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RESEARCH ARTICLE

Contractual Performance Facing Covid-19: A Comparative Analysis

Zafer Kahraman*

Abstract

Covid-19 is a social disaster, an unforeseen and unavoidable event affecting most of the pre-existing contracts, which has occurred beyond the control of the parties. The drastic measures taken by governments to protect public health, emanated some radical changes in the circumstances on which most of the contracts were based.

The impact of Covid-19 differs in various contracts. It adversely affects some of the contracts by preventing or impeding the disadvantaged party to perform, whereas in some other cases it causes a radical change in circumstances generating an excessive difficulty to the fulfillment of the contract, which renders performance unreasonable and the contract unfair. It is also possible that the contract might even not be affected by the pandemic. In short, it renders some contracts impossible and for some others, it makes them unreasonably difficult to perform. This article focuses on the agreements "infected" by the Covid-19 pandemic, by studying its legal implications.

Within the framework of this article, the legal nature of the pandemic will be presented and its impact on the contracts will be discussed. The aim is to provide both academic analysis and an idea of the way civil law and common law systems are coping.

Keywords

Law, Covid-19, Force Majeure, Hardship, Frustration, Contract law

* **Corresponding Author:** Zafer Kahraman (Assoc. Prof. Dr.), Bahçeşehir University, Faculty of Law, Department of Civil Law, Istanbul, Turkiye. E-mail: zafer.kahraman@law.bau.edu.tr ORCID: 0000-0002-9303-1062

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Introduction

We live in the aftermath of the Covid-19 outbreak, which was declared an international pandemic by the World Health Organization in March 2020, following a dramatic increase in the number of cases since the first reported case in December 2019. This caught humanity unprepared despite all the intellectual and technological advancements that we have made.

Indeed, there have been some examples of pandemics in human history. Still, Covid-19 might be considered an unprecedented event in the modern world regarding the reaction of the countries which took drastic measures never seen before up to this level. The pandemic sparked a range of responses from various public and private actors, particularly governments immediately reacted in different ways. We can observe that all countries have been affected by the Covid-19 pandemic up until now and many of them imposed prohibitions in order to protect public health, which caused a negative effect on their economies and lifestyle.

In terms of contract law, this situation has caused some major difficulties in the ongoing contractual relations and in performing some obligations. There have been some negative side effects of the measures taken. Especially the lockdowns or travel bans created various problems on legal ground, and it is highly probable that this may originate unusual conflicts in the future. The pandemic affects directly existing contracts, creating a major change in circumstances.

The effect of the Covid-19 pandemic on contracts is widely considered to be the leading topic in most countries. Legal systems differ significantly in their approach to how changes of circumstances may have an effect upon the contract. The question is not only about how significant this change of circumstances must be in order to give rise to a remedy, but also about the choice of the remedy.

This article focuses on the agreements “infected” by Covid-19 pandemic, studying its legal implications in comparative law. Within the framework of this work, the legal nature of the pandemic will be presented and its impact on contracts will be discussed. The aim is to provide both an academic analysis and an idea of the way the civil law and the common law systems are coping.

The article is structured in two overall parts. First, the legal nature, the terminology and the qualification of the Covid-19 pandemic will be analyzed and second, the legal remedies in case of a breach of contract resulting from it will be handled.

I. The Legal Nature, The Terminology and The Qualification of the Covid-19 Pandemic

A. The Legal Definition of the Covid-19 Pandemic

Deeply concerned both by the alarming levels of spread and severity, and by the alarming levels of inaction, the World Health Organization made the assessment that Covid-19 could be characterized as a pandemic[1]. A pandemic is defined as an epidemic occurring worldwide, or over a very wide area, crossing international boundaries and usually affecting a large number of people[2].

The pandemic is an unfortunate event resulting from unforeseeable circumstances. Because of this situation, a state of emergency has been declared by some countries, lockdown, travel bans, mandatory rules for wearing masks, various prohibitions and other possible measures have been taken in order to put social distance between people. The usual flow of life has been changed, in the entire world, because of the restrictions and prohibitions imposed by the governments. Most of workplaces are still closed, most white-collar workers work from home, distance education continues, and travel restrictions still exist in different ways.

As a result of these measures, the usual flow of life has been altered to a more cautious lifestyle and economic activities have been affected by this. In short, Covid-19 has changed human life, and that negatively influenced many legal relationships in business. Hence, in terms of law, the pandemic can be described as a social disaster that shakes human social existence [3], highlighting social and economic shortcomings and causing drastic measures in response which inevitably create many legal conflicts.

There is no uniform understanding of what a disaster is within the law doctrine. We can hardly find a definition in the international law. The recently adopted United Nations International Law Commission (ILC) draft convention on the "protection of persons in the event of disasters", which provides a framework of rights and responsibilities during disasters, uses the definition "a calamitous event or series of events resulting in a widespread loss of life, great human suffering and distress, mass displacement, or large-scale material or environmental damage, seriously disrupting the functioning of society[4]". However, the ILC articles and commentaries, which point out hurricanes and earthquakes, do not reference pandemics[5].

1 Listings of WHO's Response to Covid-19 (2020), <https://www.who.int/news/item/29-06-2020-covidtimeline> accessed 27 February 2021.

2 Heath Kelly, '*The Classical Definition of a Pandemic is not Elusive*' (2011) Bull World Health Org 540, 541.

3 Başak Baysal and Murat Uyanık and Selim Yavuz, '*Koronavirüs 2019 ve Sözleşmeler*' in *Covid-19 Salgınının Hukuki Boyutu, Hukukun Tüm Alanlarında Değerlendirmeler* (Onikilevha 2020) 269, 271.

4 Art. 3, G.A. Res. 71/141 (Dec. 13, 2016) and G.A. Res. 73/209 (Dec. 20, 2018)

5 Alp Öztürk, '*Covid-19: Just Disastrous or the Disaster Itself? Applying the ILC Articles on the Protection of Persons in the Event of Disasters to the Covid-19 Outbreak*' (2020) 24 American Society Of Int'l Law, <https://www.asil.org/insights/volume/24/issue/6/covid-19-just-disastrous-or-disaster-itself-applying-ilc-articles> accessed 27 February 2021.

In short, the pandemic should be defined as a social disaster, which may cause different legal repercussions on the contracts. In the following section, the difference in the terminology between the Civil law and the Common law concepts will be clarified and the distinction between these concepts will be analyzed with their legal implications.

B. The Legal Terminology related to the Covid-19 Pandemic

First of all, we need to clarify the terminology associated with Covid-19 and distinguish the *force majeure,* frustration, impossibility and hardship in order to elaborate the legal consequences of Covid-19 on contracts.

The first hurdle to overcome is the understanding of *force majeure* in comparative law. For this reason, we will handle this in the first subtitle below and then we will distinguish between *force majeure* and hardship.

1. The Term of *Force Majeure* in Various Legal Systems

The term "*force majeure*" is French and stands for greater or superior force, which is commonly used to describe a supervening, unavoidable event causing a major change in circumstances, which could not have been prevented by any means.

Despite changing circumstances, the contract is law between parties, and it imposes a duty on each party to perform its obligations as they are set out. The common law does not recognize a defense of *force majeure* or allow for adjustment or termination of the contract on the grounds of changed circumstances. In common law, the *force majeure* is a contractual term which cannot be invoked unless being included in the contract. That is why, in practice, many contracts contain a force majeure or hardship clauses because in the absence of such clauses, in common law, an unforeseen post-formation event will lead to the parties being excused or released from their obligations only in a narrow range of circumstances under the frustration doctrine. Unlike *force majeure*, frustration needs not be referred to or included in a contract and might be invoked by any party.

According to the frustration doctrine, a contract may be discharged or set aside on the ground of frustration where an unforeseen event, subsequent to the date of the contract, renders the performance of the contractual obligations physically or commercially impossible, or excessively difficult, impracticable or expensive, or destroys the utility which the stipulated performance had to either party[6]. The frustration doctrine and its subsequent expansion came to be known in the United Kingdom as discharge by "frustration" and in the United States as discharge by

6 *Autry v. Republic Productions, Inc*. (1947) 30 Cal.2d 144.

"impossibility, impracticability and frustration of purpose". This difference in terminology reflects the wider scope of the American (than that of the English) doctrine, the latter being reluctant to recognize "impracticability" (as opposed to "impossibility")[7]. In American law, frustration is defined in § 454 of the (first) Restatement of Contracts, as not only strict impossibility but impracticability because of extreme and unreasonable difficulty, expense, injury or loss involved[8]. In the United States, a distinction has also been made between frustration of performance and frustration of purpose[9].

Hence, according to common law, the *force majeure* is merely a contractual design covering unexpected post-formation events and determining their legal consequences. However, the frustration doctrine is applied when any contractual force majeure provisions do not cover a supervening event which renders the contract impossible or impracticable to fulfill, or performance becomes substantially different from the original obligations undertaken by the parties at the moment of entry into the contract.

In civil law, it is difficult to find a statutory definition of *force majeure*. A rare exception is article 1218 of the French Civil Code, which states that "*in contractual matters, there is force majeure where an event beyond the control of the debtor, which could not reasonably have been foreseen at the time of the conclusion of the contract and whose effects could not be avoided by appropriate measures, prevents performance of his obligation by the debtor*."

In civil law doctrine, the concept of *force majeure* is defined as an external supervening event that inevitably leads to a breach of an obligation, which cannot be foreseen or avoided[10]. This must be, despite the exercise of diligence and utmost care, an unforeseeable, unavoidable supervening event not attributed to the affected party[11]. According to civil law, the *force majeure* is an event which prevents and

7 Guenter Treitel, '*Some Comparative Notes on English and American Contract Law*' (2002) 55 Smu L Rev 357, 360.

8 Tyrrell Williams, '*Restatement of the Law of Contracts of the American Law Institute, Sections 454-469, with Missouri Annotations*' (1933) 18 St Louis L Rev 181.

9 Hans Smit, '*Frustration of Contract, A Comparative Attempt at Consolidation*' (1958) 58 Columbia L Rev 287.

10 Henri Deschenaux and Pierre Tercier, *La responsabilité civile* (Stæmpfli 1982) 62; Charles André Junod, *Force majeure et cas fortuit dans le système suisse de la responsabilité civile* (Georg 1956) 27; Rolf H. Weber, *OR art. 103 in Berner Kommentar, Schweizerisches Zivilgesetzbuch, Das Obligationenrecht*, (Stæmpfli 2002) Art. 103, para 48; Franz Schenker, *Die Voraussetzungen und die Folgen des Schuldnerverzugs im Schweizerischen Obligationenrecht* (Univ-Verlag 1988) para 307; Haluk Tandoğan, *Türk Mesuliyet Hukuku* (2nd edn Vedat 2010) 464; Fikret Eren, *Sorumluluk Hukuku Açisindan Uygun Illiyet Baği Teorisi* (Ankara Üniversitesi Hukuk Fakültesi 1975) 176; Fikret Eren, *Borçlar Hukuku Genel Hükümler* (24nd ed. 2019) para 1731; Selahattin Sulhi Tekinay and Sermet Akman and Haluk Burcuoğlu and Atilla Altop, *Borçlar Hukuku Genel Hükümler* (Filiz 1993) 1003; O. Gökhan Antalya, *Borçlar Hukuku Genel Hükümler* (2nd ed. Seçkin 2019) para 2586; Özer Seliçi, *Özel Hukukta Mücbir Sebep ve Uygulanış Tarzı in Sorumluluk Hukukunda Yeni Gelişmeler III Sempozyumu* (İstanbul Üniversitesi Hukuk Fakültesi 1980) 61; Bundesgesetzentscheidung [Swiss Official Journal] [hereinafter "BGE"] 111 II 433; BGE 102 II 262; BGE 91 II 474, 487-488; BGE 88 II 283, 291.

11 Abdullah Pulat Gözübüyük, *Mücbir Sebepler Beklenmeyen Haller* (Kazancı 1977) 66-67; Eren, (n.10-Obligations) para 1733-1744; Rona Serozan, *Borçlar Hukuku Genel Bölüm, Ifa-Ifa Engelleri-Haksiz Zenginleşme* (Filiz 2006) Vol 3, §15 para 4; Erzan Erzurumluoğlu, *Türk İsviçre Borçlar Hukuku Sistemine Göre Borçluya Yüklenemeyen Nedenlerden Dolayı Edimin Yerine Getirilememesi* (1970) 37-38; H. Tamer İnal, '*Sözleşmenin Kurulması Esnasında Öngörülemeyen Sonraki İfa İmkansızlığı ve Mücbir Sebep'* (2014) Kazancı Hukuk Araştırmaları Dergisi, 115-164.

impedes the affected party from fulfilling the contract, and which causes unavoidably the violation of an obligation. In short, according to civil law, *force majeure* is a supervening event causing impossibility.

Indeed, the parties to the contract may agree upon a different definition and they can even determine the legal consequences within their contract, thanks to the freedom of contract. They may agree upon terms which seek to provide solutions for unforeseen or unexpected circumstances. In this case, the contractual design will be given priority rather than the statutory results of the impossibility.

Natural disasters of all kinds such as earthquakes, storms, floods, fires, wars, riots, strikes, volcanic eruptions, pandemics may be considered as *force majeure*[12], which are widely accepted as causes creating “impossibility of performance” in the doctrine. It should be highlighted that in the case of *force majeure*, the supervening event must be objectively unavoidable, which means that nobody can avoid the occurrence of this event or prevent its undesired consequences, despite all kinds of precautions taken according to the actual knowledge and technology[13]. As a result, according to civil law, the *force majeure* must not be incorporated in a contract in order to be invoked because it leads, by definition, to impossibility.

It should be added that many international legal documents contain provisions on the *force majeure*, describing it with unanimity, as an unforeseen, unavoidable and external post-contractual event which prevents or impedes unavoidably the performance of the contractual obligations. For example, *force majeure* is defined by The International Chamber of Commerce (ICC) Force Majeure Clause 2020[14], as the occurrence of an event or circumstance which prevents or impedes a party from performing one or more of its contractual obligations under the contract. According to this definition, the impediment must be beyond reasonable control, could not have been reasonably foreseen at the time of the conclusion of the contract, and its effects could not have been reasonably avoided or overcome by the affected party.

A similar explanation of *force majeure* can be found in article 79 of the United Nations Convention on Contracts for the International Sale of Goods (CISG), which states that “*a party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences*.”

12 Turkish Court of Cassation [hereinafter “TCC”] General Assembly on the unification of the conflicting judgments (6 May 2016) E. 2015/1, K. 2016/1; TCC General Assembly (27 June 2018) E. 2017/90, K. 2018/1259.

13 Junod (N.10) 155; Tandoğan (N.10) 465; Eren, (n.10-Obligations) para 1742; Tolga Özer, *Özel Hukukta Mücbir Sebep Beklenmeyen Hal Covid-19 Yorumu* (Vedat 2020) 22.

14 ICC Force Majeure and Hardship Clauses 2020 <https://iccwbo.org/content/uploads/sites/3/2020/07/icc-forcemajeure-introductory-note.pdf> accessed 27 February 2021.

In article 8:108 of the Principles of European Contract Law (PECL)[15] it is stated that "*a party's non-performance is excused if it proves that it is due to an impediment beyond its control and that it could not reasonably have been expected to take the impediment into account at the time of the conclusion of the contract, or to have avoided or overcome the impediment or its consequences*."

Similarly, the Unidroit Principles of International Commercial Contracts (PICC)[16] state in article 7.1.7 that "*non-performance by a party is excused if that party proves that the non-performance was due to an impediment beyond its control and that it could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences*."

Accordingly, FIDIC Conditions of Contract for Construction (FIDIC Red Book, 2017 edition) sub-clause 18.1 defines force majeure as "*an exceptional event or circumstance which (i) is beyond a Party's control; (ii) the Party could not reasonably have provided against before entering into the Contract; (iii) having arisen, such Party could not reasonably have avoided or overcome; and (iv) is not substantially attributable to the other Party*." It should be mentioned that in the FIDIC (2017), the term "*Force Majeure*", which was used in the first edition, was replaced with "*Exceptional Event*", but the definition and the non- exhaustive list of events or circumstances remained substantially the same.

In light of the above explanations, *force majeure* is generally defined as an unforeseen, unavoidable supervening event or circumstance, which happens after the formation of the contract and beyond the control or the inducement of the affected party. This definition leads to the "impossibility".

2. The Distinction Between *Force Majeure* and Hardship

It is important to understand that, in civil law, *force majeure* and hardship are two different principles, in their preconditions and in their legal consequences. *Force majeure* applies to cases where performance has become impossible because of an event beyond one party's control although all reasonable precautionary measures had been taken.

In the light of aforementioned explanations, *force majeure* is an event, which causes by definition the impossibility. However, hardship deals with cases where the agreed performance is basically still possible even though some underlying facts have

15 The Principles Of European Contract Law [hereinafter "PECL"], https://www.trans-lex.org/400200/_/pecl/ accessed 27 February 2021.

16 The Unidroit Principles of International Commercial Contracts [hereinafter "PICC"], <https://www.unidroit.org/instruments/commercial-contracts/unidroit-principles-2016> accessed 27 February 2021.

substantially changed to the extent that fulfilling the contractual obligations does not make any economic sense anymore. If the disastrous event does not absolutely cause a breach of obligation for everybody, but creates an excessive difficulty performing this obligation, it should be known as hardship.

Hardship is based on the fact that the underlying circumstances of the contract radically change after the formation of the contract, in a way the parties did not foresee at that time, and although in theory the contractual obligations are still performable, the balance between mutual obligations designed by the parties has been lost and it makes little sense from an economic viewpoint. In hardship, the contract becomes unfair and unreasonable for the disadvantaged party.

Therefore, the breach of a contract is not objectively unavoidable in hardship cases[17]. There is hardship where an unforeseen, inevitable and external supervening event fundamentally alters the balance preset by the parties to the contract, to the level that it becomes not impossible, but unbearable for the disadvantaged party to perform.

This distinction leads us to make a legal assessment in the understanding of these two concepts: *Force majeure* renders the performance impossible and breaks the chain of causation between non-performance and the obligor's actions[18]. In contrast, hardship causes neither impossibility nor frustration, but it renders the performance excessively difficult[19].

The distinction is not absolute, it should be assessed regarding to circumstances[20]. In order to distinguish between the two concepts, the judge has to understand the circumstances, assess the features of the situation and decide upon all the complexity inherent in social disaster cases[21]. Both are unexpected, unforeseen, inevitable, external and extraordinary events. It is highly possible that the same event may have different affects on different contracts.

In short, *force majeure* prevents unavoidably the performance[22], whereas hardship renders it excessively difficult[23]. It could be said that in cases of hardship, the

17 Tandoğan (n.10) 466; Tamer Pekdinçer and İrem Toprakkaya-Babalık, '*Koronavirüs Salgınının Sözleşmelere Etkisi, İfa İmkânsızlığı, İfa Güçlüğü ve Uyarlama' in Covid-19 Salgınının Hukuki Boyutu, Hukukun Tüm Alanlarında Değerlendirmeler* (Onikilevha 2020) 303, 316.

18 Tandoğan (n.10) 468; Tekinay et all (n.10) 1003; Eren, (n.10-Obligations) para 1745; Antalya (n.10) para 2586.

19 Hale Şahin, *Mücbir Sebep Nedeniyle Borcun Ifa Edilememesi* (Onikilevha 2020) 78.

20 Eren, (n.10-Obligations) para 1734.

21 Tekinay et all (n.10) 1004; Ş. Barış Özçelik, '*Covid-19 Salgını Çerçevesinde Alınan Önlemlerin Sözleşme Hukuku ve Mücbir Sebep Kavramı Açısından Değerlendirilmesi' in Covid-19 Salgınının Hukuki Boyutu, Hukukun Tüm Alanlarında Değerlendirmeler* (Onikilevha 2020) 283, 284.

22 Antalya (n.10) para 2605.

23 Şahin (n.19) 79.

impossibility is not objective but "subjective"[24]. It must be pointed out that subjective inability to perform does not lead to impossibility, however if it may result from hardship. Hardship is an extraordinary and unforeseen event, which alters the balance in the obligation on an unexpected scale, creating an unreasonable and unfair situation for the disadvantaged party[25].

In civil law, force majeure is covered by the impossibility and the hardship by the theory of *imprévision* (in French law) or *Wegfall der Geschäftsgrundlage* (in German law) which both describes the legal situation in which the economic balance of the contract, has fundamentally changed[26]. These theories are widely accepted in civil law countries and applied in hardship cases to adjust the contract in order to adapt it to the radically changed circumstances.

In common law, the frustration doctrine covers not only the frustration because of impossibility but also frustration arising from different reasons such as the frustration of purpose (in United Kingdom and United States) or the impracticability (in the United States). Herein appears the essential difference in nature between frustration, hardship and *force majeure*. This is made clear by a definition of frustration which has been given by Lord Radcliffe in the case of *Davis Contractors, Ltd. v. Fareham U.D.C.*[27]: "*Frustration occurs when the law recognizes that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which the performance is called for would render it a thing radically different from that which was undertaken by the contract. Non haec in foedera veni. It was not this that I promised to do*."

According to this explanation, the frustration is certainly broader than the concept of *force majeure* and encompasses to some extent the features of the French concept of *imprévision* and the German concept of Wegfall *der Geschäftsgrundlage.* However, there is a significant distinction between both systems in cases of hardship. When a contract is frustrated, in common law, a judge cannot amend or adjust it to the new situation. Frustration simply discharges the contract and the defendant will be excused from paying whereas in civil law, the judge would certainly rule in favor of an amendment to the contract since, due to the changed circumstances, the contract essentially lost economic balance[28].

24 Tekinay et all (n.10) 909; Serozan (n.11) § 15 para 1.

25 Gözübüyük (n.11) 162; TCC General Assembly (7 May 2003) E. 2003/13-332, K. 2003/340.

26 A. H. Puelinckx, '*Frustration, Hardship, Force Majeure, Imprévision, Wegfall der Geschäftsgrundlage, Unmöglichkeit, Changed Circumstances*' (1986) 3 J. Intl Arb 47, 50.

27 *Davis Contractors, Ltd. v. Fareham U.D.C. (*1956) A.C. 696 (HL) 728-729.

28 Puelinckx (n.26) 51.

C. The Legal Qualification of Covid-19

It must be highlighted that it is not Covid-19 itself which affects the contractual relationships, but the imposed measures taken worldwide do. Therefore, it must be clarified that the culprits are the drastic and high-scale measures taken against Covid-19, which make the obligation difficult or impossible to perform. However, because they are all reactions against Covid-19, which stays at the center of the subject, the pandemic should be deemed as the main reason for the impact on contracts, resulting from the measures taken by the countries affected by the outbreak.

With the lexicon of the pandemic, it may be argued that Covid-19 may "infect" or not contractual relationships. If a contract has not been negatively affected by the measures taken against the pandemic, if the balance in the contract has not been significantly altered in the disadvantage of one party, it means that Covid-19 did not have a negative impact on this legal relationship. In that case, one must admit that the contract in question remains untouched by the pandemic.

To illustrate, the income of a supermarket may not have been adversely affected because of its delivery services or a restaurant may increase its profits thanks to take-out services. In those examples, despite the lockdown, these hypothetical businesses in question are not "infected" by Covid-19. Hence, it would be a misjudgment to call automatically for *force majeure* or hardship in their possible future legal disputes.

Nevertheless, it is probable that Covid-19 had an impact on some contractual relationships, which are adversely affected by the measures taken by the public authorities. In some cases, it may prevent or impede the disadvantaged party to perform[29], in some other cases it may create an excessive difficulty that makes performance extremely difficult. The assessment should be done case by case[30]. Even after the assessment has been made correctly, the main problem stays the same, which is to determine how the risks will be allocated between the parties who found themselves in this situation, coming from this self-induced supervening event[31].

It should be noted that the parties may identify, thanks to the freedom of contract, what circumstances should be considered as *force majeure* or hardship and they can determine the legal consequences of these[32]. It is also possible to guarantee the performance despite the impossibility or excessive difficulty resulting from *force majeure* or hardship[33].

29 Murat Aydoğdu and Ali Haydar Yağcıoğlu, '*Kovid-19 Salgınının Borç İlişkilerine ve Yargılamaya Etkileri*' *in Covid-19 Salgınının Hukuki Boyutu, Hukukun Tüm Alanlarında Değerlendirmeler* (Onikilevha 2020) 22.

30 Özer (n. 13) 24.

31 Pascal Pichonnaz, '*Un droit contractuel extraordinaire ou comment régler les problèmes contractuels en temps de pandémie'* (2020) Sondernummer der Zeitschrift für Schweizerisches Recht 137, 140.

32 Pichonnaz (n.31) 140; Tandoğan (n.10) 468; Antalya (n.10) para 1667; Baysal et all (n.3) 269 and 271.

33 Leyla Müjde Kurt, Borçlunun Sorumlu Olmadığı Sonraki İmkânsızlık (Yetkin 2016) 180 *ff.*; Pekdinçer and Toprakkaya-Babalık (n.17) 307; Zafer Kahraman, Saf Garanti Taahhütleri (Vedat 2017) 73.

In light of the above explanations, it should be admitted that the impact of Covid-19 on contracts must be analyzed case by case, taking into account its effects. On the one hand, it is clear that Covid-19 is an unforeseen, inevitable and external event which caught the entire world unprepared. On the other hand, its legal implications differ in various contracts. It renders some contracts impossible and for some other, it makes it difficult to perform them. It is also possible that the contract might not even be affected by the pandemic.

In the section below, the legal remedies of non-performance due to the adverse effects of Covid-19 will be assessed.

II. The Legal Remedies in Case of Breach of Contract Resulting from the Covid-19 Pandemic

In the section above, it has been scrutinized that the prohibitions and measures taken by the states in response to Covid-19 causes some significant changes in circumstances, which may negatively affect contractual relations. The affected (or with the lexicon of the pandemic -"infected") contracts suffer mostly from strict impossibility or excessive difficulty, which prevents or impedes the disadvantaged party to fulfil his or her part of the bargain. The common law and the civil law remedies (with the remedies specified in PICC, PECL and CISG articles), in case of breach of contract (or non-performance) resulting from the Covid-19 pandemic, will be analyzed in the following subtitles.

A. Common Law Remedies

The changed market circumstances caused by the Covid-19 pandemic rendered some contracts excessively difficult to fulfil and some others impossible. This has led affected parties to non-performance and they seek legal remedies for this. In this context, two well-known common law concepts are being tested: the doctrine of frustration and the contractual remedy of *force majeure* (or hardship, which recently attracts attention). The contractual remedies, the doctrine of frustration and its legal consequences will be analyzed below.

1. Contractual Remedies

The contract is generally defined as a legally enforceable agreement, a bargain between the parties[34], to which each party has given his assent on the basis of the circumstances as they believed them to be at the time of the formation of the contract. The contract binds each party to fulfil obligations which necessarily contain a balance to which the parties have agreed and therefore an allocation of

34 Paul Richards, *Law of Contract* (11th edn Pearson 2013) 10-11.

risks between the parties[35]. It is possible that the contract contains a clause which anticipates and identifies the case as *force majeure* or *hardship,* and determines the legal consequences of it, as well. The doctrine of frustration will not be applicable if the relevant risks have been addressed and allocated by the contract terms.

Hence, the frustration operates only where the contract does not deal properly or at all with the supervening event[36]. If the contract dictates what will happen in case of the anticipated supervening event occurring, either by an express or an implied term, there is no room for the doctrine of frustration[37].

In this case, the contractual clause will be applied to the changing circumstances. Indeed, this clause only comes into effect when a supervening event beyond the control of either party occurs and renders the contract impossible or impracticable to fulfil. The intent is to allocate the risk from events that are well outside of normal business risks. The words used in the force *majeure* (or hardship) clause will describe the events or acts that trigger relief from obligations. This clause enables the parties to a contract to suspend or terminate their obligations.

The key question is whether the Covid-19 pandemic qualifies as a *supervening event*. It caught the entire world unprepared. In this regard, it is unexpected. However, the words used in the *force majeure* (or hardship) clause and the nature of the contract may dictate whether Covid-19 constitutes a supervening event. These clauses usually cover events such as an act of God, war, riots, strikes, earthquakes, floods, fires, government restrictions, epidemics, pandemics or public health emergencies. Hence, Covid-19 likely falls into these broad categories of events, even though it is not named in the contract.

Force majeure (or hardship) clauses sometimes include a catch-all phrase such as *"(...) or any other cause beyond the parties' control"*. While in one case the court have allowed parties to use this phrase for events not stated or unrelated to those in the *force majeure* clause[38], in another case it is rejected[39]. I suggest that it must be interpreted regarding the overall clause, and the clause must cover Covid-19 if the implied intent of the parties is in favor.

Therefore, if there is a clause to terminate the contract because of changing circumstances due to Covid-19, the right to terminate arises under the contract rather than by the operation of the doctrine of frustration. Stipulations to that effect

35 John Cartwright, *Contract Law, An Introduction to the English Law of Contract for the Civil Lawyer* (3rd edn Hart 2016) 260.

36 *Joseph Constantine Steamship Line Ltd v Imperial Smelting Corpn Ltd* (1942) AC 154.

37 Janet O'Sullivan, *The Law Of Contract* (8th edn Oxford University Press 2018) para 14.7.

38 *Chandris v Isbrandtsen Moller Co Inc* (1951) 1 K.B. 240 (20 July 1950).

39 *Tandarin Aviation Holdings Ltd. v Aero Toy Sore LLC* (2010) 2 Lloyd's Rep 668.

are effective; provided that they are not uncertain in their terms and that there is compliance with any notice requirement[40].

Nonetheless, if the contract does not include a *force majeure* (or hardship) clause or it does but a pandemic is not included, it may be possible for the parties to rely on the common law doctrine of frustration, which discharges the contract when the contract is frustrated.

2. The Doctrine of Frustration

In Common law, the starting point of contract law is "*pacta sunt servanda"*, which translates from Latin as "agreements must be kept." It may be accurately described as a "bedrock principle of contract law[41]." It means that agreements must be respected in all circumstances. This philosophy is still at the heart of the matter in modern times, for reasons of legal certainty and stability. The typical example of this strict approach is the English case of *Paradine v. Jane*[42] where Jane was the tenant of Paradine's estate for a number of years while the German prince Rupert occupied the estate himself for three years by military force. In this case, the Kings Bench nevertheless decided that Jane had to pay rent for that period. This rigid interpretation prevailed in the United Kingdom until Blackburn J's famous judgment in *Taylor v. Caldwell (1863)*[43], where the destruction of a music hall which had been hired out for the giving of a series of concerts was held to have discharged the contract of hire. In Blackburn J's words, "both parties are excused" from further performance because "*in contracts in which the performance depends on the continued existence of a given person or a thing, a condition is implied that the impossibility of performance arising from the perishing of the person or thing shall excuse the performance*[44].".

According to the court, the parties must have intended that the contract would no longer bind them if it became impossible to perform[45]. This was a turning point in common law, as the case in which common law moved away from the doctrine of absolute contracts (the rigid interpretation of *pacta sunt servanda*) to the modern doctrine of discharge by supervening events[46].

While the implication of a term was the original technique used by the court to justify the setting aside of the contract, modern courts no longer rely on this, as

40 *Channel Island Ferries Ltd v Sealink UK Ltd* (1988) 1 Lloyd's Rep 323.

41 *Davis v GN Mortgage Corp*. (2003) F. Supp. 2d 950, 244

42 *Paradine v. Jane*, 82. Eng. Rep. 897.

43 *Taylor v Caldwell* (1863) 3 B & S 826, QB.

44 *3 B & S* 826, 840.

45 Cartwright (n.35) 261-262.

46 Guenter Treitel, *Frustration and Force Majeure* (3rd edn Sweet & Maxwell 2014) para 2-022.

the second leading case demonstrates[47]. In *Davis Contractors Ltd v. Fareham Urban District Council* (1956)[48], the court recognizes commercial impracticability rather than impossibility. It was clearly not impossible for Davis to carry out their contractual obligations. They fulfilled their obligations, and they had been paid for so doing. Their submission was that it was not fair to hold them to the contract price in these changed circumstances. According to Lord Radcliffe, frustration occurs also in the change of circumstances, which renders the obligations radically different from that which was undertaken by the contract. This is accepted as the overall test for frustration in the modern law[49].

Similarly, Lord Simon in *National Carriers Ltd v Panalpina (Northern) Ltd*[50] states the test to be: "*Frustration of contract takes place when there supervenes an event (without default of either party and for which the contract makes no sufficient provision) which so significantly changes the nature (not merely the expense or onerousness) of the outstanding contractual rights and/or obligations from what the parties could reasonably have contemplated at the time of its execution that it would be unjust to hold them to the literal sense of its stipulations in the new circumstances; in such a case, the law declares both parties to be discharged from further performance*."

Therefore, the doctrine of frustration is designed to cover the case where the parties have not made provision for a change in circumstances, and the new circumstances have the effect of radically altering the nature of contractual obligations[51]. The party seeking relief from their obligations under the contract, relying on this doctrine, has the burden of proof to show the contract was frustrated.

Indeed, the frustrating supervening event must occur after the formation of the contract, and it must be unexpected, unforeseeable or uncontemplated by the parties[52]. The failure by the parties to deal with a known risk should indicate the parties' willingness to bear the consequences of that risk materializing. In addition, the event must not be induced by the party seeking discharge[53].

Hence, the hallmark of frustration is that it refers to a supervening event not reasonably contemplated by the parties at the time of contracting which radically alters the foundation of the contract or renders it physically or legally impossible, illegal or

47 Ewan McKendrick, *Contract Law, Text, Cases And Materials* (8th edn Oxford University Press 2017) 695.

48 *Davis Contractors Ltd v. Fareham Urban District Council* (1956) AC 696, HL

49 *Pioneer Shipping Ltd v BTP Tioxide Ltd (The Nema)* (1982) AC 724.

50 *National Carriers Ltd v Panalpina (Northern) Ltd* (1981) A.C. 675.

51 Cartwright (n.35) 264.

52 *Walton Harvey Ltd v Walker and Homfrays Ltd* (1931) 1 Ch 274.

53 *J Lauritzen AS v. Wijsmuller BV ("The Super Servant Two")* (1990) 1 Lloyd's Rep 1, p. 707.

impracticable to perform[54]. It should be noted that disappointed expectations or mere inconvenience do not of themselves give rise to frustrated contracts. A person claiming radical change would have to show that the contract became futile or even impossible, not just less than expected[55]. In the *Nema*, Lord Roskill stated that the doctrine of frustration should be dealt with seriously, and it should "*not lightly to be invoked to relieve contracting parties of the normal consequences of imprudent bargains*[56]."

It is not possible to discuss all the circumstances in which the doctrine of frustration applies because these are innumerable. However, it is possible to identify certain typical situations such as unavailability of the subject matter of the contract[57], non-occurrence of an event central to the contract[58], inability to comply with the specified manner of performance[59], supervening illegality[60] etc.

Finally, the question is, is Covid-19 a frustrating event? The answer will vary on a contract by contract basis as it has the potential to impact different contracts in different ways. The aforementioned explanations show that it will essentially depend upon whether the existence of coronavirus renders further performance of the contract impossible, illegal or something different from what was contemplated by the parties when entering into the contract.

In determining whether Covid-19 frustrates a given contract, the courts will construe the terms of the contract in light of the nature and content of the contract, examine the economic effects of the new circumstances, compare performance of the relevant contractual obligation in the original circumstances (the old obligation) with a performance of the same obligation in the new circumstances (the new obligation) to whether the contract has radically or fundamentally changed.

It is clear that the measures taken in response to Covid-19 (such as travel bans, prohibitions of some activities or lockdowns, government decrees, quarantine zones, cancellation of events and the introduction of emergency legislation) affect some of the contracts. Some contracts have become impossible as a result of the consequences of Covid-19. The impossibility remains under the doctrine of frustration unless there is a contractual *force majeure* clause[61].

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54 Mary Charman, *Contract Law* (4th edn Routledge 2007) 216; P.A. Chandler '*Self-Induced Frustration, Forseeability and Risk*' (1990) 41 N. Ir. Legal Q. 362.

55 *Maritime National Fish Ltd v Ocean Trawlers* (1935) AC 524, PC; *Amalgamated Investment & Property Co. Ltd v. John Walker & Sons Ltd* (1977) 1 WLR 164; *Herne Bay Steamboat Co. v. Hutton* (1903) 2 KB 683.

56 *Pioneer Shipping Ltd v BTP Tioxide Ltd (The Nema)* (1982) AC 724, 752.

57 *Taylor v Caldwell* (1863) 3 B & S 826; *Morgan v. Manser* (1948) 1 KB 184; *Condor v Barron Knights* (1966) 1 WLR 87.

58 *Krell v. Henry* (1903) 2 KB 740; *Herne Bay Steamboat Co. v. Hutton* (1903) 2 KB 683 ("Coronation cases").

59 *Tsakiroglu & Co. Ltd v. Noblee Thorl GmbH* (1962) AC 93; *Eugenia* (1964) 1 All ER 161.

60 *Metropolitan Water Board v Dick Kerr and Co Ltd* (1918) AC 119; *Denny, Mott & Dickson Ltd v James B Fraser & Co Ltd* (1944) AC 265.

61 Richards (n.34) 440-441.

It should be noted that, in common law, the impossibility must be permanent in order to frustrate the contract. Therefore, with respect to Covid-19, in order to rely on frustration, the main hurdle to overcome would be the ability to demonstrate that the impossibility is permanent, and not just temporary or transient. Nonetheless, most effects of Covid-19 seem temporary. However, if time is of the essence for performing a fundamental term in a contract, and such a performance is utterly prevented by the Covid-19 pandemic, the contract could be deemed as frustrated.

In the case that the Covid-19 pandemic does not cause impossibility, but excessive difficulty in the fulfillment of the contract, the doctrine of frustration may still be effective unless the parties agree upon a contractual hardship clause.

In short, the Covid-19 pandemic is a supervening and an extraordinary event which is unavoidable, unforeseeable and beyond the control of the parties by its nature. If it affects a contractual relation, causing impossibility or excessive difficulty to the level that the agreed obligation radically alters, the disadvantaged party may rely on the doctrine of frustration, unless of course they agreed upon a contractual remedy.

3. Legal Consequences of Frustration

Frustration is often an "all or nothing" outcome: either the parties are entirely released, or they remain liable to perform[62]. It is worth noting that if an unforeseen event causes frustration, discharge occurs automatically, not through the choice of one of the contracting parties[63]; the parties to the contract are released from having to perform future matters of law.

Therefore, if Covid-19 changes the circumstances, satisfying the test for frustration, the contract is terminated. The effect of this remedy is significantly different from the remedies which most of the civil law systems will recognize in such a context. According to the doctrine of frustration, the termination is not retroactive, but it terminates for the future (*ex nunc*) with prospective effects[64]. When a contract is terminated, the primary obligations of the parties are discharged in so far they have not yet accrued due to be performed. However, those obligations which have already accrued due are left undisturbed. In brief, the loss lay where it fell, which means that all duties end at the point of frustration, any money paid remaining paid, any money due remaining due[65].

62 Michael H. Whincup, *Contract Law and Practice: The English System and Continental Comparisons* (5th edn Kluwer Law International 2006) para 12.4; Cartwright (n.35) 268; Hugh Beale and Christian Twigg-Flesner, *'COVID-19 and English Contract Law*' <https://www.intersentiaonline.com/publication/coronavirus-and-the-law-in-europe/28> accessed 27 February 2021.

63 *Hirji Mulji v Cheong Yue Steamship Co Ltd* (1926) AC 497.

64 *Chandler v. Webster* (1904) 1 KB 493.

65 Charman (n.54) 220; Cartwright (n.35) 267.

Hence, in effect, both parties are released automatically from performance of the contract in the future[66]. Nevertheless, there is no automatic reversal (restitution) of the performance which has been rendered under the contract before termination. In brief, the termination discharges the future primary obligations whereas it does not disturb the past performance.

In case of a breach of contract which justifies termination, the innocent party may is entitled to sue for damages for the loss which arises from the breach. In case of frustration, nonetheless, there is no claim for damages because, by definition, neither party is at fault in the occurrence of the supervening event.

Hence, on the one hand, all obligations finish at the point of frustration[67]. On the other hand, the termination *ex nunc* (non-retroactive) of the contract, without restoring the parties to their original positions in which they were placed before they entered into the contract, can leave one party at a significant disadvantage[68].

However, in the case of *Fibrosa*[69], Viscount Simon was critical of the *Chandler* case and found that it would apply only where there has been no failure of the consideration. However, in the circumstances, there was a failure of the consideration as Fibrosa had received none of the machinery ordered, because of a frustrating event occurred after the deposit had been paid. It was held that the deposit was recoverable since there was a total failure of the consideration. Nevertheless, it would not be possible if there had already been partial performance of the contract by the seller.

In the United Kingdom, in order to offer a solution to this problem, the Parliament passed the Law Reform (Frustrated Contracts) Act 1943 to give the court certain powers to adjust the financial positions of the parties after frustration has taken effect. Section 1 (2) of the Act gives right to the recovery of the sums paid (or that became payable) before the time of discharge. However, if the party to whom the sums have been paid (or payable) has incurred expenses in performance of the contract before the time of discharge, the court may allow him or her to retain a sum up to the total of his or her expenses. The decision on the sum to be awarded is within the court's discretion[70].

Section 1 (3) states that, if before the time of discharge one party has conferred a benefit on the other which has not yet been paid for under the contract, the court may require the party who received the benefit to pay for it. In this case, the sum payable is again at the court's discretion.

66 M. P. Furmston, Geoffrey Chevalier Cheshire, Cecil Herbert Stuart Fifoot, *Cheshire, Fifoot and Furmston's Law of Contract* (16th edn Oxford University Press 2012) 731-732; O'Sullivan (n.37) para 14.54.

67 *Chandler v. Webster* (1904) 1 KB 493; *Cutter v. Powell* (1795) 6 TR 320.

68 Cartwright (n.35) 267.

69 *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1942] UKHL 4.

70 *Gamerco SA v ICM/Fair Warning (Agency) Ltd* (1995) 1 WLR 1226.

It should be noted that, in common law, the court cannot require the parties to renegotiate, nor can the court itself impose a new contract. There is no doubt that it would be in the best interests of both parties to renegotiate the terms of the contract to avoid losing the whole transaction due to frustration. However, this is a commercial matter which must be solved between the parties. That is why, in common law, a power it is not accepted a for the court to intervene in this way. The House of Lords has rejected even an express duty to negotiate in good faith[71].

B. Civil Law Remedies

The Covid-19 pandemic and the measures taken in response has significantly changed market circumstances and rendered the performance of some contracts excessively difficult and some others impossible. The negatively affected parties seek legal remedies for this new situation. In this context, the termination of the contract because of impossibility, the adjustment because of hardship and the contractual remedies will be handled below.

1. Termination Because of Impossibility

a. Statutory Provisions on the Impossibility Extinguishing Obligation

In civil law, the concept of impossibility is usually accepted as a cause for the termination of the obligations. According to the Swiss Code of Obligations article 119 and the Turkish Code of Obligations article 136 "*an obligation is deemed extinguished where its performance is made impossible by after-formation circumstances not attributable to the obligor*. *In a bilateral contract, the obligor thus released is liable for the consideration already received pursuant to the provisions on unjust enrichment and loses his counter-claim to the extent it has not yet been satisfied*."

Similarly, section 275 of the German Civil Code (*Bundesgesetzbuch*) states that "*a claim for performance is excluded to the extent that performance is impossible for the obligor or for any other person*."

Accordingly, in article 1351 of the French Civil Code, it is stated that "*impossibility of performing the act of performance discharges the debtor to the extent of that impossibility where it results from an event of force majeure and is definitive unless he had agreed to bear the risk of the event or had previously been given notice to perform*."

In addition, article 1218 of the French Civil Code, which offers a satisfying definition of force majeure states the consequences as follows: "*the occurrence*

71 *Walford v Miles* (1992) 2 AC 128

of an event which is beyond the control of the obligor, which could not have been reasonably foreseen at the time of the entry into the contract and the effects of which cannot be avoided by appropriate measures and which prevents performance of its obligation by the obligor. If the prevention is temporary, performance of the obligation is suspended unless the delay which results justifies termination of the contract. If the prevention is permanent, the contract is terminated by operation of law and the parties are discharged from their obligations under the conditions provided by articles 1351 and 1351-1. (termination because of impossibility)"

The Italian Civil Code also sets forth protections for parties whose obligations are no longer capable of being performed due to a supervening impossibility (*impossibilità sopravvenuta*) not imputable to the same parties. In particular, article 1256 provides for the extinguishment of an obligation if its performance becomes impossible for an event not imputable to the obligor. If the impossibility is only temporary, the obligor would not be liable for the delay, but when it continues up to a time when the obligor is no longer to be deemed to be obligated, based on the underlying reason and the nature of the relevant obligation, or that the other party has no longer an interest in receiving the obligor's fulfillment, the obligation will expire. In addition, article 1463 dictates that a party released from an obligation that has become impossible, is not entitled to claim the performance from the other party of the relevant agreement. In a nutshell, the agreement would terminate with the full release of the parties.

In light of the above statutory findings, it may be deduced that the impossibility extinguishes the obligation. This doctrine flows from the Roman law saying "*impossibilium nulla obligatio"*, which translates as "impossibility (*Unmöglichkeit*) nullifies the obligation". It should be noted that the impossibility of performance causes the automatic termination of the obligation[72]. At the moment of impossibility, the obligor is discharged from the obligation, without being held responsible for the non-performance.

b. Discussions on the Aspects of Impossibility

As for the impossibility, it is important to clarify some discussions held by the civil law doctrine. First, some argue, in the doctrine, that the impossibility must be objective in order to terminate the obligation[73]. The opposing opinion in the Swiss-Turkish doctrine inspired by § 275 of the German Civil Code (BGB), argues that

72 Pascal Pichonnaz, *Impossibilité et exorbitance* (Univ. Fribourg 1997) para 999-1000; Max Keller and Christian Schöbi, *Das Schweizerische Schuldrecht* (Helbing und Lichtenhahn 1984) Vol.4, 187; Wolfgang Wiegand, 'OR art. 119' *in Basler Kommentar zum Schweizerischen Privatrecht, Obligationenrecht* (6th edn Helbing Lichtenhahn 2015) Art. 119 para 11; Kurt (n.33) 213.

73 Keller and Schöbi (n.72) 187; Eren (n.10-Obligations) 1330; Mustafa Dural, *Borçlunun Sorumlu Olmadığı Sonraki İmkânsızlık* (Fakülteler 1976) 89.

the impossibility, whether it is objective or subjective, triggers the ending of the obligation[74].

In my humble opinion, in order to rely on impossibility, the performance should be impossible for everybody, which means that the impossibility must be objective. According to this approach, the "subjective" impossibility is a pseudo-impossibility because the subjective inability to perform does not lead to impossibility, however it may be resulting from hardship[75]. Letting the subjective impossibility terminate the obligation, would lead lawyers to uncertainty in the reliance on the impossibility and would leave no room for hardship, where the contract does not terminate but prevails thanks to an adjustment or modification[76].

To illustrate, a lease agreement of a workplace closed by a government's decree face an objective impediment beyond his or her control, which prevents the lessor to perform his obligation to grant the usage of the leased place. In this scenario, there is without doubt an impossibility. In a different scenario, despite not facing any kind of prohibition, a lessee of a shop might find himself or herself in difficulty to pay his rent because his or her income decreased significantly due to the pandemic. In this latter case, the payment is still possible, though the shopkeeper may rely on hardship.

Second, it is significantly important to determine whether the impossibility is permanent. When the obligation becomes impossible permanently, there is no doubt that it extinguishes. Nevertheless, the impossibility might be temporary in some cases where the performance of the obligation becomes impossible for a definite or indefinite period of time. In those cases, impossibility persists during that specific period, though, when the impossibility is removed, when the conditions return to normal, obligations become performable again. I suggest that the contract is "paralyzed", which means temporarily "in suspense" during the time that impossibility continues.

In light of the above explanations, if an obligation becomes impossible due to the prohibitions or measures taken against the Covid-19, which occurred after the conclusion of the contract, it may be assessed that the contract is suspended until

74 Ingeborg Schwenzer, *Schweizerische Obligationenrecht, Allgemeiner Teil* (5th edn Stämpfli 2009) para 64.09; Andreas Von Tuhr and Arnold Escher, *Allgemeiner Teil Des Schweizerischen Obligationenrecht* (3rd edn Schulthess 1974) Vol.2, 94; Tekinay et all (n.10) 909; Serozan (n.11) § 15 para 1. It should be pointed out that the § 275 BGB, the wording makes clear, applies to all types of impossibility. However, it draws a line between practical and factual impossibility because the section provides a different legal consequence for practical impossibility: the obligor's obligation does not automatically fall away, but the obligor is granted a right to refuse performance. *See* Reinhard Zimmermann, *The New German Law Of Obligations* (Oxford University Press 2005) 47. In this case, the performance is not impossible, but practically unreasonable. That is why it is called in the doctrine as "pseudo-impossibility". *See* Hartmut Braunschneider, *Das Skript Schuldrecht, Allgemeiner Teil* (Bund-Verlag 2002) 139.

75 Ahmet M. Kılıçoğlu, *Borçlar Hukuku Genel Hükümler* (16th edn Turhan 2012) 843. See also Bruno Von Büren, *Schweizerische Obligationenrecht, Allgemeiner Teil* (Schulthess 1964) 390. In this case, the § 275 of the German Civil Code grants the obligor a defense to refuse the performance even before renegotiating or adjusting it. See Jan Dirk Harke, *Allgemeines Schuldrecht* (Springer 2010) para 218.

76 Pichonnaz (n.72) 303-305.

the end of the pandemic. It means that the contract does not terminate permanently because the impossibility is not permanent. The temporary impossibility is not named in statutes, however it may find recognition thanks to the partial impossibility. In my humble opinion, it is a partial impossibility, which is not partial in quantity but in time.

In article 137 of the Turkish Code of Obligations, the partial impossibility leads to the termination of the impossible part of the obligation, unless it is not reasonable to separate the contract from this part. In such case, the contract would be deemed impossible entirely. Accordingly, under article 1464 of the Italian Civil Code, in the event a party's performance has become impossible only in part, the other party may request a proportional reduction of its (counter) obligation and, absent any reasonable interest in receiving only part of the originally agreed performance, also claim termination of the agreement.

To illustrate, when the use of a workplace is prohibited as a measure against the pandemic, it becomes impossible for the lessor to grant the lessee the use of the leased place. In this case, since the workplace is closed by a mandate of the public authority, the impossibility is objective[77]. In this scenario, the lease agreement faces a temporary impossibility during which no obligation arise from it, although the mutual obligations, which are generated from before the time of the impossibility, prevail. In the end, when the prohibitions cease to exist, the contract comes back to life from the "paralyzed", "infected" state. For that reason, it is argued in the doctrine that it might be considered a "postponement[78]", which in my opinion is not correct because the obligations are not postponed but they are void as long as the impossibility continues.

In doctrine, it is suggested that the temporary impossibility leads the obligor to default[79]. From this point of view, the consequences of the default will arise for the contracts facing Covid-19 prohibitions, which grant the obligee the right to terminate the contract without the compensation[80]. I think this opinion is not correct. The default of the obligor requires a feasible, performable obligation[81]. Accordingly, it is defined as the failure of the obligor to fulfill an obligation while he could[82]. Hence, the impossibility and the default cannot exist together.

77 Kurt (n.33) 111; Ş. Barış Özçelik, '*Sözleşmeden Doğan Borçların İfasında Hukukî İmkânsızlık ve Sonuçları*' (2014) 63(3) Ankara Üniversitesi Hukuk Fakültesi Dergisi, 569, 577-578.

78 Aslı Makaracı Başak and Seda Öktem Çevik, '*Koronavirüsün İşyeri Kira Sözleşmelerine Etkisi'* in *Covid-19 Salgınının Hukuki Boyutu, Hukukun Tüm Alanlarında Değerlendirmeler* (Onikilevha 2020) 393, 398.

79 Tekinay et all (n.10) 909; Eren (n.10-Obligations) 1067; Dural (n.73) 107; Kurt (n.33) 170; Pekdinçer and Toprakkaya-Babalık (n.17) 311-312.

80 Özçelik (n.21) 286; Tolga Özer, '*Covid-19 Salgınının İş Yeri Kiralarında Kiracının Kira Bedelini Ödeme Borcuna Etkisi'* in *Covid-19 Salgınının Hukuki Boyutu, Hukukun Tüm Alanlarında Değerlendirmeler* (Onikilevha 2020) 451, 455.

81 Tandoğan (n.10) 469; M. Kemal Oğuzman and Turgut Öz, *Borçlar Hukuku Genel Hükümler* (2017) Vol.1, para 1526; Tekinay et all (n.10) 912; Eren (n.10-Obligations) 1120; Antalya (n.10) para 2430; Hüseyin Hatemi and Kadir Emre Gökyayla, *Borçlar Hukuku Genel Hükümler* (4th edn Vedat 2017) § 26, para 59; Ayşe Havutçu, *Tam Iki Tarafa Borç Yükleyen Sözleşmelerde Temerrüt ve Müspet Zararin Tazmini* (Dokuz Eylül Üniversitesi Hukuk Fakültesi 1995) 24.

82 Serozan (n.11) § 17 para 1; Antalya (n.10) para 2431.

In my opinion, due to the temporary impossibility, the obligations of the lessor and the lessee are void until the moment where the impossibility disappears, and the contract starts to generate obligations from the moment when the contract becomes performable again. In short, I suggest that, in cases of impossibility resulting from Covid-19, the contract stops generating obligations during the time of the impossibility and waits in suspense. However, it restarts to generate obligations after the impossibility created by Covid-19 disappears.

It is also worth noting that the obligor, released from the obligation due to the impossibility, is not liable for compensation because he cannot be held responsible by *force majeure*, which is in fact a supervening event occurring without the inducement of the obligor.

Third, it is important to determine the consequences of the prolonged suspense. It is possible that a prolonged suspense becomes unbearable for the parties and this might reach a point where expecting them to wait for the continuation of the contract becomes incompatible with the principle of good faith. In that case, the contract may be terminated for a just cause. It is understandable because the affected party may seek relief from the contract relying on the principle of good faith, after a long time of suspense[83].

In this approach, it is not clear how long the parties must wait for the end of the suspense and when they can terminate the contract due to the prolonged impossibility. It should be under the court's discretion to evaluate the duration of this period according to the circumstances[84].

According the opposing view, the obligee has the right to seek performance as long as the benefits of the performance prevail, or may apply the consequences of the default, without the compensation[85].

In my opinion, it is not possible to apply for default provisions as long as the impossibility continues. However, termination for default could be done if the obligor does not perform after the impossibility ends, without the possibility to seek compensation because the obligor cannot be held responsible for the impossibility.

Nonetheless, if a long period of suspense is against the hypothetical intents of the parties, if it is clear that such a contract would not be concluded if the length of the temporary impossibility was foreseen, the entire contract should be deemed as terminated due to the impossibility[86].

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83 Baysal et all (n.3) 277.

84 TCC General Assembly (28 Avril 2010) E. 2010/15-193, K. 2010/235.

85 Emre Cumalıoğlu, '*Covid-19 (Yeni Korona Virüs) Pandemisinin Özel Hukuk Sözleşmelerine Etkisinin; İmkânsızlık, Amacın Bozulması, Uyarlama ve Ödemezlik Def'i Bakımından Değerlendirilmesi'* in *Covid-19 Salgınının Hukuki Boyutu, Hukukun Tüm Alanlarında Değerlendirmeler* (Onikilevha 2020) 295, 296.

86 F. Gündoğdu and N. Ural, *'Koronavirüs (Covid-19) Tedbirlerinin Kira Sözleşmelerine Etkisi*' in *Covid-19 Salgınının*

Fourth, in the case of impossibility resulting from *force majeure*, it is worth questioning whether the supervening event must be self-induced. The French Supreme Court rejected this approach in two separate cases where the obligor could not perform his duty because he was sick, stating that the event must be unforeseen and unavoidable to be deemed as force majeure. It should not be necessarily originating from an external source than the affected party[87]. However, this is overruled by two recent cases in which the court reinstalled the requirement of exteriority from the affected party[88]. In the end, the new reform of the law of obligations in 2016 states the core elements of force majeure as unforeseeability, unavoidability and occurring beyond control of the affected party.

I think that it suffices to determine whether the obligor is at fault in the occurrence of the supervening event. In the case of the event causing post-formation impossibility, happening beyond his control, he or she must be discharged from his or her obligation because of impossibility. That is why, in Swiss-Turkish and German law, to be discharged with no liability, one must have clean hands in the occurrence of impossibility. In the doctrine it is called post-formation impossibility without fault.

It should be noted that the principle of good faith imposes that each party is at all times obliged to use all reasonable endeavors to reduce any loss in the performance of the contract[89]. This compels an early warning obligation in order to mitigate the undesired effects of the matter, which will increase the damage. According to this, the affected party shall give notice of the event without delay to the other party.

Similarly, article 136 of the Turkish Code of Obligations defines the duty to notify without delay that the performance became impossible in order to prevent the situation from aggravating or the damage from increasing. It is also stated that if the obligor does not comply with these duties, he will be held responsible for the additional damages arising from his failure to comply. In short, the obligor will have to compensate for the damage, which could have been prevented from occurring if he had notified the impossibility at the first appropriate time and had taken measures to reduce the loss[90].

Hukuki Boyutu, Hukukun Tüm Alanlarında Değerlendirmeler (Onikilevha 2020) 372.

87 French Cour de Cassation [hereinafter "CCass"] Assemblée plénière [Ass.Pl.] (14 Avril 2006) 02-11.168; CCass 1ère civ. [First Civil Chamber] (30 October 2008) 07-17134.

88 CCass soc. [Social Chamber] (16 May 2012) 10-17.726; CCass 3e civ [Third Civil Chamber] (15 October 2013) 12-23126.

89 Dural (n.73) 131; Haluk Nami Nomer, *Borçlar Hukuku Genel Hükümler* (Beta 2017) para 184.2.

90 Oğuzman and Öz (n.81) para 1820; Kılıçoğlu (n.75) 847.

2. Adjustment or Termination of The Contract Because of Hardship

a. The Doctrine

The fundamental principle of the sanctity of contracts (*pacta sund servanda*) implies that the terms of a contract are law between the parties, and therefore means that neglect of their respective obligations is a breach of the contract. This indicates that the parties must remain loyal to the balance of interests they have established while concluding the contract, and fulfill their obligations in accordance with their commitments[91]. According to this principle, agreements must be kept in all circumstances[92].

It is related to the freedom of contract. This principle presupposes that the parties are free to design their contract by calculating the possible risks, which might negate the purpose of their mutual understanding[93]. Indeed, they conclude the contract recognizing that the future cannot be predicted with certainty and taking into account the possible risks that may arise in the future. They undertake obligations despite the uncertainty which the future holds[94]. They form the contract with their anticipations for the future, which becomes the basis of the contract[95].

Nevertheless, it is possible that an unforeseen and unavoidable supervening event occurs after the formation of the contract and significantly disrupts the intra-contractual balance established by the parties, to the extent that it becomes unbearable or unreasonable for one party to honor his obligations as undertaken. If the balance preset in contract was distorted significantly in favor of one party, it would be against the principle of good faith to enforce the contract to the other party, as if nothing had happened. This would result in impracticability of the performance, and the bargain becomes unfair[96].

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91 Karl Larenz, *Geschäftsgrundlage und Vertragserfüllung* (3rd edn C.H. Beck 1963) 161; Jacques Bischoff, *Vertagsrisiko Und Clausula Rebus Sic Stantibus* (Schulthess 1983) 7-8; Hasan Erman, '*Borçlar Hukukunda Akit Serbestisi ve Genel Olarak Sınırlamaları'* (1973) Istanbul Üniversitesi Hukuk Fakültesi Mecmuasi 601 *ff*.; Başak Baysal, *Sözleşmenin Uyarlanması* (Onikilevha 2009) 5; Rona Serozan, '*Karşılıklı Sözleşmelerde Baştan Dayatılmış veya Sonradan Oluşmuş Edimler Arası Dengesizliğin Uyarlama Yoluyla Düzeltilmesi*' in *M. Kemal Oğuzman'ın Anısına Armağan (2000)* 1013 *ff*.; Antalya (n.10) para 1474 *ff*.; Kılıçoğlu (n.75) 252; Pekdinçer & Toprakkaya-Babalık (n.17) 304.

92 Seçkin Topuz, *Türk-Isviçre ve Alman Borçlar Hukukunda Denge Bozulmasi ve Ifa Güçlüğü Durumlarinda Sözleşmeye Müdahale* (Yetkin 2009) 64.

93 Antalya (n.10) para 1475.

94 İbrahim Kaplan, Hakimin Sözleşmeye Müdahalesi (3rd edn Yetkin 2013) 112; Baysal (n.91) 5; Topuz (n.92) 65; Haluk Burcuoğlu, *Son Mahkeme Kararlari Ve Yargitay Kararlari Işığında Hukukta Beklenmeyen Hal Ve Uyarlama* (Filiz 1995) 6-7; Şener Akyol, *Dürüstlük Kurali ve Hakkın Kötüye Kullanilması Yasağı* (Vedat 1995) 77; Talya Şans Uçaryılmaz, Bona Fides (Dürüstlük Kuralı) (Yetkin 2019) 307.

95 Necip Kocayusufpaşaoğlu, '*İşlem Temelinin Çökmüş Sayılabilmesi İçin Sosyal Felaket Olarak Nitelenebilecek Olağanüstü Bir Olayın Gerçekleşmesi Şart Mıdır?'* in *M. Kemal Oğuzman'ın Anısına Armağan (2000)* 506; Tekinay et all (n.10) 1005; Ayşe Arat, *Sözleşmenin Değişen Şartlara Uyarlanması* (Seçkin 2006) 58-59; Ümmühan Kaya, '*Sözleşmenin Uyarlanmasında Sonradan Değişen Şartlar ve Öngörülemezlik İlkesi'* in *Prof. Dr. Cevdet Yavuz'a Armağan* (2012) 1569, 1573.

96 Paul Oertmann, *Die Geschäftsgrundlage, ein neuer Rechtsbegriff* (A. Deichert 1921) 138; Tekinay et all (n.10) 1003; Eren (n.10-Obligations) 368.

This is called the doctrine of *Clausula rebus sic stantibus*, which makes a contract disregarded because of an unforeseen fundamental change of circumstances rendering the terms of the contract unfair and unreasonable for one of parties, even though the performance is still possible at a much higher cost or with great difficulty[97]. This doctrine flows from the principle of good faith[98].

The German doctrine of the *Wegfall der Geschäftsgrundlage* and the French doctrine of *imprévision* emanate from the *Clausula rebus sic stantibus* doctrine. According to these, an unforeseen and unavoidable supervening event, which occurs beyond the control of the affected party, may cause a radical change in circumstances, which renders the contract unfair and the performance unreasonable. It disrupts the basic intent of the parties, which cannot be achieved or realized in the absence of an existing environment, for example, the prevailing economic and social order, the value of the currency, normal political conditions, etc. In those cases, contracts affected by the radical change in circumstances may be adjusted or amended because of the excessive difficulty of the performance for the disadvantaged party[99].

The doctrine of *Wegfall der Geschäftsgrundlage* is codified in the section 313 of the German Civil Code which states that "*if circumstances which became the basis of a contract have significantly changed since the contract was entered into and if the parties would not have entered into the contract or would have entered into it with different contents if they had foreseen this change, adaptation of the contract may be demanded to the extent that, taking account of all the circumstances of the specific case, in particular the contractual or statutory distribution of risk, one of the parties cannot reasonably be expected to uphold the contract without alteration. It is equivalent to a change of circumstances if material conceptions that have become the basis of the contract are found to be incorrect. If adaptation of the contract is not possible or one party cannot reasonably be expected to accept it, the disadvantaged party may revoke the contract. In the case of continuing obligations, the right to terminate takes the place of the right to revoke.*"

The doctrine of *imprévision* is explained in article 1195 of the French Civil Code states that "*If a change of circumstances that was unforeseeable at the time of the conclusion of the contract renders performance excessively onerous for a party who had not accepted the risk of such a change, that party may ask the other contracting party to renegotiate the contract. The first party must continue to*

97 Kemal Tahir Gürsoy, *Hususi Hukukta Clausula Rebus Sic Stantibus (Emprevizyon Nazariyesi)* (1950) 90; Karl Oftinger, *Cari Akitlerin Temellerinde Buhran İcabı Tahavvül (Clausula Rebus Sic Stantibus Hakkında)* (1942) 8 İÜHFDM, 612; Eren (n.10-Obligations) 502; Arat (n.95) 29-30.

98 Oğuzman and Öz (n.81) para 1836; Kılıçoğlu (n.75) 255; Kenan Tunçomağ, '*Borcun İfasında Aşırı Güçlük ve Alman Yargıtayı'* (2011) 1, 7 Marmara Hukuk Araştırmaları Dergisi 87 *ff.*; Nomer (n.89) para 183.4. *See also* TCC General Assembly (30 October 2002) E. 2002/13-852, K. 2002/864.

99 Baysal (n.91) 16 *ff.*; Topuz (n.92) 69-70.

perform his obligations during renegotiation. In the case of refusal or the failure of renegotiations, the parties may agree to terminate the contract from the date and on the conditions which they determine, or by a common agreement ask the court to set about its adaptation. In the absence of an agreement within a reasonable time, the court may, on the request of a party, revise the contract or put an end to it, from a date and subject to such conditions as it shall determine."

Similarly, the "excessive difficulty in performance" is regulated in article 138 of the Turkish Code of Obligations, which states that "*if an unforeseen event occurring without the inducement of the obligor, changes the circumstances to the level that enforcing the contract to the disadvantaged party would be against the principle of good faith, and if the obligor did not perform yet or he performed with a reservation, he may seek for adjustment of the contract from the court. In case it is not possible to adjust, he may terminate the contract*."

Different from the above mentioned provisions, article 1467 of the Italian Civile Code states that "*in contracts with continuous or periodical execution or adjourned execution and in case that the obligation of one of the parties has become excessively onerous due to extraordinary and unpredictable events, the party who is obliged to such performance can demand the dissolution of the contract with the effects laid down in art. 1458. The dissolution cannot be demanded if the supervening onerosity is part of the normal risk of the contract. The party against which the dissolution is demanded can prevent this by offering to modify equitably the conditions of the contract*."

It should be noted that, unlike the United Kingdom or most of the US states, the civil law legal systems impose a general duty of acting in good faith, which covers the exercise of rights and the performance of obligations[100]. The principle of good faith (*bona fides*) itself may lead civil law courts to adjust or terminate the contract upon the request of the disadvantaged party

Anyway, social disasters are prime examples for the application of these doctrines which offers the way of adjustment in case of hardship[101]. The Covid-19 pandemic is unfortunately becoming the best example of social disasters. It caused a significant and unprecedented change in the usual social and economic life. It is probable that a great number of contracts have been affected by that radical change in circumstances. Hence, when a contract faces the pandemic, it is possible that the prohibitions imposed by the government or its other undesired consequences may create hardship, which renders the performance excessively difficult, unfair and even unreasonable but still possible in theory[102].

100 The § 242 of the German Civil Code, the art. 2 of the Swiss Civil Code, the art. 2 of the Turkish Civil Code, the art. 1134 of the French Civil Code and the art. 1467 of the Italian Civil Code.

101 Burcuoğlu (n.94) 10-11; Pekdinçer and Toprakkaya-Babalık (n.17) 316.

102 Pichonnaz (n.72) para 772; Baysal et all (n.3) 279.

b. The Requirements

Based on all of the aforementioned provisions, it is possible to make a list of the required conditions for adjustment or termination because of hardship, which will be handled in the following paragraphs below.

First of all, there should be a radical change in the balance between the obligations agreed upon by the parties, originating from a post-formation supervening event. Because of this event, the main balance established by the parties, the main reason of the contract is lost, which renders the contract unfair or unreasonable[103]. The change in circumstances must render the contract so unfair that asking for performance amid the new circumstances would be against the principle of good faith[104].

In practice a fundamental change in the balance of the contract may manifest itself in two different but related ways. The first is characterized by a substantial increase in the cost for one party performing its obligation. The second manifestation of hardship is characterized by a substantial decrease in the value of the performance received by one party, including cases where the performance no longer has any value at all for the receiving party. This might be due to changes in market conditions or the frustration of the purpose for which the performance was required.

Second, it is a crucial point that the events causing hardship must be unforeseeable when the parties are entering into the contract, which means that the encountered change in circumstances must be beyond the anticipations of any reasonable person. The change in circumstances cannot cause hardship if they could reasonably have been taken into account by the disadvantaged party at the time the contract was concluded[105]. It implies *per se* that the change in circumstances takes place or becomes known to the disadvantaged party after the conclusion of the contract.

It should be highlighted that the hardship is typically relevant in long-term contracts because of the requirement of unforeseeability. However, this happens not only in long term contracts, but it might also occur in short term contracts[106], or sometimes the change in circumstances is gradual and has already begun but the final result of this cannot be predicted.

103 Nurten Ince, *Der Wegfall Der Geschäftsgrundlage Nach Deutschem Und Türkischem Recht* (2015); Baysal (n.91) 130; Ferhat Canbolat, Sözleşmelerde Amacın Gerçekleşmesi, Çökmesi ve Boşa Çıkması (Yetkin 2012) 218; Ayşe Arat, '*Küresel Salgının İşyeri Kiralarına Etkisi ve Çözüm* in *Covid-19 Salgınının Hukuki Boyutu, Hukukun Tüm Alanlarında Değerlendirmeler* (Onikilevha 2020) 283, 284.

104 Oğuzman and Öz (n.81) para 1837; Antalya (n.10) para 1598 *ff.*; Arat (n.103) 443; Semih Yünlü, '*Küresel Salgının Sözleşmelere Etkisi: Corona Virüsü (Covid-19) Olağanüstü Örneği*' in *Covid-19 Salgınının Hukuki Boyutu, Hukukun Tüm Alanlarında Değerlendirmeler* (Onikilevha 2020) 323, 332-334.

105 Kılıçoğlu (n.75) 257; Antalya (n.10) para 1602; Yünlü (n.104) 333-334; Pekdinçer and Toprakkaya-Babalık, (n.17) 317.

106 TCC General Assembly (30 October 2002) E. 2002/13-852, K. 2002/864.

Third, the supervening event must be beyond the control of disadvantaged party. It means that the change in circumstances must not be induced by the party who seeks adjustment. It implies also that the supervening event must be unavoidable.

Fourth, the disadvantaged party may seek for adjustment of the contract to restore intra-contractual balance only if he has not yet fulfilled his obligation or if he performed with a reservation[107]. Hence, once a party has performed with no reservation, he is no longer entitled to invoke a substantial increase in the costs of its performance or a substantial decrease in the value of the performance he receives as a consequence of a change in circumstances[108].

Fifth, there should be an adjustment gap, which emerges when there is no contractual remedy, no specific clause for modification of the contract[109]. The court is entitled to fill this gap upon the request of the disadvantaged party, indeed in the existence of the hardship[110].

Moreover, adjustment is not possible in case the disadvantaged party had assumed the risk of the change in circumstances. If the risks are expressly or tacitly taken over by a party in a contract, or if the party has undertaken to bear the risks of hardship, he cannot request adjustment of the contract relying on the hardship.

In short, the statutory provisions grant, in the existence of aforementioned criteria, the authority to resort to the court for restoring the radical imbalance created by an unforeseen, unavoidable and supervening event. The adjustment or termination in these conditions are not automatic, but it should be done upon the request of the disadvantaged party.

c. Requesting Adjustment or Termination Because of Covid-19

The Covid-19 pandemic, which must be considered a social disaster, generated legal impediments and economic difficulties in the course of life and business. This emanated some radical changes in the circumstances on which most of the contracts were based[111]. It is clear that that worldwide effect of Covid-19 and the drastic measures taken by the governments in response, are unforeseen and unavoidable by the parties to almost all the pre-existing contracts in question. The entire event has generally occurred and developed beyond the control of the parties. All these explanations point out the fact that Covid-19 may, without doubt, be the reason for

107 Oğuzman and Öz (n.81) para 1837; Eren (n.10-Obligations) 508; Kılıçoğlu (n.75) 258.

108 Eren (n.10-Obligations) 507; Arat (n.95) 115.

109 Eren (n.10-Obligations) 506; Arat (n.95) 165 *ff.*; Pekdinçer and Toprakkaya-Babalık (n.17) 318; Antalya (n.10) para 1661.

110 Kaplan (n.94) 146.

111 TCC 3rd Civil Chamber (4 June 2021) E. 2021/3452 K. 2021/6001.

hardship, in case of course the pandemic has significantly and negatively affected this contractual relation[112].

Once Covid-19 is indicated as hardship in a case, after an investigation of the specific effects of the pandemic on the contractual relation in question, first of all, the disadvantaged party must rely on the contractual remedies, stipulated in hardship clauses, if one exists[113]. In such a case, the hardship clause incorporated in the contract will be relied upon if it covers the events giving rise to hardship.

Second, in cases where there is no contractual remedy stipulated in the contract, the parties must search for an amiable solution by renegotiation. The duty to renegotiate, as the duty to mitigate, flows from the principle of good faith[114]. In case renegotiations end with success, the parties modify their contract, restoring the balance between their mutual obligations within their freedom of contract, which grants them the liberty to design the future of their agreements according to their own freewill.

Nonetheless, if the parties fail to reach an agreement within a reasonable period of time, the disadvantaged party may resort to the court to request adjustment or termination. How long a party must wait before resorting to the court will depend on the complexity of the issues to be settled and the particular circumstances of the case.

In this case, the court which finds that a hardship situation exists may react in a number of different ways. A first possibility is for it to adjust the contract with a view to restoring its balance. In so doing the court will seek to make a fair distribution of the losses between the parties[115]. The judge may distribute between the parties in a just and equitable manner the losses and gains resulting from the change of circumstances[116]. In this difficult task, the court may, upon request, change the content of the contract by using different methods, which include extending the performance period, changing the place of performance, reducing or abolishing the default interest, changing the level of quality required, increasing or decreasing the price, etc[117].

Another possibility would be for a court to terminate the contract when this is reasonable[118]. In this case, the terms of the termination will be determined by the court. In civil law, the contracts of successive performance, which originate from continuing obligations, terminate for the future (*ex nunc*) with prospective effects,

112 TCC 3rd Civil Chamber (4 June 2021) E. 2021/3452 K. 2021/6001.

113 Baysal et all (n.3) 271.

114 Pichonnaz (n.31) 143; Başak Baysal, '*Yeniden Müzakere Ödevi'* in prof. Dr. Hasan Erman'a Armağan (2015) 185 *ff*.; Nurten İnce, '*Yeniden Müzakere Etme Borcu Mu Külfeti Mi?'* (2017) 33,1 Batider 179 *ff*.

115 Arat, *supra* note 103, at 446-447.

116 Eren (n.10-Obligations) 507; Arat (n.95) 166-167; Kaplan (n.94) 159; Antalya (n.10) para 1663; Pekdinçer & Toprakkaya-Babalık, *supra* note 17, at 320.

117 Eren (n.10-Obligations) 508; Oğuzman and Öz (n.81) para 1838; Antalya (n.10) para 1665.

118 Antalya (n.10) para 1656.

because it is impossible to undo the time’s effect for the past[119], whereas the contracts of instant performance terminate *ex tunc* with retrospective effects, which means that the parties will reestablish the *status quo*.

In either case, the court may award damages for the loss suffered through a party refusing to negotiate or break off negotiations contrary to good faith and fair dealing.

C. The Remedies Offered by International Legal Principles

The *force majeure* and *hardship* concepts are also dealt with by some important international legal documents, such as the Unidroit Principles of International Commercial Contracts (PICC)[120], the Principles of European Contract Law (PECL)[121]. Notably, some legal principles have been offered particularly for Covid-19 in the ELI Principles for the Covid-19 Crisis[122].

The first paragraphs of articles 8:108 of PECL and 7.1.7 of the PICC state unanimously that the affected party’s non-performance is “excused” if that party proves that the non-performance was due to an impediment beyond its control and that it could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences. It is obvious that the mentioned articles regulate the case of *force majeure* which causes impossibility.

In the second paragraphs of these articles, it has been clarified that where the impediment is only temporary the excuse provided by these articles has effect for the period during which the impediment exists. However, if the delay amounts to a fundamental non-performance, the obligee may treat it as such. It means that he will be excused for non-performance because of a prolonged delay.

In the last paragraphs, an early warning obligation in order to mitigate the undesired effects of the force majeure is imposed on the non-performing party. The party who fails to perform must give notice to the other party of the impediment and its effect on its ability to perform. If the notice is not received by the other party within a reasonable time after the party who fails to perform knew or ought to have known of the impediment, it is liable for damages resulting from such non-receipt.

As mentioned above, the hardship is also covered within the articles of PICC and PECL. The concept is defined in article 6.2.2 of the PICC and the paragraphs (1) and (2) of article 6:111 of the PECL.

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119 Özer Seliçi, *Borçlar Kanununa Göre Sözleşmeden Doğan Sürekli Borç Ilişkilerinin Sona Ermesi* (Fakülteler 1977) 37 *ff*.

120 <https://www.unidroit.org/instruments/commercial-contracts/unidroit-principles-2016> accessed 27 February 2021.

121 <https://www.trans-lex.org/400200/_/pecl/> accessed 27 February 2021.

122 European Law Institute <www.europeanlawinstitute.eu> accessed 27 February 2021.

In article 6.2.2 of the PICC, it is stated that "*there is hardship where the occurrence of events fundamentally alters the equilibrium of the contract either because the cost of a party's performance has increased or because the value of the performance a party receives has diminished, and (a) the events occur or become known to the disadvantaged party after the conclusion of the contract; (b) the events could not reasonably have been taken into account by the disadvantaged party at the time of the conclusion of the contract; (c) the events are beyond the control of the disadvantaged party; and (d) the risk of the events was not assumed by the disadvantaged party*."

Similarly, according to the first and second paragraphs of article 6:111 of the PECL *"(1) A party is bound to fulfil its obligations even if performance has become more onerous, whether because the cost of performance has increased or because the value of the performance it receives has diminished. (2) If, however, performance of the contract becomes excessively onerous because of a change of circumstances, the parties are bound to enter into negotiations with a view to adapting the contract or terminating it, provided that: (a) the change of circumstances occurred after the time of conclusion of the contract, (b) the possibility of a change of circumstances was not one which could reasonably have been taken into account at the time of conclusion of the contract, and (c) the risk of the change of circumstances is not one which, according to the contract, the party affected should be required to bear."*

Then, the legal consequences are dealt in article 6.2.3 of the PICC and paragraphs (3) and (4) of article 6:111 of the PECL.

In article 6.2.3 of the PICC, the legal consequences of the hardship is stated as following: "*(1) In case of hardship the disadvantaged party is entitled to request renegotiations. The request shall be made without undue delay and shall indicate the grounds on which it is based. (2) The request for renegotiation does not in itself entitle the disadvantaged party to withhold performance. (3) Upon failure to reach agreement within a reasonable time, either party may resort to the court. (4) If the court finds hardship it may, if reasonable, (a) terminate the contract at a date and on terms to be fixed, or (b) adapt the contract with a view to restoring its equilibrium."*

In the third and fourth paragraphs of article 6:111, it is stated that "*(2) If performance of the contract becomes excessively onerous because of a change of circumstances, the parties are bound to enter into negotiations with a view to adapting the contract or terminating it, (…) (3) If the parties fail to reach agreement within a reasonable period, the court may: (a) terminate the contract at a date and on terms to be determined by the court ; or (b) adapt the contract in order to distribute between the parties in a just and equitable manner the losses and gains resulting from the change of circumstances. In either case, the court may award damages for the loss suffered through a party refusing to negotiate or breaking off negotiations contrary to good faith and fair dealing*."

Since hardship consists in a fundamental alteration of the balance of the contract, these articles in the first instance entitle the disadvantaged party to request the other party to enter into renegotiation of the original terms of the contract with a view to adjust them to the changed circumstances. This duty flows again from the principle of good faith. It should be noted that this duty is mentioned in the ELI Principles for the COVID-19 Crisis[123] as well.

The request for renegotiations must be made without undue delay. The disadvantaged party must indicate the grounds on which the request for renegotiations is based, so as to permit the other party better to assess whether or not the request for renegotiations is justified. Failure to set forth the grounds on which the request for renegotiations is based may be the same as the breach of duty.

Indeed, both the request for renegotiations by the disadvantaged party and the conduct of both parties during the renegotiation process are subject to the general principle of good faith.

If the parties fail to reach agreement on the modification of the contract to the changed circumstances within a reasonable time, they are authorized to resort to the court. Such a situation may arise either because the non-disadvantaged party completely ignored the request for renegotiations or because the renegotiations, although conducted by both parties in good faith, did not have a positive outcome.

The court may, upon request, adjust the contract to the changed circumstances, allocating risks and losses between parties or terminate it only when this is reasonable.

Conclusion

The Covid-19 pandemic, affecting the entire world unprecedentedly, should be considered a social disaster, because it radically changes the usual flow of life, the normal circumstances of the markets due to the restrictions and prohibitions imposed by the governments in response to it. The measures taken by the governments, imposed in order to protect public health, emanated some radical changes in the circumstances on which most of the contracts were based. It is clear that the worldwide effect of Covid-19 and the drastic measures taken by the governments in response, are unforeseen and unavoidable by the parties to almost all of the pre-existing contracts in question. The entire event has generally occurred and developed beyond the control of the parties.

With the lexicon of the pandemic, it may be argued that the Covid-19 may "infect" or not the contractual relationships. If the contract has not been negatively affected by the measures taken against the pandemic, if the balance in the contract has not been

123 European Law Institute <www.europeanlawinstitute.eu> accessed 27 February 2021.

significantly altered in the disadvantage of one party, it means that Covid-19 did not have a negative impact on this legal relationship. In that case, one must admit that the contract in question remains untouched by the pandemic.

Nevertheless, it is probable that Covid-19 had an impact on some contractual relationships, which are adversely affected by the measures taken by the public authorities. In some cases, it may prevent or impede the disadvantaged party to perform, in some other cases it may create an excessive difficulty that makes performance extremely difficult. The assessment should be done case by case because it causes different impacts on the contracts.

In case the Covid-19 pandemic adversely affects a contract, different concepts may be associated to it in legal terminology. The very first notion which attracts attention is *force majeure* which is generally defined as an unforeseen, unavoidable supervening event or circumstance, which happens after the formation of the contract and beyond the control or the inducement of the affected party. Natural disasters of all kinds such as earthquakes, storms, floods, fires, wars, riots, strikes, volcanic eruptions, pandemics may be considered *force majeure*, which are widely accepted as causes creating "impossibility of performance" in the doctrine. By definition, the Covid-19 pandemic may be considered force majeure, in case it arises impossibility to perform.

The second crucial notion which should be highlighted is hardship, which changes the underlying circumstances of the contract, after the formation of the contract, in a way the parties did not foresee at that time, and although in theory the contractual obligations are still performable, the balance between mutual obligations designed by the parties has been lost and it does not make sense from an economic viewpoint. In hardship, the contract becomes unfair and unreasonable for the disadvantaged party.

The distinction, in a nutshell, between those concepts may be explained as the *force majeure* prevents unavoidably the performance whereas the hardship renders it excessively difficult. The legal implications of Covid-19 may differ in various contracts. It renders some contracts impossible and for some others, it makes them difficult to perform. It is also possible, as mentioned above, that the contract might even not be affected by the pandemic.

It is important to note that in common law, *force majeure* and hardship are mere contractual terms which cannot be invoked unless being incorporated in the contract. According to this approach, those are contractual clauses covering unexpected post-formation events and determining their legal consequences.

The common law does not recognize a defense of *force majeure* or allow for adjustment or termination of the contract on the ground of changed circumstances, because the starting point of contract law is "*pacta sunt servanda"*, which translates

from Latin as "agreements must be kept". However, the doctrine of frustration has been developed as a cause for discharge of the frustrated contract by "impossibility, impracticability and frustration of purpose" in cases where there is no contractual remedy agreed upon.

In civil law, the basic principle of the contract law is also "*pacta sunt servanda",* which implies that the terms of a contract are law between the parties, and therefore means that neglect of their respective obligations is a breach of the contract. Nevertheless, the impossibility of performance arising from post-formation supervening events extinguishes the obligation. This doctrine flows from the Roman law saying "*impossibilium nulla obligatio"*, which translates as "impossibility nullifies the obligation".

It should be noted that, in civil law, the impossibility of performance causes the automatic termination of the obligation. At the moment of impossibility, the affected party is discharged from the obligation, without being held responsible for non-performance.

Concerning impossibility, the frustration doctrine offers termination, which is not retroactive but for the future (*ex nunc*) with prospective effects. In this approach, when a contract is terminated, the primary obligations of the parties are discharged in so far they have not yet due to be performed. However, those obligations which are already due, are left undisturbed. In common law, there is only little room for restitution. In United Kingdom, the Law Reform (Frustrated Contracts) Act 1943 give the court certain powers to adjust the financial positions of the parties after frustration has taken effect.

Nonetheless, in civil law, the termination takes effect for the future (*ex nunc*) only when the contracts of successive performance are ending, because it is impossible to undo the time's effect for the past. Whereas the contracts of instant performance terminate *ex tunc* with retrospective effects, which means that the parties will reestablish the *status quo,*

Impossibility must be objective and permanent in order to terminate the contract. Although, the temporary impossibility arising from cases such as the Covid-19 pandemic, renders the contract impossible for a time and thus "paralyzes" it or puts it in suspense. The affected contract stops generating obligations during the period of impossibility. This approach may be held in civil law which acknowledges the partial impossibility, however the doctrine of frustration, in common law, does not admit the impossibility if it is temporary.

In some cases where Covid-19 renders the contract impossible, both legal systems offer the same solution, which is the termination of the contract, with some differences

in the consequences. It is also possible that Covid-19 renders the performance excessively difficult, rather than impossible. In the latter cases, the pandemic may be the reason for hardship, if it has radically and negatively affected this contractual relation.

In cases of hardship, it is crucial to note that the doctrine of frustration or the statutory remedies offered by civil law will not be applicable if the relevant risks have been addressed and allocated by the contract terms. In this case, the freedom of contract prevails, and the parties will have to rely on the clauses of the contract.

Unless there is no other contractual clause which covers the hardship in question the doctrine of frustration offers only the termination of the contract. Nevertheless, in civil law, there are statutory remedies established for adjustment of the affected contract by resorting to the court in order to restore balance lost, only after the failure of the renegotiations imposed on the parties because of the principle of good faith.

According to this approach, the parties may modify their contract themselves thanks to the freedom of contract. In case they fail to agree upon a solution for the hardship, either of the parties may resort to the court in order to seek adjustment or termination of the contract. The court may, upon this request, adjust the contract to the changed circumstances, allocating risks and losses between parties or terminate it only when this is reasonable.

In addition to the remedies offered by common law and civil law, *force majeure* and hardship are regulated in the Unidroit Principles of International Commercial Contracts (PICC), the Principles of European Contract Law (PECL), and *force majeure* takes place in the United Nations Convention on Contracts for the International Sale of Goods (CISG). The definitions and legal effects of these are similar to the explanations held by civil law.

In conclusion, civil law offers the remedies of termination and adjustment against the impossibility or the changing circumstances arising from Covid-19, whereas the doctrine of frustration developed by common law provides only the remedy of termination when the contract is frustrated because of the pandemic. In my humble opinion, the option to seek adjustment in hardship originated from Covid-19 bestows superiority to the remedies offered by civil law versus common law.

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