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Abstract

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

Keywords

Coronavirus (Covid-19) pandemic; sanctity of contracts; subsequent impossibility of performance; debtor's delay of performance; creditor's delay of performance

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Introduction

The sanctity of contracts, a guiding principle of contract law in civil law systems, requires that both or all contracting parties be expected to meet their contractual obligations, thereby ensuring efficacy and efficiency of private ordering.[1] Consequently, the principle of *pacta sunt servanda*, according to which agreement must be kept, serves as a general principle of civil law. This principle dominates the law of contracts. One justification for this dominant role can be traced back to legal certainty and economic efficiency, the other lies in the fact that contracting parties are free to include specific clauses in their contract for allocating the distribution of risks between them. In commercial practice, the contractual risk allocation may occur through *force majeure*, hardship or material adverse change clauses.

Under extraordinary circumstances, however, legal systems provide for mechanisms, which may excuse contractual performance or lead to adaption or termination of contractual obligations.[2] From a public policy perspective, nobody should be legally committed to do or to refrain from doing something that is impossible. An important distinction to be made is whether an act or omission is indeed permanently impossible or only temporarily impossible. The first case concerns the legal institution of subsequent impossibility (*nachträgliche Unmöglichkeit*, *impossibilité d'executer*, *force majeure*, *impossibilità sopravvenuta*), the second that of delay, either by the debtor (*Verzug des Schuldners*, *demeure du débiteur*, *more del debitore*) or by the creditor (*Verzug des Gläubigers*, *demeure du créancier*, *mora del*

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

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

creditore). The principle of *clausula rebus sic stantibus* (hardship) adds another dimension to this issue. Under various institutions of civil law, contracts may be adapted or terminated not only under changed circumstances (*Störung der Geschäftsgrundlage*, *imprévision*, *presupposizione*), but also for cause (*Kündigung von Dauerschuldverhältnissen aus wichtigem Grund*, *caducité*, *eccessiva onerosità*).

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

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

Subsequent Impossibility of Performance

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

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[3] From an international perspective, *see* F. T. SCHWARZ et al, 'Introduction', in F. T. Schwarz et al (eds), *Contractual Performance and COVID-19: An In-Depth Comparative Law Analysis* (28 April 2020), n 1-3, 5-13; C. TWIGG-FLESNER, 'A Comparative Perspective on Commercial Contracts and the Impact of COVID-19 – Change of Circumstances, Force Majeure, or what?', in K. Pistor (ed), *Law in the Time of COVID-19* (20 April 2020); G. WAGNER, 'Corona Law' (2020) *Zeitschrift für Europäisches Privatrecht* 531. From a German perspective, *see* S. LORENZ, 'Allgemeines Leistungsstörungsrecht und Veranstaltungsrecht', in H. Schmidt, *COVID-19: Rechtsfragen zur Corona-Krise* (Munich: C.H. Beck, 2020) 1. For a first interpretative note under Austrian law, *see* M. UITZ and H. PARSCHÉ, 'Vertragsverstösse aufgrund COVID-19' (2020) 1 *COVID-19 und Recht*. On the risk allocation in contracts under Swiss law, *see* B. V. ENZ, 'Risikozuordnung in Verträgen und die COVID-19 Situation: Teil 1 – Anwendungsbereich der clausula rebus sic stantibus, der Unmöglichkeit nach Art. 119 OR und der Kündigung aus wichtigem Grund', *Jusletter* (18 May 2020); B. V. ENZ and S. MOR, 'Risikozuordnung in Verträgen und die COVID-19 Situation: Teil 2 – Problemstellungen der COVID-19 Situation im Werkvertragsrecht', *Jusletter* (10 August 2020); V. JENTSCH, 'The Law of Contracts in the Age of the Coronavirus Pandemic: Is the Statutory Risk Allocation pursuant to the Swiss Code of Obligations still adequate?', *Jusletter* (7 September 2020), n 5-50. On contract adaption under Swiss law, *see* A. HAEFELI et al, 'Anpassung privatrechtlicher Verträge infolge von COVID-19', in *COVID-19: Ein Panorama der Rechtsfragen zur Corona-Krise* (Basel: Helbing Lichtenhahn, 2020) 1. For a preliminary assessement under French law, *see* L. LANDIVAUX, 'Contrats et coronavirus : un cas de force majeure ? Ça dépend …', *Dalloz actualité* (20 March 2020); C. VERROUST-VALLIOT and S. PELLETIER, 'L'impact du covid-19 sur les contrats de droit privé', *Dalloz actualité* (9 June 2020). On the eternal conflict between the principles of *pacta sunt servanda* and *rebus sic stantibus* from an Italian perspective, *see* A. S. M. ROSETI, 'Il COVID-19 riaccende l'eterno conflitto tra il principio pacta sunt servanda e il principio rebus sic stantibus', *Diritto del Risparmio* (17 August 2020).

[4] For a functional and comparative analysis on adaption or termination of contractual obligations, *see* EUI Working Paper LAW 2021/08.

In Germany, section 275 of the German Civil Code applies to subsequent impossibility of performance. According to section 275(1), the claim for performance is excluded to the extent performance is impossible for the debtor or any other person. As impossibility is not defined in the statute, legal doctrine[5] and case law[6] have interpreted this rule to include 'objective impossibility', 'subjective impossibility' and 'legal impossibility'. In all these cases, the debtor is excused from performance by operation of law, irrespective of whether he or she is responsible for the impossibility. In contrast, 'economic impossibility' does not fall under this rule. Sections 275(2) and 275(3) deal with 'practical impossibility' and 'personal impossibility'.[7] In both of these cases, the debtor has a right to withhold performance, if he or she can establish impossibility. In all cases of impossibility, the creditor is released from rendering counter-performance pursuant to sections 275(4) and 326(1) of the German Civil Code.[8] Depending on the debtor's responsibility, the creditor may be able to claim damages and reimbursement of futile expenses in accordance with sections 280, 283, 284 and 311a of the German Civil Code.

In Austria, subsequent impossibility of performance is governed by section 1447 of the Austrian Civil Code. This provision applies, if performance has become permanently impossible so that it is virtually certain for a reasonable person in the relevant industry that an obligation cannot be performed now or in the future. After the prevailing legal doctrine, this concept includes not only 'factual impossibility', consisting of 'objective impossibility' and 'personal impossibility', and 'legal impossibility', but also – and this is quite exceptional in international comparison – 'economic impossibility'.[9] Initially, courts only recognized economic impossibility in cases, in which insisting on performance would result in the financial ruin of the debtor.[10] Decisions that are more recent require insisting on performance to be commercially unreasonable and pointless.[11] As a result, the affected obligations of the debtor are dissolved by operation of law, the creditor also does not have to perform its counter-performance and

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

6 On objective impossibility, *see* BGH, 13 January 2011, III ZR 87/10, in BGHZ 188, 71; BGH, 8 May 2014, VII ZR 203/11, in (2014) *Neue Juristische Wochenschrift* 3365. On subjective impossibility, *see* BGH, 25 October 2012, VII ZR 146/11, in BGHZ 195, 195. On legal impossibility, *see* BGH, 8 June 1983, VIII ZR 77/82, in (1983) *Neue Juristische Wochenschrift* 2873; BGH, 14 November 1991, III ZR 145/90, in (1992) *Neue Juristische Wochenschrift* 904; BGH, 11 December 1991, VIII ZR 4/91, in BGHZ 116, 268; BGH, 17 May 1995, VIII ZR 94/94, in (1995) *Neue Juristische Wochenschrift* 2026; BGH, 25 November 1998, XII ZR 12-97, in (1999) *Neue Juristische Wochenschrift* 635.

7 *See* SCHWARZE, n 5 above, 67-89; WESTERMANN, n 5 above, § 275 n 20-29; STADLER, n 5 above, § 275 n 24-29; ERNST, n 5 above, § 275 n 73-124; RIEHM, n 5 above, § 275 n 187-228, 265-286; LORENZ, n 5 above, § 275 n 57-64.

8 *See* SCHWARZE, n 5 above, 67-89; WESTERMANN, n 5 above, § 326 n 4-10; STADLER, n 5 above, § 326 n 4-12; W. ERNST, in F. J. Säcker et al (eds), *Münchener Kommentar zum Bürgerlichen Gesetzbuch*: *Schuldrecht – Allgemeiner Teil II* (Munich: C.H. Beck, 2019), § 326 n 8-34; C. HERRESTHAL, in B. Gsell et al (eds), *beck-online Grosskommentar zum Bürgerlichen Gesetzbuch* (1 June 2020), § 326 n 53-162; H. SCHMIDT, in W. Hau and R. Poseck (eds), *Beck'scher Online-Kommentar zum Bürgerlichen Gesetzbuch* (1 August 2020), § 326 n 4-11.

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

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

11 *See* OGH, 20 March 1963, 7 Ob 70/63, in SZ 36, no 44; OGH, 30 April 1963, 8 Ob 102/63, in (1963) *Österreichische Immobilien-Zeitung* 367. *See* also OGH, 14 February 2007, 7 Ob 255/06k, in SZ 82, no 25.

any performance already rendered can be claimed back. If the debtor is at fault, he or she will also be liable for damages for non-performance pursuant to sections 920 and 921 of the Austrian Civil Code.

In Switzerland, Article 119 of the Swiss Code of Obligations deals with subsequent impossibility of performance, which is not attributable to the debtor. Pursuant to Article 119(1), the debtor is no longer under a duty to perform. This provision includes 'factual impossibility' and 'legal impossibility', but neither 'temporary impossibility' nor 'economic impossibility'. Most scholars,[12] including the Swiss Federal Supreme Court,[13] do not subsume 'subjective impossibility' under this provision. Pursuant to Article 119(2), the creditor is also released from his or her duties. According to Article 119(3), this basic allocation of risk does not apply to cases, in which the contract or another statutory rule provide for a different risk allocation. Article 185(1) of the Swiss Code of Obligations provides such a different risk allocation (*periculum est emptoris*), except where it is otherwise agreed or dictated by exceptional circumstances. Swiss courts interpret 'exceptional circumstances' quite broadly, so that this rule does in most cases not apply.[14] If the debtor is at fault, however, he or she will not be released from his or her obligations, but be liable for damages pursuant to Article 97(1) of the Swiss Code of Obligations.[15]

In France, Articles 1351 and 1351-1 of the French Civil Code deal with subsequent impossibility of performance (*impossibilité d'exécuter*), referring to the concept of *force majeure*. Although codified only with the 2016 reform, this concept had been recognized by French courts for a long time before that.[16] Pursuant to the new Article 1218 of the French Civil Code, *force majeure* is defined and its consequences arranged.[17] It is required that the event preventing performance is external (*extériorité*), it has not been reasonably foreseeable (*imprévisibilité*) and its effects on performance were unavoidable (*irrésistibilité*). So far, French courts have been reluctant to accept an outbreak of an infectious disease as *force majeure*.[18] Government or administrative measures are more often recognized as *force majeure*,

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

[13] *See* BGer, 15 January 2009, 4A_394/2008, in BGE 135 III 212 (218-219).

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

[15] *See* H. BECKER, in H. Becker (ed), *Berner Kommentar zum Obligationenrecht: Allgemeine Bestimmungen* (Berne: Stämpfli, 1945), Art 97 n 11-25; WEBER, n 12 above, Art 97 n 98-146; L. THÉVENOZ, in L. Thévenoz and F. Werro (eds), *Commentaire romand du Codes des obligations* (Basel: Helbing Lichtenhahn, 2012), Art 97 n 5-18; H. GIGER, in W. Fischer and T. Luterbacher (eds), *Haftpflichtkommentar* (Zurich: Dike, 2016), Art 97 n 7-17; WIEGAND, n 12 above, Art 97 n 7-24.

[16] *See* Cass. 1re civ., 9 March 1994, 91-17459, 91-17464, in I *Bulletin*, no 91; Com., 1 October 1997, 95-12435, in IV *Bulletin*, no 240; Cass. 2e civ., 18 March 1998, 95-22014, in II *Bulletin*, no 97; Cass. 1re civ., 16 November 2002, 99-21203, in I *Bulletin*, no 258; Cass. 1re civ., 30 October 2008, 07-17134, in I *Bulletin*, no 243.

[17] *See* G. CHANTEPIE and M. LATINA, *La réforme du droit des obligations: Commentaire théorique et pratique dans l'ordre du Code civil* (Paris: Dalloz, 2016), n 617-626; F. GRÉAU, 'Force majeure', in *Répertoire de droit civil* (Paris: Dalloz, 2017), n 26-84; D. HOUTCIEFF, *Droit des contrats* (Bruxelles: Bruylant, 2018), n 1013-1022; P. MALAURIE et al, *Droit des obligations* (Paris: LGDJ, 2018), n 952-957; A. BÉNABENT, *Droit des obligations* (Paris: LGDJ, 2019), n 347-363; B. FAGES, *Droit des Obligations* (Paris: LGDJ, 2019), n 322-324; M. FABRE-MAGNAN, *Droit des obligations: Contrat et engagement unilatéral* (Paris: Presses Universitaires de France, 2019), n 982-990.

[18] *See* Cour d'appel, Nancy, 22 November 2010, 09-00003; Cour d'appel, Basse-Terre, 17 December 2018, 17-00739; Cour d'appel, Besançon, 8 January 2014, 12-02291; Cour d'appel, Paris, 17 March 2016, 15-04263; Cour d'appel, Paris, 29 March 2016, 15-05607. *See* also P. GUIOMARD, 'La grippe, les épidémies et la force majeure en dix arrêts', *Dalloz actualité*

but courts are quite strict as well.[19] If the impediment is permanent, the contract may be terminated by operation of law and parties discharged from their obligations, unless the debtor has agreed to perform or has been given prior notice of default by the creditor. If the impediment is temporary, performance of the obligations are suspended, unless the resulting delay justifies termination of the contract.

In Italy, subsequent impossibility of performance is governed by Articles 1218, 1256 and 1463 of the Italian Civil Code (*impossibilità sopravvenuta*). According to Italian legal doctrine, these provisions include only 'permanent impossibility' and 'objective impossibility' that is not attributable to the debtor, but not 'personal impossibility' or 'subjective impossibility'.[20] Pursuant to Article 1256(1), the debtor is released from the relevant obligations, if he or she is not responsible for the impossibility.[21] If the impossibility is only temporary, however, Article 1256(2) provides that the debtor shall not be liable for the delay in performance and not be released from his or her obligations.[22] Article 1463 further provides that the creditor shall be released from his or her duty to deliver counter-performance and performance already rendered must be reversed.[23] In addition, according to Article 1218, the debtor who did not perform his or her obligation due to an impossibility resulting from a cause not attributable to him or her is not liable for damages.[24] Additional rules, set forth in Articles 1464, 1465 and 1466 of the Italian Civil Code, apply to 'partial impossibility', permanent contracts and multi-party obligations.

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

Debtor's Delay of Performance

The legal institution of delay of debtor is applicable to situations, where contractual performance is only temporarily impossible due to a default of the debtor. In general, no prevention, but only a suspension

(4 March 2020); F. T. SCHWARZ et al, 'France', in F. T. Schwarz et al (eds), *Contractual Perfomance and Covid-19: An In-Depth Comparative Law Analysis* (8 June 2020), n 23.

19 *See* Cass. 3e civ., 11 October 1989, 87-19490; Cour d'appel, Nancy, 6 November 2001, 2001-184443; Cass. 1re civ., 18 May 2005, 01-16243; Com., 31 January 2006, 04-15164; Cass. 3e civ., 28 November 2007, 06-17758, in III *Bulletin*, no 213; Cass. 3e civ., 1 June 2011, 09-70502, in III *Bulletin*, no 89. *See* also Schwarz et al, n 18 above, n 24.

20 *See* G. OSTI, 'Impossibilità sopravveniente', in A. Azara and E. Eula (eds), *Novissimo digesto italiano* (Torino: Utet, 1962) 287, 287-300; F. GALGANO, *Trattato di diritto civile: Le obbligazioni in generale,Il contratto in generale, I songoli contratti* (Padova: Antonio Milani, 2010), n 16, 115; G. ALPA, *Il contratto in generale: Principi e problemi* (Milan: Giuffrè, 2014), 169-170; M. C. DIENER, *Il contratto in generale* (Milan: Giuffrè, 2015), n 16.10; A. CATAUDELLA, *I contratti: Parte generale* (Torino: G. Giappichelli, 2019), n 44.

21 *See* L. CIAFARDINI, in L. Ciafardini and F. Izzo (eds), *Codice civile: annotato con la giurisprudenza* (Milan: Simone, 2013), Art 1256 § 2; A. ZACCARIA, in G. Cian (ed), *Commentario breve al Codice civile* (Padova: Antonio Milani, 2014), Art 1256 I; A. BARENGHI, in P. Rescigno (ed), *Codice civile: le fonti del diritto italiano* (Milan: Giuffrè, 2018), Art 1256 n 1; A. CALABRESE, in M. Franzoni and R. Rolli (eds), *Codice civile: commentato con dottrina e giurisprudenza* (Torino: G. Giappichelli, 2018), Art 1256 n 1. *See* also Cass., 22 October 1982, 5496; Cass., 28 January 1995, 1037.

22 *See* CIAFARDINI, n 21 above, Art 1256 § 2; ZACCARIA, n 21 above, Art 1256 II; BARENGHI, n 21 above, Art 1256 n 2; CALABRESE, n 21 above, Art 1256 n 2. *See* also Cass., 6 February 1979, 794.

23 *See* CIAFARDINI, n 21 above, Art 1463 §§ 3, 4; ZACCARIA, n 21 above, Art 1463 IV; C. DEL FEDERICO, in M. Franzoni and R. Rolli (eds), *Codice civile: commentato con dottrina e giurisprudenza* (Torino: G. Giappichelli, 2018), Art 1463 n 2; G. MAURO PELLEGRINI, in P. Rescigno (ed), *Codice civile: le fonti del diritto italiano* (Milan: Giuffrè, 2018), Art 1463 n 1. *See* also Cass., 14 January 1992, 360; Cass., 28 January 1995, 1037.

24 *See* CIAFARDINI, n 21 above, Art 1218 §§ 3, 5; ZACCARIA, n 21 above, Art 1218 II, III; BARENGHI, n 21 above, Art 1218 n 3; R. FORNASARI, in M. Franzoni and R. Rolli (eds), *Codice civile: commentato con dottrina e giurisprudenza* (Torino: G. Giappichelli, 2018), Art 1218 n 1-4. *See* also Cass., 14 November 2011, 23728.

of contractual performance may result from such situations. Damages are in some cases owed regardless of debtor's fault, in other cases only if the debtor is at fault. In addition, creditors have various remedies at their disposal, which indeed vary from one jurisdiction to another. In all jurisdictions examined, this institution is important during a pandemic as it provides debtors with an incentive to perform a contract.

In Germany, section 286 of the German Civil Code deals with delay of debtor (*Verzug des Schuldners*). Pursuant to section 286(1), a debtor is in delay, if he or she fails to perform despite a warning notice from the creditor made after performance is due.[25] Under certain conditions, specified in section 286(2), no warning notice is required. However, according to section 286(4), the debtor is not in delay as long as performance is not made as a result of circumstances he or she is not responsible for. In contrast, section 323(1) of the German Civil Code, which also covers situations of delayed performance and entitles the creditor to revoke the contract, is applicable regardless of whether the debtor is at fault.[26] As a general rule, the creditor can only resort to this remedy, if he or she grants a grace period for the debtor. It is to be decided at the time the impediment occurs, if the debtor can rectify non-performance (delay) or not (impossibility). In addition, the debtor is liable for damages pursuant to section 325 of the German Civil Code.[27] Pursuant to the second sentence of section 280(1), the debtor is not liable, if he or she is not at fault. Section 275(4) states that this also applies, if he or she is excused from performance.

In Austria, the requirements and consequences of delay of debtor are addressed in section 918 of the Austrian Civil Code. Pursuant to section 918(1), delay of debtor is defined as a situation, in which the debtor does not perform his or her contractual obligation at the agreed time, at the proper place or in the agreed manner.[28] According to section 918(1), the creditor can choose whether to insist on future performance and claim damages for the delay or declare the contract terminated after a reasonable grace period and claim expectation damages.[29] Austrian law notably distinguishes between 'objective delay' and 'subjective delay' of debtor.[30] This distinction is important because the debtor is only liable for damages, if he or she is at fault. Consequently, delayed performance due to temporary impossibility without debtor's fault leads to a suspension of the due date either for the duration of the impediment or for the duration of a reasonable grace period.[31] In some cases such as a delay of performance relating to fixed-term contracts, however, Austrian law allows a creditor to resort to the remedies of (permanent) impossibility even in cases, in which only a temporary impediment to performance exists.[32]

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[25] *See* SCHWARZE, n 5 above, 424-443; J. HAGER, in H. P. Westermann et al (eds), *Erman Handkommentar zum Bürgerlichen Gesetzbuch* (Cologne: Otto Schmidt, 2017), § 286 n 18-50; STADLER, n 5 above, § 286 n 13-40; ERNST, n 5 above, § 286 n 20-76; T. W. DORNIS, in B. Gsell et al (eds), *beck-online Grosskommentar zum Bürgerlichen Gesetzbuch* (1 March 2020), § 286 n 98-225; LORENZ, n 5 above, § 286 n 3-38. From an international perspective, *see* F. T. SCHWARZ et al, 'Germany', in F. T. Schwarz et al (eds), *Contractual Perfomance and Covid-19: An In-Depth Comparative Law Analysis* (8 June 2020), n 22-25.

[26] *See* WESTERMANN, n 5 above, § 323 n 10-24; STADLER, n 5 above, § 323 n 5a-14; ERNST, n 8 above, § 323 n 45-132; D. LOOSCHELDERS, in B. Gsell et al (eds), *beck-online Grosskommentar zum Bürgerlichen Gesetzbuch* (1 February 2020), § 323 n 83-218; H. SCHMIDT, n 8 above, § 323 n 4-38.

[27] *See* SCHWARZE, n 5 above, 447-461; WESTERMANN, n 5 above, § 325 n 3-5; STADLER, n 5 above, § 325 n 2; ERNST, n 8 above, § 325 n 4-21; HERRESTHAL, n 8 above, § 325 n 64-116; SCHMIDT, n 8 above, § 325 n 8-20.

[28] *See* A. REIDINGER, in M. Schwimann and G. Kodek (eds), *Praxiskommentar zum Allgemeinen bürgerlichen Gesetzbuch* (Vienna: LexisNexis, 2014), § 918 n 4-26; P. BYDLINSKI, in H. Koziol et al (eds), *Kurzkommentar zum Allgemeinen bürgerlichen Gesetzbuch* (Vienna: Österreich, 2017), § 918 n 4-7; REISCHAUER, n 9 above, § 918 n 2-6; M. GRUBER, in A. Kletecka and M. Schauer (eds), *Online-Kommentar zum Allgemeinen bürgerlichen Gesetzbuch* (1 August 2019), § 918 n 4-20, 50-51.

[29] *See* REIDINGER, n 28 above, § 918 n 27-95; BYDLINSKI, n 28 above, § 918 n 8-19; REISCHAUER, n 9 above, § 918 n 9, 11-71, 138-154; GRUBER, n 28 above, § 918 n 21-49, 52-62.

[30] *See* REISCHAUER, n 9 above, § 918 n 7; GRUBER, n 28 above, § 918 n 4-62.

[31] *See* REISCHAUER, n 9 above, § 918 n 141-154; GRUBER, n 28 above, § 918 n 53-59, § 921 n 3-14. From an international perspective, *see* SCHWARZ et al, n 10 above, n 48-49.

[32] *See* BYDLINSKI, n 28 above, § 918 n 13; REISCHAUER, n 9 above, § 918 n 25-33. From an international perspective, *see* SCHWARZ et al, n 10 above, n 50.

In Switzerland, Articles 102 to 109 of the Swiss Code of Obligations govern delay of debtor (*Verzug des Schuldners*). Pursuant to Article 102(1), a delay of debtor requires a default of such party, despite the possibility of performance, a contractual claim that is due, a formal reminder from the creditor (if necessary) and non-performance must be in breach of a duty.[33] No formal reminder is required pursuant to Article 102(2), if a deadline for performance of the obligation has been set. In such a situation, the debtor in default is liable for damages for late performance, accidental damage and excess damage pursuant to Articles 103 and 106.[34] In addition, a debtor in default on payment of a pecuniary debt must pay default interest in accordance with Articles 104 and 105. Pursuant to Articles 107(2) and 109, the creditor has three options.[35] The first option is to insist on performance and sue for damages due to the delay. The second option is to waive performance and claim damages for non-performance. The third option is to waive performance and terminate the agreement altogether. The creditor is thus not entitled to claim immediate performance or damages from the debtor for the duration of the impediment.[36]

In France, delay of debtor (*mise en demeure du débiteur*) is today governed by Articles 1344 to 1344-2 of the French Civil Code. French law modernized this institution in its 2016 reform.[37] Pursuant to Article 1344, a debtor can be put in default to pay by a formal notice, either in the form of a summons or a sufficient act of interpellation.[38] No formal notice is required, if the contract provides for a fixed due date. In obligations relating to pay a sum of money, Article 1344-1 further provides that the formal notice causes default interest at the statutory rate to accrue.[39] In addition, the formal notice may also cause contractually agreed interest to become payable. In obligations relating to an object, Article 1344-2 provides that the formal notice puts the risk of accidental loss on the debtor, if it is not already borne by the debtor.[40] This provision derogates from the general rule on risk allocation provided for in Article 1196, according to which the owner bears the risk of the object, thereby worsening the debtor's position and thus sanctioning his or her late performance. In such a situation, the creditor may, in accordance with Article 1217 of the French Civil Code, choose among various remedies.[41]

In Italy, delay of debtor is in particular regulated in Articles 1219 (*constituzione in mora*) and 1221 (*effetti della mora sul rischio*) of the Italian Civil Code. The concept of delay of debtor under Italian law requires a claim due, a formal notice and unjustified non-performance by the debtor. Pursuant to Article

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33 *See* THÉVENOZ, n 15 above, Art 102 n 10-32; EMMENEGGER et al, n 12 above, 116-118, 123-127; SCHWENZER, n 12 above, 475; KOLLER, n 12 above, 963-974; C. HUGUENIN, *Obligationenrecht: Allgemeiner und Besonderer Teil* (Zurich: Schulthess, 2018), 289-295; C. WIDMER LÜCHINGER and W. WIEGAND, in C. Widmer Lüchinger and D. Oser (eds), *Basler Kommentar zum Obligationenrecht* (Basel: Helbing Lichtenhahn, 2020), Art 102 n 3-12a.

34 On liability for damages for late performance and excess damage, *see* THÉVENOZ, n 15 above, Art 103 n 4-6; EMMENEGGER et al, n 12 above, 118-120; SCHWENZER, n 12 above, 475; KOLLER, n 12 above, 978-981; HUGUENIN, n 33 above, 296. On liability for accidental damage, *see* THÉVENOZ, n 15 above, Art 103 n 7-10; EMMENEGGER et al, n 12 above, 120; SCHWENZER, n 12 above, 476; HUGUENIN, n 33 above, 296; WIDMER LÜCHINGER and WIEGAND, n 33 above, Art 103 n 8-12.

35 *See* THÉVENOZ, n 15 above, Art 107 n 26-37; EMMENEGGER et al, n 12 above, 128-141; KOLLER, n 12 above, 989-1012; HUGUENIN, n 33 above, 297-304; WIDMER LÜCHINGER and WIEGAND, n 33 above, Art 107 n 12-20.

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

37 *See* CHANTEPIE and LATINA, n 17 above, n 976; B. GRIMONPREZ, 'Mise en demeure', in *Répertoire de droit civil* (Paris: Dalloz, 2017), n 2; HOUTCIEFF, n 17 above, n 965-968; MALAURIE et al, n 17 above, n 973-975; BÉNABENT, n 17 above, n 767; FAGES, n 17 above, n 285; FABRE-MAGNAN, n 17 above, n 930.

38 *See* CHANTEPIE and LATINA, n 17 above, n 977-978; GRIMONPREZ, n 37 above, n 22-37. *See* also Cass. 3e civ., 31 March 1971, 69-12294, in III *Bulletin*, no 230; Cass. 3e civ., 19 March 1997, 95-17070; Cass. 3e civ., 1 June 2011, 09-70502, in III *Bulletin*, no 89.

39 *See* CHANTEPIE and LATINA, n 17 above, n 979; GRIMONPREZ, n 37 above, n 47-77.

40 *See* CHANTEPIE and LATINA, n 17 above, n 979; GRIMONPREZ, n 37 above, n 78-80.

41 *See* CHANTEPIE and LATINA, n 17 above, n 612-616; HOUTCIEFF, n 17 above, n 936-937; MALAURIE et al, n 17 above, n 872; BÉNABENT, n 17 above, n 365-366; FAGES, n 17 above, n 282-284; FABRE-MAGNAN, n 17 above, n 991-992.

1219(1), the creditor may put the debtor in default by a formal notice or request in writing.[42] In certain cases specified in Article 1219(2), no notice of default is necessary. As a consequence of default, the debtor shall compensate the damage resulting from the delay in accordance with Articles 1218 and 1223 to 1229, shall pay default interest in accordance with Article 1224 and will be burdened by the risk of the perishment of the object in accordance with Article 1221, even if not attributable to him or her. Pursuant to Article 1221(1), the debtor, whose performance is delayed without his or her fault, is not released from contractual obligations, unless he or she proves that the creditor would have assessed the situation equally.[43] Article 1221(2) further clarifies that the destruction or unlawful removal of an object does not release the person, who is responsible for this, from his or her obligation to return its value.

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

Creditor's Delay of Performance

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

In Germany, sections 293 to 304 of the German Civil Code cover delay of creditor (*Verzug des Gläubigers*). Section 293 contains the main provision for a default in acceptance. Together with sections 294 to 296, this provision puts forth the requirements for this particular form of default caused by the creditor. A delay of creditor requires that a debtor's delay in performance is due to the creditor's failure to accept the performance duly offered to him or her or to refrain from taking any cooperative action necessary for performance.[44] Other than delay of debtor, delay of creditor is not a breach of duty and thus triggers no damages.[45] A delay of creditor may only lead to a mitigation of liability in favour of the debtor in accordance with sections 300(1), 301 and 302, to a shift of the risk of performance and price risk to the debtor in accordance with section 300(2) and the second sentence of section 326(2) and to a claim for reimbursement of expenses by the debtor in accordance with section 304 of the German Civil Code.[46] However, defaults in performance, which are based on an obligation of acceptance or cooperation on the part of the creditor, are not covered by these provisions on delay of creditor.

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[42] *See* GALGANO, n 20 above, n 12; CIAFARDINI, n 21 above, Art 1219 §§ 2-4; ZACCARIA, n 21 above, Art 1219 III; BARENGHI, n 21 above, Art 1219 n 3; G. SICCHIERO, in M. Franzoni and R. Rolli (eds), *Codice civile: commentato con dottrina e giurisprudenza* (Torino: G. Giappichelli, 2018), Art 1219 n 1. *See* also Cass., 24 February 1978, 959, in (1978) *Massimario del Foro italiano*, n 959; Cass., 12 October 1998, 10090, in (1999) I *Giustizia civile* 422; Cass., 3 December 2002, 17157 (2002) *Massimario del Foro italiano*, n 105.

[43] *See* CIAFARDINI, n 21 above, Art 1221 §§ 1-2; SICCHIERO, n 42 above, Art 1221 n 1. *See* also Cass., 13 April 1987, 3654.

[44] *See* SCHWARZE, n 5 above, 592-622; HAGER, n 25 above, § 293 n 1-7; STADLER, n 5 above, § 293 n 4-5; ERNST, n 5 above, § 293 n 7-22; S. DÖTTERL, in B. Gsell et al (eds), *beck-online Grosskommentar zum Bürgerlichen Gesetzbuch* (15 July 2020), § 293 n 55-98; LORENZ, n 5 above, § 293 n 2-11.

[45] *See* SCHWARZE, n 5 above, 622; DÖTTERL, n 44 above, § 293 n 113; LORENZ, n 5 above, § 293 n 13.

[46] *See* SCHWARZE, n 5 above, 622-635; HAGER, n 25 above, § 300 n 1-9; STADLER, n 5 above, § 293 n 6-7; ERNST, n 5 above, § 300 n 2-4, § 301 n 2-3, § 302 n 2-3, § 304 n 2-4; DÖTTERL, n 44 above, § 293 n 99-121; LORENZ, n 5 above, § 293 n 12-13.

In Austria, the provision on delay of creditor is section 1419 of the Austrian Civil Code. According to this provision, specific negative consequences (*widrige Folgen*) fall upon the creditor, if he or she is in delay in accepting performance.[47] First, the creditor is required to perform under the contract, also if the debtor is released from his or her contractual obligations. Second, the creditor must bear additional costs that the debtor incurs due to the fact that the creditor does not accept performance in time. Third, the creditor has no right to claim damages from the debtor, if goods to be delivered are damaged due to ordinary negligence. The debtor has a duty to store the goods in such a situation. Pursuant to section 1425 of the Austrian Civil Code, the debtor can render performance of its own contractual obligation by means of judicial deposit (*gerichtliche Hinterlegung*).[48] In commercial contracts, the debtor can also resort to a self-help sale (*Selbsthilfeverkauf*) in accordance with section 373 of the Austrian Commercial Code.[49] However, if the creditor does not accept performance due to a permanent impediment outside his or her control, the rules on impossibility and not those on delay of creditor apply.[50]

In Switzerland, Articles 91 to 96 of the Swiss Code of Obligations concern delay of creditor (*Verzug des Gläubigers*). Pursuant to Article 91, a delay of creditor requires that a party in default refuses, without good cause, to accept performance properly offered to him or her or to carry out such preparations as he or she is obligated to make as the debtor cannot render performance otherwise.[51] As a consequence of delay of creditor, delay of debtor is no longer possible. In the case of obligations relating to objects, the debtor has a right to deposit the object at the expense and the risk of the creditor pursuant to Article 92(1), thereby discharging his or her obligation, and a right to take it back pursuant to Article 94(2), causing the claim and all accessory rights to become effective again. In some cases, the debtor has a right to sell the object and dispose the sale proceeds in accordance with Article 93. In the case of all other obligations, the debtor has a right to terminate the contract pursuant to Article 95.[52] Pursuant to Article 96, the debtor is also entitled to deposit his or her performance or to terminate the contract, if performance is prevented for other reasons attributable to the creditor.[53]

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47 On the requirements, *see* HEIDINGER, n 9 above, § 1419 n 2-12; H. KOZIOL and M. SPITZER, in H. Koziol et al (eds), *Kurzkommentar zum Allgemeinen bürgerlichen Gesetzbuch* (Vienna: Österreich, 2017), § 1419 n 1-2; REISCHAUER, n 9 above, § 1419 n 1; J. STABENTHEINER, in A. Kletecka and M. Schauer (eds), *Online-Kommentar zum Allgemeinen bürgerlichen Gesetzbuch* (1 July 2018), § 1419 n 2-3. On the consequences, *see* HEIDINGER, n 9 above, § 1419 n 13-19; KOZIOL and SPITZER, n 47 above, § 1419 n 4-10; REISCHAUER, n 9 above, § 1419 n 8; STABENTHEINER, n 47 above, § 1419 n 4. From an international perspective, *see* SCHWARZ et al, n 10 above, n 52-55.

48 *See* HEIDINGER, n 9 above, § 1425 n 4-22, 29-39; KOZIOL and SPITZER, n 47 above, § 1425 n 3-10, 12-13; REISCHAUER, n 9 above, § 1425 n 1-11, 25-24e; STABENTHEINER, n 47 above, § 1425 n 5-17, 32-39.

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

50 *See* R. WELSER and B. ZÖCHLING-JUD, *Grundriss des bürgerlichen Rechts II: Schuldrecht Allgemeiner Teil, Schuldrecht Besonderer Teil, Erbrecht* (Vienna: Manz, 2020), n 301.

51 *See* D. LOERTSCHER, in L. Thévenoz and F. Werro (eds), *Commentaire romand du Codes des obligations* (Basel: Helbing Lichtenhahn, 2012), Art 91 n 10-16; EMMENEGGER et al, n 12 above, 66-69; SCHWENZER, n 12 above, 492-495; KOLLER, n 12 above, 1021-1028; HUGUENIN, n 33 above, 306-307; S. LEIMGRUBER, in C. Widmer Lüchinger and D. Oser (eds), *Basler Kommentar zum Obligationenrecht* (Basel: Helbing Lichtenhahn, 2020), Art 91 n 2-15.

52 On the right to deposit and take back objects, *see* LOERTSCHER, n 51 above, Art 92 n 4-5, 12-14; EMMENEGGER et al, n 12 above, 69-70; SCHWENZER, n 12 above, 492-495; KOLLER, n 12 above, 1032-1034; HUGUENIN, n 33 above, 306-307; LEIMGRUBER, n 51 above, Art 92 n 2-3, 8-10. On the right to sell objects, *see* LOERTSCHER, n 51 above, Art 93 n 4-12; EMMENEGGER et al, n 12 above, 70-71; SCHWENZER, n 12 above, 492-495; KOLLER, n 12 above, 1035-1037; HUGUENIN, n 33 above, 306-307; LEIMGRUBER, n 51 above, Art 93 n 2-4, 7-8. On the right to terminate the contract, *see* LOERTSCHER, n 51 above, Art 95 n 4-7; EMMENEGGER et al, n 12 above, 71-72; SCHWENZER, n 12 above, 492-495; KOLLER, n 12 above, 1040-1043; LEIMGRUBER, n 51 above, Art 95 n 2-3a.

53 *See* LOERTSCHER, n 51 above, Art 96 n 4-10; EMMENEGGER et al, n 12 above, 74-75; SCHWENZER, n 12 above, 492-495; KOLLER, n 12 above, 1054-1060; LEIMGRUBER, n 51 above, Art 96 n 2-5.

In France, delay of creditor (*mise en demeure du créancier*) is now governed by Articles 1345 to 1345-3 of the French Civil Code. The revision of French contract law in 2016 introduced this concept to French law.[54] If the creditor refuses the payment on the due date and without legitimate reasons, pursuant to Article 1345(1), the debtor may give a formal notice to the creditor to accept performance offered or to allow it to be performed.[55] It is further specified in Article 1345(2) that the creditor's notice of default shall determine the rate of interest due by the debtor and shall allocate the risks relating to the object to the creditor, unless this person acts with gross negligence or wilful misconduct. In addition, Article 1345-1(1) provides that the debtor may either consign (*consigner*) the sum of money in question or sequester (*séquestrer*) the object in question with a professional custodian.[56] In case a sequestration of the object is impossible or too costly, a competent judge may authorize a private sale or a public auction, consigning the price after deduction of the costs pursuant to Article 1345-1(2). Article 1345-1(3) clarifies that the consignment or sequestration shall discharge the debtor from his or her obligations.

In Italy, delay of creditor (*mora del creditore*) is governed by Articles 1206 to 1217 of the Italian Civil Code. Pursuant to Article 1206, the creditor is in default, when he or she does not receive the payment offered to him or her in the manner specified by the law or does not do what is necessary for the debtor to fulfil its obligation.[57] The concept of delay of creditor has a number of consequences unfavourable to the creditor. Pursuant to Article 1207(1), the impossibility of performance for reasons not attributable to the debtor shall be borne by the creditor, no more interest is owed and the fruits of the object that has not been received by the debtor cannot be collected.[58] Pursuant to Article 1207(2), the creditor must compensate the damage caused by his or her default and bear the costs of storage and preservation of the object.[59] According to Article 1210(1), the debtor can make a deposit, if the creditor refuses to accept the actual offer or declares that he or she is not willing and prepared to receive the object(s) offered to him or her by notice.[60] In the case of perishable or wasteful custody, the debtor may obtain permission from the court to sell them in accordance with Article 1211 and deposit the price.[61]

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

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54 *See* CHANTEPIE and LATINA, n 17 above, n 980; GRIMONPREZ, n 37 above, n 3; BÉNABENT, n 17 above, n 768; FAGES, n 17 above, n 502; FABRE-MAGNAN, n 17 above, n 931. *See* also C. ROBIN, 'La mora creditoris' (1998) *Revue trimestrielle de droit civil* 607.

55 *See* CHANTEPIE and LATINA, n 17 above, n 981-985; GRIMONPREZ, n 37 above, n 38-44. *See* also Com., 9 October 2001, 99-10974, in IV *Bulletin*, no 163.

56 *See* CHANTEPIE and LATINA, n 17 above, n 986-988; GRIMONPREZ, n 37 above, n 81-87.

57 *See* GALGANO, n 20 above, n 15; CIAFARDINI, n 21 above, Art 1206 §§ 1-2; ZACCARIA, n 21 above, Art 1206 II, III; G. BORRACCIA, in P. Rescigno (ed), *Codice civile: le fonti del diritto italiano* (Milan: Giuffrè, 2018), Art 1206 n 1-2; DEL FEDERICO, n 23 above, Art 1206 n 2-6. *See* also Cass., 21 January 1986, 376, in (1986) I *Giustizia civile* 1933; Cass., 8 February 1986, 809, in (1986) I *Giustizia civile* 1928; Cass., 18 January 1995, 522.

58 *See* CIAFARDINI, n 21 above, Art 1207 §§ 1-3; ZACCARIA, n 21 above, Art 1207 III, IV; BORRACCIA, n 57 above, Art 1206 n 1-3; DEL FEDERICO, n 23 above, Art 1207 n 2-3. *See* also Cass., 25 May 1984, 3228; Cass., 13 January 1995, 367.

59 *See* CIAFARDINI, n 21 above, Art 1207 § 4; ZACCARIA, n 21 above, Art 1207 V; BORRACCIA, n 57 above, Art 1206 n 4; DEL FEDERICO, n 23 above, Art 1207 n 4. *See* also Cass., 21 January 1985, 202.

60 *See* CIAFARDINI, n 21 above, Art 1210 § 1; ZACCARIA, n 21 above, Art 1210 I; BORRACCIA, n 57 above, Art 1210 n 2; DEL FEDERICO, n 23 above, Art 1210 n 2. *See* also Cass., 27 November 1973, 3249; Cass., 27 January 1983, 743.

61 *See* BORRACCIA, n 57 above, Art 1211 n 1; DEL FEDERICO, n 23 above, Art 1211 n 1.

Conclusions

This article deals with the fundamental question, whether excuses of contractual performance and remedies for breach of contract still serve their purpose in times of pandemic or whether and to what extent a uniform breach of contract action is needed in European Contract Law. Using a functional and comparative approach, similarities and differences of all these excuses and remedies in five important civil law jurisdictions are analysed and compared in order to answer this question. The analysis has in particular shown that, despite structural differences, the application of those excuses and remedies largely leads to similar end results.[62] This finding notably implies that there is no need for a uniform breach of contract action with regard to permanent or temporary default in European Contract Law, not even in times of pandemic.

Although the requirements and consequences of legal institutions on breach of contract differ quite a bit in various European countries, their main mechanisms are ultimately the same: contractual obligations are either permanently prevented or temporarily suspended and – if applicable, in case of fault – damages are triggered. In Germany, Austria and Switzerland, the institutions of subsequent impossibility and delay of performance, either of the debtor or of the creditor, are relevant. In France and Italy, the concept of subsequent impossibility provides for separate legal consequences, depending whether impediments are of permanent or only of temporary nature. This is exemplary and would also be worth considering in the German, Austrian and Swiss legal systems. As a side note, Italy has even adopted an emergency provision, which requires taking compliance with coronavirus-containment measures into consideration, when assessing debtor's liability and deadlines or liquidated damages for non-performance.[63]

In the good old days (which is only a few years back from now), German, Austrian and Swiss law – the legal systems in the German-speaking jurisdictions – were all based on a differentiating concept of breach of contract, whereas French and Italian law – the Roman civil codes – were both following a uniform concept of breach of contract.[64] In more recent years, however, this dichotomy has been somewhat relativized, bringing both conceptions closer together. In 2002, the Germans modernized their law of obligations considerably, leading to a situation, where the German Civil Code is 'very much a unitary system', at least in terms of legal consequences.[65] Later, in 2016 (and 2018), the French, although still based on a 'unitary concept' of breach of contract, introduced different legal consequences for various breaches of contract.[66] It seems therefore appropriate to speak of diversity that is united at its core, reaffirming that no uniform breach of contract action is needed in European Contract Law.

Because of such common core, it is safe to conclude that there is no need for unification in European Contract Law in this regard. The distinction between permanent and temporary default of performance is convincing as it allows different situations to be treated differently, paired with appropriate incentives. Subsequent impossibility should be assumed restrictively, at least if the law provides no separate legal

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62 From an international perspective, *see* SCHWARZ et al, n 3 above, n 20-35.

63 *See* Art 91(1) of Decreto-Legge, 17 March 2020, no 18, 'Misure di potenzialmento del Servizio sanitario nazionale e di sostegno economico per familie, lavoratori e imprese connesse all'emergenza epidemiologica da COVID-19', GU 161, no 70. For a discussion and analysis of various extraordinary measures taken by European governments during the coronavirus pandemic, *see* V. JENTSCH, 'Government Responses on Corona and Contracts: Extraordinary Measures in Times of Crisis' (2021) *European Business Law Review* (forthcoming).

64 *See* K. ZWEIGERT and H. KÖTZ, 'Einführung in die Rechtsvergleichung' (Tubingen: Mohr Siebeck, 1996), 486-501.

65 *See* S. GRUNDMANN, 'Structural Elements in the Contract Law Parts of the German Civil Code', in S. Grundmann and M. Schauer (eds), *The Architecture of European Codes and Contract Law* (Alphen aan den Rijn: Kluwer, 2006) 57, 80. *See* also S. GRUNDMANN, 'Der Schadenersatzanspruch aus Vertrag: System und Perspektiven' (2004) 204 *Archiv für die civilistische Praxis* 569; S. GRUNDMANN, 'Germany and the Schuldrechtsmodernisierung 2002' (2005) *European Review of Contract Law* 129.

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

consequences for such temporary impediments. As a result, remedies of delay rather than those of impossibility should be claimed during the coronavirus pandemic.[67] Doing so pays tribute to the sanctity of contracts, a guiding principle of European Contract Law, namely by keeping contractual obligations alive. This is why the distinction between permanent and temporary default should not be abolished, but reinforced.

[67] For a functional and doctrinal analysis under Swiss law, *see* JENTSCH, n 3 above, n 6-23.