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**Contractual Performance in Covid-19 Times: Does Anglo-French
Legal History Repeat Itself?**

Pedamon, C. and Vassileva, R.

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Contractual Performance in COVID-19 Times

Does Anglo-French Legal History Repeat Itself?

Abstract: The COVID-19 pandemic has dealt a universal challenge to contractual performance, but legal systems have responded differently. In this article, we focus on two jurisdictions with distinct paths of development — England and France — to examine if they have drawn from their own legal history to craft solutions to this challenge and to consider if either has better-suited tools to address it. Notably, the UK has refrained from intervening in the area of contract law, thus relying on long-standing common law doctrines and equitable remedies, while, in France, the government has intervened with a series of *ordonnances* providing contracting parties with new tools tackling difficulties of performance, which add to the existing arsenal in the *Code civil*. The article demonstrates that the responses to the COVID-19 challenge by England and France have historic roots and illustrate important legal cultural differences *vis-à-vis* state intervention in the area of contract in trying times. Moreover, even though, at first glance, parties contracting under French law have more tools balancing freedom of contract and fairness, a closer look reveals that over protection or under protection may lead to the same outcome for contractual relationships on both sides of the Channel. Ultimately, in both countries, parties seem better off settling their disputes themselves, away from the courts.

1. Introduction

1. The COVID-19 pandemic gave rise to a public health emergency which led to economic turmoil that world leaders have compared to the aftermath of World War II (WWII).¹ National governments implemented diverse measures in an attempt to curtail the pandemic and support the economy. While contract law is rarely the focus of public concern, it should be noted that COVID-19 may have long-lasting repercussions for the performance of contracts at the heart of everyday life — the execution of obligations may become more difficult, impossible, or illegal due to the public health emergency itself and/or the measures imposed by governments.² Hence, it is interesting to observe that contract law is one of the areas in which national responses towards COVID-19 seem to diverge substantially — some governments have set forth specific rules addressing contractual performance during the pandemic³ whilst others have chosen not to take action.⁴

2. Meanwhile, national contract laws differ regarding the impact which supervening events such as the COVID-19 emergency may have on contract. Although many continental jurisdictions have embraced the doctrine of *force majeure*, which usually addresses cases of supervening impossibility and/or illegality, or other doctrines which lead to similar results, their scope, criteria of application and effects prescribed by law are not homogeneous.⁵ The concept of hardship, which developed primarily in the aftermath of World War I (WWI) to deal with instances of

¹ In his first speech on national television dedicated to the COVID-19 pandemic, French President Emmanuel Macron repeatedly said that France was ‘at war’. See « Nous sommes en guerre »: le verbatim du discours d’Emmanuel Macron (*Le Monde*, 16 March 2020), https://www.lemonde.fr/politique/article/2020/03/16/nous-sommes-en-guerre-retrouvez-le-discours-de-macron-pour-lutter-contre-le-coronavirus_6033314_823448.html; Germany’s Chancellor Angela Merkel has compared the impact of COVID-19 to the aftermath of WWII. See ‘Merkel: Coronavirus is Germany’s greatest challenge since World War II’ (*Deutsche Welle*, 18 March 2020), <https://www.dw.com/en/merkel-coronavirus-is-germanys-greatest-challenge-since-world-war-ii/a-52830797>.

² Many contracts are not directly affected by the pandemic itself, but by the concrete responses by governments such as prohibitions for gatherings, the shutting down of particular businesses for extended periods of time (restaurants, cinemas, etc.), the closing of borders, the imposition of curfews and restrictions on movement, etc.

³ Below we discuss the French response; For Italy, see Decree Law no. 18 of 17 March 2020.

⁴ The UK response we discuss below; Some East European countries like Bulgaria and Serbia have allowed the delayed payment of bills, mortgage installments, etc., but have not put forward general measures addressing contractual performance.

⁵ In some jurisdictions the *force majeure* is explicitly defined in the law. See Art. 1218 of the French *Code civil*; Other jurisdictions have a more nuanced approach. For instance, the Italian *Codice Civile* refers to diverse types of impossibility which may excuse non-performance. See its Arts. 1218, 1256, 1463 and 1464.

overly burdensome performance,⁶ has been progressively enacted in continental contract laws under various names.⁷ Differences in the scopes, the criteria of application, and the consequences, nevertheless, remain.⁸ The response by common law jurisdictions to supervening events is not harmonized either — the doctrine of frustration, which terminates agreements due to unforeseen supervening events, seems to have acquired different roles and scopes.⁹ Some jurisdictions recognize the concept of hardship while others do not,¹⁰ etc. Although the *force majeure* is not a common law doctrine, parties are encouraged to include *force majeure* clauses in their contracts and allocate the risk imposed by supervening events themselves.¹¹

3. In this article, we compare the likely effects of the COVID-19 emergency on the performance of contracts in two jurisdictions with distinct paths of legal development — England and France. The purpose of the comparison is to:

—showcase that legal cultural disparities, which have historical roots, persist even during a global crisis which has affected these jurisdictions in similar ways;¹²

—consider if these countries have drawn from their own legal history in seeking to find solutions which balance freedom of contract and fairness; and

⁶ Arguably, Germany was the first country to relieve parties experiencing burdensome performance in the aftermath of WWI through jurisprudential solutions relying on the scholarly theories of Krückmann and Oertmann. For an overview, see B.S. MARKESINIS, H. UNBERATH & A. JOHNSTON, *The German Law of Contract: A Comparative Treatise* (Oxford: Hart Publishing, 2nd edn 2006), pp 326-342.

⁷ *Imprévision* (Art. 1195 of the French *Code civil*), supervening onerousness (Art. 1467 of the Italian *Codice Civile*), etc.

⁸ See E. HONDIUS & H. C. GRIGOLEIT (eds), *Unexpected Circumstances in European Contract Law* (Cambridge: Cambridge University Press 2014). See also C. PEDAMON & J. CHUAH, *Hardship in Transnational Commercial Contracts* (Paris: Paris Legal Publishers 2013).

⁹ The common law in the United States seems to view frustration and impossibility as two distinct doctrines. For a discussion, see M.A. EISENBERG, 'Impossibility, Impracticability, and Frustration', 1(1). *JLA (Journal of Legal Analysis)* 2009, pp 207-261; By contrast, in contemporary English common law frustration encompasses instances of physical impossibility, illegality, frustration of purpose, etc. See G. TREITEL, *Frustration and Force Majeure* (London: Sweet & Maxwell, 2nd edn 2004); English law made the same distinction as US law in early 20th century.

¹⁰ The Uniform Commercial Code (United States) has enshrined the notion of impracticability in Section 2-615. By contrast, English law is reluctant to embrace it, as we explain below.

¹¹ W. SWALDING, 'The Judicial Construction of Force Majeure Clauses', in E. McKendrick (ed), *Force Majeure and Frustration of Contract* (Abingdon: Routledge, 2nd edn 1995).

¹² France and the UK have similar population sizes (approximately 66 million). At the time of writing of this article, France and the UK are amongst the countries in Europe which have the highest number of COVID-19 cases as shown by Worldometer: <https://www.worldometers.info/coronavirus/>.

—analyze if one of them has better-suited solutions to the challenges posed by COVID-19 to contractual performance.

4. As shown below, unlike England, France has a long record of legislative intervention in contract law during challenging times, such as wars, to which it has remained committed today because the measures endorsed by the French government *vis-à-vis* COVID-19 cover contractual performance. However, the novelty is that the government intervened at the outset of the emergency while historically it has intervened when the disastrous impact of crises on contractual performance was palpable. Meanwhile, we will also see that in contrast to English contract law, which only offers doctrines with limited scopes, French contract law, in theory, disposes of specific and better geared tools, which apply to supervening events like the COVID-19 pandemic.

Yet, messy intervention, such as the legislation enacted regarding COVID-19, may create more problems than it solves, and signature doctrines not only have narrow scopes, but are also dependent on judicial discretion. Neither jurisdiction disposes of an ideal solution to the difficulties of contractual performance arising from COVID-19. Ultimately, in both countries, parties seem better off settling their dispute quickly and amicably themselves away from the courts. Over protection or under protection may lead to the same outcome for contractual relationships on both sides of the Channel.

2. Contractual Performance in Times of Crisis: An Historical Overview

5. The fact that global leaders compare the COVID-19 emergency to the aftermath of wars serves as an invitation for an historical inquiry into how jurisdictions like France and England have approached the difficulties of contractual performance due to these challenges. It is interesting that one can discern a divide between France, which favours legislative intervention through special statutes for the sake of fairness,¹³ and England, which promotes freedom of contract and usually leaves the difficult choices at the discretion of the courts that can either reason in equity or apply/develop existing common law doctrines. In the cases in which the UK legislator has intervened, one also observes a narrower scope and a commitment to leaving a larger margin for discretion to courts compared to the French legislator who is more prescriptive.

2.1. France: A Long Tradition of Special Legislative Intervention

¹³ These can either pass through Parliament as *lois* (laws) or they are implemented by the government as decrees that circumvent parliamentary scrutiny (*ordonnance*, *décret*, *arrêté* or *circulaire*).

6. It is well-known that France is the first country to enact a civil code, but it is less known that one of Napoléon's main goals was to curtail the corruption of the judiciary.¹⁴ The principle of freedom of contract, which underlies his civil code, serves a dual purpose — it confines judicial intervention within narrow limits and pays due respect to the values of liberal individualism, which marked the 19th century.¹⁵ In line with the spirit of the *Code civil*, the French judiciary is wary of interfering with parties' bargains even when confronted with supervening events. The doctrine of *force majeure* enshrined in the original version of the code has been interpreted narrowly.¹⁶ Even during WWI, French courts were reluctant to allow its application — they insisted that performance had to become impossible, not merely excessively onerous, to relieve parties of their obligations.¹⁷ In principle, the traditional effect of the *force majeure*, as settled by French case law at the time, was suspension due to the usual temporary character of such events,¹⁸ which by itself could lead to harsh outcomes even if the application of the *force majeure* was allowed — it may be tremendously difficult to perform once a war is over due to an array of factors from labour shortages to lack of access to funding.¹⁹

Moreover, many students of the French law of obligations have historically pondered the clash between the *Canal de Craponne* (1876) case in which the French *Cour de cassation* (Court of Cassation) did not recognize the concept of hardship (*imprévision*) in a civil contract and the *Gaz de Bordeaux* (1916) case in which the *Conseil d'Etat* (Council of State) admitted hardship in an administrative contract.²⁰ France is one of the

¹⁴ M. ASCHERI, 'Turning Point in the Civil-Law Tradition: From *ius Commune* to Code Napoléon', 70. *TLR (Tulane Law Review)* 1996, p 1041.

¹⁵ Scholars, however, have disputed the extent to which the *Code civil* reflects the spirit of liberal individualism. See J. GORDLEY, 'Myths of the French Civil Code', 42. *AJCL (American Journal of Comparative Law)* 1994, pp 459-505.

¹⁶ Former Art. 1148 of the *Code civil* stated: 'There is no occasion for any damages where a debtor was prevented from transferring or from doing that to which he was bound, or did what was forbidden to him, by reason of force majeure or of a fortuitous event', (translation by G. ROUHETTES & A. ROUHETTES-BERTON); See G. CHANTEPIE & M. LATINA, *La réforme du droit des obligations* (Paris: Dalloz 2016), pp 529-536.

¹⁷ See the discussion by the former President of the French Court of Cassation B. LOUVEL, 'La Cour de cassation et la Grande Guerre', 9 November 2018, https://www.courdecassation.fr/publications_26/prises_parole_2039/discours_2202/premier_president_7084/cour_cassation_40656.html that refers to a case of the *Cour de cassation* confirming that war does not amount to *force majeure* per se (Cour de cassation civ. 4 août 1915, Maison Agnès/demoiselle Maalderinck, DP 1916, 1, p 22).

¹⁸ CHANTEPIE & LATINA, p 537.

¹⁹ It is interesting that these harsh effects of the *force majeure* inspired countries which had originally borrowed the French model of obligations to depart from it and to develop new principles promoting substantive fairness in contract. See R. VASSILEVA, 'On the Diverging Conceptions of Fairness in English and Bulgarian Contract Law: The Peculiar Journey(s) of Roman *Causa*', *OUCLF (Oxford University Comparative Law Forum)* 2019, <https://ouclf.law.ox.ac.uk/on-the-diverging-conceptions-of-fairness-in-english-and-bulgarian-contract-law-the-peculiar-transformations-of-roman-causa/>.

²⁰ Cour de cassation civ. 6 mars 1867, *De Galliffet/Commune de Pelissanne (Canal de Craponne)*, D. 1876, 1, 193, n. A. GIBOULOT; Conseil d'Etat 30 mars 1916, *Compagnie Générale d'Eclairage de Bordeaux/Ville de Bordeaux (Gaz de Bordeaux)*, <https://www.legifrance.gouv.fr/ceta/id/CETATEXT000007629465>; For an historic

continental jurisdictions, which enshrined the doctrine of hardship in civil contracts late compared to other European legal systems²¹ — this was only possible after the overhaul of French contract law via *ordonnance* n° 2016-131 of 10 February 2016.²²

7. Yet, as French legislators are aware of the limitations of the *Civil code*, they have not shied away from providing parties and, respectively, courts with tools to address difficulties of performance in extreme circumstances, such as war. One of the early 20th century examples is provided by the *loi* of 21 January 1918, better known as the *Loi Failliot*, which was relevant to commercial contracts entered into before the start of WWI.²³ Its Article 2 provided for termination of contract upon the request of either party

if it [was] established that due to the state of war, the performance of obligations of one of the contracting parties [would] involve costs or cause[d] it loss whose importance significantly surpass[e]d the forecasts which could have reasonably been made at the time of contracting.²⁴

Alternatively, pursuant to the same Article, upon the request of one of the parties, the judge could also suspend performance during a period s/he determined. However, as a way of encouraging negotiated solutions, Article 3 set a condition that any claim could only be filed following a call for conciliation before the president of the court. It should be noted that this Law was enacted at a time when, although there was no certainty when WWI would end, its impact on contractual performance was visible. The ‘exceptional’ nature of these statutory provisions justified that they would only apply during the war and its immediate aftermath, as provided in Article 1. Not surprisingly, in line with case law, the *Cour de cassation* restrained the application of this emergency legislation to narrow confines for the sake of legal certainty.²⁵ Subsequently, in the same spirit of easing contract performance in difficult times, when Europe was plagued by inflation, French legislators put forward a law in 1926 which allowed the

overview of the evolution of the judge’s role regarding contract in times of changed circumstances, see P. PICHONNAZ, ‘From *Clausula Rebus Sic Stantibus* to Hardship: Aspects of the Evolution of the Judge’s Role’, 17. *Fundamina* 2011, pp 125-143.

²¹ It seems that the first country to enshrine the concept in law was Poland in 1933. Italy, Greece, etc. followed suit during/after WWII. See A. PUELINCKX, ‘Frustration, Hardship, Force Majeure, Imprévision, Wegfall der Geschäftsgrundlage, Unmöglichkeit, Changed Circumstances’, 3. *JIA (Journal of International Arbitration)* 1986, p 54, P.J. ZEPOS, ‘Frustration of Contract in Comparative Law and in the New Greek Civil Code of 1946 (Article 388)’, 11. *MLR (Modern Law Review)* 1948, pp 36-46, E. ZACCARIA, ‘The Effects of Changed Circumstances in International Commercial Trade’, 9. *ITBLR (International Trade and Business Law Review)* 2005, pp 135-147.

²² See new Article 1195. For a commentary, see C. PEDAMON, ‘The Paradoxes of the Theory of Imprévision in the New French Law of Contract: A Judicial Deterrent?’, 112. *ACJFSALS (Amicus Curiae: Journal of the Society for Advanced Legal Studies)* 2017, pp 10-17.

²³ This Law applies to commercial contracts entered into before 1 August 1914 with the exclusion of financial operations on stock exchanges, hire contracts and lease agreements (Article 7).

²⁴ Translation our own; The same article also stipulates that the judge could terminate the contract with or without damages depending on the circumstances.

²⁵ See the case law cited in LOUVEL, ‘La Cour de cassation et la Grande Guerre’.

judicial modification of commercial leases at fixed prices every three years if the economic conditions resulted in variation of value of more than 25%.²⁶

The French legislature remained committed to the lessons learned from WWI during and after WWII. *Ordonnance* n°45-1483 of 30 June 1945 *relative aux prix* established rules pertinent to the determination of prices of products and services. Similarly to the *Loi Failliot*, the *loi* n°49-547 of 22 April 1949 *permettant la résiliation de certains marchés et contrats* set the conditions when the judge had to terminate commercial agreements upon the request of either party — Article 4 of this Law is almost a verbatim copy of Article 2 of the *Loi Failliot* with nevertheless ‘new economic circumstances’ as an alternative ground for termination in addition to the state of war. In contrast to the *Loi Failliot*, the *loi* n°49-547 was enacted nearly four years after the end of WWII when the economic consequences of the war were palpable. In addition to the relief granted to contracts entered into before 2 September 1939 as stated in Article 1, this Law provided for termination of commercial agreements concluded between 1 September 1939 and the liberation of the (French) territory where performance was ‘impossible’ due to the state of war and would lead to ‘new costs upsetting the economic balance of the contract’ in Article 6.²⁷ Such a high threshold was likely justified given that the only remedy available was termination. It is, however, interesting to note that Article 3 explicitly mentioned that parties seized the court *à défaut d’accord amiable* (where there is no amicable agreement). This seems to suggest that parties must try to renegotiate the contract by themselves before going to court, thus promoting freedom of contract. The new Article 1195, which enshrines the concept of hardship in the French *Code civil* in 2016, echoes the same idea, as highlighted below. Furthermore, the *Décret* n°53-700 of 9 August 1953 *adaptant le régime des loyers à la situation économique et sociale* linked leases to the minimum salary to adapt them to the socio-economic reality. The *Décret* n°53-960 of 30 September 1953 *réglant les rapports entre bailleurs et locataires en ce qui concerne le renouvellement des baux* revived the spirit of the 1926 law pertinent to commercial leases and the judicial review of rent mentioned above. Diverse specific Laws (*lois*) aimed at indexing mortgages were enacted too.²⁸

²⁶ See Art. 3 of the *loi du 30 juin 1926 réglant les rapports entre locataires et bailleurs en ce qui concerne le renouvellement des baux à loyer d'immeubles à usage commercial ou industriel, dite loi sur la propriété commerciale*. This law was modified by the *lois* of 22 April 1927, 12 July 1933, 13 July 1933 and 2 February 1937, the *décret* of 25 August 1937; and the *lois* of 18 April 1946, 25 August 1948, 31 December 1948, 24 May 1951 and 5 February 1953. In England, the main focus of concern in the same time period was regulating the rent of smaller dwellings inhabited by the working class. See Increase of Rent and Mortgage Interest (War Restrictions) Act 1915. See also UK Parliament, ‘A Short History of Rent Control’, Briefing Paper, Number 6747, 30 March 2017.

²⁷ In addition, Art. 2 of *loi* n°49-547 of 22 April 1949 set a stringent time limit that any request had to be made before 1 July 1949.

²⁸ See M. VASSEUR, ‘French Monetary Depreciation and Methods Used to Remedy It’, 30. *TLR (Tulane Law Review)* 1955-1956, pp 77-78.

8. In the context of the 1973 oil crisis, the Ministry of Economy and Finances issued a series of *circulaires*. One of them from 1974 provided for the indemnification of parties in public contracts when faced with changed economic circumstances upsetting the contractual balance (*l'équilibre contractuel*), thus applying the theory of *imprévision*.²⁹ The same Ministry, in response to a question by a Senator, confirmed that parties could invoke hardship based on the same *circulaire* in the context of the first Gulf War.³⁰ This explicit reminder that the principle of hardship was relevant to such public contracts even though the doctrine was embraced by the *Conseil d'Etat* in its case law serves as evidence of the paternalism typical of French law in trying times.

Below we will see that the Ministry of Finance did not hesitate to qualify COVID-19 as an event of *force majeure*.

In sum, the French government has remained committed to saving the parties from the drastic consequences, which challenging times have on contract, brandishing fairness as the justification for its intervention.

2.2. England: A Long Tradition of Judicial Discretion

9. Due to the relatively limited and specific intervention in the area of contract law illustrative of the commercial sensibility of the UK legislator, in England, the fate of contracts traditionally lies at the mercy of judges unless parties find solutions themselves. Judicial discretion, however, may be fickle, especially in challenging times.

2.2.1. Limited Legislative Intervention

10. UK legislators rarely intervene in the area of contract law, which can be explained with the particularities of the legal system — in common law jurisdictions, law is judge-made,³¹ the English common law is firmly committed to freedom of contract, so it is up to the parties to be proactive and define the terms of their bargains,³² etc. The UK Parliament has enacted legislation pertaining to contract law only in exceptional cases — for instance, when legal precedent leads to manifestly unjust results³³ or when existing legislation needs an update for better clarity.³⁴

²⁹ *Circulaire du 20 novembre 1974 relative à l'indemnisation des titulaires de marchés publics en cas d'accroissement de leurs charges économiques (Application de la théorie de l'imprévision)*, JORF 30 novembre 1974, p 11971, <https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000000661659>. This follows a series of *circulaires* providing indemnities due to hardship (7 November 1973, 25 January 1974, 30 April 1974, 14 June 1974 and 4 July 1974).

³⁰ See *question écrite au Sénat, n°12062 de M.P. GIROD* (Aisne - UMP), JO Sénat 18 octobre 1990, p 2233.

³¹ On the role of the common law judge, see P. GLENN, *Legal Traditions of the World* (Oxford: Oxford University Press, 3rd edn 2007), p 245.

³² On the importance of legal certainty for the common law, see I. MACNEIL, 'Uncertainty in Commercial Law', 13. *ELR* (*Edinburgh Law Review*) 2009, p 68; The English common law does not recognize a general principle of good faith unlike French law.

³³ For example, the Law Reform (Frustrated Contracts) Act 1943, as explained below.

Parliament also enacted emergency legislation regarding WWI and WWII touching upon contract law — the main focus was not on alleviating difficulties of contractual performance but on problems of payment. The Courts (Emergency Powers) Act, 1914 allowed courts to defer the execution of judgments and orders for the payment or recovery of a sum of money because of difficulties attributable to war for a time and under conditions the courts saw ‘fit’.³⁵ The Courts (Emergency Powers) Act, 1917 allowed courts to suspend or annul building contracts, which could not be performed ‘without serious hardship’ because of delay in the supply of materials or shortages of labour due to WWI.³⁶ It has been pointed out that this exceptional piece of legislation evidences that the common law did not dispose of remedies for the types of economic changes experienced in WWI.³⁷ The 1917 Act also gave power to the courts to suspend or annul contracts under the condition performance could not be enforced without ‘serious hardship’ due to government restrictions imposed in ‘defence of the realm’.³⁸ The requirement of direct causality between government actions and serious hardship seems to have been interpreted narrowly.³⁹ Furthermore, case law suggests that judges had serious concerns that the emergency legislation did not stipulate principles guiding the choice between remedies, which seems to be a point of contrast with French law.⁴⁰ The same 1917 Act also provided a statutory defence for non-performance of contracts due to compliance with restrictions imposed by the government,⁴¹ essentially mimicking the effects of a temporary *force*

³⁴ For instance, the Consumer Rights Act 2015 consolidated existing rules pertinent to consumer agreements.

³⁵ Section 1(1)(a) and 1(2).

³⁶ Section 1(1) which was further amended by The Courts (Emergency Powers) Act, 1919; In *Schofield v Maple Mill Ltd* (1918) 34 TLR 423, relief was provided under this section in a case concerning impossibility. The plaintiffs had entered into an agreement to do carpenters’ work part of which involved covering the floors of a mill with maple boards. However, due to a government prohibition to import maple, performance became impossible; *Blackburn Bobbin v TW Allen* [1918] 1 KB 540 at 552 suggests that judges interpreted the notion of building narrowly too: ‘The wording of the sub-section is narrow. Its operation is restricted... [I]t cannot apply to a contract for the supply of timber to be used for the making of bobbins for spinning mills’.

³⁷ R. G. MCELROY, *Impossibility of Performance* (Cambridge: Cambridge University Press, 1941), p 195.

³⁸ Section 1(2); In *Metropolitan Electric Supply Company v London County Council* [1919] 1 Ch 357 at 364, Sargant J concluded that the main intent behind this section was to motivate parties to renegotiate their agreement ‘by holding out the threat of the simpler process of suspension or annulment should an offer of a reasonable variation be declined’, thus promoting freedom of contract.

³⁹ *Direct United States Cable Co v Western Union Telegraph Co* [1921] 1 Ch 370 concerned the repair of a transatlantic cable which the defendant could not complete in time due to an array of factors, including instructions by the Admiralty to repair another transatlantic cable first. It was held that these ‘orders were given for the purpose of assisting and not restricting’ the endeavours to repair the cable, so they were not restrictions in defence of the realm.

⁴⁰ In *North Metropolitan Electric Power Supply Company v Stoke Newington Corporation* [1921] 1 Ch 455 at 468, Lawrence J stated: ‘I cannot help feeling much embarrassed by having to exercise a power so arbitrary in its nature’.

⁴¹ Section 3.

majeure, as understood in French law. While reassuring at first glance, this aspect of the 1917 Act left the question of what happens once restrictions were levied open — a similar issue experienced in France, as mentioned above.

On the question of the impact of government actions on performance, particularly interesting is the case of *Metropolitan Water Board v Dick, Kerr & Co*,⁴² which concerned a contract for the building of a reservoir. The appellants argued that illegality due to instructions by the Ministry of Munitions to stop work was only temporary, so the contract was not frustrated and the builders had to continue performance. Lord Dunedin, nevertheless, stressed:

On the whole matter I think that the action of the Government, which is forced on the contractor as a vis major, has by its consequences made the contract, if resumed, a work under different conditions from those of the work when interrupted.⁴³

Essentially, the builders would have to perform a completely different contract to which they would not have agreed in the first place. Thus, the House of Lords sided with the builders and established that the contract was frustrated. In the next section, we will see in more details the important impact which war had on the development of the doctrine of frustration.

11. To address the difficulties resulting from WWII, UK legislators enacted the Courts (Emergency Powers) Act, 1939, which resonated the spirit of WWI legislation. It conferred onto courts powers regarding the remedies for the non-payment of money and the non-performance of some obligations. It differs from WWI legislation in several ways — it does not bestow powers upon the court to suspend or annul contracts and it does not provide a statutory defence of government interference in an action for non-performance. In other words, the focus was on suspending the enforcement of the remedy while the contract was still standing. Case law pertinent to the 1939 Act, however, sheds further light on the issue of judicial discretion. Namely, in *Metropolitan Properties v Purdy*,⁴⁴ Goddard LJ stressed:

Under [this Act], the court...is really put very much in the position of a Cadi under the palm tree. There are no principles on which he is directed to act. He has to do the best he can in the circumstances, having no rules of law to guide him, and very often with no dispute as to the facts.⁴⁵

Surely, this is far from an ideal solution because it promotes judicial discretion, which may lead to arbitrariness incompatible with freedom of contract and legal certainty. Furthermore, for disputes pertaining to difficulties of performance, parties were left at the mercy of the common law.

2.2.2. *Equitable Remedies and Common Law Doctrines*

⁴² [1918] AC 119.

⁴³ Ibid 130.

⁴⁴ [1940] 1 All ER 188; See also Courts (Emergency Powers) Act, 1943.

⁴⁵ Ibid 191.

12. While wide-ranging from a common law perspective, the powers conferred to the judiciary by the emergency legislation discussed above did not cover all issues arising for contractual performance due to war. Historically, English courts have responded to such challenges by either reasoning in equity or by developing existing common law doctrines.⁴⁶

Parties may be tempted to renegotiate a contract, but this does not necessarily preclude disputes. In *Central London Property Trust v High Trees House*,⁴⁷ Lord Denning found an equitable solution in such a scenario. In this case, the plaintiff had granted a 99-year lease to the defendant in 1937. Because of WWII, many people left London, so the defendant was unable to let all flats. That is why, the plaintiff agreed to reduce the rent. In 1945, when the flats were fully occupied, the plaintiff attempted to recover the full amount of rent in arrears. Lord Denning concluded that the promise for rent reduction was enforceable although it was not supported by consideration,⁴⁸ which is one of the four main conditions of validity of contract in English law along with offer, acceptance, and intention to create legal relations, and is traditionally viewed as 'something...of some value in the eye of the law'.⁴⁹ Denning noted that '[t]here [were] cases in which a promise was made which was intended to create legal relations and which, to the knowledge of the person making the promise, was going to be acted on by the person to whom it was made and which was in fact so acted on'.⁵⁰ He also held that 'at any event the estoppel would cease when the conditions to which the representation applied came to an end...'⁵¹ Thus, the rent reduction was only applicable up to early 1945 when the flats were fully occupied again. Although *High Trees* is considered as 'one of the most prominent of the landmarks in twentieth century contract law'⁵² in England, it remains as an exception which can be explained with the context (war) and the personality of Lord Denning who is famous for neglecting precedent.

13. The development of the peculiar doctrine of frustration, which discharges obligations automatically at the time it occurs, in turn, illustrates how English courts may stretch existing common law doctrines to respond to extreme circumstances, such as war. While the foundation of the doctrine is attributed to *Taylor v Caldwell*,⁵³ in which Blackburn J based his conclusion on an implied condition, it has been argued that this

⁴⁶ Before the Judicature Acts of 1873-74, England had separate courts for equity and for the common law. Although this separation does not exist any longer, courts dispose of wide-ranging equitable powers permitting them to disregard legal precedent.

⁴⁷ [1947] KB 130.

⁴⁸ *Ibid*, 135.

⁴⁹ *Thomas v Thomas* (1842) 2 QB 851, 859.

⁵⁰ [1947] KB 130, 134.

⁵¹ *Ibid* 136.

⁵² G. TREITEL, *Some Landmarks of Twentieth Century Contract Law* (Oxford: Oxford University Press 2002), p 29.

⁵³ (1863) 3 B & S 826; In this case, a concert hall rented for a series of performances burned down. Blackburn J held that there was an implied condition that the property should continue to exist, so the owner did not answer in damages for breach of contract; In principle, implied conditions were a device which medieval lawyers used to 'ensure that the change of circumstances may be taken into account'. See PICHONNAZ, p 132.

was neither Blackburn J's intention nor how his contemporaries viewed the case.⁵⁴ Indeed, while implied conditions pay due respects to freedom of contract, they are artificial constructs which judges use with caution — this sheds some light on why in more contemporary English cases, frustration has different underpinnings.⁵⁵ Moreover, *Taylor* is curious, from a comparative perspective, because Blackburn J cites Pothier⁵⁶ whose writings informed the drafting of the French *Code civil*.⁵⁷ Ironically, the term *obligation implicite* (implied condition) permeated French law only recently under the influence of international harmonizing instruments such as the UNIDROIT Principles.⁵⁸

Whereas the early 20th century saw a line of cases on frustration of purpose pertaining to the postponed coronation of Edward VII,⁵⁹ it seems that WWI provided the true new impetus for the development of the doctrine of frustration because of the way 'Britain waged its war'.⁶⁰ Namely, 'the government never formed a coherent, principled resolution of the conflict between the private interests of traders and the general interests of the nation'.⁶¹ Parties could either renegotiate their contract, rely on the emergency legislation, mentioned above, or count on common law doctrines.⁶² Litigation before the courts led to the widening of the scope of frustration from an English perspective.⁶³ Yet, English courts were wary of applying it to cases of hardship which were not directly

⁵⁴ C. MACMILLAN, 'English Contract Law and the Great War: The Development of a Doctrine of Frustration', 2(2). *CLH (Comparative Legal History)* 2014, p 280.

⁵⁵ So many diverse theories of the theoretical foundation of frustration were put forward in case law that in *National Carriers v Panalpina* [1981] AC 675, Lord Wilberforce stressed at 693: 'It is not necessary to attempt selection of any [of these theories] as the true basis [of frustration]: my own view would be that they shade into one another and that a choice between them is a choice of what is most appropriate to the particular contract under consideration'.

⁵⁶ (1863) 3 B & S 826, 834 and 837.

⁵⁷ On Robert Joseph Pothier's influence on English law, see D.J. IBBETSON, *A Historical Introduction to the Law of Obligations* (Oxford: Oxford University Press 1999), pp 220-29.

⁵⁸ See their Art. 5.1.2.

⁵⁹ Frustration of purpose covers cases in which the purposes of both parties entering the contract cannot be fulfilled. Traditional textbook examples, which students of English law contrast, are *Krell v Henry* [1903] 2 KB 740 and *Herne Bay v Hutton* [1903] 2 KB 683. In the former, which concerned the rent of a room with a view to watch the coronation proceedings, the court established the purpose of both parties was frustrated. In the latter, which involved a contract for the hire of a ship to view the naval review accompanying the coronation and a cruise around the fleet, the contract was not frustrated because the fleet could still be viewed.

⁶⁰ MACMILLAN, p 283.

⁶¹ *Ibid* 285.

⁶² *Ibid*.

⁶³ In *Horlock v Beale* [1916] 1 AC 486, for instance, the House of Lords allowed the application of frustration to a service contract which Earl Loreburn deemed had become 'impracticable in a commercial sense'. The wife of a seaman whose ship was detained in Germany and who was imprisoned sought the wages due under his contract of service. The House of Lords concluded the service contract was frustrated on the day the crew was imprisoned. Yet, we argue that the facts of the case seem to illustrate a case of

connected to illegality. A compelling example is provided by *Blackburn Bobbin v TW Allen* where it was held that

There is here no question of illegality or public policy...There is merely an unforeseen event which has rendered it practically impossible for the vendor to deliver. That event the defendants could easily have provided for in their contracts. If I approved the defendants' contention, I should be holding in substance that a contract which did not contain a war clause was as beneficial to the vendor as a contract which contained such a provision.⁶⁴

Essentially, absent an explicit war/force majeure clause or another provision which could be interpreted to cover difficulties of performance, it was problematic for struggling parties to find relief.

14. WWII served as the next catalyst for further development of frustration, but it also demonstrated the unwillingness of judges to overstretch the doctrine as well as the limits of legal precedent. The most pivotal case, which established the modern application test of the doctrine, is *Davis Contractors Ltd v Fareham UDC*,⁶⁵ which concerned a building contract whose performance became costlier because of a long period of frost and labour shortages, which characterized the period after WWII. Lord Radcliffe famously said that frustration occurs when

without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract...It was not this that I promised to do.⁶⁶

While this test brought the doctrine further in line with the principle of freedom of contract — parties should not be expected to do something which has little to do with what they promised — it also further confined the scope of the principle. The 'radically different' test is extremely difficult to satisfy.

It should be noted that WWII case law on frustration demonstrated the necessity for legislative intervention, which, as explained above, occurs very rarely. Frustration results in automatic termination of the contract and, in the common law, loss lies where it falls, which can lead to unjust enrichment. In *Fibrosa Spolka Ackcyjna v Fairbairn, Lawson Combe Barbour Ltd*,⁶⁷ the House of Lords managed to craft a smart exit from the straitjacket of legal precedent, but the result left more questions than it answered. The case concerned a contract for the supply of machinery between a Polish and a UK company. The Polish company had made an advance payment, but following the German invasion of Poland, it was not possible to deliver the machinery. The House of Lords concluded that the contract was frustrated and held that the advance payment had to be returned on the grounds of total failure of consideration. The principle, as articulated by the court, implied that recovery would not be possible if the

physical impossibility as the seaman was physically unable to continue his duties due to his imprisonment rather than hardship, as understood in the modern sense.

⁶⁴ [1918] 1 KB 540, 551.

⁶⁵ [1956] AC 696.

⁶⁶ Ibid 729.

⁶⁷ [1943] AC 32.

failure of consideration was only partial.⁶⁸ This troubled area of the common law led to the enactment of the Law Reform (Frustrated Contracts) Act 1943 which now governs the adjustment of rights and liabilities following termination due to frustration. However, the legislation has been criticized for not endorsing loss apportionment, which is the guiding principle in other common law jurisdictions, and which leads to more balanced solutions.⁶⁹

15. In sum, the specifically focused intervention by the UK government in contract law has pushed English courts to seek further solutions to the challenges posed by crises. Of course, these solutions are informed by the ultimate values of the common law — the importance of legal certainty and freedom of contract, the fact that good faith is not a general principle of English law, and the reluctance of the English judiciary to tackle issues of pure substantive unfairness. The COVID-19 emergency, however, risks altering this traditional landscape.

3. Contractual Performance and COVID-19

16. From a historical perspective, it is interesting to observe that the divide between France and England on the extent of legislative intervention persists even with respect to the COVID-19 crisis. In France, contracting parties can benefit from a mix of government intervention and contract law solutions whereas in England, at the time of writing of this article, they can only rely on private law solutions. However, a closer look indicates that both approaches have deficiencies and parties are better off looking for solutions themselves — is history repeating itself in these unprecedented times?

3.1. France: Many Options, but None of Them Fits to a Tee

17. Not only have French legislators introduced measures which cover contractual performance as part of the emergency response package, but also existing French contract law itself seems to provide more tools to tackle the effects of the crisis on contractual performance at first glance. But how effective are they?

3.1.1. A Messy State Intervention?

18. On 25 March 2020, the French Government issued 27 *ordonnances* to deal with some effects of the COVID-19 public health emergency (*urgence*

⁶⁸ On the legislative history of the 1943 Act, including the worries sparked by *Fibrosa*, see P. MITCHELL, '*Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour, Limited* (1942)', in C. Mitchell & P. Mitchell (eds), *Landmark Cases in the Law of Restitution* (Oxford: Hart Publishing 2006), pp 247-73.

⁶⁹ E. MCKENDRICK, 'Frustration, Restitution, and Loss Appointment', in A. Burrows (ed), *Essays on Restitution* (Oxford: Oxford University Press 1991), p 155.

sanitaire). Among these, the *ordonnance* n° 2020-306 of 25 March 2020 adopts measures supposed to alleviate the drastic consequences, which this crisis may have for contractual performance.⁷⁰ At first glance, French legislators seem committed to the interventionism, which they had relied upon in the past. However, there are important differences. On the one hand, these measures have been put forward at the onset of the crisis rather than at the time its effects were felt, which may be taken as a sign that French legislators have drawn from their prior experience discussed above. On the other hand, these measures seem less clear than the legislative intervention during WWI and WWII. This may either be the result of the early response itself because, to a certain degree, French legislators have engaged in crystal ball gazing to predict the likely effects of the pandemic on contract, or this may be due to the fact that the sectors of the economy have become much more intricate compared to WWI and WWII, so intervening adequately is a complex endeavour.

3.1.1.1. Ordonnance n° 2020-306 of 25 March 2020

19. Article 4 of this *ordonnance*, as amended by the *ordonnance* n° 2020-427 of 15 April 2020, provides that late performance penalties (*astreintes*), penalty clauses (*clauses pénales*), termination clauses (*clauses résolutoires*) and forfeiture clauses (*clauses prévoyant une déchéance*) are ‘deemed not to have come into force or effect’ insofar as

- (i) the purpose of these terms is to ‘impose liability for the non-performance of an obligation within a specified period of time’ and
- (ii) the period available to the promisor to perform its obligations expires between 12 March 2020 and 23 June 2020 included (legally protected period).

Article 4 quite confusingly distinguishes between three hypotheses as to the date when these contractual terms may come into effect:

(i) in the case where the promisor has not performed its obligation between 12 March and 23 June 2020 (included), the date on which these terms come into effect is delayed from 24 June 2020 for a period equal to ‘the time elapsed between 12 March 2020, or if later, the date on which the obligation arose, and the date on which it should have been performed’;

(ii) in the case where the terms that impose liability for the non-performance of an obligation (excluding payment obligations) should have come into force after 24 June 2020, the date on which these terms come into effect is delayed by a period equal to ‘the time elapsed between 12

⁷⁰ *Ordonnance No 2020-306 du 25 mars 2020 relative à la prorogation des délais échus pendant la période d’urgence sanitaire et à l’adaptation des procédures pendant cette même période*, <https://www.legifrance.gouv.fr/loda/id/JORFTEXT000041755644/2020-09-21>. See also *circulaire du 26 mars 2020 de présentation des dispositions du titre I de l’ordonnance no 2020-306 du 25 mars 2020 relative à la prorogation des délais échus pendant la période d’urgence sanitaire et à l’adaptation des procédures pendant cette même période*, NOR: JUSC2008608C, http://circulaires.legifrance.gouv.fr/pdf/2020/03/cir_44952.pdf.

March 2020, or if later, the date on which the obligation arose, and the end of this period (24 June 2020)';

(iii) late performance penalties (*astreintes*) and penalty clauses (*clauses pénales*) that came into effect before 12 March 2020 have their effect suspended until 24 June 2020.

For instance, in the event a borrower fails to make a payment under its loan on a due date falling within the legally protected period, the lender cannot claim default triggering penalties and/or termination. Payment of these sums due by the borrower is deferred by a period calculated as set out above depending on the date the clause comes (or came) into force. This mechanism creates an incentive to wait until the expiry of the deferred period with the hope that the promisor performs its obligations, thus discouraging any potential litigation and encouraging amicable solutions.⁷¹

Article 4 already raises issues in its implementation. Initially, the health emergency was announced for a two-month period and was supposed to end on 24 May 2020.⁷² However, in May, the French government announced it would extend it by two more months until 10 July 2020.⁷³ This extension now clashes with Article 1 of the same *ordonnance* that set the legally protected period from 12 March to 23 June 2020 (included). The period running from 24 June 2020 to 10 July 2020 is left in a state of limbo. In itself, the uncertainty of when the state of emergency would end, coupled with the suspensive effect of Article 4, may put contracting parties in a difficult position. In practice, Article 4 has the same effect as a temporary *force majeure*, without however any of the constraints of this doctrine, as discussed below, but with the difficulties of performance that the French legislator had considered problematic during the wars, as explained above. Once the state of emergency is over, it may be difficult for the parties to perform for a variety of reasons, so it is unclear to what extent this suspension (or excused delay) is helpful.

The problems with the wording and the coherence of the *ordonnance* do not end here. Its scope of application is uncertain since it only targets specific clauses whose purpose is to impose liability for non-performance. Does it exclude terms with any other purpose, such as delaying the performance of obligations or other positive or negative covenants in financial agreements, which may trigger termination or penalty clauses? Similarly, can a material adverse change (MAC) clause in a loan agreement be enforced as the financial condition of the borrower is likely to have

⁷¹ D. HOUTCIEFF, 'Régime dérogatoire d'exécution des contrats dans le cadre de la crise sanitaire : exécuter ou ne pas exécuter', No 820. *La lettre juridique*, 2020.

⁷² By the *loi n°2020-290 du 23 mars 2020 d'urgence pour faire face à l'épidémie de Covid-19 (1)*, a state of public health emergency due to the COVID-19 outbreak (*l'état d'urgence sanitaire*) was declared for a period originally running between 24 March and 24 May 2020.

⁷³ Pursuant to *loi n°2020-546 du 11 mai 2020 prorogeant l'état d'urgence sanitaire et complétant ses dispositions (1)*, the state of public health emergency was extended until 10 July 2020 (included).

changed due to COVID-19 leading to an event of default?⁷⁴ This literal reading of Article 4 may contradict the *circulaire* explaining the rationale of this *ordonnance* as aiming to freeze ‘the contractual clauses whose purpose is to impose liability for non-performance’ during the legally protected period.⁷⁵ Whatever the scope of application, it is clear that all payment obligations must still be performed pursuant to the terms of the contract. There is no exemption.

The failure to perform pursuant to Article 4 does not necessarily have to be directly attributable to the health crisis in order to freeze these clauses. It is deemed to be, so there is no burden of proof. The accessibility of the provision is clearly to the benefit of the promisor, which raises the question of whether this provision does not, in fact, violate the French notion of good faith — why should all promisors, whether acting in good or bad faith, benefit from the same legislative protection?

In turn, Article 5 of the same *ordonnance* n° 2020-306 refers to the extension of the period during which the parties are entitled to terminate the contract or notify the termination of a tacitly renewable contract. If this right to terminate or to notify expires between 12 March 2020 and 23 June 2020 (included), it is extended by two months after 23 June 2020, meaning 23 August 2020 (included). This seemingly benign provision may also create problems as it prolongs the state of uncertainty by keeping the parties bound to a contract and by essentially preventing them from contracting with other parties for the same purpose.

3.1.1.2. Other *ordonnances*

20. The rest of the landscape of *ordonnances* may also be challenging to navigate and interpret. *Ordonnance* n° 2020-316 of 25 March 2020 uses the same mechanism as the one in Article 4 of *ordonnance* n° 2020-306 to suspend the effects of any liquidated damages or other penalty or termination clauses in case of a default of payment of rent or rental charges relating to gas, water and electricity which pertain to the offices of specifically identified companies affected by the COVID-19 epidemic. As such, it raises similar questions.

In the tourism sector, *ordonnance* n° 2020-315 of 25 March 2020 authorizes entities to derogate from the effects of contractual termination in case of *force majeure*. Interestingly, this *ordonnance* does not qualify the epidemic as a *force majeure* event despite its reference in its title, which seems like an important omission on behalf of the government.

21. Overall, these *ordonnances* appear patchy with specific and limited scopes, leaving contracting parties to their own fate and subjecting them

⁷⁴ A MAC acts as a ‘sweep up’ protection for lenders against an adverse change in a borrower’s position or circumstances.

⁷⁵ *Circulaire du 26 mars 2020 de présentation des dispositions du titre I de l’ordonnance n° 2020- 306 du 25 mars 2020 relative à la prorogation des délais échus pendant la période d’urgence sanitaire et à l’adaptation des procédures pendant cette même période*, http://circulaires.legifrance.gouv.fr/pdf/2020/03/cir_44952.pdf; Emphasis our own.

to the ultimate discretion of the judge in their application. Contracts have proven fairly immune to governmental attempts to find solutions to the contractual challenges posed by the COVID-19 emergency, placing an even greater reliance on existing general contract law.⁷⁶

3.1.2. Private Law: When Two Doctrines Fit Only Partially

22. Most commercial contracts usually have *force majeure* or hardship clauses, which allow parties to define the supervening events and their effects on their agreements themselves. In the absence of such clauses or where they are ambiguous, French contract law has clearly defined statutory provisions, which may be relevant in light of the COVID-19 emergency — Article 1218 (*force majeure*) and Article 1195 (hardship) of the *Code civil*, as well as other provisions, which together form part of the ‘contractual toolbox’ (*boîte à outils contractuels*) available to the parties.⁷⁷ Considering this, at first glance, one may question the necessity of legislative intervention discussed above. Yet, appearances may be deceiving.

3.1.2.1. The *force majeure*

23. While the *force majeure* is one of the signature doctrines of the French law of contract, its application criteria are still subject to disputes.⁷⁸ Although the Minister of Finance announced on 28 February 2020 that COVID-19 should be considered as a case of *force majeure* for companies in public contracts,⁷⁹ these considerations are not automatic for private contracts — the party claiming *force majeure* has to prove the criteria of application are met.⁸⁰ There are three main criteria, which stand out in the first paragraph of the new Article 1218,⁸¹ which essentially codifies prior legal practice: 1) impediment beyond the promisor’s control (no fault in causing the event); 2) impediment which could not reasonably have been foreseen when the contract was concluded (unforeseeability); 3)

⁷⁶ D. HOUTCIEFF, ‘Régime dérogatoire d’exécution des contrats dans le cadre de la crise sanitaire : exécuter ou ne pas exécuter’.

⁷⁷ M. MEKKI, ‘De l’urgence à l’imprévu du Covid-19 : quelle boîte à outils contractuels?’, *AJ Contrat (Actualité Juridique Contrat)* 2020, p 164.

⁷⁸ *Force majeure* was not explicitly defined in the former Art. 1148 of the *Code civil*, so the criteria of application were developed jurisprudentially: an event which is 1) external; 2) unforeseeable and 3) unavoidable.

⁷⁹ Statement by Bruno Le Maire of 28 February 2020 following a meeting with social partners at the Ministry of Labour, available at: <https://www.vie-publique.fr/discours/273763-bruno-le-maire-28022020-coronavirus>.

See also statement on the Government website available at <https://www.economie.gouv.fr/covid19-soutien-entreprises/marches-publics-les-penalites-de-retard-ne-seront-pas-appliquees#>.

⁸⁰ See, for instance, Cour de cassation, 3ème civ. 10 décembre 2014, n°12-26.361, www.legifrance.gouv.fr/juri/id/JURITEXT000029899203.

⁸¹ ‘The *force majeure* occurs in contractual matters where an event beyond the control of the promisor, which could not have reasonably been foreseen when the contract was concluded and whose effects cannot be avoided using appropriate measures, prevents the promisor to perform his obligation’ (Translation our own).

impediment's effects which could not have been avoided by appropriate measures (unavoidability of the impediment's effects).⁸² In the recent past, French courts have been reluctant to treat health emergencies as a *force majeure* — examples include the dengue virus,⁸³ the H1N1 flu epidemic,⁸⁴ the chikungunya virus⁸⁵ and, more recently, the avian flu.⁸⁶ A study of these cases shows that the qualification of *force majeure* is rejected for purely factual reasons demonstrating that the criteria are not met. The chikungunya epidemic was not deemed unforeseeable because it had started before the conclusion of the contract and was not unavoidable since the disease could be relieved with painkillers.⁸⁷

Recent decisions by *la Cour d'appel de Colmar* (the Court of Appeal of Colmar) have, nevertheless, qualified the COVID-19 pandemic as a *force majeure* event.⁸⁸ However, these cases did not concern a contractual matter but an immigration law question. The court held that the absence of an asylum seeker at a court hearing was justified given 'the exceptional and insurmountable circumstances, amounting to a *force majeure*, linked to the current COVID-19 epidemic'.⁸⁹ It confirmed that these exceptional circumstances met the conditions of externality, unforeseeability and unavoidability attached to the *force majeure*. The appellant had been in contact with a person who was likely infected with COVID-19 and could not attend the court hearing given the risk of contagion. Surely, however, one court decision is insufficient to predict how other courts will react. It is all about the facts.

24. What may be different regarding the COVID-19 pandemic are the diverse health and economic measures put forward by the French government.⁹⁰ In fact, it may be the case that it is not the pandemic itself,

⁸² This provision essentially codified the jurisprudentially developed criteria of application under former Art. 1148. The reference to an 'impediment beyond the party's control' seems very close to the externality requirement. Case law shows that courts assimilate the criteria under former Art. 1148 with those under the new Art. 1218 anyway. See Cour d'appel Montpellier, 1ère chambre 28 février 2018, n°17-00784.

⁸³ Cour d'appel Nancy 22 novembre 2010, n°09/00003 — the dengue fever was deemed foreseeable and avoidable because it is a recurrent phenomenon and is not lethal in most cases.

⁸⁴ Cour d'appel Besançon 8 janvier 2014, n°12/02291 — the H1N1 flu was deemed foreseeable because it was widely announced and expected.

⁸⁵ Cour d'appel Basse-terre 17 décembre 2018, n°17/00739; Cour d'appel Saint Denis de la Réunion 29 décembre 2009, n°08/02114.

⁸⁶ Cour d'appel Toulouse 3 octobre 2019, n°19/01579.

⁸⁷ Tribunal civil de Seine 17 avril 1869, as discussed by B. NICHOLAS, 'Force Majeure in French Law', in E. McKendrick (ed), *Force Majeure and Frustration of Contract* (Abingdon: Routledge, 2nd edn 1995).

⁸⁸ Cour d'appel Colmar 12 mars 2020, n°20/01098, and successive decisions confirming the Court's qualification of COVID-19 as a *force majeure* and the sufficiently serious risks to the personnel running the court hearing if the appellant would be present. See Cour d'appel Colmar 16 mars 2020, n°20/01142 and n°20/01143, and 23 mars 2020 n°20/01206 and n°20/01207.

⁸⁹ See Cour d'appel Colmar 12 mars 2020, n°20/01098.

⁹⁰ *Arrêtés* du 14 et 15 mars 2020 and *décret* n°2020-293 du 23 mars 2020 that sets measures fighting the spread of COVID-19.

but the measures taken *vis-à-vis* the pandemic, which help the promisor tick all three boxes for *force majeure*.

The externality requirement is surely the easiest to satisfy. Yet, the latter two application criteria may pose challenges. The date on which the contract was concluded as well as the date on which the pandemic is considered to have started seem important to determine what could have reasonably been foreseeable. However, it is difficult to fix the date which constitutes the start of the pandemic — 4 March 2020 (the official confirmation there is an epidemic in France),⁹¹ 16 March 2020 (forced lockdown from 17 March 2020),⁹² or 23 March 2020 (public health emergency law)?⁹³ Or maybe, one should consider when the virus was first identified in China or when the first statement relating to a pandemic by the World Health Organisation (WHO) was released?⁹⁴ The uncertainty of which date is relevant affects any contracts concluded or renewed in February or March 2020.

With regard to unavailability, one must prove that there was no alternative solution, which may be the hardest requirement to satisfy, all the more since the principle of good faith, which applies throughout the lifecycle of the contract in French law, may require the promisor to exercise best efforts in avoiding the effects of COVID-19, to mitigate damages, etc. Obviously, if the promisor has seriously fallen ill with COVID-19, this is likely to be a case of unavailability. Similarly, if the measures implemented by the French government prevent the performance of the contract, this is most likely a case of unavailability, too.⁹⁵ Above all, the courts consider the degree of impossibility of performance.⁹⁶ By essence, some obligations, such as payment

⁹¹ *Arrêté du 4 mars 2020 portant diverses mesures relatives à la lutte contre la propagation du virus covid-19* prohibiting the gathering of more than 5,000 people in closed areas until 31 May 2020, <https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000041686833>. This *Arrêté* was subsequently amended.

⁹² *Décret n°2020-260 du 16 mars 2020 portant réglementation des déplacements dans le cadre de la lutte contre la propagation du virus covid-19* imposing the lockdown from 17 March 2020, <https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000041728476>. This *Décret* was repealed on 22 September 2020.

⁹³ *Loi n°2020-290 du 23 mars 2020 d'urgence pour faire face à l'épidémie de covid-19* (1) declaring a state of public health emergency from 24 March 2020; <https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000041746313>.

⁹⁴ The WHO declared the COVID-19 outbreak of international concern on 30 January 2020: [https://www.who.int/news-room/detail/30-01-2020-statement-on-the-second-meeting-of-the-international-health-regulations-\(2005\)-emergency-committee-regarding-the-outbreak-of-novel-coronavirus-\(2019-ncov\)](https://www.who.int/news-room/detail/30-01-2020-statement-on-the-second-meeting-of-the-international-health-regulations-(2005)-emergency-committee-regarding-the-outbreak-of-novel-coronavirus-(2019-ncov)).

⁹⁵ Cour de cassation Assemblée plénière 14 avril 2006, n°02-11.168, <https://www.legifrance.gouv.fr/juri/id/JURITEXT000007051847> — the serious illness of a party to a contract may be a *force majeure* event that suspends the performance of the obligation.

⁹⁶ Cour de cassation 1^{ère} civ. 12 juillet 2001, n°99-18.231, <https://www.legifrance.gouv.fr/juri/id/JURITEXT000007044516> — the failure of one supplier is not deemed unavoidable since another supplier could deliver the goods; The Court of Appeal of Colmar clarified in its cases mentioned above that the risk of COVID-19 contagion could be overcome by using appropriate measures, such as videoconferencing, but that the detention centre did not have such equipment.

obligations, are always enforceable, although the act of paying may be prevented in rare circumstances.⁹⁷ Even if the epidemic or related public health measures are recognized as an event of *force majeure*, a link of causation must be established between the epidemic or the measure and the impossibility of performance.⁹⁸

The effects of the *force majeure* are defined in the second paragraph of Article 1218.⁹⁹ If the supervening event is deemed temporary, which seems to be the case of the COVID-19 emergency, the contractual performance is merely suspended.¹⁰⁰ However, a suspension which last too long may defeat the purpose of the contract. It may also make contractual performance excessively burdensome, which is far from an ideal solution. If the impediment is permanent, the termination of the contract is *de plein droit* (as of right), meaning without any judicial review. In both instances, the parties are discharged from their obligations without incurring any contractual liability.¹⁰¹ The promisor is not liable for any damages related to the losses caused,¹⁰² but some restitution may be due, such as the indemnity paid for an option that cannot be exercised, or the return of the goods against the price without damages.¹⁰³

Finally, considering the strict criteria of application, which are difficult to satisfy and assessed on a case by case basis, it seems that the *force majeure* doctrine is not best placed to adequately address the challenges of performance resulting from the COVID-19 pandemic.

3.1.2.2. Hardship

25. The 2016 reform of the French law of obligations has now incorporated a doctrine of hardship — known as *imprévision* in French law — in the

⁹⁷ Cour de cassation com. 16 septembre 2014, n°13-20.306 and Cour de cassation com. 16 septembre 2004, n°13-20.306, <https://www.legifrance.gouv.fr/juri/id/JURITEXT000029480960> for a payment obligation that remains enforceable. For a bug that prevented electronic payment, see Cour de cassation 3ème civ. 17 février 2010, n°08-20.943 <https://www.legifrance.gouv.fr/juri/id/JURITEXT000021855151>.

⁹⁸ Cour d'appel Paris 17 mars 2016, n°15/04263 about the Ebola outbreak.

⁹⁹ If the prevention is temporary, the performance of the obligation is suspended unless the resulting delay justifies the termination of the contract. If the prevention is permanent, the contract is automatically terminated and the parties are discharged from their obligations in the conditions provided for in Articles 1351 and 1351-1 (translation our own).

¹⁰⁰ Cour de cassation 1ère civ. 24 février 1981, n°79-12.710, <https://www.legifrance.gouv.fr/juri/id/JURITEXT000007007126>; Cour de cassation 1ère civ. 18 décembre 2014, n°13-24.385, <https://www.legifrance.gouv.fr/juri/id/JURITEXT000029934441>.

¹⁰¹ Pursuant to Art. 1351 of the *Code civil*, the impossibility to perform the obligation discharges the party when it derives from a case of *force majeure* and that it is permanent. See J. HEINICH, 'L'incidence de l'épidémie de coronavirus sur les contrats d'affaires de la force majeure à l'imprévision', *RD (Recueil Dalloz)*2020, p 611. Any liability due to the termination of commercial relationships is set aside pursuant to Art. L.442-1 II of the Commercial Code in a case of *force majeure*.

¹⁰² Art.1231-1, *Code civil*.

¹⁰³ Art.1352 and subsequent, *Code civil*.

Code civil.¹⁰⁴ Similarly to the doctrine of *force majeure*, the strict conditions of application of the new Article 1195 limit its reach in the context of the COVID-19 epidemic.

Article 1195 only applies to contracts concluded after 1 October 2016. Contracts concluded before that date are still subject to the well-anchored rejection of *imprévision* set in 19th century case law, as held recently by *la Cour d'appel de Paris* (the Court of Appeal of Paris).¹⁰⁵ A few months later, the same court re-iterated that a contract for the supply of electricity concluded in 2007 could not be reviewed for *imprévision* given the governing principle of intangibility of contracts (former Article 1134). It nevertheless acknowledged that 'the obligation to perform the contract in good faith must encourage the parties to renegotiate the (imbalanced) contract'.¹⁰⁶ In that particular case, the electricity company, EDF, was not bound by such obligation to renegotiate since the other party, Azienda Elettrica Ticinese, did not establish that the price change in the electricity market was unforeseeable at the time of contracting. It is to be expected that courts will be reluctant to depart from a long tradition of rejection of hardship, but this obligation to renegotiate could be a call for a less abstract understanding of the contract and a return to 'contractual solidarity'.¹⁰⁷

Other exclusions apply to the application of Article 1195 — some are statutory¹⁰⁸ and others derive from the *lex specialis derogat legi generali* principle in light of special contract law (*droit des contrats spéciaux*).¹⁰⁹ Furthermore, since this is not a mandatory provision, it is quite likely that sophisticated commercial contracts exclude this article. So, what is left for hardship under Article 1195 then?

¹⁰⁴ 'If a change of circumstances that was unforeseeable at the time of conclusion of the contract renders performance excessively onerous for a party who had not agreed to bear the risk of such a change, that party may ask the other contracting party to renegotiate the contract.

This party must continue to perform her obligations during the renegotiation. In the case of refusal or failure of renegotiation, the parties may agree to terminate the contract from the date and on the conditions which they determine, or ask the court, by a common agreement, to set about its adjustment.

In the absence of agreement within a reasonable time, the court may, upon request of one party, adjust the contract or put an end to it, from a date and subject to such conditions as it shall determine' (Translation our own).

¹⁰⁵ Cour d'appel Paris 9 mai 2019, n°17/04789, Gaz. Pal 2019, n°31, p 21, obs. D. HOUTCIEFF.

¹⁰⁶ Cour d'appel Paris, Pole 5 - ch.11 17 janvier 2020, n°18/01078.

¹⁰⁷ On contractual solidarity in French law, see for instance C. JAMIN, 'Plaidoyer pour le solidarisme contractuel', in *Le contrat au début du XXIème siècle: Etudes offertes à J. Ghestin* (Paris: LGDJ 2001), p 441; D. MAZEAUD, 'Loyauté, solidarité, fraternité: la nouvelle devise contractuelle?', in *Mélanges F. Terré* (Paris: Dalloz PUF & Juris-Classeur 1999), p 603.

¹⁰⁸ Article L. 211-40-1 of the Monetary and Financial Code regarding promises arising from securities transactions and financial contracts.

¹⁰⁹ Cour d'appel Versailles 12 décembre 2019, n°18/07183, Gaz. Pal. 2020, n°14, p 36 obs. D. HOUTCIEFF — special provisions for commercial leases; Cour d'appel Douai 23 janvier 2020, n°19/01718, Gaz. Pal. 2020, n°14, p 36 obs. D. HOUTCIEFF — special provisions for real estate fixed price contract (*marché à forfait*).

26. Assuming that the contract is subject to Article 1195, there are three application criteria: 1) an unforeseeable change of circumstances at the time of conclusion of the contract; 2) the risk of change that has not been allocated to the affected party; and 3) an excessive financial burden of performance. It is uncontested that the COVID-19 pandemic and the measures issued by the government meet the requirement of changed circumstances. As to the test of unforeseeability, as discussed for *force majeure*, the date which constitutes the start of the pandemic will determine what could have reasonably been foreseeable at the time of the contract.¹¹⁰ Some additional issues may arise for contracts that are renewed expressly (Article 1214) or tacitly (Article 1215)¹¹¹ to determine their date of conclusion. The second condition of allocation of risk is likely to be satisfied. Furthermore, the party invoking Article 1195 must demonstrate that the changed circumstances have rendered the performance of the contract *excessively onerous*. How excessive should the performance have become to be excused or, in other words, how significant should the financial losses be? There is no clear test to assess the excessive financial burden — lower courts can either consider how fundamental the change in the balance of obligations is or assess the affected financial abilities of the contracting party. Even if the former test appears to comply with the spirit of the reform, it is still subject to interpretation.

The novelty of Article 1195 lies in the effects of the doctrine of *imprévision* in terms of remedies available to the parties pursuant to a strict procedure. The first remedy available is the right for a party to call for a renegotiation of the contract. Such right or faculty, which already exists *de facto*, is a pre-emptive step that may be accepted or refused. While pursuant to Article 1104, the obligation to renegotiate must be performed in good faith,¹¹² there is no obligation to reach an agreement.¹¹³ The main hurdle is that whilst renegotiating, parties are still bound to

¹¹⁰ Cour d'appel Paris 17 janvier 2020, n°18/01078, for a discussion on the foreseeability of the fluctuation of electricity prices. See also Cour d'appel Nancy 26 septembre 2007, n°2073/07, D. 2010, 2481, for the effects of a new legislation on the reduction of greenhouse gases causing a significant contractual imbalance that justified an obligation to renegotiate. However, this case seems isolated.

¹¹¹ Depending on the type of contract and renewal, it can be considered as a new contract or an extension of the existing contract. See Arts. 1213, 1214 and 1215 of the *Code civil*.

¹¹² Art. 1104 of the *Code civil*: 'Contracts must be negotiated, formed and performed in good faith. This provision is a measure of public order'. See Cour de cassation com. 3 novembre 1992, n°90-18.547, Bull. Civ. IV, n°388, <https://www.legifrance.gouv.fr/juri/id/JURITEXT000007029915>; Cour de cassation com. 24 novembre 1998, n°96-18.357, Bull. Civ. IV, n°277, <https://www.legifrance.gouv.fr/juri/id/JURITEXT000007040987>; Cour de cassation com. 15 mars 2017, n°15-16.406, D. 2018.371, obs. M. MEKKI, <https://www.legifrance.gouv.fr/juri/id/JURITEXT000034217969>; and recently, Cour d'appel Paris 17 janvier 2020, n°18/01078.

¹¹³ Cour de cassation com. 17 février 2015, *Dupiré Invicta Industrie/Gabo*, n°12-29.550, 13-18956 and 13-20.230, <https://www.legifrance.gouv.fr/juri/id/JURITEXT000030270329>. A failure to renegotiate the price or the postponement of a meeting to discuss the situation does not amount to bad faith.

perform their obligations. Although this requirement is aimed at avoiding opportunistic tactics from the affected party, at this stage and in the pandemic context, many parties are more concerned about survival than a return to a 'new contractual equilibrium'. Article 1195 could provide an incentive for the parties to renegotiate the allocation of losses due to COVID-19. However, in the event the renegotiation fails, the same article can encourage parties, by common agreement, to terminate the contract, but how realistic is this option since the failed renegotiation shows the unwillingness of the parties to accommodate each other's interests? It is even more unrealistic to expect that the parties will then jointly 'ask the court to adjust the terms of the contract', as the provision requires. Finally, the remedy of last resort — the ability of one party to request the judge to adjust the terms of the contract or terminate it in the absence of agreement within a reasonable time — opens the door to judicial modification. Courts have traditionally shied away from rewriting the commercial terms of contracts, particularly in the absence of indexes or parameters for adjustment, so they might be inclined to terminate the contract. In sum, all the steps which parties have to fulfil to argue hardship in court indicate a lengthy process, which makes this provision unattractive for contracts concerning large amounts of money, which may have hardship or MAC clauses anyway.

27. Overall, COVID-19 and all its ramifications will test the new Article 1195. Its scope of application will be judged on a case by case basis, and, as with the *force majeure* doctrine, it may not be best placed to address the contractual challenges posed by COVID-19. However, it can act as a Damocles' sword to force the parties to renegotiate and settle their disputes out of court.¹¹⁴

3.1.2.3. The contractual toolbox

28. In a move inspired by soft law harmonizing instruments, such as the Principles of European Contract Law, the 2016 reform of the law of contract has enshrined a section on contractual non-performance that sets out a list of remedies (*sanctions*) available to the aggrieved party.¹¹⁵ It includes a series of unilateral prerogatives, which allow the aggrieved party (or promisee) to deal with the consequences of contractual non-performance without involving the court. These provisions that circumvent the power of the judge aim to leave the parties to decide their own fate for the sake of economic efficiency, which is relevant in the context of COVID-19.

Article 1219, for instance, formalizes the ability of a party to refuse to perform its obligation where the failure to perform of the other party is sufficiently serious (*suffisamment grave*). Article 1220 sets a defence for pre-emptive non-performance as it allows a party to suspend its

¹¹⁴ PEDAMON, 'The Paradoxes of the Theory of *Imprévision* in the New French Law of Contract: A Judicial Deterrent?'

¹¹⁵ Arts. 1217 and subsequent, *Code civil*.

performance as soon as it is apparent that the other party will fail to perform and that the consequences of this non-performance are sufficiently serious. Although the vague drafting of these two articles makes their application uncertain,¹¹⁶ they clearly benefit the promisee who holds a means of pressure over the promisor to perform.

The failure to perform may lead to the exercise of another unilateral prerogative — the reduction of price. The new Article 1223 provides for the promisee to unilaterally reduce the price proportionally in the case of an imprecisely or partially performed obligation (*exécution imparfaite*) where it has not yet paid the whole price. This significant power allows the promisee to unilaterally impose the effects of incomplete performance.¹¹⁷ Its application is independent from the circumstances as it does not matter whether the obligation has not been performed due to COVID-19 or another reason. However, two conditions must be met for this power to be exercised: (1) a notice to perform should be given to the promisor; and (2) in the case the promisor fails to do so, it is notified that the price will be reduced proportionally. The promisor may contest this reduction before the court. Even if the burden of proof is on the promisee,¹¹⁸ the promisor bears the risk and uncertainties of a court proceeding, particularly in the context of COVID-19.¹¹⁹ In the meantime, the promisee benefits immediately from the price reduction.

As one of the major novelties in the reform, Article 1226 enshrines the unilateral termination of the contract by notice where the non-performance is sufficiently serious. Except in case of urgency, the promisee must previously request that the promisor in default perform its undertaking within a reasonable time. The notice to perform must state expressly that if the promisor fails to perform its obligation, the promisee will have a right to terminate the contract. Where the non-performance persists, the promisee notifies the promisor of the termination of the contract and the reasons on which it is based. The formalism aims at constraining the ability of the promisee to terminate without giving a chance to the promisor to perform. In addition, if the promisor initiates proceedings to challenge such termination, which it can do at any time, the burden of proof is on the promisee which must establish the seriousness of the non-performance. Although the promisee exercises this prerogative at its own risk, its commercial efficiency may justify its use, particularly in the context of COVID-19.

In the same vein, the pandemic may shed a new light on the doctrine of *caducité* (lapse of contract), which provides another tool for the contracting party seeking relief from burdensome performance. Pursuant to Article 1186, ‘a validly formed contract lapses upon disappearance of one of its essential elements’ (*éléments essentiels*). The notion of ‘essential

¹¹⁶ CHANTEPIE & LATINA, p 546.

¹¹⁷ D. HOUTCIEFF, ‘Les nouveaux pouvoirs unilatéraux du contractant: l’étendue des pouvoirs,’ 115. *RDC (Revue des contrats)* 2018, p 505.

¹¹⁸ Tribunal de commerce Paris, 19 ch. 21 février 2018, n°2016051093, referring to the former Art. 1315.

¹¹⁹ HOUTCIEFF, ‘Régime dérogatoire d’exécution des contrats dans le cadre de la crise sanitaire: exécuter ou ne pas exécuter’.

elements' has not been defined: could it be that an essential element disappears where a contract loses its economic efficiency (*efficacité de l'opération économique*) due to COVID-19 or public health measures? The disappearance of this element renders the performance of the contract something different from what was agreed upon although performance is not impossible or excessively onerous. This new provision stands halfway between the *force majeure* and hardship — a third way.¹²⁰ It could be a powerful tool in the hands of the promisor as it puts an end to the contract as of right (Article 1187). Even though the other party can contest this in court, it bears the risk associated to a court proceeding, as already mentioned.

The parties may be motivated to choose these contract remedies over the doctrines of *force majeure* and hardship, which appear ill-suited to the challenges of contractual performance in COVID-19 times. They will also always have recourse to good faith as a tool for keeping in check excessive exercise of the unilateral prerogatives discussed above. Good faith might be tested to adjust contractual imbalances generated by COVID-19 although this would be a stretch in the light of the *Cour de cassation's* recent assertion that good faith cannot be used to undermine the rights and obligations of a contracting party.¹²¹ However, it remains a tool in the hands of the judge to redress contractual injustices and even impose a duty to cooperate to the parties, which may be the way forward in the current context.¹²²

3.2. England: Freedom of Contract Prevails but to What Avail?

29. Unlike the French government which attempted to put forward some measures aimed at alleviating certain difficulties of contractual performance, the UK government chose to remain silent. While this is not surprising considering our historical inquiry above, the reality is that contracting parties may be materially impacted by the COVID-19 pandemic and/or the concrete measures implemented to tackle it — the Health Protection (Coronavirus) Regulations 2020, the Coronavirus Act 2020,¹²³ etc. The UK lockdown was announced on 23 March 2020 obliging citizens to stay at home unless they have a reasonable excuse.

Where contractual performance becomes burdensome, parties can either attempt to renegotiate or reach out to the courts — it seems,

¹²⁰ MEKKI, 'De l'urgence à l'imprévu du Covid-19 : quelle boîte à outils contractuels?', at Section 2.1.2.1.

¹²¹ Cour de cassation com. 19 juin 2019, n°17-29.000, <https://www.legifrance.gouv.fr/juri/id/JURITEXT000038734034>. In that case, the *Cour de cassation* confirmed the right of one party to refuse to renegotiate, even if such refusal could lead to the ruin of the other party.

¹²² On the complex relationship between good faith and cooperation, see C. PEDAMON & R. VASSILEVA, 'The Duty to Cooperate in English and French Contract Law: One Channel, Two Distinct Views', 14(1). *JCL (Journal of Comparative Law)* 2019, pp 1-25.

¹²³ This Act is time-limited for two years: it grants the government powers to limit public gatherings and transport, detain people, etc.

however, that the outcome of both may depend on judicial discretion. That is why, it is interesting to refer to a conceptual note put forward by the British Institute of International and Comparative Law (BIICL) after consultation with experts, including two former Presidents of the UK Supreme Court, which raises the issue of whether there is room for a ‘... creative, graded, but nevertheless rigorous approach without prejudicing the underlying need for legal certainty’¹²⁴ which is relevant to COVID-19 — a breathing space. In the same spirit, the Cabinet Office released a note advising parties to contracts impacted by the COVID-19 emergency to act responsibly and fairly.¹²⁵ It encourages parties to be ‘... reasonable and proportionate in responding to performance issues and enforcing contracts, acting in a spirit of co-operation and aiming to achieve practical, just and equitable contractual outcomes having regard to the impact on the other party (or parties) ...’¹²⁶ How does it fit with the individualism typical of English law?

3.2.1. COVID-19 and the Parties’ Will

30. Continental lawyers often do not realize that freedom of contract in English law may be the most powerful tool in promoting fairness. Parties know that English courts are wary of intervening, so English contracts are traditionally more comprehensive. As a response to the narrow scope of the doctrine of frustration, parties often include detailed clauses covering supervening events — *force majeure*, hardship, MAC, etc. — in which they define the consequences of such cases themselves. If there is such a clause, it has to be interpreted, of course. Recent case law indicates there are contracts in which an epidemic and quarantine are explicitly listed as grounds to excuse delay in a *force majeure* clause.¹²⁷

Yet, not all such clauses are written in a such a detailed manner. In case of ambiguity, in theory, the *contra proferentem* rule will apply, which means the clause is interpreted against the party which proposed it, although it has been pointed out that this is a principle of last resort because most such clauses are neutrally drafted.¹²⁸ Particularly interesting is the case of *Channel Island Ferries v Sealink*¹²⁹ which

¹²⁴ ‘Breathing space — a Concept Note on the effect of the pandemic on commercial contracts’, <https://www.biicl.org/breathing-space>, accessed 7 May 2020.

¹²⁵ Cabinet Office, ‘Guidance on responsible contractual behaviour in the performance and enforcement of contracts impacted by the Covid-19 emergency’, 7 May 2020 available at <https://www.gov.uk/government/publications/guidance-on-responsible-contractual-behaviour-in-the-performance-and-enforcement-of-contracts-impacted-by-the-covid-19-emergency>.

¹²⁶ *Ibid.*, at Section 14.

¹²⁷ See Article VIII of the contract discussed in *Jiangsu Guoxin Corporation Ltd (formerly known as Sainty Marine Corporation Ltd) v Precious Shipping Public Co. Ltd* [2020] EWHC 1030 (Comm), 2020 WL 0208922.

¹²⁸ M. FURMSTOM, ‘Drafting of Force Majeure Clauses — Some General Guidelines’, in E. McKendrick (ed), *Force Majeure and Frustration of Contract* (2nd edn, Abingdon: Routledge 1995), p 58.

¹²⁹ 1988 WL 622867.

contained a relatively concise *force majeure* clause.¹³⁰ Parker LJ made several observations, which are relevant to the interpretation of such clauses — for our study, his argument that the relying party should not only ‘bring himself within the clause’, but also ‘show that he has taken all reasonable steps to avoid its operation, or mitigate its results’ seems very interesting from a comparative perspective.¹³¹ In principle, mitigation is a rule which governs the estimation of damages for breach.¹³² This proposition does not have an explicit equivalent in French law.¹³³ However, in certain (rare) instances, good faith may implicitly produce the same effect.¹³⁴

31. Even if there are no explicit clauses dedicated to supervening events, judges may provide relief by interpreting the contract (for instance, there may be a right to cancel/terminate clause which may prove helpful) or by implying terms, which may lead to creative solutions, as called for in the conceptual note by the BIICL. From a continental perspective, the latter option may appear like a smokescreen for judicial activism, which, however, permits a certain flexibility which sits relatively comfortably *vis-à-vis* the common law. We saw above that the very doctrine of frustration emerged from a decision relying on an implied condition. In contemporary times, a decision, which attracted much commentary, was *Yam Seng Pte v International Trade Corporation*,¹³⁵ which implied a duty of good faith in a relational contract, but debate suggests that the solution developed in that case is not universally embraced.¹³⁶ In the current times of crisis, it seems even more relevant that the spirit of cooperation prevails to fulfil the purpose of these types of contracts. This is an interesting point of contrast with French law since the new Article 1104 of the *Code civil* requires that all contracts be performed in good faith. Yet, while principles may differ, the results may be the same as French judges interpret good faith relatively narrowly, as explained above.

32. Finally, one should not forget that parties are free to renegotiate their contract — under English law, a contract modification requires consideration. As explained above, in challenging times, judges have resorted to the equitable doctrine of promissory estoppel to circumvent this requirement. There is also room for judicial manoeuvres in how consideration is defined too — in *Williams v Roffey Bros* the court found that a promise to pay more for the completion of an existing contract was supported by good consideration because the defendants obtained a

¹³⁰ ‘A party shall not be liable in the event of non-fulfilment of any obligation arising under this contract by reason of Act of God, disease, strikes, Lock-Outs, fire, and any accident or incident of any nature beyond the control of the relevant party’.

¹³¹ 1988 WL 622867.

¹³² See *British Westinghouse v Underground Electric Railways* [1912] AC 673.

¹³³ Cour de cassation 1ère civ. 2 juillet 2014, n°13-17.599 <https://www.legifrance.gouv.fr/juri/id/JURITEXT000029194036>.

¹³⁴ Cour de cassation 2ème civ. 24 novembre 2011, n°10-25.635, <https://www.legifrance.gouv.fr/juri/id/JURITEXT000024856679>.

¹³⁵ [2013] EWHC 111 (QB).

¹³⁶ PEDAMON & VASSILEVA, ‘The Duty to Cooperate in English and French Contract Law: One Channel, Two Distinct Views’.

benefit in practice, such as not having to seek alternative performance and the timely completion of their project.¹³⁷ In this light, the versatility of the doctrine of consideration and its equitable alter ego, the promissory estoppel, may be better suited to promote fairness compared to the doctrine specifically geared to address supervening events — frustration.

3.2.2. COVID-19 and Frustration

33. Frustration is often portrayed as covering three broad sets of supervening events — physical impossibility, illegality, and frustration of purpose. Yet, these categories shade into one another: as pointed out by Chen-Wishart, ‘[t]he catastrophic destruction of the Twin Towers in New York on 11 September 2001 would frustrate any contract to provide cleaning services on the premises’: ‘performance would be illegal...physically impossible, and purposeless’.¹³⁸ It has also been pointed out that ‘there [was] no *numerous clausus*’ — no limited class of frustrating events.¹³⁹

However, as explained above, to this day the doctrine has a very narrow scope and remains messy, which does not make it best suited to address the COVID-19 challenges for contractual performance. The consequence of automatic termination right when the frustrating event occurs, irrespective of parties’ wishes, may also lead to harsh results as in some cases it might be better to save the contract or terminate it at a later stage.

In contemporary cases where frustration was argued, one identifies several common factors which judges considered: 1) foreseeability (the primary reference is the contract, but also courts take the circumstances into account); 2) no fault requirement (event is not due to the fault of either party); 3) radical change of obligation (as stated by Lord Radcliffe in *Davis Contractors* discussed above). This three-stage test seems coherently summarized by Lord Simon of Glaisdale in *National Carriers v Panalpina*:

Frustration of a contract takes place when there supervenes an event (without default of either party and for which the contract makes no sufficient provision) which so significantly changes the nature (not merely the expense or onerousness) of the outstanding contractual rights and/or obligations from what the parties could reasonably have contemplated at the time of its execution that it would be unjust to hold them to the literal sense of its stipulations in the new circumstances; in such case the law declares both parties to be discharged from further performance.¹⁴⁰

Yet, this test is not absolute, which may explain that depending on the factual matrix and the way the contract is written, judges prioritize different factors. In *Edwinton Commercial Corporation v Tsavlis*, Rix LJ stressed that ‘[o]f course, [frustration] need[ed] an overall test such as that provided by Lord Radcliffe, if it [was] not to descend into a morass of quasi-

¹³⁷ [1991] 1 QB 1, 15-16.

¹³⁸ M. CHEN-WISHART, *Contract Law* (5th edn, Oxford: Oxford University Press 2015), p 293.

¹³⁹ *Canary Wharf v European Medicines Agency* [2019] EWHC 335 (Ch), [41].

¹⁴⁰ [1981] 1 All ER 161, 175.

discretionary decisions'¹⁴¹ but case law on the doctrine demonstrated that 'circumstances [could] be so various as to defy rule-making'.¹⁴² Thus, he argued in favour of a 'multi-factorial approach'¹⁴³ or considering a broad range of factors — not only the contractual terms, but also the parties' knowledge, expectations and contemplations. Still, he conceded that the 'radically different' test was important in telling us 'the doctrine [was] not to be lightly invoked'.¹⁴⁴

The starting point for English judges, of course is the contract itself. They first examine if the risk of the supervening event was assumed as risk by either party — the existence of an explicit *force majeure* and hardship clauses may preclude the application of frustration, although that is not necessarily the case. In *Metropolitan Water Board v Dick, Kerr & Co*, the argument that a hardship clause permitting extension of time for performance in the contract precluded frustration was rejected because judges construed it very narrowly since the disruption caused by war 'could not possibly have been in the contemplation of the parties ... when it was made'.¹⁴⁵ Judges also consider if the surrounding circumstances may indicate the event was foreseen, but, as recently stated in *Canary Wharf*, 'foreseeability is something of a slippery concept that needs careful handling'.¹⁴⁶ In this case, for instance, it was held based on expert evidence that 'the withdrawal of the [UK] from the European Union could be said to be relevantly foreseeable' in August 2011.¹⁴⁷ This legal reasoning seems to indicate that contracts signed at the time it was known about the epidemic in China may not necessarily satisfy this criterion.

English law puts a strong emphasis on the fact that frustration should not be self-induced, but cases like the *J Lauritzen AS v Wijsmuller BV (The Super Servant Two)* showcase that the power to elect is considered as an event within the parties' control.¹⁴⁸ In this case, the contract provided for transporting a drilling rig by sea by either the Super Servant One ship or the Super Servant Two ship. The former was allocated to another contract while the latter sank. As a result, the contract could not be performed but the court concluded that the contract was not frustrated because Wijsmuller's election regarding which ship to use interrupted the causal link between the supervening event (the sinking of the ship) and Wijsmuller's inability to perform.¹⁴⁹ If one reasons by analogy and considers the hypothetical scenario that a contract stipulates that it would either be performed by worker A or worker B, worker B is assigned to another contract, and worker A contracts COVID-19, there are grounds to argue this is self-induced frustration.

¹⁴¹ [2007] EWCA Civ 547, [110].

¹⁴² *Ibid.*

¹⁴³ *Ibid.*, [111].

¹⁴⁴ *Ibid.*

¹⁴⁵ [1918] AC 119, 126.

¹⁴⁶ [2019] EWHC 335 (Ch), [213].

¹⁴⁷ *Ibid.*, [216].

¹⁴⁸ [1990] 1 Lloyd's Rep 1.

¹⁴⁹ *Ibid.* 9.

The requirement of fundamentality also reminds us that the doctrine is applied in very rare cases. Historically, cases in which frustration has successfully been argued have been limited — they concern destruction of subject-matter, unavailability of the subject-matter or something essential for the performance, illegality or a radically altered market.¹⁵⁰ Considering the government restrictions which may make certain types of contracts illegal (the prohibition of large gatherings may have an effect on certain hospitality businesses) or the market disturbances that COVID-19 caused, some contracts may fulfill this requirement. Yet, as explained above, the fussiness of the doctrine, coupled with the fact that courts construe some of the criteria of application rather narrowly, showcase why the principle does not seem best suited to address the COVID-19 challenge, leaving the parties to their own destiny.

4. Conclusion

34. We have shown that both France and England have stayed true to their historic responses *vis-à-vis* the effects of challenging times on contractual performance. Whereas France has a long tradition of state intervention in the name of fairness in contract, England, more often than not, leaves the difficult choices to the parties and the courts, even if the UK legislator chooses to intervene. Unsurprisingly, key common law doctrines and equitable solutions were developed in such instances. We have also highlighted that French law, in theory, disposes of more contractual tools which are apt to address the consequences of supervening events on contracts.

However, we have also demonstrated that neither France nor England has an ideal solution to the challenges posed by COVID-19 for contractual performance. Messy and limited state intervention or narrowly constructed common law doctrines may not address the needs of the protagonists. In practice, both jurisdictions seem to be encouraging the parties to be proactive, albeit by different means. In England, the government and members of the legal community are making calls for parties to act responsibly and fairly to achieve fair and equitable outcomes in contractual arrangements. They explicitly acknowledge the limitations of traditional judicial remedies, such as the doctrines of frustration and consideration or equitable principles such as the promissory estoppel. In France, legislators have provided an array of new temporary tools to suspend or delay the entering into effect of certain clauses forcing the parties to re-imagine their post-crisis contractual relationship during this reprieve. Additional tools can be found in the *Code civil* which include the *force majeure*, hardship and a series of unilateral self-help rights for dealing with non-performance. The intent here is to empower either the promisor or the promisee to take steps with a view to speeding resolution.

¹⁵⁰ See, for instance, *Appleby v Myers* (1867) LR 2 CP 651, *The Nema* [1982] AC 724, *Fibrosa Spolka Ackcyjna* [1943] AC 32, *Acetylene Corp of Great Britain v Canada Carbide* (1921) 8 LLR 456.

However, these prerogatives must be exercised with moderation as otherwise the judge will curtail excesses using the doctrine of good faith. Against the backdrop of costly and uncertain court proceedings parties may be better off settling their dispute quickly and amicably themselves. Over protection or under protection may lead to the same outcome for contractual relationships on both sides of the Channel.

The COVID-19 epidemic highlights the need for creative alternative responses to contractual challenges in times of crisis. The French and English approaches both involve varying degrees of reliance on the courts. Perhaps the real solution lies beyond the legal realm and calls for collaboration and solidarity between actors. Will there be an evolution of the values of the English and French business communities as a result of the COVID-19 curveball? We are yet to see.