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Contracts and the Coronavirus Crisis: Emergency Policy Responses between Preservation and Disruption

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Abstract

As of late spring 2021, three major Covid-19 waves have hit Europe. These waives were accompanied by three generations of emergency policy responses taken by national and supranational governments, consisting of containment and closure measures, economic measures, and health measures. Against this backdrop, the coronavirus crisis creates a wide variety of contract-specific problems. One key strategy to solve contract-specific problems during the coronavirus crisis is the preservation of a contract. The other key strategy to solve contract-specific problems during the coronavirus crisis is the disruption of a contract, in one way or another. Using a legal theory and law and economics approach, this article deals with the research question, whether emergency policy responses will pay off or cause even more harm in the long term. The article further aims to assess the impact of different generations of emergency policy responses on contract law in order to inform the ongoing debate in law and politics. This is important because any intervention in a functioning system increases complexity and creates a new equilibrium that may be inferior.

Keywords

Coronavirus (Covid-19) pandemic; contracts; impossibility of performance; delay of performance; adaption and termination under changed circumstances; termination for cause

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Introduction

«Was heute gilt, ist morgen vielleicht schon veraltet» (analogous translation: what counts today, may already be obsolete tomorrow), *Alain Berset*, Switzerland's Health Minister, proclaimed on the 1st of March 2020 in the popular boulevard newspaper *Blick*.[1] As simple as this statement might sound, it captures the nature of the coronavirus crisis quite well. Covid-19, the new coronavirus and its mutants, is a moving target, making it incredibly hard to come up with solid and sustainable solutions to fix the underlying problem. Neither *Berset* nor anybody else on this planet dared to foresee at the time, what was actually in store for us in the months (and perhaps even years) to come.

As of late spring 2021, three major Covid-19 waves have hit Europe.[2] The first wave started in spring 2020, the second wave in fall 2020, and the third wave in spring 2021. These waives were accompanied by three generations of emergency policy responses taken by national and supranational governments, consisting of containment and closure measures, economic measures, and health measures.[3] Containment and closure measures aim at preventing or slowing down the spread of the coronavirus.[4] Economic measures and health measures during a lockdown, or after a reopening of the economy, aim at curing economic consequences caused by the coronavirus, but also serve the health of society.[5]

Against this backdrop, the coronavirus crisis creates a wide variety of contract-specific problems.[6] Business enterprises, customers, and other contracting parties may often ask themselves, whether existing contracts are still valid and binding and, as a result, must be adhered to, or whether performance may be suspended or its acceptance refused. The role of general legal institutions for risk allocation between both or all contracting parties has been examined on other occasions already.[7]

Using a legal theory and law and economics approach, this article deals with the research question, whether emergency policy responses will pay off or cause even more harm in the long term. The article further aims to assess the impact of different generations of emergency policy responses on contract law in order to inform the ongoing debate in law and politics. This is important because any intervention in a functioning system increases complexity and creates a new equilibrium that may be inferior.

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1 *See* Blick (2020).

2 For new Covid-19 cases and deaths per 100,000 people, *see* The Economist, (2021) (assembling data on Covid-19 cases and deaths for 39 countries and for 173 sub-national areas for which data are available, presenting the total number of deaths per 100,000 in the population and breaking down the infections and death rates for the past seven days).

3 For a rigorous and consistent tracking of various emergency policy responses around the world, *see* OxCGRT (2021) (tracking and comparing worldwide government responses to the coronavirus, using the COVID-19 Government Response Stringency Index, consisting of eight indicators on containment and closure policies, such as school closures and restrictions in movement, four indicators on economic policies, such as income support to citizens or provision of foreign aid, and eight indicators on health system policies, such as the Covid-19 testing regime, emergency investments into healthcare, and vaccination policies).

4 For a comparison of lockdowns, *see* Financial Times (2021) (providing an ongoing visual representation of the worldwide imposition and relaxation of lockdown measures, using the COVID-19 Governement Response Stringency Index).

5 For Europe, *see* Jentsch (2021a). *See* also Jentsch (2020b).

6 From an international perspective, *see* Twigg-Flesner (2020); Wagner (2020). From a German perspective, *see* Lorenz (2020). For a first interpretative note under Austrian law, *see* Uitz and Parsché (2020). On the risk allocation in contracts under Swiss law, *see* Enz (2020); Enz and Mor (2020). On contract adaption under Swiss law, *see* Haefeli et al. (2020b). For a preliminary assessement under French law, *see* Landivaux (2020); Verroust-Valliot and Pelletier (2020). On the eternal conflict between the principles of *pacta sunt servanda* and *rebus sic stantibus* from an Italian perspective, *see* Roseti (2020).

7 For Switzerland, *see* Jentsch (2020a). For Europe, *see* Jentsch (2021b). *See* also Jentsch (2021c).

Emergency Policy Responses

In order to answer the critical question asked in this article, which basically relates to costs and benefits of emergency policy responses, a distinction can, and must, be drawn between commercial contracts, consumer contracts, employment contracts, and lease contracts. Against this backdrop, this section offers a discussion and analysis of various emergency policy responses taken by European (notably German, Austrian, Swiss, French, and Italian) governments and puts these responses into perspective.

Responses for Commercial Contracts

The emergency policy responses for commercial contracts include financial support and certain legislative changes.[8] The financial support mainly intends to ensure liquidity of funds, but partly also replace lost profits, for instance, in the form of tax deferrals. The Member States of the European Union (including Germany, Austria, France, and Italy) have themselves provided massive aid packages for their companies. In addition, the European Union itself has also adopted a temporary framework for State aid. This means that several pots with State aid are available to such companies not only in their respective countries, but also at the supranational level. As many companies are likely to meet the requirements of several aid packages and therefore can benefit from them in several ways, it might well be possible that some companies claim more State aid than they actually need, which is certainly not unproblematic. The legislative changes include temporary modifications or suspensions of certain provisions from insolvency law in order to avoid a major wave of bankruptcies because of illiquidity due to a lack of sales and profits, but also a standstill of procedural and/or substantive time limits. Italy even went a step further, enacting an overriding provision, according to which compliance with government-issued containment and closure measures shall always be considered when interpreting debtor's liability and contractual remedies for non-performance.

An analysis and discussion of commercial contracts clearly reflect policy makers' main concern to preserve contractual relations in the near term.[9] In the longer term, however, legal systems should rather facilitate significant adjustment of contractual relations. For instance, a company's supply relations need to be changed in due course, if demand contracts for its production. Therefore, policy makers should also cope with this issue by codifying legal institutions on adaption or termination of contractual obligations. The main reason for a codification of such institutions is that adaption and termination of contracts will most likely become more important in the near future and the quality of judicial decisions would certainly benefit from clear requirements and consequences. Such a legislative intervention can provide transaction-cost efficiency and orderliness.

Responses for Consumer Contracts

The emergency policy responses for consumer contracts are largely contract-related.[10] Such measures include not only a moratorium for performance and termination of long-term contracts covering basic needs and contracts relating to consumer credits, but also voucher solutions for leisure events and facilities as well as travel tickets and packages. Other measures include the standstill of procedural and/or substantive time limits, the exclusion of contractual remedies, and a temporary standstill in debt collection for travel agencies, which – in fact, adversely – affect customers. Italy enacted an overriding

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[8] For Germany, *see* Janssen and Wahnschaffe (2020); Mann et al. (2020); Otte-Gräbener (2020); Rehder and Schmidt (2020); Römermann (2020a); Römermann (2020b); Thume (2020); Wagner et al. (2020); Wagner and Rarinato (2020). For Austria, *see* Angermair et al. (2020). For Switzerland, *see* Staehelin and Bopp (2020); Christ et al. (2020). For France, *see* Heinich (2020); Ziadé and Cavicchioli (2020). For Italy, *see* Gentili (2020).

[9] On commercial contracts between preservation and disruption, *see* Jentsch (2021a); Jentsch (2020b).

[10] For Germany, *see* Rüfner (2020); Schmidt-Kessel and Möllnitz (2020); Wolf et al. (2020). For Austria, *see* Haghofer (2020); Kellner and Liebel (2020); Mayr (2020). For France, *see* Deshayes (2020).

provision, according to which compliance with government-issued containment and closure measures shall always be considered when interpreting debtor's liability and contractual remedies for non-performance.

An analysis and discussion of consumer contracts indicate that a distinction should be made between debt contracts, such as consumer credit, and other types of consumption, such as utilities.[11] As debt contracts can unduly restrict the economic progress of an individual, such contracts should not be enforced excessively in times of pandemic. Other types of consumption lack this systemic element and, therefore, such contracts should – as a rule of thumb – be performed as agreed. Therefore, contract law must address both of these issues through a combination of preservation and disruption strategies.

Responses for Employment Contracts

The emergency policy responses for employment contracts are numerous and concern various issues.[12] Interestingly, they not only vary considerably from one jurisdiction to the other, but also over time. The most important measure is arguably the facilitation and extension of state-sponsored short-time work programs. Under these schemes, employers reduce their employees' working hours instead of laying them off. Moreover, labour laws of many countries were amended during the early stages of the crisis, particularly with regard to the duty to pay wages, holiday arrangements, and time for childcare. Other measures, which were put in place since the reopening of the economies after a lockdown, concerned worker protection, including and in particular the protection of high-risk groups.

An analysis and discussion of responses for employment contracts suggest that pandemic-induced economic measures and health measures again aim for preservation against excessive disruption, but there would likely be longer-term changes to workplaces and work patterns.[13] In some sense, the coronavirus pandemic caused the future of work (new work), consisting of remote work, flexible hours, and technology-enabled tools, to arrive earlier than expected. Depending on how fast things develop over the coming months and years, it will probably be necessary to amend labour laws to these circumstances.

Responses for Lease Contracts

The emergency policy responses for lease contracts vary greatly from jurisdiction to jurisdiction.[14] The most common are rules and regulations concerning a moratorium prohibiting the termination of such contracts, if rent payments are delayed. The biggest bone of contention, which the countries have solved very differently so far, concern rent for commercial premises, especially during a lockdown. This issue was long and particularly hard-fought in Switzerland, but ultimately abandoned.

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[11] On consumer contracts between preservation and disruption, *see* Jentsch (2021a); Jentsch (2020b).

[12] For Germany, *see* Bertram et al. (2020); Fischinger (2020); Fuhlrott and Fischer (2020); Geulen and Vogt (2020); Hohenstatt and Krois (2020); Hohenstatt and Sittard (2020); Kiesche and Kohte (2020); Müller and Becker (2020); Reifelsberger (2020); Sagan and Brockfeld (2020); Schmeisser and Fauth (2020); Schmidt (2020); Tödtmann and von Bockelmann (2020). For Austria, *see* Auer-Mayer (2020); Mazal (2020); Mosing (2020); Spitzl (2020). For Switzerland, *see* Blesi et al. (2020); Geiser (2020); Geiser et al. (2020); Schwaab (2020); Pietruszak (2020); Tschannen (2020); Wildhaber (2020). For France, *see* Duchange (2020); Leroy (2020); Radé (2020).

[13] On employment contracts between preservation and disruption, *see* Jentsch (2021a); Jentsch (2020b).

[14] For Germany, *see* Artz and Steyl (2020), § 3 paras 1-105; Häublein and Müller (2020); Hellmich (2020); Hellner (2020); Schall (2020); Schmid (2020); Sittner (2020); Warmuth (2020); Weidt and Schiewek (2020); Zehelein (2020). For Austria, *see* Hochleitner (2020); Krenn and Schüssler-Datler (2020); Laimer and Schickmair (2020), Ch. 11 paras 3-19; Ofner (2020). For Switzerland, *see* Haefeli et al. (2020a); Koller (2020); Lachat and Brutschin (2020a); Lachat and Brutschin (2020b); Müller (2020); Wolf and Minnig (2020). For France, *see* Blatter (2020); Kendérian (2020); Regnault (2020). For Italy, *see* Pertot (2020).

An analysis and discussion of responses for lease contracts suggest that pandemic-induced economic measures and health measures aim for preservation against excessive disruption.[15] In the dispute over commercial leases, however, it is slowly but surely becoming apparent that most lessors and lessees have already found an agreement among themselves. This new situation makes any intervention by the legislator unnecessary.

Preservation, but Excuses and Remedies

One key strategy to solve contract-specific problems during the coronavirus crisis is the preservation of a contract. This strategy is relativized by excuses of contractual performance and remedies for breach of contract. 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 permanently impossible or temporarily impossible. The first case concerns the legal institution of subsequent impossibility, the second that of delay, either by the debtor or by the creditor.

Subsequent Impossibility of Performance

The legal institution of subsequent impossibility generally applies to a situation where contractual performance becomes permanently impossible.[16] In such a situation, which may arise from a pandemic, all jurisdictions under examination (Germany, Austria, Switzerland, France, and Italy) 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.

German courts have interpreted the rule on subsequent impossibility of performance to include objective impossibility, subjective impossibility, and legal impossibility.[17] Moreover, economic impossibility does not fall under this rule, and additional rules apply to practical impossibility and personal impossibility. In Austria, 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.[18] Under Swiss law, the provision on subsequent impossibility of performance includes factual impossibility and legal impossibility, but neither temporary impossibility nor economic impossibility. Although disputed in legal scholarship, the Swiss Federal Supreme Court does not subsume subjective impossibility under this provision.[19] In France, the concept of *force majeure* applies, requiring that the event preventing performance is external, it has not

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15 On lease contracts between preservation and disruption, *see* Jentsch (2021a); Jentsch (2020b).

16 On subsequent impossibility of performance from a functional and comparative perspective, *see* Jentsch (2021b); Jentsch (2021c).

17 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 Neue Juristische Wochenschrift 2014, 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 Neue Juristische Wochenschrift 1983, 2873; BGH, 14 November 1991, III ZR 145/90, in Neue Juristische Wochenschrift 1992, 904; BGH, 11 December 1991, VIII ZR 4/91, in BGHZ 116, 268; BGH, 17 May 1995, VIII ZR 94/94, in Neue Juristische Wochenschrift 1995, 2026; BGH, 25 November 1998, XII ZR 12-97, in Neue Juristische Wochenschrift 1999, 635.

18 *See* OGH, 21 November 1951, 3 Ob 589/51, in Evidenzblatt der Rechtsmittelentscheidungen 1952, no 103; OGH, 20 March 1963, 7 Ob 70/63, in SZ 36, no 44; OGH, 30 April 1963, 8 Ob 102/63, in Österreichische Immobilien-Zeitung 1963, 367. *See* also OGH, 14 February 2007, 7 Ob 255/06k, in SZ 82, no 25.

19 *See* BGer, 15 January 2009, 4A_394/2008, in BGE 135 III 212, pp 218-219. *See* also Schwenzer (2016), p. 465; Koller (2017), pp 901-902; Emmenegger et al. (2014), p. 90, pp 93-99.

been reasonably foreseeable, and its effects on performance were unavoidable.[20] So far, French courts have been reluctant to accept an outbreak of an infectious disease as *force majeure*.[21] Government or administrative measures are more often recognized as *force majeure*, but courts are quite strict as well.[22] According to Italian legal doctrine, the provisions on subsequent impossibility of performance include only permanent impossibility and objective impossibility that is not attributable to the debtor, but not personal impossibility or subjective impossibility.[23]

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. 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.[24] In general, no prevention, but only a suspension of contractual performance may result from such situations. Damages are in some cases owed regardless of the 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 (Germany, Austria, Switzerland, France, and Italy), this institution is important during a pandemic as it provides debtors with an incentive to perform a contract.

The requirements and consequences of delay of debtor are more or less the same in Germany, Austria, Switzerland, France, and Italy. Austrian law differs in one respect, however, namely by distinguishing between objective delay and subjective delay of debtor.[25] This distinction is important because the debtor is only liable for damages, if he or she is at fault.

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, 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

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[20] *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.

[21] *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 Guiomard (2020).

[22] *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.

[23] *See* Osti (1962), p. 287; Galgano (2010), para 16, p. 115.

[24] On debtor's delay of performance from a functional and comparative perspective, *see* Jentsch (2021b); Jentsch (2021c).

[25] *See* Reischauer (2018), § 918 para 7; Gruber (2019), § 918 paras 4-62.

the creditor.[26] 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 (Germany, Austria, Switzerland, France, and Italy), this institution is important during a pandemic as it makes creditors accept performance and cooperate.

The requirements and consequences of delay of creditor are largely identical in Germany, Austria, Switzerland, France, and Italy. Therefore, there is no need to highlight a particular feature from one regime or the other.

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.

Disruption, either Adaption or Termination

The other key strategy to solve contract-specific problems during the coronavirus crisis is the disruption of a contract, in one way or another. In the mild form, this strategy represents the adaption of a contract, in the strict form, it represents the termination of a contract. Under various institutions of civil law, contracts may be adapted or terminated not only under changed circumstances, but also for cause.

Adaption and Termination under Changed Circumstances

It is generally accepted in all five jurisdictions under examination (Germany, Austria, Switzerland, France, and Italy) that a change of circumstances, which renders contractual performance impossible, may release a party from his or her obligations to perform under a contract.[27] Those jurisdictions evaluate it differently, however, whether economic disadvantages or mere impracticability arising from a pandemic also have an effect on releasing the party from his or her contractual obligations. Germany and France have such institutions already codified in their civil codes. Austria, Switzerland, and Italy have not, but similar institutions are widely recognized here.

In Germany, the concept of interference with the basis of the transaction, an emanation of the *clausula rebus sic stantibus*, was developed by legal doctrine[28] and case law[29] in the early 19th century and ultimately codified in 2002. Austrian legal scholars[30] and courts[31] accept and acknowledge the concept of a *clausula*, which operates as a last resort (*ultima ratio*), applying to exceptional cases only. Similarly,

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[26] On creditor's delay of performance from a functional and comparative perspective, *see* Jentsch (2021b); Jentsch (2021c).

[27] On adaption and termination of contracts under changed circumstances from a functional and comparative perspective, *see* Jentsch (2021b); Jentsch (2021c).

[28] *See* Oertmann (1921). *See* also Windscheid (1850).

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

[30] For a general overview, *see* Riedler (2018), para 25/4; Kletecka et al. (2018), para 510.

[31] *See* OGH, 13 July 1955, 3 Ob 330/55; OGH, 12 February 1970, 1 Ob 24/70, in Evidenzblatt der Rechtsmittelentscheidungen 1970, no 203; OGH, 15 September 1970, 8 Ob 181/70; OGH, 12 May 1977, 7 Ob 564/77; OGH, 28 June 1979, 7 Ob 509/79; OGH, 23 October 1986, 6 Ob 650/86; OGH, 4 November 1986, 14 Ob 176/86; OGH, 5 March 1987, 7 Ob 522/87, in SZ 60, no 42; OGH, 1 March 2012, 1 Ob 22/12k; OGH, 17 June 2015, 3 Ob 104/15p.

the *clausula* is accepted in both legal doctrine[32] and case law[33] in Switzerland. In France, the concept of *imprévision* was incorporated into French law by a reform in 2016, allowing contracting parties to request a renegotiation or termination of a contract, if certain requirements are met.[34] Other than the concept of *eccessiva onerosità* (see below), Italian law does not contain a positivized *clausula*. Italian courts[35] have so far been rather reluctant to accept such a concept, although it is already well developed in legal scholarship[36] in Italy.

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

Termination for Cause

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

In Germany, the concept of extraordinary termination of permanent contracts, eventually leading to contract termination by a court, was codified back in 2002. Austrian law contains no general provision on the termination of permanent contracts for cause, but it is well accepted in Austrian legal doctrine[38] and case law[39] that long-term contracts can be terminated without any grace period, if there is a compelling reason. The Austrian Supreme Court emphasized, however, that termination of long-term

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32 *See* Schmid et al. (2014), pp 327-331; Schwenzer (2016), pp 278-280; Koller (2017), pp 507-519; Berger (2018), pp 399-401; Huguenin (2018), pp 100-105, p. 257.

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

34 *See* Chantepie and Latina (2016), paras 522-530; Ancel (2017), paras 55-119.

35 *See* Cass., 6 July 1971, 2104, in I Giurisprudenza italiana 1973, 1; Cass., 9 May 1981, 3074, in I Giurisprudenza italiana 1983, 1; Cass., 11 November 1986, 6584, in I La nuova giurisprudenza civile commentata 1987, 683; Cass., 31 October 1989, 4554.

36 *See* Osti (1959), p. 353; Galletto (1988), p. 383.

37 On termination of permanent contracts for cause from a functional and comparative perspective, *see* Jentsch (2021b); Jentsch (2021c).

38 *See* Reischauer (2018), Vor §§ 918ff paras 57-75; Gruber (2018), § 918 paras 15-18.

39 *See* OGH, 30 June 1987, 2 Ob 652/86, in SZ 60, no 125; OGH, 24 September 1987, 7 Ob 646/87, in Juristische Blätter 1988, 446; OGH, 15 December 1987, 5 Ob 591/87; OGH, 24 January 1989, 5 Ob 504/89; OGH, 30 October 1998, 1 Ob 252/98k; OGH, 6 October 2000, 1 Ob 101/00k; OGH, 25 June 2001, 8 Ob 311/00v; OGH, 8 June 2005, 7 Ob 40/05s; OGH, 31 May 2006, 7 Ob 77/06h; OGH, 22 February 2007, 3 Ob 13/07v; OGH, 28 August 2007, 5 Ob 166/07h; OGH, 28 July 2010, 9 Ob 36/10z; OGH, 27 March 2013, 7 Ob 15/13a; OGH, 22 May 2014, 2 Ob 163/13d, 2 Ob 163/13d; OGH, 23 October 2015, 6 Ob 196/15i; OGH, 22 March 2018, 4 Ob 34/18f; OGH, 26 September 2018, 1 Ob 155/18b.

contracts may only be invoked as a last resort (*ultima ratio*).[40] Switzerland does not contain general rules on termination of permanent contracts for cause either, but it is likewise widely accepted in Swiss legal doctrine[41] and case law[42] that parties to long-term contracts are entitled to terminate such contracts with immediate effect, if there is a compelling reason. In France, the concept of *caducité* was incorporated into French law by a reform in 2016, eventually leading to the termination of a validly formed contract, if one of its essential elements disappears.[43] In lack of a statutory definition of essential elements, French courts understand this statutory term to refer to circumstances relating to both validity and content of a contract.[44] Essential elements will thus relate either to essential motives of the parties for entering into the agreement and the purpose that the agreement is designed to serve, or to the subject matter of the contract. In Italy, the concept of *eccessiva onerosità* provides that the party in charge of performance that has become overly burdensome due to the occurrence of extraordinary and unforeseeable events may request termination of a contract for continuous or periodic performance. Although a party can request a court to terminate a contract, the other party may avoid such termination by offering an adequate modification of the terms of the contract.

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

Conclusions

In the context of the coronavirus crisis, the triangle between emergency policy responses, preservation, and disruption of contracts deserves our attention. This article deals with the research question, whether emergency policy responses will pay off or even cause more harm in the long term. More specifically, the article aims to assess the impact of different generations of emergency policy responses on contract law in order to inform the ongoing debate in law and politics. As already mentioned in the introduction, this is important because any intervention in a functioning system increases complexity and creates a new equilibrium that may be inferior. Therefore, it is understood that emergency policy responses may adversely affect the *Pareto*-efficient balance between preservation and disruption of contracts. Two observations, which both relate to economic measures, taken by governments during a lockdown, or after a reopening of the economy, seem particularly important and interesting in this regard.

From a legal theory perspective, it can be concluded that economic measures have a certain spill-over effect on contract law. Business enterprises, customers, and other contracting parties, who directly or indirectly benefit from any economic measures, should arguably not be able to release themselves from

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40 *See* OGH, 10 July 1986, 7 Ob 585/86, in Juristische Blätter 1987, 180; OGH, 26 November 1987, 6 Ob 671/87; OGH, 10 December 1987, 6 Ob 719/87; OGH, 15 June 1989, 7 Ob 719/87; OGH, 25 June 1996, 4 Ob 2142/96w; OGH, 25 February 1997, 4 Ob 44/97t; OGH, 14 October 1997, 1 Ob 210/97g; OGH, 15 October 1998, 8 Ob 171/98z; OGH, 28 May 1999, 6 Ob 42/99s; OGH, 25 July 2000, 1 Ob 24/00m; OGH, 22 April 2003, 9 Ob 24/03z; OGH, 21 May 2003, 6 Ob 93/03z; OGH, 23 October 2006, 7 Ob 235/06v; OGH, 29 August 2007, 7 Ob 158/07x; OGH, 24 June 2014, 4 Ob 81/14m; OGH, 25 February 2016, 2 Ob 20/15b, in SZ 91, no 22; OGH, 6 April 2016, 7 Ob 201/15g; OGH, 22 February 2017, 8 Ob 89/16w; OGH, 31 July 2019, 5 Ob 91/19x.

41 *See* Schwenzer (2016), p. 278; Koller (2017), pp 498-502; Berger (2018), p. 402; Huguenin (2018), pp 255-256.

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

43 *See* Chantepie and Latina (2016), para 493, paras 498-499.

44 *See* Com., 3 March 2004, 02-12905, in IV Bulletin, no 42; Cass. 1re civ., 7 November 2006, 05-11775, in I Bulletin, no 457; Com., 30 October 2008, 07-17646, in I Bulletin, no 241.

their obligations under a contract as easily as if no such measures would have been put in place or contracting parties make no use of them. In other words, neither a business enterprise nor a customer should be able to discharge its contractual obligations after the government has already assumed most of its business risk. The existing architecture of economic measures for business enterprises, including, but not limited to, State aid, liquidity support, non-repayable grants, loan subsidies and guarantees, bridging credits as well as deferred payments of social security contributions and taxes, not only on the national, but also on the supranational level, adds many additional complications on an already complex system. Other measures, namely designed to protect employees, such as state-sponsored short-time work programs, indirectly also serve business enterprises, simply by transferring wage costs, which are at risk due to the pandemic, to the government. This manoeuvre is basically nothing else than delaying an inevitable structural change at the expense of future generations. Courts are therefore obligated to make a holistic assessment, when deciding contractual disputes, where one or both parties have benefited from economic measures that have shifted the statutory or contractually agreed upon risk allocation.

From a law and economics perspective, it can be concluded that economic measures have adverse effects. Recent experience in a variety of contexts has shown that many of these measures often do not serve their original purpose. For obvious reasons, rational business enterprises claimed financial support, which was mainly intended to ensure liquidity of funds, without being in liquidity distress, but because this is a favourable form of refinancing. Also, governments have granted large aid packages to airlines, but in the end, these lump-sum payments did not serve their purpose at all, because restructurings and mass layoffs have been inevitable at many airlines. The same is true for state-sponsored short-time work programs: not only did highly profitable business enterprises – anecdotal evidence tells, even (leading) law firms – place themselves under the umbrella of such programs, but also many small and medium-sized enterprises were, allegedly or demonstrably, in a position to claim compensation for lack of sales through short-time work, which they would not have achieved even in normal operations. In short, all these programs and aid packages have led to enormous distortions of competition that cannot easily be reversed. At least, the legislator has restrained itself from also pouring additional money into tenants' coffers for a risk that normally lies in their own sphere and not in that of the landlord.

As a result, the research question posed in this article must be answered rather critically, at least for economic measures. It cannot possibly be the idea that, thanks to such measures, business enterprises, customers, and other contracting parties are better off during the coronavirus crisis than in normal times without crisis. However, one caveat must be made at this point: both containment and closure measures and health measures are not covered in this article, which focusses predominantly on economic measures. Frankly speaking, that is not tragic. Containment and closure measures will be the subject of expert disputes for a long time to come, to which a distinguished virologist can perhaps contribute more than a simple lawyer. Health measures cannot be judged in a reliable way at the moment, because vaccination campaigns have only just begun, but this should not obscure the fact that there is good reason to remain optimistic. After all, it does not look like that the coronavirus crisis is going to be over any time soon, uncertainty and rumours on the market will continue, but one thing is for sure: we have learned from our mistakes and contract law has evolved and emerged stronger from the crisis.

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