

Excusing Performance of Contractual Obligations:

The Impact of Climate Change Events

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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 civil law jurisdictions, such as Switzerland, the doctrine of impossibility of performance of contractual obligations may be a defense against a contract claim if the event which made performance impossible was unforeseen by the parties at the time the contract was made.¹ Where the event was found to be foreseeable, Swiss courts have denied relief unless the party seeking relief had provided for the contingency in his contract.

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

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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.

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 sovereign bonds issued by countries that are unable to fulfil their repayment obligations

² The IPCC in its sixth assessment report outlined 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.

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.

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

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’ (forthcoming 2022) *Capital Markets Law Journal*, 11.

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

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 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

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.

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

¹⁶ Palmer, n 14 above, 72.

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 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

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.

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

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

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 K B 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.

³² Treitel, n 20 above, para 4-004.

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, 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 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

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.

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

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 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

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 TW 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 LIL Rep 456.

⁴⁸ Treitel, n 20 above, para 6-031.

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

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

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 Noblee 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.

⁵⁷ *ibid* para 7-011.

⁵⁸ *ibid* para 7-036.

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 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

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 *Esposito 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.

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.

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 Compañía 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 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

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.

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.

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 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.

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.

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

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

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

⁸⁹ § 261 Restatement (Second) of Contracts.

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

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

⁹⁰ UCC § 2-615.

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.

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 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

⁹⁵ *Mineral Park Land Company v Howard* 172 Cal289, 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.

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.

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 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

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.

¹⁰⁶ *ibid* 71ff.

¹⁰⁷ See Perillo, n 92 above, 484.

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

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

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.

¹¹² § 265 Restatement (Second) of Contracts.

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

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

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

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.

¹¹⁹ *ibid* 499.

¹²⁰ Perillo, n 92 above, 506.

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 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

¹²¹ *ibid* 506.

¹²² *ibid* 493.

¹²³ *ibid* 506 ff.

¹²⁴ Grenada has issued bond contracts that contained a "hurricane clause" in its debt arrangement with foreign investors.

obligations under the bond contract. 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.¹²⁵ 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.¹²⁶ 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.¹²⁷

The usefulness of CRDCs is questionable, however, as they are currently not widely used in sovereign bond contracts (and other sovereign debt instruments).¹²⁸ Also, CRDCs suffer from certain limitations that undermine their potential effectiveness in preventing sovereign defaults caused by physical risks.¹²⁹ 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, it is possible that agreed contractual services - or entire contractual relationships – may be modified

¹²⁵ 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).

¹²⁶ 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).

¹²⁷ 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).

¹²⁸ *ibid.*

¹²⁹ See D. Waelchli, *Climate-proofing Sovereign Bond Contracts* (Zurich: Dike, 2025) 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.

or excused if certain conditions are met under Article 119 CO (force majeure).¹³⁰ The force majeure principle set forth in Article 119 CO also recognises the doctrine of impossibility.

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.¹³¹ 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.¹³²

Art. 119

¹ An obligation is deemed extinguished where its performance is made impossible by circumstances not attributable to the obligor.

² 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.

³ This does not apply to cases in which, by law or contractual agreement, the risk passes to the obligee prior to performance.

Under Swiss law, a party may invoke impossibility of performance because of force majeure if three conditions are met: 1) Article 119 CO describes "circumstances not attributable to the obligor", including coincidence and force majeure. The term force majeure includes natural environmental phenomenon such as floods and earthquakes as well as war, terrorism and labour strikes. 2) The common elements of these events are that they are *unforeseeable* at the time the contract was concluded and 3) the occurrence of the event was unavoidable.¹³³ The question of whether a natural disaster or climate-induced weather event would constitute grounds for invoking impossibility of performance under a private contract has not been conclusively confirmed in a Swiss court decision. This will depend on the facts of each case and whether the three conditions are met.

If the three conditions required by Article 119 CO are not met, and there is no force majeure situation, it must be considered whether the circumstances are of such extraordinary

¹³⁰ Wiegand, n 1 above, Art 119, N 1-2.

¹³¹ Wiegand, n 1 above, Art 119, N 4-6.

¹³² *ibid* N 10, 14.

¹³³ *ibid* N 12-13.

nature that the performance of the contractual obligation can be adapted to the changed circumstances. This is known as the principle of “*clausula rebus sic stantibus*”. In the context of natural disasters or other climate-induced emergency events that may hinder or limit performance of a contract under Swiss law, it is not clear whether a party can specifically invoke force majeure or impossibility *or* whether contractual obligations can be adapted or whether the agreement itself renegotiated based on the principle of *clausula rebus sic stantibus* to the new circumstances.

Nevertheless, under Article 119 CO a force majeure event – such as natural disaster, war or social emergency because of a pandemic - that causes impossibility of performance *only* leads to the excusal or extinction of contractual obligations if the force majeure event (ie., natural disaster) provides a sufficient causal effect – or proximate cause – that renders the party’s performance under the contract impossible.¹³⁴

In the situation of a contract with continuing obligations, such as financial services contracts, their performance can be affected. Under such contracts with continuing payment obligations, any payments previously made to the other party are not affected by a reversal. In this case. The reversal applies to services currently to be rendered.

In addition, Swiss contract law, and in particular Article 119 of the Swiss Code of Obligations (“CO”), draws a fundamental distinction between permanent (definitive) impossibility and temporary impossibility. Commentary on Article 119 defines permanent impossibility to be where performance of a contractual obligation becomes definitively impossible due to circumstances beyond the debtor’s control (e.g., destruction of the subject matter by a natural disaster, or the death of a person whose personal performance is essential), the obligation is extinguished by law.

In bilateral contracts, the counter-performance of the other party is also released. Under the rules on unjust enrichment, a party which pays or performs their side of the contract must be reimbursed from the counter-party whose performance was excused because of the unforeseen climate change event. The legal consequence is thus the automatic termination of the relevant obligations between the parties, and neither party is bound to continue performance.

¹³⁴ *ibid* N 8-9.

Regarding temporary impossibility, where performance is only impossible for a certain period (e.g., a temporary business closure due to state orders during the pandemic, or a supply chain interruption caused by extreme weather), Swiss law does not consider Article 119 CO applicable. In these cases, the debtor remains obliged to perform once the impediment has been removed. The obligation is delayed, not extinguished. At this point, the legal framework shifts to the rules on delay (Articles 102 ff. CO). Once the performance again becomes possible, the creditor may demand it, and if the debtor fails to perform in due time, the creditor may invoke the remedies available under the law of delay (e.g., damages or rescission under certain conditions).

In borderline situations, doctrine and case law recognise that a very long-lasting but temporary impossibility can, in practice, be assimilated to permanent impossibility. If the delay is so substantial that the contractual purpose can no longer reasonably be achieved (e.g., where a contract for a time-sensitive event is delayed indefinitely due to natural disaster), courts may treat the obligation as definitively impossible, thereby triggering Article 119 CO. This evaluation is fact-specific and depends on whether the continued existence of the contractual purpose has been frustrated.

The practical implications of Swiss legal doctrine in this area is 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 it. 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.

In summary, Swiss law only applies Article 119 CO where performance is definitively and objectively impossible. Temporary impossibility suspends performance until the impediment is removed, unless the delay is so significant that the purpose of the contract is frustrated, in which case the law treats it as a permanent impossibility.

During the corona virus pandemic in 2020, the Swiss Federal Council ordered businesses to close and limited public interaction. In many situations, this made the performance of contracts impossible, thus triggering the application of Article 119 CO. In the case where a party was obliged to make payments or to repay a loan, the Federal Council issued a ban on debt enforcement on 18 March 2020. In the case where other non-payment were

required under a contract, legal opinion recognises that a distinction must be made regarding whether it is actually impossible to provide the service or whether the circumstances merely lead to a delay in performance.¹³⁵ If the circumstances lead to a delay, then Article 119 CO does not apply and a separate set of statutory rules regarding delay will apply. In determining whether the force majeure event has adequate causality, the timing between the occurrence of the force majeure event and the carrying out of the contractual obligation will be relevant. Where the force majeure event continues over time (ie., an extended natural emergency because of a flood) then the parties will be expected to adapt their relations to the new circumstances. The facts of each case will be determinative. If it is possible for the parties reasonably to adapt their behaviour to the unexpected event, there will no longer be adequate causality between the force majeure event and the time that the act or service under the contract is required to be performed, thereby negating impossibility.¹³⁶ Also, Article 119 CO apply only to the claim for performance and, if applicable, the claim for consideration, but it does not apply to the contractual obligation itself, which can be revived at a later date once the emergency circumstances have expired.¹³⁷

The coronavirus episode and the government ordered lockdown has provided a legal framework for determining how Article 119 CO would apply in an emergency situation. The experience with applying Article 119 CO shows that its application in other emergency situations, such as natural disasters or climate-induced weather emergencies will depend on the type of contract and the facts surrounding the performance of that contract.

It should also be pointed out that the legal scope of application of a force majeure event can be contractually extended or restricted by the parties involved. The adoption of such clauses by the parties can take precedence over the general application of Article 119 CO. As a result, the terms and conditions of many commercial contracts, where the parties have a sophisticated understanding of the business, contain force majeure clauses, which apply, for example, to the occurrence of pandemics or other unexpected circumstances, such as natural disasters, that are to be qualified or not as a force majeure event. These contractual force majeure clauses also contain provisions on breach, damages, termination of liability for the non-breaching party or grace periods for late performance.

In the case of climate change causing circumstances that make it impossible for parties to perform under the contract, the fulfilment of the requirements of Article 119 CO will be

¹³⁵ Wiegand, n 1 above, Art 119, N 16.

¹³⁶ See Wiegand, n 1 above, Art 119.

¹³⁷ *ibid* N 15-16.

strictly construed. However, a final assessment of whether the conditions have been fulfilled will be made on the basis of the specific circumstances and the wording of the contract that will define the coverage and scope of the force majeure event.

In addition, there are no court cases (BGer decisions) that provide systematic case law on Art. 119 CO (impossibility without fault) in connection with climate change or natural disasters such as floods. The doctrine exists and could, in theory, be applied where a natural event objectively prevents contractual performance without the debtor's fault, but the BGer has not yet issued a decision in such cases.

Instead, the Court has dealt with natural hazard situations primarily under tort law and *Werkeigentümerhaftung* (Art. 58 CO), e.g. liability for inadequate flood protection, defective riverbanks, or insufficient maintenance of drainage systems. These cases focus on damages rather than the extinction of contractual obligations.

Also, during the COVID-19 pandemic, legal practitioners have determined that Swiss law does not explicitly regulate force majeure;¹³⁸ however, it is recognized under Article 119 CO. As discussed above, according to Article 119 CO, if performance is objectively impossible due to unforeseeable and unavoidable events, obligations may be extinguished. Each case requires a strict assessment of causality (the event must make the specific performance impossible, not just economically burdensome). And if performance remains possible but circumstances have fundamentally changed, the principle of *clausula rebus sic stantibus* may apply.

It should also be mentioned that the BGer has discussed COVID-19 closures in the context of Art. 119 CO (e.g. BGE 150 III 22 refers to such closures as objective reasons relevant for impossibility). However, to date there is no fundamental or systematic body of case law on how Art. 119 CO applies to pandemic-related contractual disputes. Much of the discussion has taken place at the cantonal level or in doctrine.

In summing up Swiss law, Article 119 CO, provides the theoretical framework for impossibility due to force majeure, potentially relevant for both climate-related events and pandemics. In practice, however, the BGer has not yet developed leading case law on Art. 119 CO in these contexts.¹³⁹ The COVID-19 experience shows that courts and scholars treat such extraordinary events under the same legal categories, but the highest court has so far only touched upon these questions without creating settled doctrine.

¹³⁸ See discussion at <https://www.mme.ch/en/magazine/articles/force-majeure-in-contract-law>

¹³⁹ Natural disaster cases are more commonly litigated under *Werkeigentümerhaftung* (Art. 58 CO).

General assessment of contractual principles for modifying or excusing performance

The doctrines discussed above relating to unexpected circumstances share similar scopes and limitations. They all apply in relation to unexpected circumstances which have made the performance of an obligation impossible, impracticable, or changed the fundamental purpose of the contract in question.

Similarly, they are all limited to circumstances where the party relying on a doctrine related to unexpected circumstances has not contributed to the occurrence of such an unexpected event and the risk of the occurrence of such an unallocated event has not been assumed by the party relying on the doctrine relating to unexpected circumstances.

As sovereign defaults related to the impacts of physical risk occur due to unexpected circumstances, namely natural disasters, doctrines relating to unexpected circumstances appear as potential alternatives to other statutory approaches or model clauses such as CRDCs. The paper also argues that the doctrines relating to unexpected circumstances provide advantages for parties seeking to modify their contractual obligations because of climate-related factors that are induced by unforeseen weather phenomenon.

Conclusion

The article discussed the possibility of using the doctrine of impossibility (also known as force majeure) in the common law and force majeure in the Swiss civil law to excuse performance of certain contractual obligations because of natural disasters and other climate change events. It is submitted that the principles of the common law of contract, such as impossibility of performance, frustration of purpose and/or force majeure allow for the suspension of the performance 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. It requires that the courts consider the modification and/or suspension of such contractual obligations as an efficient and equitable way to mitigate weather-related damage that can induce a party to default. The article discusses how the principles and rules derived from force majeure, impossibility of performance and frustration of purpose are applied similarly in the case law 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 study 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. 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 modification of 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 modified or excused because of weather-related natural disasters caused by climate change.