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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 adaption or termination of contractual obligations. The article aims to address the fundamental question, whether institutions on adaption or termination still serve their purpose in times of pandemic or whether and to what extent a codification of such institutions 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; adaption and termination of contracts under changed circumstances; termination of permanent contracts for cause

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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 adaption or termination of contractual obligations.[4] The article aims to address the fundamental question, whether institutions on adaption or termination still serve their purpose in times of pandemic or whether and to what extent a codification of such institutions is needed in European Contract Law. A functional and comparative approach is used to unfold and analyse this timeless question from a contemporary perspective.

Adaption and Termination of Contracts under Changed Circumstances

It is generally accepted in all five jurisdictions under examination that a change of circumstances, which renders contractual performance impossible, may release a party from his or her obligations to perform under a contract. 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.

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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 excuses of contractual performance and remedies for breach of contract, *see* EUI Working Paper LAW 2021/07.

In Germany, section 313 of the German Civil Code contains the concept of interference with the basis of the transaction (*Störung der Geschäftsgrundlage*), an emanation of the *clausula rebus sic stantibus*. This concept was developed by legal doctrine[5] and case law[6] in the early 19th century and ultimately codified in 2002. The application of this concept requires a real, a hypothetical and a normative element.[7] First, circumstances, which have become the basis of a contract, must have changed seriously after the conclusion of a contract. Second, the parties would not have concluded the contract at all or only with a different content, if they had foreseen the change. Third, adherence to the contract must be unreasonable for one of the parties. If these requirements are met, such party may request adaption or, as a last resort, termination of a contract.[8] Moreover, section 242 of the German Civil Code, according to which each party to a contract has a duty to perform according to the requirement of good faith, taking customary practice into consideration, might play a role in this context. Although this is not undisputed in legal doctrine[9] and case law,[10] a duty to renegotiate an existing contract might be based on this principle.

Austrian law does not contain a general provision on *clausula rebus sic stantibus*. However, section 936 of the Austrian Civil Code touches on this with regard to preliminary contracts. More generally, Austrian legal scholars[11] and courts[12] accept and acknowledge the concept of a *clausula*. This concept operates as last resort (*ultima ratio*), applying to exceptional cases only. In its case law, the Austrian Supreme Court developed three requirements. First, the parties have made an assumption about circumstances and those, interrupting the contractual equilibrium, change so seriously that insisting on performance

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5 *See* P. OERTMANN, *Die Geschäftsgrundlage: Ein neuer Rechtsbegriff* (Leipzig: Deichert, 1921). *See* also B. WINDSCHEID, *Die Lehre des römischen Rechts von der Voraussetzung* (Düsseldorf: Buddeus, 1850).

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

7 *See* L. BÖTTCHER, in H. P. Westermann et al (eds), *Erman Handkommentar zum Bürgerlichen Gesetzbuch* (Cologne: Otto Schmidt, 2017), § 313 n 11-39; A. STADLER, in R. Stürner (ed), *Jauernig Kommentar zum Bürgerlichen Gesetzbuch* (Munich: C.H. Beck, 2018), § 313 n 14-26; T. FINKENAUER, in F. J. Säcker et al (eds), *Münchener Kommentar zum Bürgerlichen Gesetzbuch: Schuldrecht – Allgemeiner Teil II* (Munich: C.H. Beck, 2019), § 313 n 54-80; S. A. E. MARTENS, in B. Gsell et al (eds), *beck-online Grosskommentar zum Bürgerlichen Gesetzbuch* (1 July 2020), § 313 n 48-120.2; S. LORENZ, in W. Hau and R. Poseck (eds), *Beck'scher Online-Kommentar zum Bürgerlichen Gesetzbuch* (1 August 2020), § 313 n 23-81.

8 *See* BÖTTCHER, n 7 above, § 313 n 40-44; STADLER, n 7 above, § 313 n 27-30; FINKENAUER, n 7 above, § 313 n 81-123; MARTENS, n 7 above, § 313 n 121-153; LORENZ, n 7 above, § 313 n 82-91.

9 *See* H. P. WESTERMANN, in H. P. Westermann et al (eds), *Erman Handkommentar zum Bürgerlichen Gesetzbuch* (Cologne: Otto Schmidt, 2017), introduction to § 241 n 18; L. KÄHLER, in B. Gsell et al (eds), *beck-online Grosskommentar zum Bürgerlichen Gesetzbuch* (15 July 2020), § 242 n 750-820. *See* also C. SCHUBERT, in F. J. Säcker et al (eds), *Münchener Kommentar zum Bürgerlichen Gesetzbuch: Schuldrecht – Allgemeiner Teil I* (Munich: C.H. Beck, 2019), § 242 n 531. 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 35-37.

10 *See* BGH, 12 May 2006, V ZR 97/05, in (2006) *Neue Juristische Wochenschrift* 2843; BGH, 30 September 2011, V ZR 17/11, in (2012) *Neue Juristische Wochenschrift* 373. *See* also BVerfG, 7 February 1990, 1 BvR 26/84, in BVerfGE 81, 242 (255); BVerfG, 19 October 1993, 1 BvR 567, 1044/89, in BVerfGE 89, 214 (229, 231-235); BVerfG, 6 February 2001, 1 BvR 12/92, in BVerfGE 103, 89 (101-102); BVerfG, 29 May 2006, 1 BvR 240/98, in (2006) *Versicherungsrecht* 961 (962).

11 For a general overview, *see* A. RIEDLER, 'Zivilrecht I: Allgemeiner Teil', in A. Riedler (ed), *Studienkonzept Zivilrecht* (Vienna: LexisNexis, 2018), n 25/4; A. KLETECKA et al, *Grundriss des bürgerlichen Rechts I: Allgemeiner Teil, Sachenrecht, Familienrecht* (Vienna: Manz, 2018), n 510. 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 56.

12 *See* OGH, 13 July 1955, 3 Ob 330/55; OGH, 12 February 1970, 1 Ob 24/70, in (1970) *Evidenzblatt der Rechtsmittelentscheidungen*, 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.

becomes intolerable or unreasonable.[13] Second, the risk that the change of circumstances at issue may occur has not been allocated to one of the parties by law or by the contract (*Doppellücke*).[14] Third, the change in circumstances must have been unforeseeable for the party relying on it.[15] Because previous court practice has not always been entirely consistent, scholars have pointed out that there remains quite some uncertainty.[16] In addition, the concept of good faith, which corresponds to 'practice of fair dealing', referred to in section 914 of the Austrian Civil Code, might impose a duty to renegotiate a contract.[17]

Swiss law does not codify the concept of *clausula rebus sic stantibus* in general, although it is accepted in both legal doctrine[18] and case law[19] in Switzerland. Article 373(2) of the Swiss Code of Obligations

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13 *See* OGH, 9 May 1962, 6 Ob 79/62, in SZ 35, no 47; OGH, 14 January 1981, 1 Ob 725/80, in SZ 54, no 4; OGH, 9 September 1986, 2 Ob 626/85; OGH, 15 January 1987, 6 Ob 627/87; OGH, 25 June 1987, 6 Ob 627/87; OGH, 1 September 1987, 2 Ob 2/87; OGH, 20 July 1989, 8 Ob 585/88; OGH, 13 December 1990, 8 Ob 665/89; OGH, 15 December 1993, 3 Ob 502/94; OGH, 19 August 1998, 9 ObA 180/98f; OGH, 28 May 1999, 7 Ob 355/98a; OGH, 9 March 2000, 8 Ob 232/99x; OGH, 2 October 2007, 5 Ob 355/98a; OGH, 16 September 2008, 1 Ob 95/08i; OGH, 19 December 2012, 7 Ob 192/12d, in SZ 87, no 144; OGH, 17 December 2012, 5 Ob 136/12d; OGH, 17 December 2013, 5 Ob 117/13m; OGH, 21 May 2014, 7 Ob 66/14b; OGH, 9 July 2014, 2 Ob 67/14p; OGH, 25 September 2014, 9 Ob 46/14a; OGH, 29 June 2015, 6 Ob 68/15s; OGH, 30 March 2016, 6 Ob 46/16g; OGH, 27 February 2017, 1 Ob 17/17g.

14 *See* OGH, 17 December 1974, 8 Ob 246/74, in (1975) *Evidenzblatt der Rechtsmittelentscheidungen*, no 206; OGH, 14 March 1989, 2 Ob 509/89, in (1989) *Juristische Blätter* 650; OGH, 26 July 2000, 7 Ob 163/00x; OGH, 19 August 1998, 9 ObA 180/98f.

15 *See* OGH, 17 March 1970, 8 Ob 60/70, in (1970) *Österreichische Notariats-Zeitung* 92; OGH, 3 February 1976, 5 Ob 243/75, in SZ 49, no 13; OGH, 14 January 1981, 1 Ob 725/80, in SZ 54, no 4; OGH, 20 December 1984, 5 Ob 576/83, in SZ 57, no 208; OGH, 25 January 1985, 8 Ob 615/84; OGH, 22 January 1986, 3 Ob 609/85, in SZ 59. no 17; OGH, 8 July 1986, 7 Ob 537/86; OGH, 6 November 1986, 7 Ob 656/86; OGH, 6 November 1986, 7 Ob 537/86; OGH, 6 November 1986, 7 Ob 656/86; OGH, 7 July 1987, 2 Ob 613/86, in (1987) *Evidenzblatt der Rechtsmittelentscheidungen*, no 176; OGH, 15 September 1987, 4 Ob 542/87; OGH, 20 July 1989, 8 Ob 585/88; OGH, 27 October 1989, 8 Ob 684/89, in (1990) *Österreichisches Recht der Wirtschaft* 249; OGH, 11 April 1991, 8 Ob 46/89, in (1991) *wirtschaftsrechtliche blätter* 243; OGH, 25 March 1994, 3 Ob 513/94; OGH, 7 October 1997, 4 Ob 255/97x; OGH, 15 December 1997, 1 Ob 2342/96k; OGH, 22 December 1998, 5 Ob 285/98t; OGH, 23 March 1999, 1 Ob 340/98a; OGH, 11 March 1999, 2 Ob 47/99x; OGH, 28 May 1999, 7 Ob 355/98a; OGH, 19 October 1999, 1 Ob 234/99i; OGH, 9 November 2000, 8 ObA 30/00w; OGH, 20 February 2003, 6 Ob 154/02v; OGH, 24 June 2005, 1 Ob 47/05a; OGH, 13 May 2008, 6 Ob 148/07v; OGH, 2 October 2007, 5 Ob 121/07s; OGH, 29 June 2015, 6 Ob 68/15s; OGH, 25 June 2020, 6 Ob 225/19k.

16 *See* S. LAIMER and M. SCHICKMAIR, 'Ausgewählte zivilrechtliche Probleme in der COVID-19-Krise', in R. Resch (ed), *Das Corona-Handbuch: Österreichs Rechtspraxis zur aktuellen Lage* (Vienna: Manz, 2020) 253, ch 11 n 29, 56. *See* also SCHWARZ et al, n 11 above, n 58.

17 *See* M. BINDER and W. KOLMASCH, in M. Schwimann and G. Kodek (eds), *Praxiskommentar zum Allgemeinen bürgerlichen Gesetzbuch* (Vienna: LexisNexis, 2014), § 914 n 236-242; R. BOLLENBERGER, in H. Koziol et al (eds), *Kurzkommentar zum Allgemeinen bürgerlichen Gesetzbuch* (Vienna: Österreich, 2017), § 914 n 8-11; P. RUMMEL, in P. Rummel and M. Lukas (eds), *Kommentar zum Allgemeinen bürgerlichen Gesetzbuch* (Vienna: Manz, 2018), § 914 n 20-41; H. HEISS, in A. Kletecka and M. Schauer (eds), *Online-Kommentar zum Allgemeinen bürgerlichen Gesetzbuch* (1 August 2019), § 914 n 99. *See* also OGH, 14 February 2007, 7 Ob 255/06k, in (2007) *Juristische Blätter* 716.

18 *See* E. A. KRAMER and B. SCHMIDLIN, in A. Meier-Hayoz (ed), *Berner Kommentar zum Obligationenrecht: Allgemeine Einleitung in das schweizerische Obligationenrecht und Kommentar zu Art. 1-18 OR* (Berne: Stämpfli, 1986), Art 18 n 272-359; B. WINIGER, in L. Thévenoz and F. Werro (eds), *Commentaire romand du Code des obligations* (Basel: Helbing Lichtenhahn, 2012), Art 18 n 193-215; J. SCHMID et al, *Schweizerisches Obligationenrecht: Allgemeiner Teil I* (Zurich: Schulthess, 2014), 327-331; P. JÄGGI et al, in P. Gauch and J. Schmid (eds), *Zürcher Kommentar zum Obligationenrecht: Auslegung, Ergänzung und Anpassung der Verträge; Simulation* (Zurich: Schulthess, 2015), Art 18 n 710-789; I. SCHWENZER, *Schweizerisches Obligationenrecht: Allgemeiner Teil* (Berne: Stämpfli, 2016), 278-280; A. KOLLER, *Schweizerisches Obligationenrecht: Allgemeiner Teil* (Berne: Stämpfli, 2017), 507-519; B. BERGER, *Allgemeines Schuldrecht* (Berne: Stämpfli, 2018), 399-401; C. HUGUENIN, *Obligationenrecht: Allgemeiner und Besonderer Teil* (Zurich: Schulthess, 2018), 100-105, 257; C. MÜLLER, in R. Aebi-Müller and C. Müller (eds), *Berner Kommentar zum Obligationenrecht: Art. 1-18 mit allgemeiner Einleitung in das Schweizerische Obligationenrecht* (Berne: Stämpfli, 2018), Art 18 n 633-792; W. WIEGAND, in C. Widmer Lüchinger and D. Oser (eds), *Basler Kommentar zum Obligationenrecht* (Basel: Helbing Lichtenhahn, 2020), Art 18 n 95-125a.

19 *See* BGer, 29 May 1934, *Rogenmoser v. Tiefengrund AG*, in BGE 60 II 205 (209-210); BGer, 7 December 1971, *Neumühle AG v. Stadtgemeinde Chur*, in BGE 97 II 390 (398-399); BGer, 26 September 1974, *Incommerz AG v. X*, in BGE 100 II

contains a context-specific rule on the adaption of construction contracts under changed circumstances. More generally, the application of the *clausula* requires three elements. First, a change in circumstances must lead to a serious disruption of the contractual equilibrium (*gravierende Äquivalenzstörung*).[20] Second, such change of circumstances must occur after the conclusion of the contract. Third, the changed circumstances must not be foreseeable for the parties at the time of contract formation.[21] It is disputed in scholarship, however, whether this concept entitles a party to request its counterparty to renegotiate the contractual terms in good faith before asking a court to adapt or terminate the agreement. Some scholars argue that under Swiss law, the duty of good faith, which is enshrined in Article 2 of the Swiss Civil Code, includes a duty to renegotiate and adapt contractual terms to significantly changed circumstances that the parties had not foreseen at the time they entered into the contract.[22]

In France, the concept of *imprévision*, which was incorporated into French law by a reform in 2016, is now contained in Article 1195 of the French Civil Code. The provision allows contracting parties to request renegotiation or termination of contracts, if three requirements are met.[23] First, there must be a change of circumstances that was not reasonably foreseeable at the time of contract formation and that is beyond the control of the parties.[24] Second, the changed circumstances must render performance excessively onerous for one of the parties. Third, the party seeking to rely on this concept must not have tacitly or explicitly accepted the risk that materializes in the changed circumstance. In the event of *imprévision*, the disadvantaged party shall first approach its counter-party to engage in good faith negotiations. Only if parties fail to reach an agreement, they may jointly request a judge to adapt the contract. If such a joint request is not possible, the judge may, at the request of a party, adapt the contract or terminate it. Additional duties may be derived from Article 1104 of the French Civil Code, providing that contracts under French law must be negotiated, formed and executed in good faith.[25]

Other than the concept of excessive burdensomeness, which will be discussed in the next section, Italian law does not contain a positivized *clausula rebus sic stantibus*. Italian courts[26] have so far been rather

345 (348-349); BGer, 18 September 1981, *Baumann v. Rohr*, in BGE 107 II 343 (347-348); BGer, 21 March 1996, *G v. B*, in BGE 122 III 97 (98-99); BGer, 24 April 2001, *A v. Migros-Genossenschafts-Bund*, in BGE 127 III 300 (302-309); BGer, 28 October 2008, 4A_299/2008, in BGE 135 III 1 (9-10); BGer, 31 July 2012, 9C_88/2012, in BGE 138 V 366 (371-372).

[20] *See* BGer, 13 June 1975, *A v. G*, in BGE 101 II 17 (19). *See* also BGer, 7 December 1971, n 19 above, 398-399.

[21] *See* BGer, 22 November 2010, 4A_375/2010. *See* also BGer, 24 April 2001, n 19 above, 304-306.

[22] *See* PICHONNAZ, n 2 above, 37-41; P. TERCIER and P. PICHONNAZ, *Le droit des obligations* (Zurich: Schulthess, 2019), 248; P. PICHONNAZ, 'Un droit contractual extraordinaire ou comment régler les problèmes contractuels en temps de pandémie' (2020) 139 Sondernummer *Zeitschrift für Schweizerisches Recht* 137, 147-148.

[23] *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 522-530; P. ANCEL, 'Imprévision', in *Répertoire de droit civil* (Paris: Dalloz, 2017), n 55-119; D. HOUTCIEFF, *Droit des contrats* (Bruxelles: Bruylant, 2018), n 831-842-1; P. MALAURIE et al, *Droit des obligations* (Paris: LGDJ, 2018), n 758-763; A. BÉNABENT, *Droit des obligations* (Paris: LGDJ, 2019), n 308-311; B. FAGES, *Droit des Obligations* (Paris: LGDJ, 2019), n 351; M. FABRE-MAGNAN, *Droit des obligations: Contrat et engagement unilatéral* (Paris: Presses Universitaires de France, 2019), n 774-780. From an international perspective, *see* 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 34-45.

[24] *See* THIBIERGE, n 2 above, 17-303, 305-502. *See* also ANCEL, n 23 above, n 27. For the famous – but quite old – leading case on this issue, *see* Civ., 6 March 1876, *Canal de Craponne*, in (1876) 1 *Recueil Dalloz* 193. For a detailed discussion of this leading case, *see* F. TERRÉ and Y. LEQUETTE, *Les grands arrêts de la jurisprudence civile II: Obligations, Contrats spéciaux, Sûretés* (Paris: Dalloz, 2015), no 165. For more recent decisions, *see* Com., 17 February 2015, 12-29550, 13-18956, 13-20230. *See* also Cour d'appel, Reims, 4 September 2012, 11/01602.

[25] *See* THIBIERGE, n 2 above, n 796-808, in particular n 796. *See* also CHANTEPIE and LATINA, n 23 above, n 102-112.

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

reluctant to accept such concept, although it is already well developed in legal scholarship[27] in Italy. However, the institution of presupposition (*presupposizione*), a supplementary remedy of jurisprudential origin, which is closely related to this concept, could be relevant.[28] According to this institution, a party to a contract may request its termination, if the presupposition, which was implicitly taken into account at the time of contract conclusion, is no longer valid during contract execution. In addition, the general rules on fairness and good faith may trigger a renegotiation of the contract, which eventually leads to an adaption of the contract.[29] The rules of fairness of debtor and creditor in general can be found in Article 1175, those with regard to contract integration in particular in Article 1374 of the Italian Civil Code. Articles 1337, 1366 and 1375 of the Italian Civil Code enshrine the principles of good faith in different stages of contractual relations such as negotiation and formation, interpretation and performance.

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 contract for a bar. The rules in those jurisdictions differ considerably as French law has a differentiated, three-step problem-solving procedure, namely to renegotiate, to adapt and to terminate a contract.

Termination of Permanent Contracts for Cause

The extraordinary termination of permanent contracts for cause is firmly established in the German-speaking jurisdictions. 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, section 314 of the German Civil Code is about termination, for a compelling reason, of contracts for the performance of a continuing obligation (*Kündigung von Dauerschuldverhältnissen aus wichtigem Grund*). This concept of extraordinary termination of permanent contracts was codified back in 2002. Pursuant to the first sentence of section 314(1), each party may terminate a contract for the performance of a continuing obligation for a compelling reason without a notice period.[30] The second sentence of section 314(1) defines compelling reasons as a situation, in which the terminating party, taking into account all the circumstances of the specific case and weighing the interests of both parties, cannot be expected to continue the contractual relationship until the agreed end or until the expiry of a

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[27] *See* G. OSTI, 'Clausola rebus sic stantibus', in A. Azara and E. Eula (eds), *Novissimo digesto italiano* (Torino: Utet, 1959), 353, 353-360; T. GALLETTO, 'La clausola "rebus sic stantibus"', in R. Sacco (ed), *Digesto delle discipline privatistiche: Sezione civile* (Torino: Utet, 1988) 383.

[28] *See* F. GIRINO, 'Presupposizione', in A. Azara and E. Eula (eds), *Novissimo digesto italiano* (Torino: Utet, 1966), 775, 776-784; F. MACIOCE, 'La presupposizione', in G. Alpa and M. Bessone (eds), *I contratti in generale* (Torino: Utet, 1991) 487; F. GALGANO, *Trattato di diritto civile: Le obbligazioni in generale, Il contratto in generale, I songoli contratti* (Padova: Antonio Milani, 2010), n 119.2; M. MAGGIOLO, 'Presupposizione e premesse del contratto' (2014) *Giustizia Civile* 867. *See* also Cass., 21 November 2001, 14629; Cass., 14 June 2013, 15025; Cass., 13 October 2016, 20620; Cass., 20 April 2018, 9909; Cass., 5 March 2018, 5112.

[29] *See* M. A. LIVI, in P. Rescigno (ed), *Codice civile: le fonti del diritto italiano* (Milan: Giuffrè, 2018), Art 1375 n 6; G. MERUZZI, in M. Franzoni and R. Rolli (eds), *Codice civile: commentato con dottrina e giurisprudenza* (Torino: G. Giappichelli, 2018), Art 1375 n 9. *See* also A. A. DOLMETTA, 'Il problema della rinegoziazione (ai tempi del coronavirus)' (2020) speciale no 3 *Giustizia Civile* 319.

[30] *See* BÖTTCHER, n 7 above, § 314 n 3a-3c; STADLER, n 7 above, § 314 n 4; R. GAIER, in F. J. Säcker et al (eds), *Münchener Kommentar zum Bürgerlichen Gesetzbuch: Schuldrecht – Allgemeiner Teil II* (Munich: C.H. Beck, 2019), § 314 n 6-12; MARTENS, n 7 above, § 314 n 12-22; LORENZ, n 7 above, § 314 n 4-6.

notice period.[31] If the compelling reason consists in the breach of a duty under the contract, the additional rules of section 314(2) apply.[32] In such a case, extraordinary termination is generally only possible after the expiry without result of a period specified for relief or after a warning notice without result. If these requirements are met, the contract may be terminated by a court. In addition, damaged may be owed.[33]

Austrian law contains no general provision on the termination of permanent contracts for cause. Austrian law, however, provides various context-specific rules on termination for cause, in particular sections 171 (service contracts of minors), 987 (loan contracts), 1117 and 1118 (rent and lease contracts), 1162 (employment contracts) and 1210 (partnership contracts) of the Austrian Civil Code. More generally, it is well accepted in Austrian legal doctrine[34] and case law[35] that long-term contracts can be terminated without any grace period, if there is a compelling reason. The Austrian Supreme Court emphasized that termination for cause may only be invoked as a last resort (*ultima ratio*).[36] Extraordinary termination of long-term contracts allows a party to terminate an agreement, if a situation materializes that renders it intolerable to perform its contractual obligations from the perspective of a reasonable party. In Austria, courts have so far taken a nuanced approach.[37] In previous court practice, long-term agreements were allowed to be terminated, if legal circumstances relevant for the contractual performance changed significantly or if insisting on performance would have led to the impending financial ruin of a party.[38]

Swiss law does not contain general rules on termination of permanent contracts for cause. Swiss law, however, contains several context-specific rules on termination for cause, notably in Articles 226*g* (lease contracts), 297 (usufructuary lease contracts), 337 (employment contracts), 346(2) (apprenticeship contracts), 418*r*(1) (commercial agency contracts), 527 (lifetime maintenance contracts) and 545

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31 *See* BÖTTCHER, n 7 above, § 314 n 4-5; STADLER, n 7 above, § 314 n 5; GAIER, n 30 above, § 314 n 16-22; MARTENS, n 7 above, § 314 n 26-52.1; LORENZ, n 7 above, § 314 n 7-17. *See* also BGH, 7 October 2004, I ZR 18/02, in (2005) *Zeitschrift für Wirtschaftsrecht* 534; BGH, 9 March 2010, VI ZR 52/09, in (2010) *Neue Juristische Wochenschrift* 1874; BGH, 11 November 2010, III ZR 57/10, in (2011) *NJW Rechtsprechungs-Report Zivilrecht* 916; BGH, 7 March 2013, III ZR 231/12, in (2013) *Neue Juristische Wochenschrift* 2021; BGH, 4 May 2016, XII ZR 62/15, in (2016) *Neue Juristische Wochenschrift* 3718.

32 *See* BÖTTCHER, n 7 above, § 314 n 6-9; STADLER, n 7 above, § 314 n 6; GAIER, n 30 above, § 314 n 18, 23-28; MARTENS, n 7 above, § 314 n 53-67; LORENZ, n 7 above, § 314 n 18-21. *See* also BGH, 20 May 2009, IV ZR 274/06, in (2009) *NJW Rechtsprechungs-Report Zivilrecht* 1189.

33 *See* BÖTTCHER, n 7 above, § 314 n 19; STADLER, n 7 above, § 314 n 9; GAIER, n 30 above, § 314 n 35-36; MARTENS, n 7 above, § 314 n 84-87.1; LORENZ, n 7 above, § 314 n 29.

34 *See* R. REISCHAUER, in P. Rummel and M. Lukas (eds), *Kommentar zum Allgemeinen bürgerlichen Gesetzbuch* (Vienna: Manz, 2018), Vor §§ 918ff n 57-75; M. GRUBER, in A. Kletecka and M. Schauer (eds), *Online-Kommentar zum Allgemeinen bürgerlichen Gesetzbuch* (1 May 2018), § 918 n 15-18.

35 *See* OGH, 30 June 1987, 2 Ob 652/86, in SZ 60, no 125; OGH, 24 September 1987, 7 Ob 646/87, in (1988) *Juristische Blätter* 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.

36 *See* OGH, 10 July 1986, 7 Ob 585/86, in (1987) *Juristische Blätter* 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.

37 *See* OGH, 27 November 2002, 3 Ob 274/02v, in SZ 77, no 160. *See* also SCHWARZ et al, n 11 above, n 66.

38 *See* OGH, 11 June 1971, 6 Ob 92/71; OGH, 17 October 1973, 7 Ob 201/73, in (1974) *Österreichische Richterzeitung*, no 59; OGH, 10 March 1988, 8 Ob 527/88; OGH, 14 September 2010, 1 Ob 143/10a, in (2011) *Juristische Blätter* 173. *See* also OGH, 28 November 2013, 6 Ob 182/13b.

(partnership contracts) of the Swiss Code of Obligations. It is widely accepted in Swiss legal doctrine[39] and case law[40] that parties to long-term contracts are entitled to terminate such contracts with immediate effect, if there is a compelling reason (*wichtiger Grund*). Under Swiss law, a compelling reason requires three elements.[41] First, the terminating party cannot be expected to remain bound by its contractual obligations (*Unzumutbarkeit*), from both a subjective and an objective perspective. Second, there are no contractually agreed or specific statutory grounds for termination that can be invoked. Third, the party intending to terminate the contract must notify its counterparty immediately after occurrence of the compelling reason. If these requirements are met, each party may opt to terminate the contract.

In France, the concept of *caducité*, which was incorporated into French law by a reform in 2016, is now contained in Articles 1186 and 1187 of the French Civil Code. Pursuant to Article 1186(1), a validly formed contract can be terminated, if one of its essential elements disappears.[42] The disappearance of the essential element must be beyond the parties' control. If one of the contracting parties is responsible for the disappearance, this would lead to a breach of contract. 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.[43] 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. This concept may apply to many different situations. However, in accordance with Articles 1186(2) and 1186(3), *caducité* is particularly relevant in the context of interdependent contracts or of a group of contracts.[44] Therefore, if a contract that is part of the overall transaction ceases to exist under certain conditions, it may lead to the termination of the remaining contracts.

In Italy, the concept of excessive burdensomeness (*eccessiva onerosità*) is set forth in Articles 1467 to 1469 of the Italian Civil Code. Pursuant to Article 1467(1), 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.[45] Under Italian law, a party can request a court to terminate a contract, if four requirements are met.[46] First, there must be a long-term agreement or an agreement providing postponed obligations. Second, one of the obligations becomes excessively

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[39] *See* JÄGGI et al, n 18 above, Art 18 n 689-691, 785, 791-792; SCHWENZER, n 18 above, 278; KOLLER, n 18 above, 498-502; BERGER, n 18 above, 402; HUGUENIN, n 18 above, 255-256; MÜLLER, n 18 above, Art 18 n 615-619.

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

[41] 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 41-46.

[42] *See* CHANTEPIE and LATINA, n 23 above, n 493, 498-499; HOUTCIEFF, n 23 above, n 594-594-3, 596; MALAURIE et al, n 23 above, n 668; BÉNABENT, n 23 above, n 332-334; FAGES, n 23 above, n 215; FABRE-MAGNAN, n 23 above, n 744. From an international perspective, *see* SCHWARZ et al, n 23 above, n 46-50, 54.

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

[44] *See* CHANTEPIE and LATINA, n 23 above, n 494-496, 498-499; HOUTCIEFF, n 23 above, n 595-595-8, 596; MALAURIE et al, n 23 above, n 668; BÉNABENT, n 23 above, n 332-334; FAGES, n 23 above, n 215; FABRE-MAGNAN, n 23 above, n 745. From an international perspective, *see* SCHWARZ et al, n 23 above, n 46-47, 51-54.

[45] *See* GALGANO, n 28 above, n 116; L. CIAFARDINI, in L. Ciafardini and F. Izzo (eds), *Codice civile: annotato con la giurisprudenza* (Milan: Simone, 2013), Art 1467 §§ 1-5; A. ZACCARIA, in G. Cian (ed), *Commentario breve al Codice civile* (Padova: Antonio Milani, 2014), Art 1467 IV, VI; G. MAURO PELLEGRINI, in P. Rescigno (ed), *Codice civile: le fonti del diritto italiano* (Milan: Giuffrè, 2018), Art 1467 n 3-8; C. DEL FEDERICO, in M. Franzoni and R. Rolli (eds), *Codice civile: commentato con dottrina e giurisprudenza* (Torino: G. Giappichelli, 2018), Art 1467 n 3-7.

[46] *See* A. BOSELLI, 'Eccessiva onerosità', in A. Azara and E. Eula (eds), *Novissimo digesto italiano* (Torino: Utet, 1960), 331, 334-338; GALGANO, n 28 above, n 116. *See* also Cass., 9 October 1971, 2815; Cass., 20 January 1976, 167; Cass., 8 April 1981, 1996; Cass., 27 April 1982, 2615; Cass., 31 October 1989, 4554; Cass., 29 January 1990, 531; Cass., 4 August 1990, 7876; Cass., 21 February 1994, 1649; Cass., 3 November 1994, 9060; Cass., 13 June 1997, 5337; Cass., 4 March 2004, 4423; Cass., 19 April 2011, 8994.

burdensome compared to the other, or, in case of an obligation of only one party, such obligation has become excessively burdensome. Third, this obligation has not been entirely performed. Fourth, such 'excessive burdensomeness' results from an extraordinary and unforeseeable event. In addition, as set forth in Articles 1467(1) and 1458(1), the effects of termination do not extend to performance already rendered.[47] However, in accordance with Article 1467(3), the party against whom performance is requested 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 or after the coronavirus pandemic, but is most probably only of limited help to contracting parties. One practical example of this concept are subscriptions for public transportation, another example is 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

This article deals with the fundamental question, whether institutions on adaption or termination of contractual obligations still serve their purpose in times of pandemic or whether and to what extent a codification of such institutions is needed in European Contract Law. Using a functional and comparative approach, similarities and differences of all these institutions in five important civil law jurisdictions are analysed and compared in order to answer this question. The analysis has in particular shown that, despite – or because of – structural differences, the application of those institutions leads partly to largely similar end results, but partly also to quite different end results.[48] This finding notably implies that there is, indeed, need for a codification of such institutions in European Contract Law, also and in particular in times of pandemic.

Since the outbreak of the coronavirus pandemic a few months ago, the practical importance of all related institutions on adaption or termination of contractual obligations has steadily increased. In Germany, voices are growing louder in favour of solving hard and typical cases with the concept of interference with the basis of the transaction.[49] This debate has also been vitalised in Austria and Switzerland, but in a different tone.[50] In France, notably the concept of *imprévision* is being pursued, which could possibly serve as a role model for many other countries.[51] The reason of this is the triage of renegotiations, an adaption of the contract and its termination, in that order. A novelty, which has been widely criticised in scholarship, but will potentially still influence the future development of the law, concerns parties'

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47 *See* CIAFARDINI, n 45 above, Art 1458 §§ 1-4; ZACCARIA, n 45 above, Art 1458 IV; MAURO PELLEGRINI, n 45 above, Art 1458 n 2; G. SICCHIERO, in M. Franzoni and R. Rolli (eds), *Codice civile: commentato con dottrina e giurisprudenza* (Torino: G. Giappichelli, 2018), Art 1458 n 2.

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

49 *See* WAGNER, n 3 above, 536-539, in particular 539. *See* also S. JUNG, 'Systemkrisen und das Institut der Störung der (grossen) Geschäftsgrundlage: Eine Betrachtung am Beispiel der Corona-Krise' (2020) 75 *JuristenZeitung* 715; A. SCHALL, 'Corona-Krise: Unmöglichkeit und Wegfall der Geschäftsgrundlage bei gewerblichen Miet- und Pachtverträgen' (2020) 75 *JuristenZeitung* 388; C. WARMUTH, '§ 313 BGB in Zeiten der Corona-Krise – am Beispiel der Gewerberaummiete' (2020) *COVID-19 und Recht* 16. For a rather prudent assessment, *see* LORENZ, n 3 above, n 29-32, in particular 32.

50 For Austria, *see* C. GRÜNZWEIG, 'Vertragsbindung in Zeiten von Covid-19' (2020) *COVID-19 und Recht*, no 51. For Switzerland, *see* ENZ, n 3 above, n 3-25, 37.

51 *See* H. BARBIER, 'Le contrat face aux circonstances extraordinaires' (2020) *Revue trimestrielle de droit civil* 363; L. VOGEL and J. VOGEL, 'Possibilités, limites et exclusions du recours à l'imprévision dans la crise du Covid-19' (2020) *Actualité Juridique Contrat* 275.

renegotiation duties.[52] In Italy, the concept of *eccessiva onerosità* is apparently often invoked, which provides, as a general rule, for the termination of a contract and, only exceptionally, for its adaption.[53]

It is further worth mentioning that codification history of these institutions has been quite different in various European jurisdictions.[54] Italy, for instance, codified the concept of *eccessiva onerosità*, which is about termination of permanent contracts, in 1942 already.[55] In addition, the Italians developed judicial law, *presupposizione*, which may also lead to the termination of a contract. Germany has codified both *Störung der Geschäftsgrundlage* and *Kündigung von Dauerschuldverhältnissen aus wichtigem Grund* in 2002.[56] France codified not only *force majeure*, but also *imprévision* and *caducité* in 2016 (and 2018).[57] Austria and Switzerland, however, have not codified any of those institutions on adaption or termination of (permanent) contracts under changed circumstances or for cause, although these institutions have always been widely accepted in both theory and practice. Given their increasing importance, it can be argued that a codification of these institutions is needed in European Contract Law.

Although diversity is united at its core, there is a need for codification in European Contract Law in this regard, both at the national and at the supranational level. Because adaption and termination of contracts will become more important in the future and the quality of judicial decisions will further benefit from clear requirements and consequences, Member States should codify these institutions, if not already done.[58] The relationship between different instruments, starting with renegotiations between the parties, continuing with the adaption of the contract and ending with its termination, should be elevated to the *acquis communautaire*. In addition, the *acquis* should further provide for a rather narrow interpretation of termination for cause. This would contribute to respect the sanctity of contracts, which is and must remain a guiding principle of European Contract Law.

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52 For a contemporary critique from an international perspective, *see* I. SCHWENZER and E. MUÑOZ, 'Duty to Renegotiate and Contract Adaptation in Case of Hardship' (2019) 24 *Uniform Law Review* 149, 160-165; I. SCHWENZER and E. MUÑOZ, 'Duty to Re-negotiate and Contract Adaptation in Case of Hardship' (2020) *Internationales Handelsrecht* 150, 155-158. On the debate under Swiss law, *see* PICHONNAZ, n 2 above, 143-146; JENTSCH, n 3 above, n 52-57.

53 *See* P. SIRENA, 'L'impossibilità ed eccessiva onerosità della prestazione debitoria a causa dell'epidemia di CoViD-19' (2020) *La nuova giurisprudenza civile commentata* 73. For a rather critical account, *see* A. GENTILI, 'Una proposta sui contratti d'impresa al tempo del coronavirus' (2020) speciale no 3 *Giustizia Civile* 383.

54 From an international perspective, *see* F. RANIERI, *Europäisches Obligationenrecht: Ein Handbuch mit Texten und Materialien* (Vienna: Springer, 2009), 815-852.

55 *See* BOSELLI, n 46 above, 332-334; C. G. TERRANOVA, in P. Schlesinger (ed), *Il Codice civile, commentario: L'eccessiva onerosità nei contratti* (Milan: Giuffrè, 1995). On the recent reform proposal no 1151/2019, *see* P. SIRENA, 'Eccessiva onerosità sopravvenuta e rinegoziazione del contratto: verso una riforma del codice civile?' (2020) *Rivista di scienze giuridiche* 205.

56 *See* W. ERNST and R. ZIMMERMANN (eds), *Zivilrechtswissenschaft und Schuldrechtsreform* (Tubingen: Mohr Siebeck, 2001); R. SCHULZE and H. SCHULTE-NÖLKE (eds), *Die Schuldrechtsreform vor dem Hintergrund des Gemeinschaftsrechts* (Tubingen: Mohr Siebeck, 2001). *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.

57 *See* H. BARBIER, 'Les grands movements du droit commun des contrats après l'ordonnance du 10 février 2016' (2016) *Revue trimestrielle de droit civil* 247; U. BABUSIAUX and C. WITZ, 'Das neue französische Vertragsrecht – Zur Reform des Code civil' (2017) 72 *JuristenZeitung* 496.

58 On the suggestion that the Swiss should go German, *see* JENTSCH, n 3 above, n 47-50.