" was adopted on July 31 "on "foreclosures incurred as a result of the events of May and June 1968 and extending various time limits". The main provisions of this 1968 statute were copied, slightly modified and pasted in the 2020-306 "ordonnance". This is particularly true of the provisions interesting the law of contract." Deshayes, Olivier. "The impact of Covid-19 crisis on the French law of contract." *Opinio Juris in Comparatione* (2020).
[52] § 536 (1) BGB
[53] § 536 (1) BGB
[54] § 536 BGB Translation from https://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html
[55] C.f. §§ 437, 434, 435 BGB (for purchase agreements), § 633 BGB (for agreements to produce a work).
[56] C.f. § 441 BGB (for purchase agreements), § 638 BGB (for agreements to produce a work).
[57] § 280 (1) BGB
[58] § 280 (1) BGB

which will also be relevant for the discussion of more the more relevant doctrines dealing with shocks and excuse of performance coming up.[59]

ii. Impossibility

If the material change in circumstances makes it so that "performance is impossible for the obligor or for any other person" then the obligee's "claim for performance is excluded"[60] under § 275 (1) BGB. Similarly, under § 275 (2) BGB, "[t]he obligor may refuse performance to the extent that performance requires an expenditure of time and effort that, taking into account the subject matter of the obligation and the requirement of acting in good faith, is grossly disproportionate to the obligee's interest in performance."[61] The obligee then has various options available to him under § 275 (4) BGB, which are damages for breach of duty, reimbursement of its expenses, or recission from the contract. Once again some of those claims depend on whether or not the obligor is found to be at fault, due to contractual or statutory risk allocation. Additionally, it should already be noted here that German courts have traditionally never recognized impossibility of monetary performance.[62]

iii. Wegfall der Geschäftsgrundlage (frustration of purpose)

If the material change in circumstances interferes primarily with the basis of the transaction, i.e. the purpose of the contract, it is found that the contract would not have been concluded by the parties under those changed circumstances, and one of the parties cannot reasonably be required to uphold the contract, then adaptation of the contract under § 313 (1) BGB can be demanded by the disadvantaged party, or, if adaption of the contract proves impossible, the disadvantaged party can rescind or terminate the contract under §§ 313 (3) BGB.[63] All of those trigger elements must be met and whether or not they are, is decided on a case-by-case basis. This statutory doctrine is called the *Wegfall der Geschäftsgrundlage,* which translates to frustration of purpose or frustration of the basis (of the contract). Technically, § 314 BGB[64] specifically addresses the right to termination for important reasons in contracts involving continuing obligations. These do however include frustration of purpose of the continuing obligation, but the underlying doctrines are fundamentally the same, albeit § 314 BGB

[59] Weick, 'Force Majeure - Rechtsvergleichende Untersuchung und Vorschlag für eine einheitliche europäische Lösung', 312.
[60] § 275 (1) BGB Translation from https://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html
[61] § 275 (2) BGB Translation from https://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html
[62] Riehm, '§ 275', 29–32; *NJW 2015, 1296* (BGH, 04 February 2015), at para 18.
[63] § 313 BGB Translation from https://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html; this is consistent with the former judicial doctrine of *Wegfall der Geschäftsgrundlage*, see *NJW 1976, 565* (BGH, 13 November 1975); *NJW 1977, 2262* (BGH, 25 May 1977).
[64] § 314 BGB Translation from https://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html.

additionally requires that there is no possibility for improvement in the foreseeable future.[65] Furthermore, the claim of impossibility, at least as it deals with objective, absolute impossibility under § 275 (1) BGB,[66] takes precedent over any claims under §§ 313, 314 BGB.[67]

iv. Application of force majeure and MAC-clauses

German law recognizes the freedom of contract and views the freedom of content as one of its three essential components.[68] As such it is also not unusual for commercial contracts under German law to contain force majeure (*Höhere Gewalt* in German), or MAC-clauses.[69] When such contractual risk allocation takes place, the German legal system will prioritize the contractual regime, and only apply statutory law to fill in gaps in the contract.[70] When applying force majeure-clauses, German courts can be said to fall within the middle of the spectrum between a strict or lenient application of the clause at question. As such it is generally likely that the court would accept both specific mentions of the unforeseen event as well as catch-all clauses that give room for interpretation as to whether the unexpected occurrence at hand is a force majeure-event under the clause. When dealing with broadly phrased clauses courts might also look into some of the statutory definitions of *Höhere Gewalt*, that exist e.g. in EU-law-influenced travel law.[71]

v. Judicial Application of those doctrines

When looking into the judicial application of the two most relevant doctrines (impossibility and *Wegfall der Geschäftsgrundlage)*, a decision about a Christmas market during the Covid-19 pandemic serves as a good place to start, in order to show how both doctrines are distinguished. The organizer of a Christmas market had a long-term lease agreement that covered various years, including 2020 and 2021. The court found that performance of the owner to provide premises for a Christmas market was legally impossible in 2020 due to government prohibitions in December 2020. Yet when the organizer did not find it practically feasible to host the Christmas market in December 2021, the performance of the owner of the premises was not impossible, since there were merely restrictions as to size, attendance and social-distancing requirements imposed by government. The court also declined the adaptation or termination of the contract under § 313 BGB (*Wegfall der Geschäftsgrundlage*), since the

[65] S. Martens, '§ 314' in B. Gsell, W. Krüger, S. Lorenz and C. Reymann (eds.), *beck-online.GROSSKOMMENTAR BGB* (München: C.H.BECK, 2025), at para 52.
[66] Martens, '§ 313', at para 186.
[67] This has just recently been confirmed again *NZM 2024, 329* (BGH, 24 January 2024).
[68] C.f. C. Herresthal, '§ 311' in B. Gsell, W. Krüger, S. Lorenz and C. Reymann (eds.), *beck-online.GROSSKOMMENTAR BGB* (München: C.H.BECK, 2025), at paras 2-11.
[69] Martens, '§ 313', 61.2.
[70] Ibid., 61.
[71] I. Weaver, 'Störung der Lieferkette durch Covid-19 – Force Majeure? Es kommt darauf an!', *ZVertriebsR* (2020), 159; *BeckRS 2004, 16212* (AG Augsburg, 09 November 2004); *NJW 2025, 1483* (BGH, 18 February 2025).

contract allocated the financial risk of hosting the Christmas market alongside dealing with government regulation and consumer sentiment firmly in the sphere of the event organizer.[72]

The Covid-19 pandemic, also led to retail businesses being prohibited to open their stores to the general public. Therefore, German courts had to deal with a plethora of claims from affected retail renters that claimed deficiency of the rented space, impossibility of performance by the landlords, or *Wegfall der Geschäftsgrundlage.* The leading case here was decided by the BGH in 2022[73], where the court found that – absent explicit language to the contrary in the contract – a rented retail space suffered from no deficiency due to the prohibition to operate a retail store therein. The prohibition of in person service did not materially or legally create a deficient performance of the contract by the landlord.[74] Similarly, once again unless the contract specifically assigned that risk to the owner, the owner's performance did not become impossible, either. When addressing *Wegfall der Geschäftsgrundlage,* the court readily accepted that the underlying purpose of the contract had become frustrated. However, the BGH also stressed that whether it is reasonable to uphold the obligations under a contract under *Wegfall der Geschäftsgrundlage* needs to always be assessed on a case by case basis and that any generalizations are not permissible, not even if countless very similar situations exist, such as here. When analyzing the situation in question here the court explained that the economic hardship caused by the prohibitions fell outside the ordinary risk of use of the renter. Whether an adaptation of the contract was the proper remedy still would depend on assessing the financial situation overall, including, e.g. whether the retail store could feasibly still operate as a pick-up location for the items usually on sale there, whether the renter was eligible for financial aid by the state, whether the renter limited his financial losses by appropriately managing other areas of their business, such as personnel, but also how long the renter was prohibited from operating their usual business. As other decisions[75] have shown before, the financial situation of the owner should not be neglected either.[76] Finally in this case, the court decided that the hardship caused by having to close the retail space in were not so drastic as to amount to it being unreasonable to uphold the contractual obligations of both parties.

Not just in this case, but in general, German courts are not willing to readily apply *Wegfall der Geschäftsgrundlage* to any contract. They have long held that parties could not be held to be ignorant of any and all future instabilities and risks and that ordinarily parties are taking on the full risk of their contractual performance. As far back as in the 1970s – in the context of the oil crisis – the German BGH had held, that a petroleum merchant with considerable expertise on

[72] *Weihnachtsmärkte in der Pandemie: Die Vertragsverlängerung "sehenden Auges"*, 2024 NZM 653 (OLG Brandenburg, 07 May 2024).
[73] *NJW 2022, 1370* (BGH, 12 January 2022).
[74] Ibid., at paras 26-39.
[75] *NJW 2021, 948* (OLG München, 17 February 2021).
[76] *NJW 2022, 1370*, at paras 41-59.

the market and what might cause instabilities could and should have reasonably foreseen the risk associated with relying on imports from the Middle East at current market prices to fulfil their contractual obligations to customers in Germany.[77] Similar decisions can be found when looking at more contemporary case law: In 2022, when energy prices rose significantly in Germany after the war in Ukraine had broken out, the LG Offenburg found that an energy supply contract could not merely be terminated under § 314 BGB due to the increased prices on the market. It argued that upon a proper reading of the obligations under the contract the supplier solely bore the procurement risk and should have diligently hedged for price fluctuations. [78] This shows that the German judicial system highly values the doctrine of *pacta sunt servanda* and does not wish to unnecessarily interfere into the market. The outright dismissal of both of these cases that deal with economic hardship experienced by one party also highlights the general strictness of the German law when parties have to deal with liquidity and other financial problems.

In a decision by the BGH from 1984[79], which was notably prior to the statutory fixation of the *Wegfall der Geschäftsgrundlage*, serves as a good illustration of how the German doctrine seeks to allocate risk ex-post, once its conditions are met. In a case about the import of canned beer to Iran, which had become prohibited after the cessation of power by the Ayatollah Khomeini, the now frustrated contract was amended to split the losses equally between both parties. The BGH stressed that the court of second instance had developed a well-balanced adaptation of the contract that sought to alleviate the impact of the frustration of purpose fairly between both parties.

c. UK- Impossibility, Frustration of Purpose, Force Majeure, and Material Change in Circumstances.

English contract law principally has only one instrument available to the courts to deal with an unexpected event or shock that impacts the ability of a party to comply with its contractual duty of performance. In UK contract law, impossibility relates to the actual impossibility of performance, such as in the case of a theater burning down, and thus being unavailable for a lease contract that was already entered into.[80] Since the holding in the *Taylor v Caldwell* case, English Courts have been “prepared to hold that, unless a contrary intention appears, the continuance of a contract” is “conditional upon the possibility of its performance.”[81] The doctrine of impossibility has “extended outside the sphere of literal impossibility to situations

[77] *BeckRS 1978, 31119358* (BGH, 08 February 1978).
[78] *BeckRS 2022, 33307* (LG Offenburg, 26 September 2022).
[79] *NJW 1984, 1746* (BGH, 08 February 1984).
[80] Taylor v Caldwell, 122 E.R. 309
[81] Anson, William Reynell, et al. *Anson's law of contract*. Oxford University Press, USA, 2010. P. 500.

where there had been a 'frustration of adventure'" and eventually developed into the doctrine of frustration of purpose.[82]

The doctrine of frustration[83] applies to post-contractual changes in circumstances, which affect performance to make it impossible, illegal or otherwise radically different than what the parties had contemplated originally.[84] It offers a defence to the party that is unable to perform against a claim by the other party for breach of contract.[85] Once a court finds the contract to be frustrated, termination occurs automatically, irrespective of possibly opposing interests by the parties.[86]

When looking into the doctrine of frustration more in depth, then three sub-categories emerge, as already noted in the definition above. Those are impossibility – i.e. when performance of the contract is actually impossible,[87] illegality – i.e. when originally legal performance of a contract has subsequently become illegal to perform,[88] and frustration of purpose – when the common purpose or basis of the contract can no longer be obtained due to some unforeseen event.[89] Which header triggers frustration theoretically does not matter. Yet frustration defenses based on impossibility and to a lesser degree illegality are claims which are more likely to succeed, since they involve less interpretative leeway and more straight-forward application of the law to facts. On the other hand, examples of frustration of purpose being actually found are "extremely rare."[90]

As in most Western economies, English law also relies heavily on force majeure and hardship clauses in private contracting. While this may be a conscious choice in many other jurisdictions, according to McKendrick: "Contracting parties are expected to foresee many such [unexpected events] when entering into a contract and guard against them in the contract."[91] Thus individual parties are burdened with contracting over the possibility of the contract being unperformable. Even then, the "light-touch" approach that English courts often take vis-à-vis the interpretation

[82] Anson, William Reynell, et al. *Anson's law of contract*. Oxford University Press, USA, 2010. P. 500.
[83] For the definition from Chitty on Contracts see above
[84] McKendrick, *Contract Law*, p. 364.
[85] Ibid., p. 375.
[86] *Hirji Mulji v Cheong Yue Steamship Co Ltd*, [1926] A.C. 497 (Privy Council (Hong Kong)).
[87] See *Taylor v Caldwell*, where the premises leased for holding concerts therein burned down after the contract had been signed, but before the first concert had taken place.
[88] Such as in the case of *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32, where performance of a contract to manufacture and deliver machinery to Gdansk became illegal, after in World War 2 Germany had occupied the city, as it was illegal to trade with the war enemy.
[89] Such as in the „coronation case" *Krell v Henry* [1903] 2 KB 740, when the postponing of the coronation of King Edward VII was found to have frustrated the purposes of a short time rent agreement of a flat that specifically was chosen for its view overlooking the coronation ceremony.
[90] McKendrick, *Contract Law*, p. 371.
[91] Ibid., p. 367.

of one-sided force majeure clauses[92], as well as the recent refusal by the UK Supreme Court to refuse to do any (reasonable)[93] interpretation of force majeure clauses other than a strict application of the specifically named parameters[94] shows that the general strictness of the application of the doctrine of frustration in some sense carries over to the enforcement of contractual provisions as well.

The *Canary Wharf v. European Medicines Agency* (EMA) case is the most salient example of how UK courts applied the doctrine of frustration within the context of Brexit, although the case was ultimately decided based on the alienation provisions of the contract and not exclusively on the question of whether the Brexit was a foreseeable event which frustrated the lease, which the court ultimately decided was not an event which would "discharge by frustration" the lease.[95] In this case the court identified English rule that "[w]hether a contract is frustrated depends upon a consideration of the nature of the bargain of the parties when considered in the light of the supervening event said to frustrate that bargain" and "[o]nly if the supervening event renders the performance of the bargain "radically different", when compared to the considerations in play at the conclusion of the contract, will the contract be frustrated."[96] Kovac and Aubrecht discussed in detail the ruling from the Canary Wharf case and identify that question relating to the impact of the Brexit on private contracts "suggests that in the vast majority of cases, the 'construction of the contract will resolve the issue between the parties'."[97] This reflects "the traditional general rule is that an event cannot normally amount to frustration if the contract terms cover it."[98]

Several COVID 19 related cases from England, essentially follow the rule of looking first to the contract to resolve claims related to Covid-19 frustrating contracts: In one case the landlords of two commercial premises run as cinemas sued their tenants for rent due under their lease agreements. The renters had claimed no obligation to pay the rent due during those periods of the Covid 19 pandemic when those cinemas were shut down due to government regulations mandating thusly. A rent cesser clause was found to not apply and could not be viewed as impliedly covering the present circumstances. A failure of basis claim also failed, since there was a contractual regime allocating the risks associated with running the business. There was found to be no common understanding that the premises could be lawfully used as a cinema, due to

[92] Foxton, '"When Everything Changes": adapting contracts to fundamental changes in circumstance - the 2024 Jill Poole Memorial Lecture', 176.
[93] As seems to be suggested among other authors by A. Shaw-Mellors, '"Reasonable endeavours" obligations in force majeure clauses', *Journal of Business Law* (2025), 570–7.
[94] RTI Ltd v MUR Shipping BV [2024] UKSC 18.
[95] Canary Whaf [2019] EWHC 335 (Ch).
[96] Canary Wharf (BP4) T1 Ltd v European Medicines Agency, 2019 WL 00691052
[97] Kovac and Aubrecht 2022 p. 18.
[98] Kovac and Aubrecht 2022 p. 19.

the express allocation of risk in the contract not allowing for a successful frustration of purpose claim.[99] Similar cases essentially all but confirmed the aforementioned findings by Kovac and Aubrecht.[100]

d. US- Force Majeure Clauses, Material Change in Circumstances, Frustration of Purpose

i. Force Majeure Clauses

In the US there is a common usage of force majeure clauses in commercial contracting which is distinct from the doctrine of force majeure found in the French Civil Code. The use of these force majeure clauses can be thought of in terms of private law effecting a form of legal transplant concerning the use of efficient contract terms. In this sense the use of force majeure clauses repackage the traditional French concept of force majeure found in the Code Civil into a contractual clause used to allocate risk between contracting parties.[101] In the context of Covid 19, US courts found that the Covid 19 pandemic did constitute a force majeure event: for auction contracts,[102] for hotel conference reservations,[103] for a wedding venue reservation,[104] is a partial excuse from paying rent under a lease for restaurant,[105] for cancellation of in person classes at a university,[106] the completion of contract to manufacture and delivery of disinfectant wipes,[107] and multiple other situations. US courts have also found that Covid 19 did not constitute a force majeure event excusing payment of rent and in other situations.[108] The variation in defining Covid-19 as a force majeure event can be seen as part of the system of federalism in the US, where each state's judiciary functions independently.

ii. Impossibility and the modern doctrines of frustration of purpose and impracticability

The doctrine of impossibility was traditionally seen as falling under a strict interpretation which is distinct from modern doctrines of impracticality and frustration of purpose. Historically, the

[99] Bank of New York Mellon (International) Ltd v Cine-UK Ltd [2022] EWCA Civ 1021.
[100] C.f. Kovac and Aubrecht 2022 p. 18-19.; see among others: Salam Air SAOC v Latam Airlines Groups SA, [2021] 1 C.L.C. 795. (refusing application for injunction based on a frustration of purpose claim); Dwyer (UK Franchising) Limited v Fredbar Limited, Mr. Shaun Rowland Bartlett [2021] EWHC 1218 (Ch). (only the failure to consider specifically brought up circumstances could justify a force majeure claim).
[101] For a discussion on the how legal transplants may lead to legal change, see: Mattei, Ugo. "Efficiency in legal transplants: An essay in comparative law and economics." *International Review of Law and economics* 14.1 (1994): 3-19.
[102] JN Contemporary Art LLC v. Phillips Auctioneers LLC, No. 21-32 (2d Cir. 2022)
[103] Avantax Wealth Mgt., Inc. v. Marriott Hotel Services, Inc., 108 F.4th 407 (6th Cir. 2024)
[104] Nelkin v. Wedding Barn at Lakota's Farm, LLC, 152 N.Y.S.3d 216 (N.Y. Civ. Ct. 2020)
[105] In re Hitz Rest. Group, 616 B.R. 374 (Bankr. N.D. Ill. 2020)
[106] Goldberg v. Pace U., 88 F.4th 204 (2d Cir. 2023), Michel v. Yale U., 110 F.4th 551 (2d Cir. 2024)
[107] Tufco L.P. v. Reckitt Benckiser (ENA) B.V., 636 F. Supp. 3d 943 (E.D. Wis. 2022)
[108] W. Pueblo Partners, LLC v. Stone Brewing Co., LLC, 307 Cal. Rptr. 3d 626 (Cal. App. 1st Dist. 2023), 55 Oak St. LLC v. RDR Enterprises, Inc., 275 A.3d 316 (Me. 2022), amended (June 9, 2022), SVAP III Poway Crossings, LLC v. Fitness Intern., LLC, 303 Cal. Rptr. 3d 863 (Cal. App. 4th Dist. 2023), review denied (Apr. 26, 2023), Highlands Broadway OPCO, LLC v. Barre Boss LLC, 528 P.3d 517 (Colo. App. 2023)

death of a contracting party, the illegality of performing the underlying contractual duties, and the destruction of the object under contract were seen as providing for an excuse of performance.[109] Modern concepts of frustration of purpose have developed in the US which have been recognize the Restatements of Contracts, and have developed out of UK case law found in the *Krell v Henry* case, or "coronation" case.[110] Under the Restatement of Contracts (Second) § 265 four distinct questions can be identified: 1) "Did a supervening event make performance "frustrated"?", 2) "Was the nonoccurrence of that event a "basic assumption" of the parties' intent?", 3) "Was there fault on either party's side?", and 4) "Did the party seeking relief assume a greater obligation than the law imposes?".[111] The doctrine of impracticability is reflected in the Uniform Commercial Code under U.C.C. § 2-615.[112] The provision does not excuse performance for changes in business conditions related to market changes, as these are seen as within the contemplation of the parties at the time of contracting.[113] Palmer identifies how the UCC "has had a substantial influence beyond the law of sales" which is evidenced in the Restatement of Contracts (Second) § 261, which "basically mirrored the language of the UCC provision and extended the reach of impracticability to all kinds of contracts."[114] Impracticability, according to Palmer addresses "four basic questions" which are: 1) "Did a supervening event make performance "impractical?"; 2) "was the nonoccurrence of that event a "basic assumption" of the parties' intent?"; 3) Was either party at fault in causing the impracticability?; and 4) Was "the party seeking relief" under an assumption that there was "a greater obligation than the law imposes"?[115] The analysis of Plamer demonstrates application of

[109] See: Palmer 2002.

[110] Restatement of Contracts (Second) § 265 Discharge by Supervening Frustration. The famous coronation case concerning the rental of a room with a view of the coronation parade of King Edward VII is often identified as helping to develop the modern doctrine of frustration of purpose. Krell v Henry[1] [1903] 2 KB 740.

[111] Palmer 2002, p. i79.

[112] U.C.C. § 2-615 states:

> "Except so far as a seller may have assumed a greater obligation and subject to the preceding section on substituted performance:
> (a) Delay in delivery or non-delivery in whole or in part by a seller who complies with paragraphs (b) and (c) is not a breach of his duty under a contract for sale if performance as agreed has been made impracticable by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made or by compliance in good faith with any applicable foreign or domestic governmental regulation or order whether or not it later proves to be invalid.
> (b) Where the causes mentioned in paragraph (a) affect only a part of the seller's capacity to perform, he must allocate production and deliveries among his customers but may at his option include regular customers not then under contract as well as his own requirements for further manufacture. He may so allocate in any manner which is fair and reasonable.
> (c) The seller must notify the buyer seasonably that there will be delay or non-delivery and, when allocation is required under paragraph (b), of the estimated quota thus made available for the buyer."

[113] Palmer 2002, p. i76

[114] Palmer 2002, p. i76

[115] Palmer 2002, p. i76

frustration of purpose and impracticability parallel each other. Impossibility, frustration of purpose, and impracticability defense may relieve a party from performance which is proven to be affected after the occurrence of an event. The event must be an external event, not of the parties making, and must be of such nature that the parties were unable to anticipate or have knowledge of the events' eventual occurrence.

iii. Application of those doctrines

An interesting case form the US concerning impossibility and frustration of purpose in the context of Covid-19 is the *Longo v. Campus Advantage, Inc*. case (*Longo*).[116] In the Longo case, a group of students sued a private off-campus housing provider for refusing to release them from their leases when their universities were transitioned to virtual classrooms and in person classes were suspended. The students alleged numerous claims including rescission and plead that "both impossibility of performance and frustration of purpose" were grounds for rescission.[117] The court commented that "[i]mpossibility of performance and frustration of purpose are separate and distinct grounds for rescission" and that "while theoretically distinct" the two "are often confused by the courts and textbook writers in applying them."[118] The case was never decided on the question of the impact of Covid-19, but dismissed for failure to "plead sufficient facts."[119] In Yodice v. Touro College, dental students sued for reimbursement of tuition and fees when their college was closed during Covid.[120] The court found that "the COVID-19 pandemic excused Touro's nonperformance under the implied contract".[121] The reasoning of the court centers on the actions of the state to limit in person classes. According to the court "Touro's performance was made impossible by the Governor's order prohibiting the in-person operation of nonessential businesses during all of the relevant months of TCDM's move to remote instruction" and "[t]here is no dispute that holding in-person classes and other functions… would have been illegal."[122] Under these circumstances the affirmative defense of Touro of impossibility is applied using the reasoning that performance was "objectively impossible", was "produced by an unanticipated event that could not have been foreseen or guarded against in the contract" and that government regulation may be such an event, as contemplated under Restatement (Second) of Contracts §264.[123]

[116] Longo v. Campus Advantage, Inc., 588 F. Supp. 3d 1286 (M.D. Fla. 2022)
[117] Longo v. Campus Advantage, Inc., 588 F. Supp. 3d 1286, 1293 (M.D. Fla. 2022)
[118] Longo v. Campus Advantage, Inc., 588 F. Supp. 3d 1286, 1293 (M.D. Fla. 2022)
[119] Longo v. Campus Advantage, Inc., 588 F. Supp. 3d 1286, 1300 (M.D. Fla. 2022)
[120] Yodice v. Touro College and U. System, 767 F. Supp. 3d 86 (S.D.N.Y. 2025)
[121] Yodice v. Touro College and U. System, 767 F. Supp. 3d 86, 94 (S.D.N.Y. 2025)
[122] Yodice v. Touro College and U. System, 767 F. Supp. 3d 86, 93 (S.D.N.Y. 2025)
[123] Yodice v. Touro College and U. System, 767 F. Supp. 3d 86, 93 (S.D.N.Y. 2025); "If the performance of a duty is made impracticable by having to comply with a domestic or foreign governmental regulation or order, that

4. The economics of private contracting and risk preference

a. Contract Theory

Within the context of these doctrines of excuse of performance we consider the economic benefits of enforcing contracts. Under an economic view of contract law, the law should seek ways to maximize the benefits of private contracting. According to Posner, the "basic aim" of contract law is to deter parties "from behaving opportunistically toward their contracting parties, to encourage the optimal timing of economic activity and… obviate self-protective measures".[124] Others have framed the goals of contract law as seeking to promote efficiency in interfirm contracts[125], limit externalities from contracts,[126] and promoting certainty.[127] This recognizes the welfare implications of contract law. Contracts allow parties to express their preferences through their relationships and obligations.[128] This is tightly related to a party's freedom in the market to make choices which reflect the individuals' preferences, which may differ from other individuals. The law provides this freedom because it is thought that the free market is only possible if individuals and firms are allowed to freely enter into contractual relationships. Parties can maximize their individual welfare through entering into contracts which benefit them. According to the Schwartz and Scott normative theory of contract law, "contract law should facilitate the efforts of contracting parties to maximize the joint gains (the "contractual surplus") from transactions" and "contract law should do nothing else" based on "the premise that the state should choose the rules that regulate commercial transactions according to the criterion of welfare maximization".[129] Under this theory, the law provides rules and regulation in an effort to maximize the market value of transactions and thus promote welfare in society.

When a party to a contract fails to perform, the counterparty is thought to have suffered some form of disutility. The rationale behind providing damages for breach of contract is often framed in terms of making the non-breaching party whole, in the sense that they do not suffer economically from the breach or that they realize the benefits of the contract had it been

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regulation or order is an event the non-occurrence of which was a basic assumption on which the contract was made." Restatement (Second) of Contracts § 264.

[124] Posner 2011 p. 117.

[125] Schwartz and Scott 2002, p. 546.

[126] Shavell 2004, p. 320.

[127] Schwartz 2003, p. 142. Also see generally: Aubrecht 2024, PhD Thesis: Chapter 5. "Since it costs a lot to win, and even more to lose": Competition Law and the Arbitration of Tort Claims. p. 272.

[128] According to Aubrecht "as individuals are in the best position to know what contracts will increase their utility, they should be allowed to contract with others" and "[t]he state can support the ability of parties to commit to contracts through the enforcement of contracts." Aubrecht 2024, p. 137.

[129] SCHWARTZ and SCOTT 2003, P. 544.

performed by the counter party.[130] The law usually seeks to avoid the non-breaching party from gaining a windfall, which would be a benefit which they would not have realized if not for some circumstance of chance which would make them better off than they would have been if the counter party had performed, however some parties might allocate risk in order to ensure a windfall does occur, even if speculatively.[131] In such a case the law should not seek to avoid a windfall from accruing to one of the parties.[132]

There is some reason to believe that doctrines which excuse performance are designed in some ways to avoid providing the non-breaching party with a windfall. There is no doubt that events such as the Brexit, Covid-19 and the war in Ukraine have provided some parties a windfall due to circumstances beyond their control. More importantly, these doctrine can be seen as a type of risk spreading among the contracting parties. By applying the contracts strictly in terms of their risk allocation function, the law is recognizing that parties are often bargaining over a future which has many possibilities and which they have the opportunity to contract over. When parties know there is a possibility of nonperformance and an excuse for that non performance under certain circumstances, they can invest in mitigation, or insure against losses. The economic literature often points to the least cost insurer, as the party which should take measures to ensure against losses in the event of non-performance or an event occurring which the law would allow for an excuse of performance.[133] The economic approach to contract law does not only seek to allow parties to freely enter into contracts in order to maximize the gains from trade, but also to induce parties to take appropriate precautions which would ensure that costs are minimized in the event of circumstances occurring which force a party into non performance. These extraordinary events make it even more salient to parties that they should

[130] According to Posner, "The objective of giving the promisor an incentive to fulfill his promise unless the result would be an inefficient use of resources can usually be achieved by giving the promisee his expected profit on the transaction." Posner 2011 p 150.

[131] According to Kovac and Aubrecht "The potential windfall of having a contract's value change over time is a factor that parties can consider when ex ante assessing the risks of contracting. However, it may not be worth much time to consider a potential windfall, as the information costs of assessing such a scenario may be excessive and arguably speculative." Kovac and Aubrecht 2022 p. 12.

[132] According to Kovac and Aubrecht "The parties to a contract may anticipate the possibility of the contract leading to a windfall for one of the parties or at least anticipate changed circumstances in market values which the parties may value. In some cases, contracts are entered into specifically to spread risk for one or both of the parties to the contract or are entered into in speculation about the future value of performance. This may also complicate option contracts, which are also a mechanism used in private contracting to spread risk. Courts should be particularly cautious when applying the doctrine of frustration to these types of contracts that specifically anticipate a certain amount of uncertainty and specifically allocate risk among the parties regarding this uncertainty." Kovac and Aubrecht 2022 p. 12

[133] According to Posner, " The general principle is that if a risk of loss is known to only one party to the contract, the other party is not liable for the loss if it occurs. This principle induces the party with knowledge of the risk either to take appropriate precautions himself or, if he believes that the other party might be the more efficient preventer or spreader (insurer) of the loss, to reveal the risk to that party and pay himself to assume it. Incentive are thus created to allocate risk in the most efficient manner." Posner 2011. P. 158.

take into account the risk associated with their contracts to ensure that appropriate precautions are taken which address the potential risks related to nonperformance.

b. Gap Filling, Default Rules and Mandatory Rules.

The law often incorporates economic principles into how contracts are interpreted and enforced. The law can act to fill in incomplete contracts, provide default rules which are imposed unless parties contract around them, or provide mandatory rules which cannot be contracted around. According to Posner "[a]djudicative gap filling is a particularly economical method of dealing with contingencies that, even if foreseeable in the strong sense that both parties are fully aware that they may materialize, are so unlikely to do so that the cost of careful drafting to deal with them exceed the benefits when those benefits are discounted by the (low) probability that they will ever be realized".[134] This reflects a preference in the law to promote efficient market outcomes in contracts which is often found within the legal provision of mandatory rules and default rules. Mandatory rules are legal obligations which cannot be contracted around. According to Cooter and Ulen "[b]y imposing mandatory terms, the law regulates the contract" which reflects "the economic theory of market regulation", as these mandatory rules are designed to address a specific type of market imperfections which lead to inefficient contracting.[135] According to Ayers and Gertner "immutable rules are justifiable if society wants to protect (1) parties within the contract, or (2) parties outside the contract".[136] Thus the possibility of externalities is relevant when considering which default rules to use. Default rules concern the inability of contracting parties to draft a complete contract due to time and cost constraints which everyone faces and the desire for states to impose rules to prompt parties to either explicitly opt out of the rules through contracting or accept them.[137] In theory, a complete contract is impossible because the time and costs of writing such a contract are beyond the capacity of any individual or firm.[138] According to Cooter and Ulen "perfect contracts contain terms that explicitly allocate all risks" which "requires costly negotiating" and this "must be balanced against the benefit from explicit allocation of risk" which may lead to "the cost of negotiating over remote risks may exceed the benefit" which means that "efficient

[134] Posner 2011, P. 118-119. Furthermore, "[i]t may be cheaper from a social standpoint for the court to plug in (after the fact of course – after a case has arisen) a contractual term to deal with the unanticipated, uprovided-for contingency that has materialized". P. 119.
[135] Cooter and Ulen 2016, P. 294.
[136] Ayers and Gertner 1989, P. 88.
[137] Ayers and Gertner 1989 and Parisi 2013.
[138] According to Kovac and Aubrecht 2022, "[T]he ex ante parties' contracting efforts (balancing marginal benefits and costs) would depend on how courts interpret missing and vague terms. As Hermalin, Katz and Craswell point out, the question of how the courts enforce incomplete contracts is essential to an analysis of the effort that parties should make to provide for contingencies in question." P. 21. Citing to B E Hermalin, A W Katz and R Craswell, 'The Law and Economics of Contracts,' in M A Polinsky and S Shavell, eds, The Handbook of Law and Economics, North-Holland, Amsterdam, 2008, p 95.

contracts have gaps concerning remote risks."[139] The gaps in the contract can be filled by courts to impose terms which the law considers as default rules.

Default rules might allow the parties to "reduce the need for specific bargaining and to reduce transaction costs."[140] Default rules also "can be designed to correct for information asymmetries and other market failures".[141] Ayers and Gertner discuss how "when one party to a contract knows more than another, the knowledgeable party may strategically decide not to contract around even an inefficient default" as "the process of contracting around a default can reveal information" and "the knowledgeable party may purposefully withhold information to get a larger piece of a smaller contractual pie."[142] Default rules can be thought of in terms of either alleviating an unnecessary negotiation cost for parties or imposing on parties an incentive to negotiate around the defaults.[143] If one of the parties is behaving strategically which results in inefficient contracting, "lawmakers may be able to undercut the incentives for this strategic rent-seeking by establishing penalty defaults that encourage better informed parties to reveal their information by contracting around the default" but must be wary to not "impose penalty defaults indiscriminately" to avoid inefficient outcomes and only be used when "it results in valuable information revelation with low transaction costs."[144] Default rules should be used when there are gaps in private contracting which lead to inefficiencies, but lawmakers should be cautious to ensure the default rules being used to promote efficiency in private contracting do not have unintended consequences which would lead to inefficiency or externalities.

We can see in the use of these doctrines that there is a divergence in how default rules are provided and how gaps in contracts are filled. A risk averse judicial systems may be more willing to provide default rules and fill gaps which provide protection for events such as the Brexit, Covid-19 and war. This can easily be seen when comparing the differences between force majeure in the French code and force majeure clauses as used in the US and UK. While the provisions for force majeure are found directly in the French code, essentially a default rule for private contracting, there is no such provision in the US or UK statutes, and force majeure clauses are used in private contracting as a way to allocate risk between the parties. When a court must review a force majeure clause in the US or UK, as was common during the Covid-19

[139] Cooter and Ulen p. 349.
[140] Parisi 2013, P. 78.
[141] Parisi 2013, P. 78.
[142] Ayer and Gertner, p. 127
[143] According to Ayers and Gertner "efficient defaults would take a variety of forms that at times would diverge from the "what the parties would have contracted for" principle. To this end, we introduce the concept of "penalty defaults." Penalty defaults are designed to give at least one party to the contract an incentive to contract around the default rule and therefore to choose affirmatively the contract provision they prefer. In contrast to the received wisdom, penalty defaults are purposefully set at what the parties would not want -in order to encourage the parties to reveal information to each other or to third parties (especially the courts)." Ayers and Gertner 1989, P 91.
[144] Ayers and Gertner, p. 127, 128.

pandemic, the court was being asked to enforce the private allocation of risk between the parties, not impose a default rule which allocated risk between the parties. The use of force majeure clauses can be further differentiated between the civil and common law: In common law jurisdictions private contracting must address the specific events which will be considered a force majeure event in the contract. Civilian jurisdictions provide more leniency in that regard, with German courts possibly looking at statutory definitions to interpret a general force majeure clause, while similarly under the French law, the courts will determine if an event falls under the Codes provisions. Another issue concerns the use of impossibility and impracticality found in the common law, where Covid-19 was found to make performance impossible or impracticable in some instance and not in others. When comparing this with the German approach found in its courts' Covid19-related decisions the courts were applying the material aspects of the doctrines more consistently, with differences in the decisions being usually attributed to the unreasonableness of expecting the parties to hold onto the contract.

c. Least Cost Insurer

Impossibility relates to the physical impossibility of performance of a contract. This might be because the underlying subject of the contract is destroyed, if for instance there was a contract for the sale of a specific boat which was lost in a shipwreck in the time between the signing of the contract and the agreed time of delivery. One can contemplate any number of circumstances where impossibility of performance materializes after a contract is signed. Between contracting parties, one party may be in a better position to bear risk related to the performance of the contract in the event that subsequently impossibility occurs. According to Cooter and Ulen, "[i]nterpreting the impossibility doctrine to assign liability to the lowest-cost risk-bearer minimizes the cost of remote risks" which "maximizes the surplus from the contract, which the parties can divide between them".[145] Furthermore, "efficiency requires interpreting the impossibility doctrine as follows: If a contingency makes performance impossible, assign liability to the party who could reduce or spread the risk at least cost."[146] For instance, the seller of a ship might be the lowest cost risk bearer prior to delivery of the ship because they are in the position to most cheaply place an insurance policy on the ship. Parisi describes the same concept as the "best risk bearer" where "all things being equal, the law should generally allocate risks and liabilities to the individuals who can best bear them".[147] The concept of lowest cost risk bearer is related to the concept of cheapest cost avoider, cheapest precaution taker and cheapest risk avoider involving negligence claims.[148] The law can allocate risk among the parties based on their respective abilities to avoid risks and to insure for risks. This functions as

[145] Cooter and Ulen 2016, P. 351-352.
[146] Cotter and Ulen 351
[147] Parisi 2013, P. 27.
[148] See Calabresi 1970.

a type of risk preference the law adopts. By forcing parties into considering ex ante the possibility that the law may find them the party which will need to internalize the costs in the event of nonperformance by the counter party, the law encourages the parties to contract ex ante over the allocation of risk between the parties. This preference in the law to place additional requirements on the parties based on their respective ability to insure against losses due to the contract failing. In contrast, the events of Covid-19, the Brexit, and the war in Ukraine, once materialized, would need to be contemplated by contracting parties. The parties in the best position to ensure against nonperformance would be wise to take into account the existence of these events. Both the ex-ante and ex-post view of risk materializing from extreme events shows that private contracting is perhaps better able to deal with risk allocation between parties than rules imposed by the state.

d. Specific Performance v. Damages

When a contractual promise is broken, the law steps in to provide a remedy for the non-breaching party.[149] In some cases, the performance is impossible or economically unreasonable. Parties can contemplate the occurrence of nonperformance through their contracting provisions. When breach is a matter of choice by one party, it may be due to opportunism, impossibility, or due to efficiency (efficient breach). Posner would "throw the book" at the opportunistic breaching party, as opportunistic breach is done "merely to take advantage of the promisee's vulnerability in a setting… in which performance is sequential rather than simultaneous".[150] In the other two instances of breach (impossibility and efficient breach), "it is uneconomical to induce completion of performance of a contract after it has been broken".[151] One "reason for preferring damages remedies to specific performance in general is that a damages judgment is, for the court, a one shot deal".[152] Under the positive option theory of contracts, a party is "promising that" they "will either perform or pay the amount specified in the clause", which is consistent with the postulation of Oliver Wendell Holmes that "when you sign a contract in which you promise a specified performance… you buy an option to perform or pay damages", which can also be described as " a "no fault" theory of contract law".[153] In the

[149] According to Posner, "[w]hen a breach of contract is proved, the issue becomes that of the proper remedy. There is a variety of possibilities, which in rough order of increasing severity can be arrayed as follows: (1) the promisee's reliance loss (the costs he incurred in reasonable reliance on the promisor's performing the contract; (2) the expectation loss (loss of the anticipated profit of the contract); (3) liquidated damages (damages actually specified in the contract as the money remedy for a breach); (4) consequential damages (the breach's ripple effects on the promisee's business); (5) restitution (to the promise of the promisor's profits from the breach); (6) specific performance (ordering the promisor to perform on penalty of being found in contempt of court); (7) a penalty (as distinct from liquidated damages, which are a form of compensatory damages) specified in the contract, or other punitive damages." Posner 2011, P. 149.
[150] Posner 2011, P. 149.
[151] Posner 2011, P. 150.
[152] Posner 2011, P. 164.
[153] Posner 2011, P. 170.

case of nonperformance it is important to identify the reason for nonperformance, as the potential remedies are often related to the cause of nonperformance. There are certainly numerous cases which were not litigated in which one of the contracting parties determined that performance was going to be uneconomical, and the simply decided for the "option" of nonperformance by and paid the resulting damages rather than perform and suffer additional economic harm.

e. Amendments to Contracts

Since "contract liability is strict liability" there is a possibility that the breaching party is "in breach of his contract because he simply is unable, rather than merely unwilling, to carry out his promise yet has no defense of impossibility or force majeure" and "in such a case, the parties will agree to modify the contract, with appropriate compensation for the promisee".[154] Parties should be willing to renegotiate contracts under such extreme circumstances as the Brexit, Covid 19 and the war in Ukraine. Some legal systems, such as France and Germany, are more willing to impose on parties a duty to renegotiate or a judicial mechanism which adapts the contract to the change in circumstances, while the US and UK are not willing to impose such duties to renegotiate. This may demonstrate how the duty to renegotiate may be tending towards risk aversion in this respect, as the duty to renegotiate also implies that the changed circumstances will have to be taken into account in the renegotiations. The common law may be less willing to impose such duties as they conflict with the freedom of contract of the individual. This may represent risk neutrality, as it does not promote giving preference to one party over the other, while the duty to renegotiate may favor the party which would be in breach.

5. The law and economics of private contracting and excuse of performance

In the case of market shocks which can lead to an excuse of contract performance, we examine the following legal doctrines: material change in circumstance, improvision, force majeure, frustration of purpose and impossibility.

Some of these doctrines are ones which the parties must freely agree to, while other may be imposed on the parties by the law. This reflects how states can take a particular stance toward allocating risk between contracting parties, which can be either identified as placing the burden completely on the parties or by providing mandatory or default rules which allocate risk between the parties. Here we consider that the state can be risk averse through providing mandatory rules which parties cannot contract out of. When a state adopts a risk neutral

[154] Posner 2011, P. 161.

stance, they may provide a default rule which contracting parties can freely opt out of through contractual provisions which describe the duties of the parties given some type of shock occurs which places stress on the performance of one of the parties. A state can also be considered risk loving when they provide no default or mandatory rules, and place the entire burden on the contracting parties to make provisions to address such circumstances.

a. Risk Preference & Uncertainty Avoidance in Individuals and Firms

Parties can express their risk preferences through their contracting. Bernoulli identified how when "people make decisions under uncertainty" they "do not attempt to maximize expected monetary values" but instead "they maximize expected utility".[155] If individuals or firms are risk averse, this will be reflected in how risk is allocated in their contracts. For instance, when a party is risk averse "uncertainty and the risk of a loss may create welfare losses that exceed the actual expected or materialized loss, if the risk cannot be insured or diversified".[156] Cooter and Ulen comment that "[a] person is said to be risk-averse if she considers the utility of a certain prospect of money income to be higher than the expected utility of an uncertain prospect of equal expected monetary value".[157] Risk neutrality reflects a indifference "to uncertainty" and an unwillingness "to pay a positive premium to insure against a risk".[158] According to Schwartz and Scott "[i]t is optimal for risk-neutral firms to invest resources in drafting until the writing is sufficiently clear, in an objective sense, so that the mean of the distribution of possible judicial interpretations is the correct interpretation".[159] A risk loving preference relates to how a party "has an increasing marginal utility of income and, therefore, prefers an uncertain prospect of income to a certain prospect of equal expected monetary value".[160] While it important to recognize that individuals and firm express risk preferences through their contracting, it is also important to simultaneously recognize that these risk preference can be influenced by the law, which itself may have a specific preference for risk.

Allocation, or reallocation of risk can be seen as one of the primary functions of contracts.[161] In terms of contracting over unforeseen circumstance, such as Brexit, Covid 19, and the war in Ukraine, many potential situations are not addressed as the cost of contracting over countless

[155] Cooter and Ulen 2016, P. 44. Bernoulli, Daniel "Exposition of a New Theory on the Measurement of Risk" Econometrica, Vol. 22, No. 1. (Jan., 1954), pp. 23-36. (originally published in 1738)
[156] Parisi 2013, P. 260.
[157] Cooter and Ulen 2016, P. 45.
[158] Parisi 2013, P. 260.
[159] Schwartz and Scott 1989, P. 577.
[160] Cooter and Ulen 2016, P. 46.
[161] According to Palmer "one main purpose of a contract is to allocate the risk of such events" (supervening) "and once the risk is allocated by the contracting parties" consistent with the concept of "*pacta sunt servanda*". Palmer 2022, i71.

and potentially unknowable future events would be cost intense.[162] Parties can accept a certain amount of risk by not addressing remote possibilities ex ante in order to lower the transaction costs of contracting, but in doing so they may also be allocating risk between the parties ex post in the event of such an unaddressed event occurs. According to Parisi "[t]he reallocation of risk is a double edged sword, since it may create welfare gains through the incentive system but, at the same time, create welfare losses due to the risk aversion of the affected individuals" which "implies that, if alternative efficient legal solutions are available, preference should be given to those solutions that "spread" the risk rather than concentrate it on one or the other party".[163] The work of Kahneman and Tversky further identified how "individuals set reference points and evaluate risky outcomes on the basis of potential losses and gains" which is "[c]ontrary to the expected utility framework" of Bernoulli, as "prospect theory measures losses and gains with respect to the reference point, and does not measure the absolute wealth yielded by the risky prospects".[164]

b. Risk Preference & Uncertainty Avoidance in States and Governments.

States can express risk preferences, which can also be thought of in terms of the law allocated risk within the provisions of mandatory rule, default rules, through judicial enforcement of contracts, and the use and specific application of doctrines related to the excuse of performance. Risk averse legal systems may be willing to spend more time making clearly delineated codes with related doctrines which are to be used in courts when parties request judicial excuse of contractual obligations. Generally, we can see that civil law jurisdictions are more willing to invest ex ante in the formation and enactment of laws through codes or legislation. This ex ante investment in the provision of law can be seen as an upfront investment in the law which is aimed at making the law more certain and identifiable by individuals and firms. In theory, the high up-front costs can be seen within the framework of the preference for rules vs. standard, where the high up-front costs of rules has lower ex post costs in determination of objective compliance or non-compliance.[165] Standards on the other hand imply some more risk than rules, as standards are seen as less costly to enact into the law ex ante, but more costly ex post as courts are tasked with making more intensive determination of compliance with the vague standards.[166] The risk preference of the state may also be reflected in the willingness to allow legal challenges to develop which will need to be addressed ex post,

[162] Cenini, Luppi and Parisi. P. 18. "This idea is related to the necessary incompleteness of contracts: negotiating the allocation of risks imposes transaction costs with certainty while the occurrence of the risk is, in our case, remote and improbable."
[163] Parisi 2013, 260.
[164] Parisi 2013, P. 237. Kahneman, Daniel, and Amos Tversky. "Prospect theory: An analysis of decision under risk." Handbook of the fundamentals of financial decision making: Part I. 2013. 99-127.
[165] Hans Bernd Schaefer. Rules v. Standards.
[166] Hans Bernd Schaefer. Rules v. Standards.

and the unwillingness to embrace uncertainty which is reflected in more detailed ex ante provisions found within the law.[167] This may reflect a legal culture which is divergent across borders and relates to how society is willing to accept uncertainty. According to Van Dam "[u]ncertainty avoidance deals fundamentally with the level of anxiety about an unknown future in a country, more particularly by the extent to which the members of a culture feel threatened by ambiguous or unknown situations."[168] This is distinct from risk avoidance, as "uncertainty avoidance leads to a reduction of ambiguity."[169] It is also suggested that countries with a civil law tradition "show stronger uncertainty avoidance and therefor a greater need to prevent uncertainties in the behavior of other people by means of laws and rules" and "tend to be more precise than in those with weak uncertainty avoidance."[170] Uncertain avoidance is reflected in the judicial system through the preference of rules v standards, which require different ex ante and ex post formulation costs. In this sense, statutory rules which address excuse of performance show demonstrate a higher risk avoidance as they tend to be more easily applied ex post, but are more costly to formulate ex ante. Common law approaches to excuse of performance may reflect a willingness to accept more uncertainty in private contracting which is reflected in the need for more intensive judicial scrutiny of appeals to courts for excuse of performance. The risk preference and the uncertainty avoidance of a legal system reflect cultural preferences for how the law should be used to address excuse of performance when events which were not anticipated by parties lead to complications in performance. This may also relate to how legal systems will accept the use of doctrines which are strict in requiring parties to comply with their contractual obligations or lenient in terms of providing parties with options to renegotiate their contracts when events have significantly changed the performance related to contractual relationships.

Individuals, firms and legal cultures can display their risk preference and levels of uncertainty avoidance through signaling. When parties and firms signal these preferences in private contracting it will be reflected in the four corners of agreements. When states signal these preferences, it will be signaled through the law, be it in statute or through judicial decisions. This also relates to the expressive function of the law, which can serve as focal points for parties who are bargaining in the shadow of the law. Individuals who are unwilling to accept the default rules of a state will bargain around these rules in order to more fully capture their specific preference for risk and uncertainty avoidance in their private contract.

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[167] Van Dam

[168] van Dam, C. C. (2007). European Tort Law and the Many Cultures of Europe. In T. Wilhelmsson, E. Paunio, & A. Pohjolainen (Eds.), *Private Law and the Many Cultures of Europe* (pp. 57-80). Kluwer Law International.

[169] van Dam, C. C. (2007). European Tort Law and the Many Cultures of Europe. In T. Wilhelmsson, E. Paunio, & A. Pohjolainen (Eds.), Private Law and the Many Cultures of Europe (pp. 57-80). Kluwer Law International.

[170] van Dam, C. C. (2007). European Tort Law and the Many Cultures of Europe. In T. Wilhelmsson, E. Paunio, & A. Pohjolainen (Eds.), Private Law and the Many Cultures of Europe (pp. 57-80). Kluwer Law International.

Private parties should take into account the risk preference of states when deciding how to negotiate and draft their contracts. The willingness of a state to impose mandatory or default rules or allow for parties to freely negotiate over terms will play a role in how the parties allocate risk between them. The potential for events such as the Brexit, Covid 19, and the war in Ukraine to frustrate the performance of private contracts is not unknown to the parties, rather it is cost prohibitive to negotiate every potential future event. By carefully structuring private contracts to make provisions for such an event, the allocation of risk between parties, and the inclusion or not of relevant contract terms shows how private contracting is more capable of addressing the risk associated with nonperformance. A state's risk preference may however be the source of additional transaction costs when the default rules are unacceptable to the parties or may alleviate transaction costs when they are acceptable. By allowing parties to avoid performance due to these unforeseeable events, either by default rules or through enforcing private contracting, states can enable private parties to enter into and draft more efficient contracts which reflect their individual preferences and which increase welfare. States should be cautious to limit the ability of private parties to enter into contracts which allocate risk over these potential frustrating events, as this may impose transaction costs on parties which may lead to a decrease in gains from trade.

6. Conclusion

We can identify how the recent market shocks of the Brexit, Covid 19 pandemic, and the war in Ukraine have been interpreted by courts in several states. These events have lead to parties seeking excuse of performance to private contract obligations. States have taken certain approaches to applying doctrines which excuse contractual performance, and these approaches reflect institutional risk preferences found in the law. When the law places the burden on parties to take individual measures to address the possibility of nonperformance given these types of shocks, we argue this reflects a type of risk preference which can be identified as risk neutral, that being that the state is willing to allow private contracting parties to fully internalize the impacts of these events and the potential for maximizing gains from trade and thus welfare. When states provide mandatory rules to address these types of risk, we argue this represents an institutional risk preference which reflects risk aversion, meaning that the state is unwilling to let the parties freely contract over the possibility of such events occurring. When states provide opt out rules, this represents a type of risk neutrality, where the state provides both a rule which would address the stress from such a shock, but also allows parties to freely decide to reallocate risk by opting out of the state provided risk mitigation scheme.

Private parties need to consider the way in which the state will act to allocate or reallocate risk during certain types of market shocks. Excuse of performance is one such issue which represents institutional preference for risk allocation which must be accounted for by

contracting parties. A risk neutral approach may be the most efficient approach, given that such an approach should take into account both the costs and benefits of contracting and the possibilities of shocks which could lead to an excuse of non performance from contractual obligations while still allowing parties to maximize the welfare gains from private contracting.

Abbreviations

AG = Amtsgericht

LG = Landgericht

OLG = Oberlandesgericht

BGB = Bürgerliches Gesetzbuch

BGH = Bundesgerichtshof

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