

Excusing Performance of Contractual Obligations:

The Impact of Climate Change Events

Kern Alexander*

Introduction

Climate change is increasingly impacting contract law, introducing new risks and challenges for businesses and individuals. Extreme weather events, rising sea levels, and supply chain disruptions can all lead to contract breaches, while the transition to a low-carbon economy introduces new legal considerations. Climate change-related events like extreme weather can trigger force majeure clauses in contracts, potentially excusing parties from fulfilling obligations. Under the common law, events may be severe enough to render a contract impossible to perform, leading to frustration of purpose. Similarly, in Switzerland, Article 119 of the Swiss Code of Obligations governs subsequent impossibility of performance and provides that an obligation is extinguished where performance has become impossible due to circumstances not attributable to the obligor.¹ A force majeure event, such as an extraordinary natural disaster, may constitute the cause of such impossibility, but force majeure and impossibility under Article 119 CO are distinct concepts under Swiss law: Article 119 CO concerns the extinction of an obligation because of subsequent impossibility not attributable to the obligor, whereas the legal effects of force majeure may depend on the applicable statutory rules and on the parties' contractual allocation of risk.

The impact of climate change weather-related phenomenon on the performance of contracts has become a significant source of legal and regulatory risk. Regarding supply chain disruption, climate change can make it difficult for parties to obtain necessary materials or deliver goods, leading to potential contract breaches. Climate change can also impact investment decisions as investors are increasingly considering climate-related risks and

*Professor of International Commercial and Financial Law, University of Zurich. I would like to thank Laura Roth, MLaw, for her research support in preparation of this article.

¹ W. Wiegand, in H. Honsell (ed), *Basler Kommentar zum Schweizerischen Privatrecht: Obligationenrecht I* (Basel: Helbing Lichtenhahn, 7th edn, 2020) Art 119 N 1-2.

opportunities. This can impact financing agreements, mergers and acquisitions, and other contractual arrangements.

Climate change is also leading to increased litigation. Indeed, as climate change impacts become more pronounced, disputes over contract interpretation and performance are likely to increase, potentially leading to more litigation and claims in alternative dispute resolution, such as arbitration. In recent climate-related disputes, individuals and communities are seeking to hold companies liable for their contributions to climate change and its impacts, potentially impacting contract law principles. Disputes can also arise over the construction and operation of renewable energy facilities, including issues related to permits, land use, and environmental impacts.

This article discusses some of the main principles governing the excuse from performance of contractual obligations because of impossibility, force majeure or frustration of purpose in the context of climate change risks. The analysis of these principles will have reference to the common law jurisdictions of England and Wales and the United States and the civil law jurisdiction of Switzerland. In doing so, it considers how these principles might apply in situations involving unforeseen natural disasters and other climate-induced weather-related phenomena. It then will consider some initiatives of law reform in the design of contracts so that they more efficiently and equitably account for the unforeseen circumstances arising from natural disasters and weather-related events.

I. *Growing impact of climate change and natural disasters*

The growing intensity and frequency of weather-related natural disasters caused by climate change are having a deleterious impact on the economies of many states and the abilities of parties to carry out their contractual obligations. Climate change weather events have increased the risk that parties will default on certain contractual obligations as set forth in their contracts. As the frequency and intensity of natural disasters are likely to increase due to climate change,² the risk of a growing number of contractual defaults are likely to become more acute.³ For example, a growing body of research has analysed contract law disputes involving

² The IPCC observes, in its sixth assessment report, that human-caused climate change is already affecting many weather and climate extremes in every global region and advanced the view that different forms of extreme climate and weather extremes will become more frequent and intense, Intergovernmental Panel on Climate Change (IPCC), *Climate Change 2022: The Physical Science Basis. Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge: Cambridge University Press, 2022) 9 ff.

³ Diarra, 'Sovereign Defaults in a World of Climatic Disasters' (2022), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4066892 (last visited 5 September 2025) 3.

sovereign bonds issued by countries that are unable to fulfil their repayment obligations because of the impact of a natural disaster or similar weather-related events (ie., severe hurricane).⁴

A review of the literature demonstrates that natural disasters in recent years have had a substantial negative effect on economic growth and development, particularly in developing and emerging market countries exposed to the impact of climate change.⁵ Some observers assert that natural disasters may increase macroeconomic risks and lead to net losses for the economy, especially for developing countries.⁶ A similar situation occurred during the government-induced lockdowns in 2020-21 because of the coronavirus (Covid-19). The consequences of mandatory business closures and the ban on public and private events, resulting in loss of customers and suppliers, price delays and delays with suppliers and the loss of workers in the office had implications for the performance of a wide array of contracts, particularly in the area of labour law, insurance coverage, and information technology security.

In the common law jurisdictions of England and Wales and the United States and in civil law jurisdictions, such as Switzerland, public and private law doctrines recognise certain legal principles which address the consequences of the occurrence of risks that the contractual parties did not address in their contracts. These legal rules may be summarised as ‘doctrines relating to unexpected circumstances’.⁷ The increasing occurrence of natural disasters, such as hurricanes and severe drought, attributed to climate change are creating unforeseen circumstances that make it impossible or impracticable for parties to carry out their obligations under contracts.

⁴ See L.C. Buchheit and E- Karpinski, ‘Grenada’s Innovations’ (2006) 21(1) *Journal of Banking Regulation* 227, 228.

⁵ S. Solomon et al (eds), *Climate change 2007: The Physical Science Basis. Contribution of Working Group I to the Fourth Assessment Report of the Intergovernmental Panel on Climate change* (Cambridge: Cambridge University Press, 2007) 1, FAQ 1.2, available at www.ipcc.ch/publications_and_data/ar4/wg1/en/contents.html (last visited 5 September 2025).

⁶ W.J.W. Botzen, J. Deschenes and M. Sanders, ‘The Economic Impacts of Natural Disasters: A Review of Models and Empirical Studies’ (2019) 13(2) *Review of Environmental Economics and Policy* 178 ff. with further references. For the impacts of natural disasters on commodity prices, see D. Popp, ‘R&D Subsidies and Climate Policy: Is There a “Free Lunch”?’ (2006) 77 *Climatic Change* 311, 311-341; regarding price increases and supply disruptions, see also E. Cavallo, S. Galiani, I. Noy and J. Pantano, ‘Catastrophic Natural Disasters and Economic Growth’ (2013) 95(5) *Review of Economics and Statistics* 1549, 8 ff.

⁷ P. Bolton, L.C. Buchheit, U. Panizza, B. Weder di Mauro and M. Gulati, ‘Environmental Protection and Sovereign Debt Restructuring’ (2022) *Capital Markets Law Journal*, 11.17(3), pp. 307-316.

An important doctrine of contract law is that contracts must be observed (*pacta sunt servanda*).⁸ However, it has long been accepted that the principle of *pacta sunt servanda* is not absolute.⁹ In most jurisdictions, an exemption to this principle exists in contract law in circumstances where unexpected events occur.¹⁰ Doctrines relating to unexpected circumstances encompass legal doctrines that deal with the consequences for contractual obligations when unexpected supervening events occur that go beyond the reasonable expectation of the contracting parties.¹¹ Depending on the legal tradition and jurisdiction, different terminologies exist for legal concepts which qualify as doctrines relating to unexpected circumstances.¹² The relevant contract law principles will now be discussed in the common law jurisdictions of England and Wales *and* the United States. The article will then address the relevant principles applicable to the Swiss civil code of obligations regarding how unexpected circumstances can constitute grounds for excusing performance of certain contracts.

II. Common law doctrines relating to unforeseen events and impossibility

The principle of excusing performances under contracts based on the occurrence of unforeseen events, which natural disasters are, is a legal mechanism well known in domestic contract law of common law and civil law jurisdictions. Accordingly, the doctrines of frustration, impossibility and impracticability are relevant. It should be noted that these concepts are often commingled and discussed jointly as they all relate to the same issue of excusing or modifying contract performance due to unexpected, supervening events.¹³

The doctrines of frustration, impossibility, and impracticability evolved from the common law concept of impossibility.¹⁴ In its original meaning, impossibility allowed an

⁸ . E.H. Hondius and H.C. Grigoleit, 'Change of Circumstances in European contract Law – An Approach to the Relevant Issues and Doctrines' in E.H. Hondius and H.C. Grigoleit (eds), *Unexpected Circumstances in European Contract Law* (Cambridge: Cambridge University Press, 2011) 4.

⁹ *ibid* 4.

¹⁰ *ibid* 5.

¹¹ *ibid* 6.

¹² See, for example, the concept of *force majeure* in the French legal tradition (Art 1218 of the French Civil Code (*Code Civil*)), the concept of *Unmöglichkeit* in Germany (Art 275 and 311 of the German Civil Code (*Bürgerliches Gesetzbuch*)) and Switzerland (Art 97 and 119 Swiss Civil Code (*Obligationenrecht*)).

¹³ Bolton et al, n 7 above, 11; A.N. Odiadi, 'Sub-Saharan Debt: The Imperative of Contract Adjustment', available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1082538 (last visited 5 September 2025) 26 ff.

¹⁴ V.V. Palmer, 'Force Majeure, Impracticability, and Frustration of Contracts' (2022) *The American Journal of Comparative Law* (Supp 1) i70, 71.

exemption to the principle of *pacta sunt servanda* in cases where performance of a contractual obligation became objectively impossible.¹⁵

The strict impossibility approach has since been softened by courts in granting relief in cases where performance is possible but just short of impossible.¹⁶ Nevertheless, certain courts in the US, for example in New York, still use the term ‘impossibility’.¹⁷ The more modern approaches, which may also justify non-performance in cases where no objective impossibility exists, are commonly referred to under the terms of impracticability of performance and frustration of purpose. In the US, these two terms are generally distinguished as having different scopes of application.¹⁸

1. Doctrine of Impossibility and Frustration under English Law

The doctrine of frustration under English law developed out of the concept of impossibility set out in *Paradine v Jane* (1647).¹⁹ In this case, the court held that where a party imposes a duty or charge upon themselves by virtue of a contract, they are obliged to perform the duty or pay the charge regardless of any accident, because the parties could have contracted for the occurrence of such an accident.²⁰

This absolute liability for contractual obligations, however, was softened by the introduction of the modern doctrine of frustration in *Taylor v Caldwell* (1863), in which the courts decided that a contract is frustrated if the subject matter of the contract is destroyed.²¹ The court argued that the doctrine of the sanctity of contract only applies to absolute and positive promises but not to implied conditions. The court found that it must have been an implied condition of the contract that performance is only due if the subject matter of the contract continues to exist.²²

From cases of physical destruction of the subject matter of the contract such as was at issue in *Taylor v Caldwell* (1863), English courts have continued to expand the scope of applicability of the doctrine of frustration. For example, in *Jackson v Union Marine Insurance*

¹⁵ See *Paradine v Jane* [1647] EWHC KB J5, 82 ER 897.

¹⁶ Palmer, n 14 above, 72.

¹⁷ *ibid* 72.

¹⁸ *ibid* 72.

¹⁹ See Palmer, n 14 above, 71; *Paradine v Jane* [1647] EWHC KB J5, 82 ER 897.

²⁰ See G. Treitel, *Frustration and Force Majeure* (3rd edn, London: Sweet & Maxwell, 2014) para 2-001.

²¹ See *Taylor v Caldwell* [1863] EWHC QB J1, 3 B & S 826, 122 ER 309; see Palmer, n 14 above, 75.

²² H.G. Beale (ed), *Chitty on Contracts*, vol 1: *General Principles* (34th edn, London: Sweet & Maxwell, 2021) para. 26-005.

Co Ltd (1874-75), the courts allowed the frustration of the contract because the commercial adventure based on which the contract was entered into was no longer achievable.²³ Other examples of events where English courts allowed the application of the doctrine of frustration include subsequent legal changes and supervening illegality, cancellation of expected events, and delay.²⁴

English courts have applied the doctrine of frustration in cases where performance of an obligation has become impossible.²⁵ In contrast to the civil law, English law does not distinguish between objective and subjective impossibility. Rather, English courts look at the question of whether the supervening event is sufficiently serious to discharge the contractual obligations due to impossibility,²⁶ which may be partial or temporary.²⁷

English courts have accepted that a contractual obligation is discharged due to impossibility in cases where the subject-matter of the contract has been destroyed.²⁸ The rule that the destruction of the subject-matter of the contract discharges the contract has also been codified in section 7 of the Sale of Goods Act 1979. Pursuant to this provision, the contract for the sale of a specific good is discharged if the goods are lost without fault of either party before the risk of loss has passed to the buyer, provided that the loss is total.

Any damage to, or deterioration of, the subject-matter of the contract may also suffice for the application of the doctrine of frustration due to impossibility (*partial destruction*).²⁹ Where deterioration of the subject-matter of the contract is only such that it is no longer in conformity with the contract but may still be regarded as an article belonging to the same commercial category as the subject-matter of the contract, English courts have rejected the discharge of a contract.³⁰

English courts have also applied the doctrine of frustration due to impossibility in cases where the subject-matter has become unavailable.³¹ In the context of unavailability of the subject-matter of the contract, it must be noted that the subject-matter, where the contract is

²³ See *Jackson v Union Marine Insurance Co Ltd* [1874-75] LR 10 CP 125.

²⁴ Chitty on Contracts, n 22 above, para 26-022 ff.

²⁵ Treitel, n 20 above, para 3-001.

²⁶ *ibid* para 3-003.

²⁷ *ibid* para 3-005 ff.

²⁸ *ibid* para 3-004. This was the case in *Taylor v Caldwell* [1863] EWHC QB J1, 3 B & S 826, 122 ER 309.

²⁹ See *Asfar & Co v Blundell and Another* [1896] 1 QB 123 128.

³⁰ Treitel, n 20 above, para 3-06.

³¹ See *Shipton, Anderson & Co v Harrison Brothers & Co* [1915] 3 KB 676 681; see also *The Dale S S Co Ltd v The Northern S S Co* [1918] 34 TLR 271; *Bank Line Ltd v Arthur Capel & Co* [1919] AC 435; *BP Exploration Co (Libya) v Hunt (No 2)* [1983] 2 AC 352.

concerned with a service, may either be the service itself or the object in respect of which the service is to be performed.³²

Impossibility may also arise in cases where the thing essential for performance of a contract becomes unavailable or destroyed.³³ Whether a thing is essential for performance of a contract depends on whether, by interpreting the relevant contract, it may be construed that a thing was essential for performance. For example, if a contract prescribes that goods to be sold under a contract must be manufactured by the seller, the destruction of the factory of the seller would discharge the contract because the factory is essential for the performance, i.e. the manufacturing of the goods, of the contract.³⁴ This would be relevant in a case where the factory that was deemed essential for the manufacture of a product was destroyed by an unexpected or extreme weather event, such as a hurricane or severe storm.

Similarly, Treitel observes that the death, unavailability or supervening incapacity of a particular person may lead to the discharge of a contract if the contract requires personal performance by the deceased, unavailable, or incapacitated person.³⁵ An extreme weather event may cause the unavailability of a source from which the subject matter of a contract must be supplied, potentially leading to the impossibility of a contract,³⁶ provided that the contract expressly prescribes a certain source of supply.³⁷ In cases where the contract does not expressly prescribe a source of supply, contracts will generally not be discharged.³⁸

Also, regarding the unavailability of the source of supply, a supervening event may also affect the capacity of a buyer to perform either because the buyer cannot take a delivery or cannot pay for the delivery.³⁹ However, supervening events affecting the capacity of the buyer are unlikely to succeed as grounds for discharging a contract. In particular, regarding the capacity to pay, as the source of payment is only in the contemplation of the buyer but not the seller, the failure of the source for payment will not discharge the contract.⁴⁰ But in cases

³² Treitel, n 20 above, para 4-004.

³³ *ibid* para 4-016.

³⁴ *ibid* para 4-017.

³⁵ See *Whincup v Hughes* [1871] LR 6 CP 78; *Stubbs v Holywell Railway Co* [1867] LR 2 EX 311.

³⁶ Treitel, n 20 above, para 4-044.

³⁷ See *Howell v Coupland* [1876] 1 QB 258 260.

³⁸ See *Blackburn Bobbin Co Ltd v T W Allen and Sons Ltd* [1918] 2 KB 467 468 ff.; note that when both parties contemplated the use of a source without the contract expressly prescribing it, there is inconclusive precedent as to whether the contract would be discharged. See Treitel, n 20 above, para 4-057.

³⁹ *ibid* para 4-060.

⁴⁰ *Universal Corp v Five Ways Properties* [1979] 38 P. & C.R. 687 689ff.

where an extreme weather event causes impossibility of the method of performance, such as the method of delivery or the method of payment, excuse of performance may be allowed.⁴¹

2. Doctrine of Frustration of Performance and Impracticability

English cases have also discussed the application of the doctrine of frustration in the context of impracticability, i.e. in circumstances where supervening events prevent a contractual obligation short of impossibility by making performance commercially impracticable due to increased costs or other difficulties.⁴² However, no English decision provides clear support that the discharge of a contract may be made based on impracticability alone in a case involving extreme weather events or climate change phenomenon.⁴³

Parties can insert provisions in a contract that provide for the circumstances in which a contract would be impossible to perform. In *Tenants (Lancashire) Ltd v CS Wilson & Co Ltd* (1917) it was held that the notion that a contract may be discharged if it becomes commercially ‘impossible’ to perform only applies if parties have expressly contracted to this end.⁴⁴ In *Blackburn Bobbin Co Ltd v TW Allen and Sons Ltd* (1918) the court also held that the fact that it became practically impossible to perform a contract because of great difficulties of procuring the goods to be sold under a contract does not discharge performance obligations if it is not provided for in the contract.⁴⁵ Similarly, increases in prices of raw materials or costs of the seller have not been viewed as grounds for discharging a contract.⁴⁶ This would be particularly relevant in cases where climate change weather events cause a substantial increase in the cost of agricultural products or other raw materials.

Under English law, impracticability has only successfully been raised as grounds for discharging a contract in connection with other factors. For example, in cases relating to temporary impossibility, where the delay in performing a contractual obligation has radically changed the nature of the obligation originally undertaken, it was held that such delays led to precipitous increases in the cost of performance.⁴⁷ As TREITEL observes, however, these cases are not suitable for determining that English law recognises impracticability as grounds for

⁴¹ Treitel, n 20 above, para 4-072 ff.

⁴² See *Horlock v Beal* [1916] 1 AC 486.

⁴³ Treitel, n 20 above, para 6-022.

⁴⁴ See *Tenants (Lancashire) Ltd v CS Wilson & Co Ltd* [1917] AC 495 510.

⁴⁵ See *Blackburn Bobbin Co Ltd v T W Allen and Sons Ltd* [1918] 2 KB 467 468ff.

⁴⁶ Treitel, n 20 above, para 6-022.

⁴⁷ *Metropolitan Water Board v Dick Kerr & Co Ltd* [1918] AC 119 HL 125ff; see also *Acetylene Corp of Great Britain v Canada Carbide Co (No 2)* [1921] 8 Ll L Rep 456.

discharge, because in these cases performance was temporarily impossible and not just impracticable.⁴⁸

In cases that are relevant to government regulations or closures that may make methods of performance impossible, but other methods of performance are still available, it was held in the *Suez* cases that the extra costs incurred by the party due to the closure of the Suez Canal were not sufficient enough to determine a fundamental change in the nature of the contractual obligation.⁴⁹ This implies that high enough costs may be able to fundamentally change the nature of contractual obligations, in which case such contracts may be discharged.⁵⁰

Impracticability has also been considered by English courts in connection with supervening illegality, where changes in law would require extra steps for performing a contractual obligation which in turn would lead to additional expenses.⁵¹ Therefore, impracticability on its own cannot be considered an available ground for arguing a contract has been frustrated under English law.

Frustration of purpose is described as the other side of the coin of impracticability.⁵² It is generally available to the party that has agreed to pay a sum of money.⁵³ It applies in cases where the performance of an obligation is no longer of any use for the purpose contemplated by both parties.⁵⁴

The *loci classici* for frustration of purpose are the coronation cases relating to the postponement of King Edward VII's coronation due to his illness.⁵⁵ Hirers of rooms and ticketholders for seats for the procession argued successfully that the relevant contracts by which they rented rooms or acquired tickets were frustrated because they were no longer of any use for the contemplated purposes.⁵⁶

⁴⁸ Treitel, n 20 above, para 6-031.

⁴⁹ See *Albert D Gaon & Co v Soc Interprofessionnelle des Oléagineux Fluides Alimentaires* [1959] 3 W.L.R. 622 630ff; see also *Tsakiroglou & Co Ltd v Noble Thorl GmbH* [1962] AC 93.

⁵⁰ Treitel, n 20 above, para 6-034.

⁵¹ *ibid* para 6-035.

⁵² Treitel, n 20 above, para 7-001 ff.

⁵³ *ibid* para 7-001; however, it may also be raised by the party providing a service (see Treitel, n 20 above, para 7-003).

⁵⁴ *ibid* para 7-001.

⁵⁵ See *Krell v Henry* [1903] 2 KB 740; *Griffith v Brymer* [1903] 19 TLR 434; *Victoria Seats Agency v Paget* [1902] 19 TLR 16; *Clark v Lindsay* [1902] 88 LT 198; *Chandler v Webster* [1904] 1 KB 493; *Herne Bay Steamboat Co v Hutton* [1903] 2 KB 683; *Hobson v Pattenden & Co* (1903) 19 TLR 186.

⁵⁶ Treitel, n 20 above, para 7-006.

The English courts, however, have generally been reluctant to apply frustration of purpose because it could be pleaded too easily in cases of contracts which had become bad bargains for one or other of the parties.⁵⁷ As TREITEL notes, since the coronation cases, there is no precedent where English courts have discharged contracts solely based on frustration of purpose.⁵⁸

Considering English courts' scepticism towards impracticability, the reluctant application of frustration of purpose is sensible as it appears unjust to allow one side of the party to discharge the contract because its purpose can no longer be met but not allow the other party to discharge the contract in cases where it has become impracticable for this party to perform.⁵⁹

If performance of a contract becomes illegal, including cases of temporary or partial illegality,⁶⁰ it may be discharged.⁶¹ Supervening illegality may occur either due to changes in circumstances, such as the adoption of stricter environmental regulations, which make the performance of a contract illegal under existing laws, or due to changes in law which make performance of a contract subsequently illegal.⁶²

In the context of supervening illegality, the justification for discharging a contractual obligation is based not only on ensuring an equitable result between the contracting parties, but also to give effect to public policy interests.⁶³ Environmental restrictions on emissions may constitute supervening events that invalidate commercial contracts. The relevant English case law from early in the twentieth century that invalidated existing contracts because of government regulations were the cases where wartime legislation had made commercial intercourse with the nationals of an enemy state illegal,⁶⁴ or where export and import regulations prohibit certain transactions.⁶⁵

Regarding payment obligations, it should be noted that they may only be affected by supervening illegality in cases where only one party has contemplated the method of payment

⁵⁷ *ibid* para 7-011.

⁵⁸ *ibid* para 7-036.

⁵⁹ *ibid* para 7-036.

⁶⁰ *ibid* para 8-030ff.

⁶¹ *ibid* para 8-001.

⁶² *ibid* para 8-001.

⁶³ *ibid* para 8-002.

⁶⁴ *Eposito v Bowden* 119 ER 1430, (1857) 7 El & Bl 763 QB 1436ff; see also, *Duncan, Fox & Co v Schrempft & Bonke* [1915] 1 KB 365.

⁶⁵ See *Société Co-operative Suisse des Céréales v La Plata Cereal Co SA* (1946) 80 Ll.L.Rep. 530.

which has become illegal.⁶⁶ This position was affirmed in *Banco San Juan Internacional Inc v Petroleos de Venezuela (PDVSA)* (2020), where PDVSA argued it was prevented from making repayments under outstanding loans due to the imposition of US sanctions.⁶⁷ The English court rejected the argument that payment had become illegal due to the US sanctions. It held that the sanctions only made such payments impracticable because it was neither illegal for PDVSA to initiate payments nor to make payments in euros to a bank outside the US under the relevant credit agreements.⁶⁸

The decision in *Banco San Juan Internacional Inc v Petroleos de Venezuela (PDVSA)* (2020) also provides perspective on the issue of supervening illegality based on foreign law. PDVSA relied on the decision in *Ralli Bros v Compañia Naviera Sota y Aznar* (1920) to argue that contracts governed by English law are unenforceable where performance is prohibited in the place of performance.⁶⁹

At its core, the doctrine of frustration is concerned with the question of which party must bear the consequences of the occurrence of a specific risk. Thus, courts will assess whether the contract has allocated the risk of the unexpected event occurring.⁷⁰ Naturally, this will be the case where contracts contain express clauses that deal with the allocation of certain risks.⁷¹ If the contract has not expressly foreseen the allocation of risk of an unexpected event, it will be necessary to evaluate whether the parties have foreseen the occurrence of such an event.⁷² If the occurrence of the event is foreseen, it must be established if one of the parties has assumed the risk of the foreseen event occurring or whether it has been left open so as to allow the application of the doctrine of frustration.⁷³

It must also be determined whether the unexpected event has frustrated the performance of a contractual obligation in a manner foreseen by both parties and not one party alone.⁷⁴ The doctrine of frustration only applies in circumstances which are not in the control of the parties

⁶⁶ Treitel, n 20 above, para 8-007.

⁶⁷ *Banco San Juan Internacional Inc v Petroleos De Venezuela SA* [2020] EWHC 2937 (Comm) para 8.

⁶⁸ *ibid* para 105 ff.

⁶⁹ *ibid* para 8.

⁷⁰ J. Beatson, A. Burrows and J. Cartwright, *Anson's Law of Contract* (30th edn, Oxford: Oxford University Press, 2016) 514.

⁷¹ *ibid* 515.

⁷² *ibid* 515.

⁷³ *ibid* 516.

⁷⁴ *ibid* 516.

concerned.⁷⁵ It does not apply where the circumstances giving rise to frustration have been caused intentionally by the party relying on the doctrine of frustration.⁷⁶

Self-induced frustration also extends to the behaviour of third parties if the contracting party is responsible for the behaviour of the third party based on the nature of the relationships between the third party and the party relying on the doctrine of frustration, and between the party relying on frustration and the other contracting party.⁷⁷ Self-induced frustration may also occur in cases where the supervening event was caused by an omission of the party relying on the doctrine of frustration.⁷⁸ However, an omission to act may only prevent the applicability of the doctrine of frustration in cases where there was a duty to act.⁷⁹

According to common law, the effect of frustration of contracts is that the contract is discharged automatically when the requirements of frustration are met.⁸⁰ Both parties to the contract are released from further performance, and the court has no authority to allow the contract to continue or to adjust contract terms to fit the new reality.⁸¹

For obligations already performed, common law allows for restitution based on a total failure of consideration.⁸² This common law rule is seen as suboptimal for both the payee and the payor. The payee would have to repay all funds received without any allowance in respect of his expenses and the payor, in cases where no total frustration occurred, could not reclaim his paid money.⁸³

The Law Reform (Frustrated Contracts) Act 1943 was implemented to amend these deficiencies.⁸⁴ In the scope of its application, the Law Reform (Frustrated Contracts) Act 1943 allows the recovery of money which was payable or has been paid before the frustrating event.⁸⁵ At the same time, section 1(2) Law Reform (Frustrated Contracts) Act 1943 relieves a party

⁷⁵ Treitel, n 20 above, para 14-001.

⁷⁶ A.B.L. Phang, 'Frustration in English Law – A Reappraisal' (1992) *Anglo-American Law Review* 278, 296. 'Fault' also includes negligence, which goes further than negligence as defined in the law of tort and encompasses cases where an event occurs in which the party relying on the doctrine of frustration had the means and opportunity to prevent it but nevertheless caused or permitted it to occur. See *J Lauritzen AS v Wijsmuller BV (The Super Servant Two)* [1990] 1 Llo 1.

⁷⁷ Treitel, n 20 above, para 14-004.

⁷⁸ See *Mertens v Home Freehold Co* [1921] 2 KB 526 533ff.

⁷⁹ Treitel, n 20 above, para 14-016.

⁸⁰ *Hirji Mulji v Cheong Yue Steamship Co Ltd* [1926] AC 497 505.

⁸¹ Chitty on Contracts, n 22 above, para 26-101.

⁸² See *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1942] AC 32 75ff; Anson's Law of Contract, n 70 above, 525.

⁸³ Treitel, n 20 above, para 15-053.

⁸⁴ Anson's Law of Contract, n 70 above, 526

⁸⁵ Section 1(2) Law Reform (Frustrated Contracts) Act 1943.

from the obligation to pay money that was payable before the frustrating event occurred, but which had not been paid.

Further, section 1(2) of the Law Reform (Frustrated Contracts) Act 1943 gives the court discretionary powers regarding expenses that arose in performance, or for the purpose of performance, of the contract on the side of the party to whom money was paid or payable. If it considers it just to do so based on all the circumstances of the case, the court may allow this party to recover the whole or any part of the money paid or payable to offset any incurred expenses.

Section 1(3) of the Law Reform (Frustrated Contracts) Act 1943 addresses the situation in which one party has obtained a benefit, other than the payment of money, before the frustrating event. The provision sets out that the party, which has yet to receive the benefit, can recover a sum not exceeding the value of the benefit. The size of the sum is at the discretion of the court. In deciding on the sum, the court must take into account ‘the amount of any expenses incurred before the time of discharge by the benefitted party, in or for the purpose of, the performance of the contract [...]’,⁸⁶ as well as ‘the effect, in relation to the said benefit, of the circumstances giving rise to the frustration of contract’.⁸⁷

The application of the Law Reform (Frustrated Contracts) Act 1943 is further limited in several ways. For instance, it does not apply where the parties have contracted out of the Act by including a term operating in case of frustration (section 2(3)). Where a contract can be divided into severable and distinct obligations, it does not apply to obligations that have been fully performed (section 2(4)). Finally, certain types of contracts are excluded from the scope of the Law Reform (Frustrated Contracts) Act 1943, for example, insurance contracts (section 2(5)). Where the legislation does not apply, the rules at common law apply.

III. Doctrine of Impossibility, Impracticability, and Frustration of Purpose - US Law

In the US, the English law doctrine of frustration is referred to as either impossibility, impracticability, or frustration of purpose. While impossibility and impracticability are sometimes treated synonymously, frustration of purpose is generally treated as distinct from impossibility and/or impracticability.⁸⁸

⁸⁶ Section 1(3)(a) Law Reform (Frustrated Contracts) Act 1943.

⁸⁷ Section 1(3)(b) Law Reform (Frustrated Contracts) Act 1943.

⁸⁸ Palmer, n 14 above, 71

Impossibility, impracticability, and frustration of purpose under US law are based on the English court cases establishing the doctrine of frustration at common law. The common law principle of frustration was codified in §261 of the Restatement (Second) of Contracts. The doctrine of impracticability applies:

‘[w]here, after a contract is made, a party’s performance is made impracticable without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his duty to render that performance is discharged, unless the language or the circumstances indicate the contrary.’⁸⁹

In addition, the concept was also included in the Uniform Commercial Code (UCC). UCC §2-615 reads:

‘Except so far as a seller may have assumed a greater obligation and subject to the preceding section on substituted performance:

‘(a) Delay in delivery or non-delivery in whole or in part by a seller who complies with paragraphs (b) and (c) is not a breach of his duty under a contract for sale if performance as agreed has been made impracticable by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made or by compliance in good faith with any applicable foreign or domestic governmental regulation or order whether or not it later proves to be invalid.

(b) Where the causes mentioned in paragraph (a) affect only a part of the seller’s capacity to perform, he must allocate production and deliveries among his customers but may at his option include regular customers not then under contract as well as his own requirements for further manufacture. He may so allocate in any manner which is fair and reasonable.

(c) The seller must notify the buyer seasonably that there will be delay or non-delivery and, when allocation is required under paragraph (b), of the estimated quota thus made available for the buyer.’⁹⁰

⁸⁹ § 261 Restatement (Second) of Contracts.

⁹⁰ UCC § 2-615.

As under English law, US law puts little focus on the question of whether impossibility is subjective or objective⁹¹ and recognises the discharge of a contractual obligation in cases of destruction or unavailability of the subject matter or means for performance;⁹² failure of the contemplated mode of performance;⁹³ and death or disability of the person who is obliged to perform a contract.⁹⁴

In contrast to English law, US law generally recognises impracticability as grounds for discharging a contract. This is evident from the §261 of the Restatement (Second) of Contracts which expressly states that a contract may be discharged if its performance is made *impracticable*.

Similarly, §2-615 UCC prescribes that a party is not in breach of contract if its performance has become impracticable by the occurrence of a contingency, the non-occurrence of which was a basic assumption on which the contract was made.

The *locus classicus* for the doctrine of impracticability in the US is *Mineral Park Land Company v Howard* (1916), in which impracticability was argued based on the fact that excavating all gravel from the land at a price contractually agreed upon was impracticable because all gravel below the water level could only be excavated at prohibitively high costs.⁹⁵ The Californian Supreme Court stated, ‘A thing is impossible in legal contemplation when it is not practicable and a thing is impracticable when it can only be done at an excessive and unreasonable cost’.⁹⁶ In *Mineral Park Land Company v Howard* (1916), the event leading to impracticability was antecedent rather than supervening.

US courts have also discussed impracticability in the context of market movements leading to price increases of supplies.⁹⁷ In *Nora Springs Cooperative Company v Brandau* (1976), the courts held that a buyer of corn was not excused from taking delivery by a shortage of boxcars, which would have made taking delivery more expensive.⁹⁸ During the energy crisis in the 1970s, in *Gay v Seafarer Fiberglass Yachts* (1974), the builder of a yacht argued that he should be excused from having to build the yacht because prices for polyester resin had sharply

⁹¹ Treitel, n 20 above, para 3-003.

⁹² J.M. Perillo, *Contracts* (7th edn, St Paul, MN: West Academic Publishing, 2014) 473.

⁹³ *ibid* (2014) 472ff., 476ff.

⁹⁴ Perillo, n 92 above, 480 ff; see also *Herren v Harris Cortner Co* 201 Ala 577, 78 So 921 (Ala 1918) 578; *Matter of Buccini v Paterno Const Co* 253 NY 256, 170 NE 910 (NY 1930) 258 ff.

⁹⁵ *Mineral Park Land Company v Howard* 172 Cal 289, 156 P 458 (Cal 1916)

⁹⁶ *ibid* 293.

⁹⁷ *ibid* para 6-007.

⁹⁸ *Nora Springs Cooperative Company v Brandau* 247 NW 2d 744 (Iowa 1976) 748.

risen. The court held that the builder had at least an arguable case and was not entitled to summary judgment.⁹⁹

In *Eastern Airlines Inc v Gulf Oil Corp* (1975) it was argued that the price escalation clause contained in the contract was insufficient to take account of the steep price increase for aviation fuel and that due to these increased costs, the contract should be discharged. Impracticability was rejected in this case, inter alia, because the court was of the view that the price increase was foreseeable.¹⁰⁰ Similarly, in *Publicker Industries v Union Carbide Corp* (1975), the increased price of ethylene was rejected as a justification because the fact that a price-escalation clause was included in the contract evidenced that the parties allocated the risk of price increases to the seller.¹⁰¹

In *Hancock Paper v Champion Intern Corp* (1976), the court rejected impracticability based on the argument that the value of the subject-matter of the contract had dropped because a fixed-price contract covers such risk and the drop-in market value did not reach the level required to excuse performance.¹⁰² Accordingly, the court in *Hancock Paper v Champion Intern Corp* (1976) did not rule out the possibility that drops in market value could excuse performance due to impracticability.¹⁰³

The US *Suez* cases also leave open the possibility of discharging contracts based on impracticability in combination with the contemplated method of delivery becoming impossible and the alternative increasing expenses excessively.¹⁰⁴

In *ALCOA v Essex* (1980), ALCOA agreed to supply Essex with aluminium over a long period of time whereby a part of the price for the aluminium factored in the Wholesale Price Index with a cap for the maximum price which Essex would pay in case of an increase due to the Wholesale Price Index. Over time, the costs for ALCOA increased excessively so as not to be covered by the price mechanism contained in the contract. ALCOA relied on impracticability and frustration of contract to amend the contract.¹⁰⁵ The US District Court for the Western District of Pennsylvania upheld ALCOA's claims both for impracticability and

⁹⁹ See *Gay v Seafarer Fiberglass Yachts Inc* 14 UCC REP SERV 1335 (NY Sup Ct 1974) as reported in DUESENBERG (1977) 1097.

¹⁰⁰ *Eastern Air Lines Inc v Gulf Oil Corp* 415 F Supp 429 (SD Fla 1975) 441ff.

¹⁰¹ *Publicker Industries Inc v Union Carbide Corp* 17 UCC REP SERV 989 (ED Pa 1975) as reported in DUESENBERG (1977) 1094.

¹⁰² *Hancock Paper Co v Champion Intern Corp* 424 F Supp 285 (ED Pa 1976) 291.

¹⁰³ See also Treitel, n 20 above, para 6-014

¹⁰⁴ See *Transatlantic Finance Corp v US* 363 F 2d 312 (1963) 315.

¹⁰⁵ *Aluminum Co of America v Essex Group Inc* 499 F Supp 53 (WD Pa 1980) 55ff.

frustration of purpose. It argued that the more than 60-million-dollar price increase was extreme and unreasonable. Furthermore, the underlying contract stipulated a mechanism to avoid such an increase. Due to the extreme price increase, the performance of the contract would be impracticable for ALCOA.¹⁰⁶

To summarise, US courts have allowed impracticability as the basis for discharging a contract where cost of performance was increased considerably because of the necessity of performing an obligation radically different from the obligation originally contemplated, but there are only a few cases where discharge was granted on increased costs alone (e.g. *ALCOA v Essex* (1980)).¹⁰⁷ This would be particularly relevant in the context of the impact of natural disasters or severe climate-related weather events that caused the cost of performance to increase substantially in an unforeseen way, thereby making performance radically different than the obligation contemplated by the parties to the contract.

Accordingly, the difference between the English and the US law approach to impracticability is not so great, as under US law precedent suggests that impracticability alone will rarely give rise to the discharge of contractual obligations. In addition, it must be noted that in certain states, in particular New York, courts do not see impracticability as a distinct concept from impossibility and are equally hostile to granting discharge based on impracticability.¹⁰⁸

The strict position of New York law regarding commercial impracticability has been reiterated in several cases following the COVID-19 pandemic. The New York courts reiterated the position that impossibility is only applicable in case of objective impossibility. Performance is not excused where impossibility or difficulty of performance is due to financial difficulty or economic hardship, even to the extent of insolvency or bankruptcy.¹⁰⁹

Like English law, US law allows discharge of contracts due to supervening illegality.¹¹⁰

With regard to foreign law, modern US case law has granted discharge of contract due to supervening illegality based on foreign law.¹¹¹

¹⁰⁶ *ibid* 71ff.

¹⁰⁷ See Perillo, n 92 above, 484.

¹⁰⁸ Palmer, n 14 above, 72.

¹⁰⁹ *Lantino v Clay LLC* 1:18-cv-12247 (SDA) (SDNY 8 May 2020) 6ff.

¹¹⁰ Palmer, n 14 above, 74-75.

¹¹¹ *Texas Co v Hogarth Shipping Co* 256 US 619, 41 S Ct 612 (1921) 9.

Frustration of purpose is included in §265 Restatement (Second) of Contracts and excuses performance of contracts:

‘[w]here, after a contract is made, a party’s principal purpose is substantially frustrated without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his remaining duties to render performance are discharged, unless the language or the circumstances indicate the contrary.’¹¹²

US courts apply frustration of purpose in cases where the supervening event has rendered a contract valueless to a party and, as understood by both parties, the transaction contemplated by the party would have made little sense.¹¹³ Similar to frustration of purpose under English law, in US law frustration of purpose applies to the benefits of parties obliged to pay money for the delivery of goods or performance of services, whereas impracticability applies to the advantage of parties which are obliged to deliver goods or services.¹¹⁴ However, since the coronation cases, US courts have been more willing to grant frustration of purpose without additional considerations than English courts.¹¹⁵

For example, in *20th Century Lites v Goodman* (1944) the plaintiffs’ claim for monthly payments for the lease of an electrical advertising display was discharged based on frustration of purpose because blackout regulations imposed in the aftermath of the Japanese attack on Pearl Harbor prohibited the lighting of the advertising display. Thus, the purpose of illuminating the exterior of the place of business was seen as frustrated.¹¹⁶

1. Limits to Impossibility, Impracticability and Frustration of Purpose

Based on §261 and §265 Restatement (Second) of Contracts, both the doctrine of impracticability and frustration of purpose require that it was a basic assumption of the contract that the supervening event would not occur. Accordingly, US law, like English law, requires that the supervening event was not foreseeable. If an event was foreseeable but no provision for it was made in a contract, it must be assumed that the risk has been allocated to a party.¹¹⁷ US courts interpret foreseeability broadly having stated that the closing of the Suez Canal, the US entry into World War II, and the energy crisis in the 1970s were foreseeable events.¹¹⁸

¹¹² § 265 Restatement (Second) of Contracts.

¹¹³ *Gap Inc v Ponte Gadea NY LLC* 524 F Supp 3d 224 (SDNY 2021) 234ff.

¹¹⁴ Perillo, n 92 above, 489.

¹¹⁵ Treitel, n 20 above, para 7-035.

¹¹⁶ *20th Century Lites Inc v Goodman* 64 Cal App 2d 938, 149 P 2d 88 (Ca Ct App 1944) 943ff.

¹¹⁷ Perillo, n 92 above, 473.

¹¹⁸ *ibid* 499.

This extensive view of foreseeability is criticised in the literature. PERILLO (2014) has postulated that a sensible approach for interpreting foreseeability is to determine whether an event was so unlikely to occur that reasonable parties see no need to explicitly allocate the risk of its occurrence.¹¹⁹ Again, as under English law, in US law based on §261 and §265 Restatement (Second) of Contracts impossibility, impracticability, and frustration of purpose are only available in cases where the supervening event did not occur at the fault of the party relying on the defence. The effect of the doctrines of impracticability and frustration of purpose in case of total frustration is a discharge of the excused party's remaining obligations whilst simultaneously also discharging the obligations of the other parties.¹²⁰

If the impracticability or frustration of purpose is only prospective, the other party has the same rights as in case of breach of contract, except that it may not rely on a cause of action for breach.¹²¹ In cases of temporary impracticability or frustration of purpose, both parties may suspend the performance of their obligations. In addition, if suspension itself is impracticable, the discharge of the obligations is possible too.¹²²

Finally, in cases of discharge and if necessary, in the interest of justice — for example, because one party has already performed its obligation under the frustrated contract — courts may adjust the rights of the parties under the contract and grant, for example, rights under the doctrine of divisibility or restitution.¹²³

2. Sovereign Bond Contracts – and CRDCs

The only systematic effort at law reform to address the limitations and uncertainties surrounding the application of traditional contract doctrine – that is, impossibility, frustration of purpose and impracticability – has been international policymakers and practitioners efforts to design contractual clauses in sovereign bond contracts that allow for some risk-shifting away from sovereign debtors who may not be able to repay fully their contracted for debts in light of the impact of natural disasters and severe weather-related climate events. Internationally, policymakers and practitioners have drawn up model Climate Resilient Debt Clauses (CRDCs) for use in sovereign bond contracts. Some states in climate-impacted countries, such as in the Caribbean and Pacific, have adopted so-called CRDCs – also known as ‘hurricane clauses’ - in

¹¹⁹ *ibid* 499.

¹²⁰ Perillo, n 92 above, 506.

¹²¹ *ibid* 506.

¹²² *ibid* 493.

¹²³ *ibid* 506 ff.

their sovereign bond contracts (both under English and New York law).¹²⁴ CRDCs that provide an *ex-ante* sovereign debt deferral mechanism that may be triggered in the event of a pre-defined natural disaster leading to major financial losses. CRDCs allow for the deferral of a state's debt repayments for a pre-agreed period in the event of a severe climate shock or natural disaster where it is necessary to avoid a payment default for a country to preserve much needed foreign exchange and/or liquidity to support disaster relief.

Grenada had issued bond contracts containing CRDCs when Hurricane Beryl made landfall in 2024, triggering the clauses and imposing alterations on the performance of payment obligations under the bond contract.¹²⁵ The use of these clauses demonstrates how the design of sovereign bond contracts can allow issuing countries and their investors to modify their performance obligations under the contract due to the occurrence of a climate event (eg., extreme weather) in a way that reallocates the cost of non-performance to investors.¹²⁶ A growing literature has argued for the use of CRDCs for developing countries to avoid sovereign defaults caused by natural disasters, as CRDCs postpone debt servicing obligations under sovereign bonds in case of natural disasters could be relied upon.¹²⁷ That the use of CRDCs insulate governments from physical risks which could materialise in natural disasters by providing protection against certain losses for governments who are unable to meet their contractual obligations because of the impact of a natural disaster.¹²⁸

The usefulness of CRDCs is questionable, however, as they are currently not widely used in sovereign bond contracts (and other sovereign debt instruments).¹²⁹ Also, CRDCs suffer from certain limitations that undermine their potential effectiveness in preventing

¹²⁴ Grenada has issued bond contracts that contained a "hurricane clause" in its debt arrangement with foreign investors. See D. Waelchli, *Climate-proofing Sovereign Bond Contracts* (Zurich: Dike, 2025) 5.

¹²⁵ *ibid.*, 4-8.

¹²⁶ E. Mallucci, 'Natural Disasters, Climate change, and Sovereign Risk' (2022) *Journal of International Economics* 139(c) 1; U. Volz, 'On the Potential of Sovereign State-Contingent Debt in Contributing to Better Public Debt Management and Enhancing Sustainability Outcomes' (2022) 13(2) *Journal of Sustainable Finance & Investment* 401 ff. See also the agenda of the 2022 Bridgetown Initiative led by Barbados, available at www.foreign.gov.bb/the-2022-barbados-agenda (last visited 20 February 2024).

¹²⁷ Mallucci, n 134 above, 1; Volz, n 134 above, 401 ff. See also the agenda of the 2022 Bridgetown Initiative led by Barbados, available at www.foreign.gov.bb/the-2022-barbados-agenda (last visited 20 February 2024).

¹²⁸ Cohen, A. Abbas, M. Anthony, T. Best, P. Breuer, H. Miao, A. Myrvoda and E. Togo, 'The Role of State-Contingent Debt Instruments in Sovereign Debt Restructurings' (IMF Staff Discussion Note SDN/20/06, 2020) 7, available at <https://www.imf.org/en/Publications/Staff-Discussion-Notes/Issues/2020/12/14/The-Role-of-State-Contingent-Debt-Instruments-in-Sovereign-Debt-Restructurings-49867> (last visited 5 September 2025).

¹²⁹ *ibid.*

sovereign defaults caused by physical risks.¹³⁰ Specifically, the limited use of CRDCs and difficulties in connection with inserting them in already outstanding sovereign debt instruments limit their applicability in cases of physical risk-induced sovereign default.

IV. Force Majeure and Impossibility under the Swiss Code of Obligations

The Swiss Code of Obligations generally respects the autonomy of parties to freely enter into contracts with mutually binding obligations. In certain circumstances, however, agreed contractual obligations may be extinguished or otherwise affected where subsequent events prevent their performance, in particular under the rules on impossibility of performance set out in Article 119 CO.¹³¹ Article 119 CO governs subsequent impossibility of performance where the impossibility is due to circumstances not attributable to the obligor. Force majeure is a distinct concept under Swiss law and may constitute the external event that causes such impossibility, but it is not itself codified in Article 119 CO.¹³²

Article 119 CO provides that if performance has become impossible due to circumstances beyond the obligor's control, Swiss law considers the claim for performance to be legally invalid.¹³³ In such a case, the obligor would no longer be required to make payment or otherwise perform under the contract. In the case of bilateral contracts, any consideration provided by the other party would be required to be reversed, such as reimbursing a payment already made by a party to a bilateral contract.¹³⁴

Under Article 119 CO, an obligation is extinguished where its performance has become subsequently impossible due to circumstances not attributable to the obligor. Force majeure may constitute the event giving rise to such impossibility, but it is not a separate statutory requirement under Article 119 CO. Under Swiss law, force majeure is generally understood as referring to extraordinary external events that are beyond the control of the affected party and are typically unforeseeable and unavoidable. Swiss case law concerning impossibility and force majeure, although not developed specifically in relation to climate-related natural disasters,

¹³⁰ See D. Waelchli, above n. 125, 4. Waelchli argues that including statutory provisions in New York law and English law which suspend sovereign debt servicing obligations may be an effective way to mitigate the risks of sovereign defaults caused by the materialisation of physical risks.

¹³¹ Wolfgang Wiegand, Art. 119 OR, in *Basler Kommentar, Obligationenrecht I* art. 119 nn. 1–2 (Corinne Widmer Lüchinger & David Oser eds., 7th ed. 2019); Luc Thévenoz, Art. 119 CO, in *Commentaire romand, Code des obligations I* art. 119 n. 4 (Luc Thévenoz & Franz Werro eds., 3d ed. 2021).

¹³² See BGE 102 Ib 257, E. 5; Benjamin V. Enz, *Risikozuordnung in Verträgen und die COVID-19 Situation: Teil 1*, *Jusletter*, May 18, 2020, § 3.

¹³³ CO art. 119(1); Wiegand, n 131 above, art 119 n 4-6; BGE 111 II 352, E. 2a; BGer 4A_267/2025, Feb. 16, 2026, E. 4.1; Pascal Pichonnaz, *Impossibilité et exorbitance* nn. 325, 340 (1997).

¹³⁴ CO art. 119(2); Wiegand, n 131, art. 119 n. 14; BGer 4C.43/2000, May 21, 2001.

provides guidance as to the circumstances in which an external event may be regarded as sufficient beyond the obligor's sphere of responsibility to affect contractual performance.¹³⁵ These principles are potentially relevant to climate-related events such as floods, storms or other extreme weather events where the event objectively prevents the performance of a specific contractual obligation. Where Article 119 CO applies ultimately depends on whether the circumstances causing that impossibility are attributable to the obligor.¹³⁶

Where performance has not become impossible within the meaning of Article 119 CO, but a supervening and extraordinary change of circumstances has fundamentally altered the basis of the contractual relationship, the principle of *clausula rebus sic stantibus* may become relevant. Unlike Article 119 CO, which concerns the extinction of an obligation because of subsequent impossibility not attributable to the obligor, *clausula rebus sic stantibus* addresses situations in which performance remains possible but the circumstances have changed so fundamentally that adherence to the original contractual terms may become unreasonable. Force majeure may be relevant to either analysis depending on its effects: it may cause impossibility within the meaning of Article 119 CO, or, where performance remains possible, contribute to a fundamental change of circumstances potentially giving rise to an adaptation of the contract under *clausula rebus sic stantibus*. In the context of climate-related natural disasters, the applicable legal framework therefore depends on the effect of the event on the particular contractual obligation rather than on the characterization of the event as force majeure alone.¹³⁷

For Article 119 CO to apply, the supervening event must render the specific contractual performance impossible, and the circumstances causing that impossibility must not be attributable to the obligor. A force majeure event such as a natural disaster may satisfy these requirements where it directly prevents performance; the mere occurrence of an extraordinary event, however, is not sufficient if performance remains objectively possible. The assessment therefore turns on the effect of the event on the particular obligation and on whether the resulting impossibility falls outside the obligor's sphere of responsibility.¹³⁸

¹³⁵ See BGE 111 II 352, E. 2a; BGE 102 Ib 257, E. 5; BGer 4C.344/2002, Nov. 12, 2003, E. 4.2.

¹³⁶ See Pichonnaz, n 133, nn. 325, 340; Thévenoz, n 131, art. 119 n. 4; BGer 4A_267/2025, Feb. 16, 2026, E. 4.1.

¹³⁷ BGE 127 III 300, E. 5b; BGE 135 III 1, E. 2.4; Oliver Kälin, *Unmöglichkeit der Leistung nach Art. 119 OR und clausula rebus sic stantibus*, *recht* 246, 246–56 (2004).

¹³⁸ BGer 4C.335/2005, Oct. 13, 2006, E. 3.2; Pichonnaz, n 133, n. 446, at 106.

In contracts involving continuing obligations, the consequences of subsequent impossibility under Article 119 CO must be assessed in relation to the individual obligations affected by the supervening event. Where performance has already been duly rendered before the impossibility arises, those completed parts of the contractual relationship are generally not affected. By contrast, obligations that have not yet fallen due or cannot subsequently be performed may be extinguished to the extent that the requirements of Article 119 CO are met. In continuing contractual relationships, the effect of impossibility may therefore be limited to future performance rather than necessarily affecting the contractual relationship as a whole.¹³⁹

The Swiss law distinguishes between definitive and temporary impediments to performance. Article 119 CO applies where performance has become impossible due to circumstances not attributable to the obligor. In such a case, the affected obligation is extinguished by operation of law. In bilateral contracts, the obligor is released from the counter-performance to the extent provided by Article 119(2) CO and must restore any consideration already received in accordance with the rules on unjust enrichment. The legal consequence is therefore the extinction of the affected obligation rather than, in every case, the automatic termination of the contractual relationship as a whole.¹⁴⁰

Regarding temporary impossibility, where performance is only impossible for a certain period (e.g., a temporary business closure due to cancellation of state orders during the pandemic, or a supply chain interruption caused by extreme weather), the obligation is generally not extinguished under Article 119 CO, because performance may become possible again once the impediment has ceased. In such cases, the obligation remains in existence and performance is postponed rather than extinguished. Once performance becomes possible again, the consequences are generally governed by the rules on delay under Articles 102 et seq. CO. The creditor may then demand performance and, if the debtor fails to perform in due time, invoke the remedies available under the law of delay (e.g., damages or rescission under certain conditions).¹⁴¹

In borderline situations, a temporary impediment may be treated as equivalent to definitive impossibility where its duration or effects are such that the contractual purpose can no longer reasonably be achieved. If the delay is so substantial that the contractual purpose can

¹³⁹ BGer 4C.43/2000, May 21, 2001; see also Wiegand, n 131, art. 119 n. 13; Viktor Aepli, *Zürcher Kommentar: Das Erlöschen der Obligationen* art. 119 nn. 111–14 (3d ed. 1991).

¹⁴⁰ BGer 4C.34/2000, Apr. 24, 2001, E. 4; Pascal Pichonnaz & Arnaud Nussbaumer, *Les contrats de construction en temps de crise*, in *Journées suisses du droit de la construction* 2021 47, 53 (2021).

¹⁴¹ See Pichonnaz & Nussbaumer, n 142, at 53; BGE 44 II 519; Enz, n 131, § 3.

no longer reasonably be achieved (e.g., where a contract for a time-sensitive event is delayed indefinitely due to natural disaster), the impediment may therefore be treated as definitive impossibility for the purposes of Article 119 CO. This evaluation is fact-specific and depends, in particular, on the nature of the obligation, the duration of the impediment and the purpose of the contract.¹⁴²

The practical implications of Swiss legal doctrine in this area are that parties should be aware that the distinction between temporary and permanent impossibility has significant consequences for their rights and obligations. Temporary impossibility preserves the contract, while permanent impossibility extinguishes the affected obligation. In practice, many commercial agreements expressly address these scenarios through force majeure clauses, which may expand, restrict, or modify the statutory rules of Article 119 CO. In such cases, the contractual clause will generally prevail.¹⁴³

In summary, Article 119 CO principally concerns definitive impossibility of performance. A merely temporary impediment generally does not extinguish the obligation, although exceptionally its duration or effects may justify treating the situation as equivalent to definitive impossibility.

Although the COVID-19 pandemic differs in important respects from climate-related natural disasters, the contractual issues arising from pandemic-related restrictions provide a useful analogy for assessing how Swiss law responds to external events that prevent or delay contractual performance. The analogy nevertheless has limits: pandemic-related impediments frequently resulted from government restrictions, whereas climate-related impediments may arise directly from physical events such as floods, storms or droughts, or indirectly through regulatory responses to such events.¹⁴⁴

During the coronavirus pandemic in 2020, the Swiss Federal Council ordered the temporary closure of numerous businesses and imposed restrictions on public activities.¹⁴⁵ Depending on the nature of the particular contractual obligation, these measures could render performance temporarily or, in exceptional cases, definitively impossible, while in other cases they merely delayed performance. In the case where a party was obliged to make payments or

¹⁴² BGer 4C.34/2000, Apr. 24, 2001, E. 4; see Aepli, n 141, art. 119 n. 124.

¹⁴³ See CO art. 19; BGE 135 III 1, E. 2.5; Enz, n 132, §§ 2–3; Pichonnaz & Nussbaumer, n 141, at 47–64.

¹⁴⁴ See Pichonnaz & Nussbaumer, n 142, at 47–64; Thomas Geiser, *Arbeitsrechtliche Fragen bei Umweltkatastrophen*, 142 *ZBJV* 174, 174–80 (2006).

¹⁴⁵ Swiss Fed. Council, *Coronavirus: Federal Council Declares “Extraordinary Situation” and Introduces More Stringent Measures* (Mar. 16, 2020).

to repay a loan, the Federal Council ordered a general stay of debt-enforcement proceedings on 18 March 2020, applicable from 19 March 2020 to 4 April 2020.¹⁴⁶ This measure did not itself extinguish payment obligations but temporarily restricted their enforcement. For other contractual obligations, a distinction must be made between an impediment that renders the specific performance impossible and one that merely delays performance.¹⁴⁷ If the impediment causes only a delay, the obligation is generally not extinguished under Article 119 CO; instead, the rules on delay under Articles 102 et seq. CO may become applicable.

For Article 119 CO to apply, there must be a causal connection between the supervening event and the impossibility of the specific contractual performance. Where an impediment continues over time, the availability of reasonable alternative means of performance or the ability of the parties to adapt performance to the changed circumstances may therefore become relevant. The facts of each case will be determinative. If the contractual performance can reasonably be rendered despite the changed circumstances, the requirement of impossibility under Article 119 CO will not be satisfied.¹⁴⁸ Accordingly, where an impediment is merely temporary, the obligation ordinarily remains in existence and may be performed once the impediment has ceased. Where, by contrast, performance has become definitively impossible due to circumstances not attributable to the obligor, the affected obligation is extinguished under Article 119 CO.¹⁴⁹

The COVID-19 experience therefore does not establish a separate legal framework for climate-related cases, but it provides a useful illustration of how Swiss law distinguishes between definitive impossibility, temporary impediments and other changes in circumstances. Its relevance to climate-related events depends on the effect of the particular event on the contractual obligation concerned. A flood, severe storm or other climate-related event may, for example, make a particular performance impossible, merely delay it, or leave performance possible but substantially more burdensome. The applicable legal consequences must therefore be determined by reference to the nature of the contract and the effect of the event on specific obligation.¹⁵⁰

¹⁴⁶ Verordnung über den Rechtsstillstand gemäss Art. 62 SchKG, Mar. 18, 2020, AS 2020 839.

¹⁴⁷ See Pichonnaz & Nussbaumer, n 142, at 53; Enz, n 132, § 3; BGer 4A_267/2025, Feb. 16, 2026, E. 4.

¹⁴⁸ See BGer 4C.335/2005, Oct. 13, 2006, E. 3.2; Pichonnaz, n 133, n. 447, at 106; BGer 4A_267/2025, Feb. 16, 2026, E. 4.1.

¹⁴⁹ CO art. 119(1); BGE 111 II 352, E. 2a; Thévenoz, n 131, art. 119 n. 4.

¹⁵⁰ See BGer 4C.335/2005, Oct. 13, 2006, E. 3.2; BGE 127 III 300, E. 5b.

It should also be pointed out that the scope and legal consequences of force majeure may be defined by the parties in contractual force majeure clauses. Such clauses may extend or restrict the events covered and may specify the consequences of their occurrence, including suspension of performance, exclusion or limitation of liability, grace periods, renegotiation duties or termination rights. To the extent permitted by Swiss law, this contractual allocation of risk must therefore be considered before relying on the default statutory rules, including Article 119 CO. As a result, the terms and conditions of many commercial contracts expressly address events such as pandemics, natural disasters or other extraordinary circumstances and determine whether, and with what consequences, such events qualify as force majeure.¹⁵¹

Where a climate-related event makes contractual performance impossible, the application of Article 119 CO must be assessed according to its statutory requirements, in particular whether the specific performance has become impossible due to circumstances not attributable to the obligor. This inquiry must be distinguished from the interpretation of a contractual force majeure clause. Where such a clause exists, its working will determine which events are covered and which contractual consequences follow, whereas Article 119 CO governs the statutory consequences of subsequent impossibility.¹⁵²

The Swiss Supreme Court has not developed a settled line of case law applying Article 119 CO specifically to contractual impossibility caused by climate change or climate-related natural disasters. Swiss case law nevertheless provides relevant guidance both on Article 119 CO generally and on the legal treatment of natural hazards in other contexts. In particular, natural-hazard disputes have arisen under the rules on *Werkeigentümerhaftung* (Article 58 CO). In BGE 122 III 229, for example, the Federal Supreme Court considered claims arising from severe flooding of agricultural land following repeated overflow of the River Nozon and examined whether the condition and maintenance of the relevant flood-control works gave rise to liability under Article 58 CO.¹⁵³ Such cases concern liability for damage rather than the extinction of contractual obligations under Article 119 CO, but they demonstrate that Swiss courts have addressed questions of foreseeability, risk and protective measures in the context of extreme natural events.

Swiss law does not contain a general statutory definition of force majeure in the Code of Obligations, and force majeure should not be equated with Article 119 CO. Federal Supreme

¹⁵¹ See CO art. 19; BGE 135 III 1, E. 2.5; Enz, n 132, §§ 2–3; Pichonnaz & Nussbaumer, n 142, at 47–64.

¹⁵² See CO arts. 19, 119; Wiegand, n 130, art. 119 nn. 1–2; Enz, n 132, § 3.

¹⁵³ BGE 122 III 229, E. 5; Peter Gauch & Richard Sinniger, Vom Nozon, der über die Ufer trat ... und wie das Bundesgericht die Haftungsfrage entschied, *BR/DC*, no. 2, 42, 42–49 (1997).

Court case law describes force majeure more generally as an unforeseeable and extraordinary external event occurring with unavoidable force, while Article 119 CO focuses on whether subsequent impossibility is due to circumstances not attributable to the obligor.¹⁵⁴ A force majeure event may therefore be the cause of an impossibility within the meaning of Article 119 CO, but unforeseeability and unavoidability are not, as such, separate statutory requirements of Article 119 CO. The decisive question under Article 119 CO is whether the event has rendered the specific contractual performance impossible in circumstances not attributable to the obligor. If performance remains possible but circumstances have fundamentally changed, the principle of *clausula rebus sic stantibus* may apply.¹⁵⁵

The Federal Supreme Court has also considered the consequences of COVID-19 business closures in BGE 150 III 22, albeit in the specific context of employment law. The Court held that pandemic-related business closures constituted objective reasons relevant under Article 91 CO and explained that the special risk-allocation rule in Article 324 CO may take precedence over the general rule in Article 119 CO.¹⁵⁶ The decision should therefore not be presented as direct authority on the application of Article 119 CO to pandemic-related contractual impossibility. It is nevertheless instructive because it demonstrates that the legal consequences of an external emergency depend on the particular contractual relationship and on the applicable statutory allocation of risk. To date, the Federal Supreme Court has not developed a comprehensive line of case law applying Article 119 CO to pandemic-related contractual disputes.

In summary, Article 119 CO provides the statutory framework for subsequent impossibility of performance due to circumstances not attributable to the obligor. Force majeure is a distinct concept that may cause such impossibility but may also have other legal consequences, particularly where the parties have agreed on a contractual force majeure clause. These principles are potentially relevant to both climate-related events and pandemics, but their application depends on the specific effect of the event, the nature of the contractual obligation and the parties' allocation of risk. The COVID-19 experience and the existing case law on natural hazards provide useful points of comparison, although there is no settled line of Federal Supreme Court case law on climate-related impossibility under Article 119 CO. The Federal Supreme Court has so far addressed these questions only in related or specific contexts, without

¹⁵⁴ BGE 102 Ib 257, E. 5.

¹⁵⁵ BGE 127 III 300, E. 5b; BGE 135 III 1, E. 2.4; Kälin, n 137, at 246–56.

¹⁵⁶ BGE 150 III 22, E. 4–5.

developing a settled line of case law directly concerning climate-related contractual impossibility under Article 119 CO.

General assessment of contractual principles for modifying or excusing performance

The legal principles discussed above concerning supervening events perform broadly comparable functions, but their requirements and legal consequences differ across jurisdictions. Under English and US law, impossibility, impracticability and frustration of purpose may, subject to their respective requirements, excuse or discharge contractual performance. Under Swiss law, Article 119 CO governs subsequent impossibility of performance due to circumstances not attributable to the obligor, while force majeure and the principle of *clausula rebus sic stantibus* may become relevant in different circumstances and may produce different legal consequences.

Despite these doctrinal and statutory differences, the legal regimes share certain underlying considerations. In particular, the effect of the supervening event on the specific contractual obligation, the parties' allocation of risk, and the extent to which the event or its consequences fall within the affected party's sphere of responsibility are central to determining whether performance may be excused, extinguished, suspended or otherwise affected.

As sovereign defaults related to the impacts of physical risk may arise from unexpected circumstances, including natural disasters, the legal principles governing supervening events may provide a potential framework alongside statutory mechanisms and contractual instruments such as CRDCs. The paper also argues that these principles may assist parties in determining whether contractual obligations should be excused, extinguished, suspended or, where the applicable legal framework permits, adapted in response to climate-related events and other unforeseen weather phenomenon.

Conclusion

The article discussed the possibility of using the common law principles of impossibility, impracticability and frustration of purpose, as well as the Swiss rules on subsequent impossibility under Article 119 CO and the related concept of force majeure, to excuse performance of certain contractual obligations because of natural disasters and other climate change events.

It is submitted that the principles and rules governing supervening events allow for the excuse, extinction, suspension or other modification of certain primary obligations under a contract due to unexpected supervening events, such as when the ability of the parties to perform their obligations is hindered or limited because of severe climate change-related weather phenomenon or other natural disasters. The applicable legal consequences depend on the relevant legal regime, the effect of the event on the contractual obligation, and the parties' allocation of risk.

The article discusses how the principles and rules derived from force majeure, impossibility of performance and frustration of purpose are addressed under the laws of England, the United States and Switzerland and how they might be applied to excuse performance of contractual obligations made impossible by unforeseen natural disasters and other weather events caused by climate change.

The case of CRDCs is mentioned as an example of how law reform can mitigate some of the economic and legal risks for states and investors associated with natural disasters. But CRDCs have not been used often by states in their sovereign bond contracts. As some scholars point out, their impact will be limited.¹⁵⁷

In the absence of legal reform, doctrines relating to unexpected circumstances under English law and US law and Article 119 of the Swiss Code of Obligations are narrowly construed by the courts of these jurisdictions and therefore may not provide an adequate legal basis for an efficient and equitable excuse or other adjustment of contractual performance when such performance is hindered or limited by unforeseen weather-related disasters caused by climate change.

The paper argues, however, that the doctrines relating to unexpected circumstances under the common law and Article 119 of the Swiss Code of Obligations provide a legal roadmap of (albeit narrowly construed) legal rules and exceptions for determining whether a party's obligations under a contract should be excused or otherwise affected because of weather-related natural disasters caused by climate change.

¹⁵⁷ See Waelchli, n. 125, 10-11.