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The Coronacrisis and Its Impact on Creditors: Frustration of Purpose

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Abstarct: *French and Belgian law merely offer doctrines that allow for the dislocation of the risk a party bears in its capacity of debtor, namely the risk of impossible or more onerous performance of obligations. Both legal systems are debtor centrist in that regard. In light of the socio-economic crisis following the outbreak of the coronavirus SARS-CoV-2, this debtor centrist approach appears to be insufficient. The present article argues that this insufficiency is due to the debtor centrist approach and could be resolved by allowing for a doctrine that takes the materialization of the creditor risk, the frustration of purpose, into account. As German law, but also Dutch and English law, provide, such an approach exists and proves more apt to deal with contract cases arising under the current crisis.*

Zusammmenfassung: *Das französische und das belgische Recht bieten lediglich Doktrinen an, die eine Verlagerung des Risikos ermöglichen, das eine Partei in ihrer Eigenschaft als Schuldner trägt, nämlich das Risiko einer unmöglichen oder beschwerlichen Erfüllung von Pflichten. Beide Rechtsordnungen sind in dieser Hinsicht schuldnerzentriert. Angesichts der sozioökonomischen Krise resultierend aus dem Ausbruch des Coronavirus SARS-CoV-2 scheint dieser schuldnerzentrierte Ansatz unzureichend zu sein. Der vorliegende Artikel argumentiert, dass diese Unzulänglichkeit auf den schuldnerzentristischen Ansatz zurückzuführen ist und durch die Zulassung einer Doktrin, die die Materialisierung des Gläubigerrisikos, die Zweckvereitelung, berücksichtigt, gelöst werden könnte. Wie das deutsche, aber auch das niederländische und englische Recht zeigen, existiert ein solcher Ansatz und erweist sich als geeigneter, um mit Fällen umzugehen, die in der aktuellen Krise auftreten.*

Résumé: *Les droits français et belge se contentent d'offrir des doctrines qui permettent de disloquer le risque qu'une partie supporte en sa qualité de débiteur, à savoir le risque d'une exécution impossible ou plus onéreuse de ses obligations. Les deux systèmes juridiques sont centrés sur le débiteur à cet égard. A la lumière de la crise socio-économique qui a suivi l'épidémie du coronavirus SARS-CoV-2, cette approche centrée sur le débiteur semble insuffisante. Le présent article soutient que cette insuffisance est due à l'approche centrée sur le débiteur et qu'elle pourrait être résolue en autorisant une figure juridique qui prend en compte la matérialisation du risque du créancier, c'est-à-dire la frustration du but. Comme le droit allemand, mais aussi le droit néerlandais et le droit anglais, le prévoient, une telle approche existe et s'avère plus apte à traiter des cas survenant dans le cadre de la crise actuelle.*

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1. Introduction

1. The socio-economic crisis following the outbreak of coronavirus SARS-CoV-2, which leads to COVID-19[1] disease (hereinafter 'the crisis' or 'the current crisis') is, among so many others, tough on contractual relations. It puts the ability of contract law to deal with the impact of changed circumstances to the test. The crisis has made clear that the doctrines that are usually relied upon to deal with changed circumstances – *force majeure* and hardship – are unable to provide a satisfying result for both parties in a synallagmatic contract in particular types of cases. That is so, when each party in its capacity of debtor still is able, and thus obliged, to perform its obligation despite the changed circumstances, while one of the parties, may have lost the purpose it had, in its capacity of creditor, in the enjoyment of his right. That is for instance the case of the tenant of a shop that has to close down due to the measures taken by the government. Except for possible bailout measures, the tenant generates no income but nevertheless can, and thus has to, pay its rent. Another example are students whose courses have shifted to an exclusively online format and therefore have no need to stay in their student housing on campus. They can still occupy it, but have no use in doing so as all on campus activities have come to a halt. Still, they too, must pay their rent. At last, think of a young boy that wishes to no longer attend his dance class out of fear of being contaminated at the classes. The class, however, is still provided. The young boy could still enjoy his dance class, but not attending them is a sound and responsible decision in light of the facts known at that moment.

The three chosen examples vary in degree, not in kind. The underlying issue is that a party, in its capacity of creditor (hereinafter short 'the creditor') is impeded in the enjoyment of his right without that impediment being attributable to wrongful conduct by the debtor or by the creditor. The variation in degree concerns the degree of purposefulness of the enjoyment of the right. While the renting of the shop is only of limited purpose to the tenant, the student can still inhabit his student housing even though it lacks the original purpose and the young boy is still able to attend his dancing classes even though he is afraid to do so. In all of these cases, this creditor must bear the entirety of the risk while being unable to – purposefully or desirably – enjoy his right.

2. Under Belgian and French law, none of these situations has a ready to hand solution. Indeed, none of the persons mentioned can rely on *force majeure* as the performance of their obligations to pay rent or pay for dancing classes have by no

1 The present article was finalized on the (15 May 2021) and does not take later developments of the crisis and the related case law and scholarship into account. In the meantime, the Belgian reform project has been voted in parliament and been published: Loi du 28 avril 2022 portant le livre 5 Les obligations du Code civil, *MB* (1 Jul. 2022). The new provisions will enter into force on (1 Jan. 2023). An translation of the texts into English language is currently in the making.

means become impossible. Neither can we adequately speak of cases of hardship since the performance of the obligations of the parties has, in absolute terms, not become (significantly) more onerous or otherwise burdensome. That leaves parties and judges with no doctrine that can adequately deal with such cases.

In that regard, the force majeure and hardship doctrines entail a *debtor centrist* approach to cases of changed circumstances. They are used to asses to what extent the performance of the contractual obligations by the debtor have become hindered or otherwise more burdensome. However, they fail to look at the purpose a creditor has in the enjoyment of his right and the possible loss of it caused by changed circumstances.

3. In the present article, I intend to show to what extent the doctrines of *force majeure* and hardship are indeed debtor centrist and that this characteristic explains why those doctrines cannot adequately deal with a variety of the cases arising in the current crisis. Under dealing 'adequately' with cases, I understand the ability of a doctrine to provide pertinent evaluations of the relevant facts. The latter, as I will show, is possible under (at least) German, Dutch and English law as those systems provide for a broader doctrine of frustration which can take the materialization of the creditor risk into account.

The aim of the present article is to zoom out of the specificities of the current crisis and assess the cases that arise under it from a broader and more abstract point of view. This should allow a more perennial reflection on the contract related issues that are being faced in the current crisis.

4. Because of the rather limited space and the width of the issue, I had to limit the present article to the most relevant issues. This may lead the informed reader to feel that possible alternative doctrines, were set aside. However, I chose to focus on the doctrines that offer realistic chances of success plus that are sufficiently comparable in order to be able to usefully accomplish the comparative exercise this article aims at. That is why I shall focus more on the general principles underlying the analysed doctrines rather than on their peculiarities.[2]

I rely on a functional approach to this comparative exercise,[3] based on a common problem, namely the (in)ability of legal systems to provide an adequate doctrine to cases of impediment of enjoyment of a right caused by changed circumstances.[4] My hypothesis is that French and Belgian law fail to provide such

2 Read A.E. Örücü, 'Methodology of comparative law', in J. Smits (ed.), *Elgar Encyclopedia of Comparative Law* (Cheltenham: Edward Elgar Publishing Limited 2012), p 573.

3 Extensively on the functional method of comparative law R. Michaels, 'The Functional Method of Comparative Law', in M. Reimann & R. Zimmermann (eds), *The Oxford Handbook of Comparative Law* (Oxford: Oxford University Press 2019), pp 346-386.

4 D. Pieters & B. Demarsin, *Rechtsvergelijking* (Leuven: Acco 2020), p 46; A.E. Örücü, in *Elgar Encyclopedia of Comparative Law*, pp 561-562; K. Zweigert & H. Kötz, *An Introduction to Comparative Law* (Oxford: Clarendon Press 1998), p 34.

a doctrine because their doctrines dealing with changed circumstances are debtor centrist. Legal systems that can take the materialization of a creditor risk into account (among others German, Dutch and English law), however, do provide an adequate[5] doctrine for the matter.

In order to test this hypothesis, the article first will discuss the broader issue of contractual fixation and the allocation of risk it involves (section 2), to then discuss the possibilities of risk dislocation in cases of changed circumstances (section 3). This will reveal to what extent current French and Belgian law are debtor centrist in their approach to changed circumstances. In response to that insight, section 4 will discuss the doctrine of frustration, foremost under German law, as a way out of the debtor centrist impasse. Lastly, a few issues that are relevant from a comparatist point of view shall be discussed (section 5).

2. Contractual Fixation and Risk Allocation

2.1. Contractual Fixation

5. Contract as a tool for organization – In his highly influential *The New Social Contract*, Ian R. Macneil defines the contract as 'the relations among parties to the process of *projecting exchange into the future*'.[6] Concluding a contract, allows parties to organize their exchange relations in order to create a stable basis for their current and future enterprises. Creating such stable exchange relations is only possible, when the agreement between parties is binding upon them.

Legally speaking, this fixation of rights and obligations in time and scope is expressed by the adage *pacta sunt servanda.* Parties are bound by what they have agreed upon and cannot come back on it as they see fit, unless they agree to do so.[7] The judge, too, is bound by the intention of the parties. The contract becomes the law of the parties as the *Code civil* of 1804 stipulates elegantly in its Article 1134, al. 1: '*Les conventions légalement formées tiennent lieu de loi à ceux qui les ont faites*'.

6. Fixation of obligations and rights based on believed circumstances – Through the conclusion of a contract, parties fixate their respective rights and obligations so that they know *what* they owe each other and *when* it is due.[8] They do so based on

5 See the reserve on what an adequate solution is in K. Zweigert & H. Kötz, *An Introduction to Comparative Law*, p 33.

6 I.R. Macneil, *The New Social Contract: An Inquiry into Modern Contractual Relations* (New Haven: Yale University Press 1980), p 4.

7 Belgium: Art. 1134, al. 1 and 2 (old) civil code. France: Art. 1103 civil code. Germany: §241 (1) BGB Netherlands: Art. 6:248 al. 1 NBW. See on that point E. Hondius & H.C. Grigoleit, 'Introduction: An approach to the issue of doctrines relating to unexpected circumstances', in E. Hondius & H.C. Grigoleit (eds), *Unexpected circumstances in European Contract Law* (Cambridge: Cambridge University Press 2011), p 4.

8 E.V. Townfigh & N. Petersen, *Ökonomische Methode im Recht* (Tübingen: Mohr Siebeck 2017), pp 134 ff., nrs. 266-268; E. Hondius & H.C. Grigoleit (2011), in *Unexpected circumstances in*

the circumstances they believe to be true at the moment of the conclusion of the contract.[9] In that perspective, a contract is a means of fixation of rights and obligations *based on the believed circumstances relevant to those rights and obligations.*[10]

Those believed circumstances constitute the backbone of contractual agreements. Often only implicitly mentioned in their agreement, the present and future circumstances to their agreement are material to the very existence of their agreement. As Seneca (4 BC-AD 65) already put it: 'All conditions must be the same as they were when I made the promise if you mean to hold me bound in honour to perform it'.[11] Under German law, this backbone of the contractual agreement is called the *Geschäftsgrundlage*, the foundation of the agreement.[12] If, for instance, I rent a premise for a shop, I rent it based on the belief that I will be able to open that premise to customers and sell my product to them in that shop.

Yet, these *believed* circumstances can turn out to be inconsistent with the actual circumstances. Either the circumstances believed to be true were erroneous at the moment of the conclusion of the contract or they were true at the moment of the conclusion of the contract but changed subsequently to that moment. In the first scenario the doctrines of mistake or fraud (if the mistake has willingly been induced) is at stake. We shall not deal with those type of cases. It is the latter type of cases, that of changed circumstances, that is central to the present article.

7. Risk materialization – If circumstances change and that change affects the contractual relation[13] and more precisely the respective rights and obligations of the parties, a *contractual risk has materialized.* In other words, the risk materialization does not concern the changed circumstances, but the impact it has on the contractual rights and obligations.

European Contract Law, p 4; C. Fried, *Contract as Promise. A Theory of Contractual Obligation* (Cambridge: Harvard University Press 1981), pp 13–14; I.R. Macneil, *The New Social Contract*, p 19.

9 See M.-P. Weller, M. Lieberknecht & V. Habrich, 'Virulente Leistungsstörung – Auswirkung der Corona-Krise auf die Vertragsdurchführung', 15. *NJW* (*Neue juristische Wochenschrift*) 2020, p 1020.

10 See on that point D. Medicus, 'Vertragsauslegung und Geschäftsgrundlage', in H.H. Jakobs & K. Ballerstedt, *Festschrift für Werner Flume zum 70. Geburtstag* (Köln: Schmidt 1978) pp 636–637.

11 *Omnia esse debent eadem, quae fuerunt quum promitterem, ut promittentis fidem teneas.* Seneca, *De beneficiis*, pp 4, 35, 3.

12 Pfeiffer, '§313 BGB Störung der Geschäftsgrundlage', in *Staudinger Kommentar* (9th ed. 2020), nr. 35.

13 Indeed, even a considerable change in circumstances as such, is of no relevance to the contractual agreement. An imposed lockdown certainly is an unpleasant thing, but is totally irrelevant to my subscription to an online library for e-books. The change of circumstances only is relevant if it affects the contractual relation and more precisely the respective rights and obligations of the parties.

The very existence of a risk then begs the question of its allocation, i.e., the question of who has to bear the negative consequences of the materialization of the risk and to what extent.

2.2. Risk Allocation

8. Contract parties: debtor-creditor relation – The contract, or rather its conclusion, is the source and thus legitimization of obligations, respectively rights – depending on the perspective one takes.[14] From the perspective of the creditor, we speak of rights; from the perspective of the debtor, we speak of obligations. In a synallagmatic contract, the obligation of the one, is the right of the other. The obligation to pay of the buyer is the right to receive payment of the debtor.

Not seldom, scholars speak of a creditor and a debtor *of the contract*, meaning the creditor or debtor of the characteristic right or obligation of the contract. In a contract of sale for instance, the buyer may be seen as the creditor of the contract in as far as he has the right to receive the sold good. Yet, and quite obviously, such an approach to the creditor-debtor relation – and to contracts in general – lacks nuance. Rather, one should speak of the debtor or the creditor of a contractual obligation. For that reason, when I speak of the debtor or the creditor in the present article, I always mean the debtor or creditor of a particular *contractual obligation*, not of the *contract as a whole.*[15]

9. Risk – Both, the debtor *and* the creditor of an obligation run a risk. That means that they have to bear the negative consequences that may result of the materialization of a risk. That risk, is the *legal* risk – as opposed to the *economic* risk – in contractual relations. The legal risk describes which party legally has to bear the materialization of a risk. The economic risk is far more complex to assess and shall not be dealt with.

In a contractual relation, the *debtor* has to perform and thus bears the juridical risk of his own inability or difficulty to perform the contractual obligation.[16] The *creditor*, too, carries a risk. He risks the loss of value, usefulness or desirability of the benefice of his right.[17] Think of the child who no longer wishes to attend its dancing class and thus has to bear that loss of *desirability* to enjoy its right.

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14 M.E. Storme, 'Het contractsbegrip op dieet?', *TPR (Tijdschrift voor Privaatrecht)* 2008, p 305.

15 In the same sense P. Wéry, *Droit des obligations – Volume 1* (Bruxelles, Larcier 2021), p 591, nr. 578.

16 Germany: Pfeiffer, in *Staudinger Kommentar*, nr. 10. Netherlands: C.H. Sieburgh, *De verbintenis in het algemeen, 6-I* (Deventer: Kluwer 2020), nr. 337.

17 Germany: Pfeiffer, in *Staudinger Kommentar*, nr. 13.5; R. Schulze, 'Anpassung und Beendigung von Verträgen', in R. Schulze (ed.), *Bürgerliches Gesetzbuch* (10th ed. 2019), nr. 25; Finkenauer, 'BGB § 313 Störung der Geschäftsgrundlage', in *Münchener Kommentar zum BGB* (8th ed. 2019), nr. 253; Contract theory: C. Fried, *Contract as Promise*, p 59.

Beyond this default risk allocation, the contractual agreement can specify the allocation of risk. The risk that parties assume contractually – explicitly or implicitly – must be borne by them (see *infra* nr.10). If the contract fails to offer a solution, so that no convincing answer can be found in the contractual agreement and relation (a matter of interpretation), not even implicitly, a reasonable allocation of the risk will be undertaken (a matter of complementing a contract).[18] The divide between interpretation and complementation of an agreement is fluid and a matter of perspective.[19]

10. Contractually assumed risk – Who has to bear what risk can follow either explicitly from contractual stipulations on the possibility of risk materialization, or implicitly from the larger design of the contract and the contractual relation between parties. If such risk allocation covers the materialized risk, the contract itself solves the issue arising from the risk materialization.[20]

The most explicit and straightforward contractual risk allocation is that of a *force majeure*, hardship or Material Adverse Change (MAC) clause (used in merger contracts).[21] Roughly speaking, those clauses determine which party has to bear the negative impact on contractual rights and obligations caused by changed circumstances.[22]

More implicitly, the fact that a certain risk was known to the parties although they omitted to stipulate for the case of its materialization, is a strong – yet not always decisive – indication that parties intended not to deviate from the default risk allocation (see *supra* nr. 9) in case of the materialization of the risk. An individual that opens a new shop in the midst of the current crisis without stipulating on the possible consequences a lockdown, may be considered to have accepted the risk of such a lockdown.

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18 Furthermore, it cannot be excluded that such a reasonable risk allocation may be prioritized if a contract implicitly provides for a risk allocation, but such allocation proves to be unreasonable.

19 A comparatist view on the issue in H. Kötz, 'Comparative Contract Law', in M. Reimann & R. Zimmermann (eds), *The Oxford Handbook of Comparative Law*, pp 914-915.

20 D. Medicus, in *Festschrift für Werner Flume zum 70. Geburtstag*, p 642.

21 On the latter specifically in the current context (in Dutch law) read R.P.J.L. Tjittes & A. Hogeterp, 'De coronacrisis en MAC-clausules in M&A-contracten', 7. *Ondernemingsrecht* 2020, p 366.

22 See for instance the model-hardship clause of the International Chamber of Commerce (ICC):

'1. A party to a contract is bound to perform its contractual duties even if events have rendered performance more onerous than could reasonably have been anticipated at the time of the conclusion of the contract.

2. Notwithstanding paragraph 1 of this Clause, where a party to a contract proves that:

a) the continued performance of its contractual duties has become excessively onerous due to an event beyond its reasonable control which it could not reasonably have been expected to have taken into account at the time of the conclusion of the contract; and that

b) it could not reasonably have avoided or overcome the event or its consequences, the parties are bound, within a reasonable time of the invocation of this Clause, to negotiate alternative contractual terms which reasonably allow to overcome the consequences of the event'.

Even more implicitly, and brushing the complementing of a contract, it may follow from the capacity of the parties and/or the general picture of the contract that a certain risk allocation may be considered implicit to the contract. It can, for instance, be argued that a stronger party implicitly assumed a bigger risk than the weaker party. However, that is not necessarily so and remains highly case specific.

11. Reasonable and unreasonable risk – If the contract itself or a statutory provision fails to offer a (convincing) solution for the risk materialization, a judge will generally fall back on some form of reasonable risk allocation. It is normal or reasonable that each party has to stand in for the materialization of a certain degree of risk.[23] Therefore, a reasonable degree of risk must be borne by the party that bears it by default.

Yet, if a reasonable risk exists, there must also be an *un*reasonable risk. By consequence, and unless contractually assumed, such an unreasonable risk may not come (entirely) at the expense of the party bearing the risk and thus must be shifted.[24] This distinction between a reasonable and an unreasonable risk is present in all analysed legal systems.[25] They vary, however, with regard to *whose risk* and what *degree of risk* is considered (un)reasonable. Concerning the question of whose risk can be considered unreasonable, a distinction can be drawn between those doctrines that allow for a dislocation of the risk the *debtor* carries and those that allow for a dislocation of the *creditor* risk (see *supra* nr. 9). I shall rely on that distinction hereinafter.

3. Dislocation of Unreasonable Risk

3.1. Debtor Risk

12. *Force majeure* – *Force majeure*, essentially, concerns the scenario where the *performance of an obligation* has become impossible because of the emergence of a hindrance. That hindrance may not fall under the contractually assumed risk, nor under the reasonable risk that the debtor has to bear. That means that the emergence of the hindrance was not foreseeable at the moment of contract conclusion, that it has not been contractually accepted and that it did not materialize because of the negligence of the debtor (and could thus also not be prevented from emerging).[26] The hindrance renders the performance impossible because it is objectively impossible to perform, because it is impossible to the debtor in question

23 C.H. Sieburgh, *De verbintenis in het algemeen*, nr. 340.

24 E. Hondius & H.C. Grigoleit (2011), in *Unexpected circumstances in European Contract Law*, p 3.

25 M. Schmidt-Kessel & K. Mayer, 'Supervening events and force majeure', in J. Smits (ed.), *Elgar Encyclopedia of Comparative Law*, p 841; E. Hondius & H.C. Grigoleit (2011), in *Unexpected circumstances in European Contract Law*, p 3.

26 M. Schmidt-Kessel & K. Mayer, in *Elgar Encyclopedia of Comparative Law*, pp 844-845.

or because it is unreasonable to expect performance – depending on the stance a legal order takes.[27]

Delivering a *genus* is never impossible (adage *Genera non pereunt*).[28] Indeed, as a *generic good* – by definition – can be replaced by another good of the same *genus*, it hardly ever becomes impossible to provide the *genus.* As money is a *genus*, the payment of a sum of money cannot become impossible. Yet, the hardship that a debtor can potentially be in to pay a sum of money, is obvious. In those cases, the doctrine of hardship can provide relief.

13. Hardship – Indeed, hardship is at stake if the *performance of an obligation* becomes excessively costly (or burdensome) because of changed circumstances that do not fall within the contractual or reasonable risk the debtor has to bear.[29] That requires that the changed circumstances were unforeseeable at the moment of contract conclusion, that they have not been contractually accepted and that they did not materialize because of the negligence of the debtor (and could thus also not be prevented from emerging[30]).[31] Generally, hardship is limited to the changed value/ cost of the contractual agreement.[32] Yet, depending on the broadness of the

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27 Belgium: Art. 1147 *Code civil.* P. Wéry, *Droit des obligations*, pp 578 ff., nrs. 562 ff.; S. Stijns, *Verbintenissenrecht*, I (Brugge: die Keure 2015), pp 162–163, nrs. 211–212. France: Art. 1218, al. 1 civil code; F. Terré, P. Simler, Y. Lequette & F. Chénedé, *Droit civil. Les obligations* (Paris: Dalloz, 12th edn. 2019), p 815, nr. 752; C. Larroumet & S. Bros, *Les obligations. Le contrat*, in *Traité de Droit Civil*, t. III (Paris: Economica, 9th edn. 2018), p 774, nrs. 724 ff.; P. Malaurie, L. Aynès & P. Stoffel-Munck, *Droit des obligations* (Paris: LGDJ 2018), p 546, nrs. 952 ff. Germany: §275 (1) BGB. Netherlands: C.H. Sieburgh, *De verbintenis in het algemeen*, nrs. 332 ff.

28 M. Schmidt-Kessel & K. Mayer, in *Elgar Encyclopedia of Comparative Law*, p 843. Belgium: Cass. B. 28 Jun. 2018, C.17.0701.N, ECLI:BE:CASS:2018:CONC.20180628.10, *Not.Fisc.M.* 2019, 239, note M. de Potter de ten Broeck, *RW (Rechtskundig Weekblad)* 2018–19, 1260. *TBBR (Tijdschrift voor Belgisch Burgerlijk Recht)* 2020, p 26, note J. Van Zuylen & M. Higny, 'Premier tour d'horizon des décisions cantonales prononcées suite à la crise du coronavirus', in *Juridische panoplie bij pandemie ? Les premières décisions commentées en matière de COVID-19* (Brugge: die Keure 2020), p 87; S. Stijns, *Verbintenissenrecht*, p 163, nrs. 212. France: Com., 16 Sep. 2014, n° 13-20.306, D. 2014. 2217, ECLI:FR:CCASS:2014:CO00708; C. Larroumet & S. Bros, in *Traité de Droit Civil*, p 776, nr. 725. P. Jacquot, 'Le covid, le loyer et le juge', *AJDI (Actualité juridique droit immobilier)* 2021, p 99. Netherlands: C.H. Sieburgh, *De verbintenis in het algemeen*, nr. 341.

29 Belgium: S. Stijns, *Verbintenissenrecht*, p 165, nr. 217. France: Art. 1195 C.civ; F. Terré, P. Simler, Y. Lequette & F. Chénedé, *Droit civil*, p 714, nr. 634. Germany: §275 (2) BGB. Netherlands: Arts 6:74 ff NBW.

30 On this point in French law see C. Larroumet & S. Bros, in *Traité de Droit Civil*, pp 772–774, nrs. 722 and 724.

31 M. Schmidt-Kessel & K. Mayer, in Elgar *Encyclopedia of Comparative Law*, pp 844–845.

32 Take for instance Art. 6.2.2 of the UNIDROIT Principles of International Commercial Contracts (UPICC) which provides that 'there is hardship where the occurrence of events fundamentally alters the equilibrium of the contract either because the *cost* of a party's performance has increased or because the *value* of the performance a party receives has diminished, and' (Italics by the author).

formulation, the scope of application of the doctrine of hardship can go beyond the cases of difficulties to pay a sum of money, thereby providing a ground for risk dislocation in cases where performance has become unreasonably burdensome (as opposed to 'reasonably impossible' (see *supra* nr. 12)). In the latter case, one rather speaks of the theory of imprevision.[33] Yet, that terminology is not consistently used.[34]

The Belgian reform project (Art. 5.77 of the reform project[35]), like the new French *Code civil* (Art. 1195 *Code civil* fr.) and the Draft Common Frame of Reference (Art. III.-1:110 DCFR),[36] foresees a provision on *imprévision.* Essentially, such *imprévision* is at stake when the performance of an obligation has become excessively more onerous due to changed circumstances. This begs the question whether that excessive onerosity must be understood in absolute terms or rather relative to the value the counter performance has and whether such relative understanding must be objective or subjective. Take the tenant of a shop: while in absolute terms the rent he pays wasn't altered, it has been altered in relative terms as the right he receives in exchange for the rent (the tenancy) has less value. Yet, that value of the counter performance can be subjective (the value it has to the particular tenant) or objective (the value it has to the general tenant). Early interpretations of Article 1195 of the French *Code civil* suggest an absolute understanding of onerosity:

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33 See for instance M. DE POTTER DE TEN BROECK, *Gewijzigde omstandigheden in het contractenrecht* (Mortsel: Intersentia 2017), p 26, nr. 24.

34 See for instance Art. 1195 of the French Code civil and Art. 5.77 of the Belgian reform project of the civil code (S. STIJNS, P. WÉRY, et al., 'De hervorming van het verbintenissenrecht', in *De hervorming van het Burgerlijk Wetboek – La réforme du Code civil* (Brugge: die Keure 2019), p 22).

35 S. STIJNS, P. WÉRY, et al., in *De hervorming van het Burgerlijk Wetboek*, p 22. In the final version of the reformed law of obligations, the article containing the provision on changed circumstances is article 5.74.

36 III – 1:110: Variation or termination by court on a change of circumstances

(1) An obligation must be performed even if performance has become more onerous, whether because the cost of performance has increased *or because the value of what is to be received in return has diminished.*

(2) If, however, *performance* of a contractual obligation or of an obligation arising from a unilateral juridical act becomes so onerous because of an exceptional change of circumstances that it would be manifestly unjust to hold the *debtor* to the obligation a court may:

(a) vary the obligation in order to make it reasonable and equitable in the new circumstances; or

(b) terminate the obligation at a date and on terms to be determined by the court.

(3) Paragraph (2) applies only if:

(a) the change of circumstances occurred after the time when the obligation was incurred;

(b) the debtor did not at that time take into account, and could not reasonably be expected to have taken into account, the possibility or scale of that change of circumstances;

(c) the debtor did not assume, and cannot reasonably be regarded as having assumed, the risk of that change of circumstances; and

(d) the debtor has attempted, reasonably and in good faith, to achieve by negotiation a reasonable and equitable adjustment of the terms regulating the obligation.

> The request to revise the rent on the basis of the doctrine of imprevision provided for in Article 1195 of the Civil Code cannot be accepted since, without distorting the text which must be interpreted strictly, it must be considered that the amount of rent contractually agreed upon remained the same during the events, and therefore did not become "excessively onerous".[37]

14. Risk dislocation – In cases of *force majeure*, thus when performance has become impossible, the risk of non-performance is fully dislocated to the creditor who has to undergo the non-performance. The debtor does not bear the risk of the non-performance. That dislocation is limited in time if the *force majeure* is limited in time. It is definitive if the *force majeure* is definitive.[38] When the performance has become unreasonable due to hardship, the right is adapted to a reasonable degree. That can be so either for a limited period of time or definitively, depending on the nature of the hardship – limited in time or definitive.[39]

Some legal systems first call upon the parties themselves to find an agreement.[40] For example, the French provision on the theory of imprévision stipulates that a party may demand a renegotiation from its counter party. If renegotiations fail, a judge can be called upon.[41] In those cases, a duty or *Obliegenheit* (see *infra* nr. 36) of renegotiation is placed on one of the parties in order to bring the respective obligations of the parties back into balance given the changed circumstances. If parties fail to reach an agreement, either for not even having tried or merely because parties were unable to find an agreement, a judge can then temper the respective obligations of the parties to a reasonable degree.

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37 T.com. Paris, 11 Dec. 2020, n°2020035120. Translation by the author. Original text: '*La demande de révision du loyer sur le fondement de l'imprévision prévue par l'article 1195 du code civil ne peut être accueillie puisque, sans dénaturer le texte qui doit rester d'interprétation stricte, force est de considérer que le montant du loyer contractuellement convenu est resté le même pendant les événements, et n'est donc pas devenu "excessivement onéreux"*'.

38 Belgium: P. Wéry, *Droit des obligations*, pp 586 ff., nrs. 573 ff.; S. Stijns, *Verbintenissenrecht*I, p 163, nr. 213. France: Art. 1218, al. 2 C. civ. fr.; F. Terré, P. Simler, Y. Lequette & F. Chénedé, *Droit civil*, p 818, nrs. 755 ff.; C. Larroumet & S. Bros, in *Traité de Droit Civil*, p 781, nr. 726. Netherlands: C.H. Sieburgh, *De verbintenis in het algemeen*, nrs. 372 ff..

39 France P. Malaurie, L. Aynès & P. Stoffel-Munck, *Droit des obligations*, p 552, nr. 960.

40 M. Schmidt-Kessel & K. Mayer, in *Elgar Encyclopedia of Comparative Law*, p 842.

41 Article 1195 French civil code:

'*Si un changement de circonstances imprévisible lors de la conclusion du contrat rend l'exécution excessivement onéreuse pour une partie qui n'avait pas accepté d'en assumer le risque, celle-ci peut demander une renégociation du contrat à son cocontractant. Elle continue à exécuter ses obligations durant la renégociation.*

*En cas de refus ou d'échec de la renégociation, les parties peuvent convenir de la résolution du contrat, à la date et aux conditions qu'elles déterminent, ou demander d'un commun accord au juge de procéder à son adaptation. A défaut d'accord dans un délai raisonnable, le juge peut, à la demande d'une part*ie, *réviser le contrat ou y mettre fin, à la date et aux conditions qu'il fixe*'.

Tempering to a reasonable degree can go as far as ending the contractual relation.[42]

15. Debtor centrism – Both doctrines provide only for the cases where the *performance of an obligation* has become either impossible or more onerous (or otherwise burdensome).[43] The risk that the creditor carries (see *supra* nr. 9) is absent to those legal figures. In that sense, both doctrines are *debtor centric.* They only allow for a reconciliation of the tension between contractual fixation and changed circumstances for the debtor, not for the creditor. Yet, the creditor runs a risk too (see *supra* nr. 9).

3.2. Creditor Risk

16. Absence of creditor risk – In French and Belgian law, the doctrines of *force majeure* and hardship[44] are the only doctrines dealing with risk materialization due to changed circumstances. Those systems thus take a very pronounced debtor centrist approach to cases of risk materialization due to changed circumstances. The materialization of the creditor risk is not taken into account.

Of course, in synallagmatic contracts the creditor impeded in the enjoyment of his right, also is the debtor of an obligation. That can provide for an escape route out of this debtor centrist perspective. The creditor impeded in the enjoyment of his right could claim that the debtor fails to perform adequately. Think of the tenant of a shop closed because of governmental measures: he could invoke that the landlord fails to provide him with the peaceful enjoyment of his rent (Art. 1719, 2° French and Belgian *Code civil*) due to *force majeure.* By consequence, the tenant himself would be freed of his obligation to pay rent.[45] Whether, the landlord can be considered to fail to perform its obligation in the current crisis is particularly

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42 It is important to notice that this system gives the debtor in difficulties a significant leverage in negotiating an adaptation of the obligations of the parties. After all, the failure of the negotiations always comes at the cost of the creditor and the debtor has the assurance of being able to ask a court to temper his obligations.

43 Belgium: M. Higny, *Juridische panoplie bij pandemie ? Les premières décisions commentées en matière de COVID-19*, p 88. France: P. Jacquot, *AJDI* 2021, p 99. Netherlands: Art. 6:74 ff. NBW. See also C.H. Sieburgh, *De verbintenis in het algemeen*, nr. 340.

44 *Caveat* Belgian law does not directly recognize the doctrine of hardship but the current reform project contains a provision on hardship, namely Art. 5.77. See S. Stijns, P. Wéry, et al., in *De hervorming van het Burgerlijk Wetboek*, p 22. The reform project currently is a proposed bill: *Wetsvoorstel houdende Boek 5 'Verbintenissen' van het Burgerlijk Wetboek* of 24 Feb. 0202, DOC 55 2806/001. The numbering of the articles in the reform project and in the current bill proposal differ. Given the currently uncertain outcome of the concrete bill proposal I shall hereafter refer to the reform project as referenced before.

45 See for an illustration under French law: P. Briand, 'Les relations commerciales dans la tourmente de l'épidémie', 17. *JCP G (La Semaine Juridique – Edition* Générale), p 627. Under Belgian law see P. Wéry, *Droit des obligations*, p 582, nr. 546-1; H. Vyncke, 'Covid-19 en de woning- en

debatable. Depending on the stance one takes on that question, the invoked argumentation stands or falls.[46] In any case, this approach fails to tackle the actual issue: the faultless impediment of the enjoyment of his right by the creditor.[47] Inevitably, it falls short of adequate solutions for that issue – as depicted by the case law on the issue under French and Belgian law.[48]

Admittedly, in light of the current crisis solutions are constructed.[49] A prominent one is an extensive reading of the French and Belgian Article 1722 Code civil in cases of commercial tenancy. The article provides for cases where the rented immovable good is destroyed (entirely or partly) because of *force majeure*. In the current crisis the argument runs that lockdown restrictions juridically destroy

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handelshuur: een evenwichtsoefening de acrobat waardig', in *Juridische panoplie bij pandemie ? Les premières décisions commentées en matière de COVID-19*, pp 122 ff.

46 In Belgian law see H. Vyncke, in *Juridische panoplie bij pandemie ?*, p 122. Comp. P. Wéry, *Droit des obligations*, pp 590–591, nr. 577. The same argument can be advanced under Dutch law based on Art. 7:204 NBW, namely that the rented good is defect (*gebrek*). Here too, the argument is considered unsatisfying, even when relying on a generous interpretation to the advantage of the tenant: 'Now, one will agree with me that the sympathy for the tenants seriously argues that the government measures taken to curb the corona crisis can, *with some good will*, be subsumed under the term "defect". Nevertheless, I believe that this is probably a dead end. After all, the unknown variable in the equation is whether these measures do not qualify as a circumstance attributable to the tenant'. And further 'The government measures, therefore, do not create a "deficit"'. Translation by the author. Italics by the author. Original texst: '*Nu zal men met mij eens zijn dat de sympathie aan de zijde van huurders er ernstig voor pleit dat de overheidsmaatregelen die genomen zijn om de corona-crisis te beteugelen met enige goede wil te scharen zijn onder het begrip "gebrek". Toch ben ik van mening dat dit waarschijnlijk een doodlopende weg is. De onbekende variabele in de vergelijking is immers de vraag of deze maatregelen niet kwalificeren als aan de huurder toe te rekenen omstandigheid*'. And further '*De overheidsmaatregelen leveren dus geen "gebrek" op*'. J.M van Noort, 'De gevolgen van de corona-crisis voor commerciële huurovereenkomsten', 9. *Bb (Bedrijfsjuridische berichten)* 2020, p 177.

47 As does for instance recognize the French author P. Briand very explicitly: 'In this turmoil, many of the contracts concluded before the health crisis have been severely disrupted, *to the extent that their performance is either compromised or deprived of its purpose*'. Italics added. Translation by the author. Original text: '*Dans cette tourmente, bon nombre de contrats conclus avant la crise sanitaire subissent de profondes perturbations, au point que leur exécution est soit compromise, soit dépourvue d'intérêt*'. P. Briand, 17. *JCP G*, p 825. He later on recognizes that the doctrines of *force majeure* and hardship, even under the extensive reading he gives to them, fail to provide adequate means to deal with many a case in the current crisis.

48 For an overview see in Belgium: M. Higny, *Juridische panoplie bij pandemie?*, p 88. France: P. Jacquot, *AJDI* 2021, p 99.

49 Overtly admitting the construction: 'it can be examined whether a fault on the part of the debtor cannot be *constructed*'. Italics by the author. Translation by the autor. Original tekst: '*kan onderzocht worden of er niet een tekortkoming van de schuldenaar geconstrueerd kan worden*' in M.R. Ruygvoorn, 'Kan ik van mijn overeenkomst af met een beroep op de coronacrisis?', *NJB (Nederlands Juristenblad)* 2020, p 883. Italics added.

the rented immovable good, as the (main) purpose of the tenancy is no longer relevant.[50] Essentially, this construction is a variant of the previous argument applied to the specific case of tenancy. By consequence, this construction, too, generally is not quite convincing and leads to very disparate applications[51] as they fail to address the actual issue.

Indeed, this debtor centrist approach fails to provide adequate solutions in COVID-19 related cases, such as our paradigm cases (see *supra* nr. 1). It comes as no surprise, that the first rulings on COVID-19 related cases on contracts show divergent, inconsistent and not always convincing reasoning under both French and Belgian law.[52] With an eye on legal certainty, and more importantly, reasonableness, such a situation is problematic.

17. *Caducité* – The so-called *caducité* (hereinafter 'lapse') is a doctrine under Belgian and French law that provides for the case in which one of the essential elements of the contract come to perish after its conclusion, rendering the performance of the contract thereby impossible. At first sight, such a doctrine thus seems particularly promising as it appears broad enough to deal not only with the materialization of the debtor risk due to changed circumstances, but also with the risk of the creditor.[53] Indeed, it seems plausible that for instance the tenant of a shop could invoke that an essential element to the contractual agreement, namely that he no longer can welcome shoppers in his shop, has lapsed.

Yet, a twofold reserve needs to be made on that aspect. First of all, a reserve concerning the conditions of application of the doctrine of lapse. Indeed, the case law of both the French and the Belgian *Cour de Cassation* and the reform of the French law of obligations, have been particularly restrictive and not least unclear. Delving more precisely into the reasons for this troubling state of the law on this point would lead us too far. It may suffice to state that Philippe Briand doubts the chances of success of this approach under current French law,[54] under Belgian law the situation seems even less promising – to the extent that it seems not to be dealt with in the Belgian literature on the current crisis.

Secondly, a contract that has lapsed will end rather than being adapted.[55] While the French provision stipulates that a lapsed contract comes to an end (Art.

50 See for an illustration under French law: P. Briand, 17. *JCP G*, pp 626–827.

51 See for instance under French law: P. Jacquot, *AJDI* 2021, p 99. Under Belgian law: H. Vyncke, in *Juridische panoplie bij pandemie ?*, p 126.

52 For an overview under Belgian law: M. Higny, *Juridische panoplie bij pandemie?*, p 81. An overview of French law: P. Jacquot, *AJDI* 2021, p 99.

53 France: Arts 1186–1187 *Code civil.* F. Terré, P. Simler, Y. Lequette & F. Chénedé, *Droit civil*, p 663, nr. 591. Belgium: P. Wéry, *Droit des obligations*, p 230, nr. 218; S. Stijns, *Verbintenissenrecht*, II (Brugge: die Keure, 2020), pp 148 ff., nrs. 197 ff.

54 P. Briand, 17. *JCP G*, p 828.

55 France: 1187 *Code civil.* Belgium: P. Wéry, *Droit des obligations*, p 1022, nr. 1020; S. Stijns, *Verbintenissenrecht*, II, p 148, nr. 197.

1187 *Code civil*), the Belgian reform project draws a distinction between the lapse of a contract and of an obligation (Art. 5.318, 6° Belgian reform project[56]). While the latter approach appears to leave room for more nuance, setting an end to either the contract or an obligation appears as too harsh an outcome and therefore will not be desirable to the parties. For that purpose, they will – even if they can rely on the doctrine – not be inclined to pursue this very uncertain path.

For those two reasons, and contrary to the first impression one might get of the *caducité*, this doctrine thus appears unfit for our current purpose.

18. Abuse of rights – In the absence of a more suitable doctrine under French and Belgian law, the prohibition to abuse of one's rights appears to be the last remedy available to the parties. The prohibition of abuse of rights is at stake when the holder of a right, exercises it in such circumstances that relying on it becomes unlawful, while it normally is rightful to rely on it. The doctrine of the prohibition of abuse of rights thus is somewhat paradoxical in as far as the *existence* of the right is rightful, but its *exercise* turns out to be wrongful given the particular circumstances it has been exercised in.[57]

In the cases at hand, then, it is argued that while it normally is rightful for the other party to require performance, this would be unlawful in the circumstances under the current crisis since the creditor had no useful enjoyment of his right. In other words, the materialization of the risk was not wrongful, yet the reaction to its materialization was.[58] It can, for instance, be wrongful for a landlord to hold his tenant to the same rent even though the tenant has lost the essential purpose of his tenancy as the shop he rents was closed down by governmental measures.

Yet, to be abusive, the exercise of the right in question must be *manifestly* unreasonable or wrongful. That is a stringent requirement that will only be fulfilled in exceptional circumstances.[59] In that regard and from a system-oriented perspective, the prohibition to abuse one's right is not a satisfactory solution.

19. Beyond the current crisis – This shortfall of French and Belgian contract law reaches beyond the current crisis and must be considered to be a more general shortcoming of their respective system of law of obligations. That became obvious in a recent judgment of the French *Cour de cassation.*[60] At stake was a couple that

56 S. Stijns, P. Wéry et al., in *De hervorming van het Burgerlijk Wetboek*, p 74.

57 See for instance Art. 5.77 of the Belgian reform project on the law of obligations. See S. Stijns, P. Wéry et al., in *De hervorming van het Burgerlijk Wetboek*, p 3.

58 Belgium: H. Vyncke, in *Juridische panoplie bij pandemie ?*, p 124. See the same reasoning under Dutch law: J.M van Noort, 9. *Bb* 2020, p 177.

59 The same concerns are voiced by H. Vyncke, in *Juridische panoplie bij pandemie ?*, pp 124–125.

60 Cass. fr. (Civ. 1) 25 Nov. 2020, 19-21.060, ECLI:FR:CCAS:2020:C100714. See also the Belgian Court of cassation in Cass., 27 Jun. 1946, *Pas.* 1946, I, 249, *J.T.* 1947, 166, n. M. Sluzny, *R.C.J.B. (Revue Critique de Jurisprudence Belge)* (1947), p 268, note A. De Bersaques.

had booked a two week stay in a thermal station. Yet, they had to leave the station prematurely for one of them was hospitalized urgently. The other one followed the hospitalized one shortly afterwards to support him. As a consequence, the couple was unable to enjoy its stay in the thermal station and claimed restitution based on *force majeure.* The court of appeal granted the claim, resolving the contract and ordering the indemnification of the couple. The *Cour de cassation*, however, quashed the judgment of the court of appeal. Indeed, the theory of *force majeure* can only be invoked by a *debtor who finds himself in the impossibility to perform his obligation:*

> According to the wording of article 1218, first paragraph of the civil code, there is force majeure where an event beyond the control of the debtor, which could not reasonably have been foreseen at the time of the conclusion of the contract and whose effects could not be avoided by appropriate measures, prevents performance of his obligation by the debtor. *It follows that a creditor who has not been able to benefit from the performance to which he was entitled cannot obtain the cancellation of the contract by invoking force majeure.*[61]

While this decision is, technically speaking, impeccable, it raises doubts from a perspective of reasonableness. Indeed, for the decision of the court of appeal freeing the creditors from its obligation to pay for a right they had been impeded to enjoy, speaks to our intuition. That is confirmed by the old, yet famous, French case *Dispot Merlin* v. *Robillard.*[62] The commercial court, confirmed in appeal, ruled that the parties were discharged of their contractual obligations which had lost their purpose: the construction of a railroad had been faster than anticipated which rendered a prior transport contract useless. Yet, as the *Court de cassation* states explicitly in the above-mentioned decision, such a result cannot be achieved by relying on the doctrine of *force majeure.*

20. *Zweckstörung* – Contrary to French and Belgian law, German law knows the doctrine of *Zweckstörung* (frustration of purpose) as a sub-category of the so called *Störung der Geschäftsgrundlage* (frustration) of §313 BGB (*Bürgerliches Gesetzbuch*). While the specific aspect of loss of purpose is most elaborate under

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61 Translation by the author. Original text: '*Aux termes de l'article 1218 alinéa 1 du code civil, il y a force majeure en matière contractuelle lorsqu'un événement échappant au contrôle du débiteur, qui ne pouvait être raisonnablement prévu lors de la conclusion du contrat et dont les effets ne peuvent être évités par des mesures appropriées, empêche l'exécution de son obligation par le débiteur.* Il en résulte que le créancier qui n'a pu profiter de la prestation à laquelle il avait droit ne peut obtenir la résolution du contrat en invoquant la force majeure'.

62 Comm. Rouen, 28 Aug. 1843, upheld on appeal Rouen, 9 Feb. 1844, D., 1845, p 4. See on that matter D. Philippe, *Changement de circonstances et boulversement de l'économie contractuelle* (Bruxelle: Bruylant 1986), p 111.

German law, it can also be taken into account under the Dutch doctrine of *onvoorziene omstandigheden* (Art. 6:258 NBW (*Nederlands Burgerlijk Wetboek*) and the English doctrine of frustration (*Taylor* v. *Caldwell,*[63] *Davis Contractors Ltd* v. *Fareham UDC*[64]). The most famous cases of loss of purpose are quite likely the English coronation cases. Someone rents an apartment for two days in order to enjoy a splendid view on the coronation procession of King Edward VII. Yet, King Edward VII falls ill. The coronation procession does not take place as planned and the lucky few having rented an apartment for the very purpose of watching that procession find themselves with a purposeless tenancy. The Court of Appeal considers the parties discharged from their contract. The tenant no longer was considered bound by a contract which would provide him a right that had become for him completely purposeless.[65]

As German law elaborates most on the specific aspect of loss of purpose in its doctrine of frustration, I shall primarily deal with it under German law hereinafter.

4. Frustration of Purpose in the Current Crisis

4.1. Frustration of Purpose

21. The doctrine of frustration – While cases of *force majeure* or hardship deal with hindrances or burdens to the *performance of contractual obligations*, the doctrine of frustration is broader in scope.[66] It concerns various types of cases in which either changed circumstances profoundly alter the contract as it had been conceived on the moment of its conclusion (§313 (1) BGB) or those circumstances turn out to be wrong (§313 (2) BGB). For the present purpose, only those former cases of changed circumstances are relevant (see *supra* nr. 6).[67] §313 (1) BGB stipulates:

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63 (1863) 3B & S 826.

64 [1956] AC 696 (HL) 728-29.

65 *Krell* v. *Henry*, 1903, 2 K.B. 740.

66 While *force majeure* and hardship can only apply to cases of hindrances or burdens to the performance of an obligation, frustration can also apply to cases of impediment of enjoyment of a right – as is shown in the English coronation cases (see *supra* nr. 20). Yet, *qui peut le plus, peut le moins*: cases of force majeure or hardship could also be brought under the doctrine of frustration. That begs questions of delimitation in the legal systems that know both a doctrine of force majeure and of frustration. See f.i. in German law A. Schall, 'Corona-Krise: Unmöglichkeit und Wegfall der Geschäftsgrundlage bei gewerblichen Miet- und Pachtverträgen', 8. *JZ (Juristenzeitung)* 2020, p 395; E. Hondius & H.C. Grigoleit (2011), in *Unexpected circumstances in European Contract Law*, pp 55 ff. Delving deeper into this issue would go beyond the scope of the present article.

67 The fact that the doctrine of frustration also includes cases which would fall under the doctrine of mistake in most legal systems is a peculiarity of German law which can be disregarded from a comparatist point of view. E. Hondius & H.C. Grigoleit (2011), 'Overview: Germany and related jurisdictions', in E. Hondius & H.C. Grigoleit (eds), *Unexpected circumstances in European*

> If circumstances which became the basis of a contract have significantly changed since the contract was entered into and if the parties would not have entered into the contract or would have entered into it with different contents if they had foreseen this change, adaptation of the contract may be demanded to the extent that, taking account of all the circumstances of the specific case, in particular the contractual or statutory distribution of risk, one of the parties cannot reasonably be expected to uphold the contract without alteration.

For a contract to be frustrated it is required that there be (1) a significant change in circumstances posterior to the conclusion of the contract which (2) impacts the contract to the amount that parties would not have contracted, or contracted otherwise, under the changed circumstances and that (3) one of the parties cannot reasonably be expected to uphold the contract without alteration. If that is the case, adaptation of the contract can be demanded. For that purpose, the specific circumstances must be taken into account.[68]

Concerning the changed circumstances, a distinction is made between changed circumstances that affect the entirety of society (*große Geschäftsgrundlage*) and those that affect only particular individuals (*kleine Geschäftsgrundlage*). The difference between both merely resides in the fact that it may be easier for individual parties to establish a case of *große Geschäftsgrundlage* as it is then generally recognized that contractual agreements have significantly been altered. Yet, each case of frustration must still be decided based on 'the circumstances of the specific case' according to §313 (1) BGB.[69] As a result the difference between both is rather limited.[70]

There are several types of cases of changed circumstances. One is that in which the equivalence between the rights and obligations is significantly altered (the so-called *Äquivalenzstörung*). A second type is the unreasonable hindrance in the performance of an obligation (so-called *Leistungserschwernisse*). Finally, the purpose of a contractual right can be frustrated (so-called *Zweckstörung*). The latter is the case when the purpose for which the right had been contracted for can no longer be fulfilled, because of an unforeseeable change of circumstances.[71]

Contract Law, pp 55-57. See also E. Hondius & H.C. Grigoleit (2011), in *Unexpected circumstances in European Contract Law*, pp 6 ff. See also there the doctrine of assumptions and the *clausula rebus sic stantibus* (on p. 8) that we will not deal with in the present article.

68 Pfeiffer, in *Staudinger Kommentar*, nr. 32; Finkenauer, in *Münchener Kommentar zum BGB*, nr. 56. The distinction between ss 1 and 2 of § 313 BGB is considered superfluous and left behind.

69 M.-P. Weller, M. Lieberknecht & V. Habrich, 15. *NJW* 2020, p 1021.

70 See on the issue in the context of the current crisis S. Jung, '*Systemkrisen und das Institut der Störung der (großen) Geschäftsgrundlage*', 14. *JZ* 2020, p 715; M.-P. Weller, M. Lieberknecht & V. Habrich, 15. *NJW* 2020, p 1021.

71 Stadler, 'BGB §313 Störung der Geschäftsgrundlagen', in Jauernig (ed.), *Bürgerliches Gesetzbuch* (18th edn. 2021), nr. 18.

22. Discernible purpose of a right – For the application of the frustration of purpose, it is crucial that the purpose of the contractual right has become part of the agreement. That requires in first instance that the purpose of a right has been made explicit, or is implicitly discernible to the counterparty. More importantly, it is required that the fulfilment of the purpose of the right has become central to the contractual agreement.[72] The purpose of the contractual agreement can be objectively central to the agreement given the type of contract at hand, as is the case for commercial tenancy. The purpose of the contractual agreement also can be subjective in as far as parties have agreed on it. In order to become legally relevant, such a subjective purpose must then be objectified, i.e., integrated as a central element to the contractual agreement. That is particularly, but not exclusively, the case when the accomplishment of the purpose of the right has been integrated in the calculation of the price.[73] This requirement of centrality to the contractual agreement is expressed by the requirement that 'parties would not have entered into the contract or would have entered into it with different contents if they had foreseen this change'. It follows from § 313 (1) BGB's wording, that it is not required that the right has become entirely purposeless. As soon as the contract would have been concluded under other conditions, the requirement is fulfilled.

Yet, the frustration must be such that 'one of the parties cannot reasonably be expected to uphold the contract without alteration'. By consequence, the materialized risk must outweigh the reasonable degree of risk the creditor has to bear, that is the reasonable risk of frustration of purpose.[74] By consequence, the mere fact that the shop of a tenant of a commercial premise does not generate sufficient income cannot be seen as unreasonable risk.

23. Too lenient a test? – Yet, that test may strike as being too lenient. Take for instance someone who buys a season ticket for the train to visit his girlfriend in another city. Shortly afterwards, his girlfriend breaks up with him. The season ticket has become entirely purposeless to its owner as he knows no one else in that city. Would that newly single man be able to rely on the frustration of purpose? The answer must be negative. Indeed, the purpose of his season ticket – going to the other city – has by no means become a central element of the contractual agreement. That being so, the owner of the season ticket cannot rely on the impediment of enjoyment.

The same is true for the tenant of a shop located in a neighbourhood that has gotten a bad reputation during the execution of the contract. As long as it has not become a substantial element to the contract, he cannot rely on an impediment of enjoyment.

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72 M.-P. Weller, M. Lieberknecht & V. Habrich, 15. *NJW* 2020, p 1022.

73 R. Schulze, in *Bürgerliches Gesetzbuch*, nr. 25.

74 See M.-P. Weller, M. Lieberknecht & V. Habrich, 15. *NJW* 2020, p 1021.

Obviously, these are only examples. Still, they illustrate the safeguards build in the prerequisites of application.

24. Adaptation – If the creditor suffers a frustration of purpose, he can ask the 'adaptation of the contract'. More precisely, the respective rights and obligations deprived of purpose will be adapted. In this adaptation the judge must strike a reasonable balance and take all specific circumstances of the case into account. Yet, it remains unclear according to which standards exactly a judge must adapt the contract. Dieter Medicus argues convincingly that the intention of the parties ought to be the point of reference a judge relies on when adapting the respective rights and obligations. However, because of the very nature of the doctrine of frustration, the intention of the parties cannot be determined under the changed circumstances. In that case, the judge needs to adapt the contract so as to re-establish its reasonableness, as the wording of § 313 (1) BGB suggests. If it is clear that under the changed circumstances, parties would not have upheld the contract, adaptation of the contract should do likewise.[75]

25. Renegotiation – The primacy of the intention of the parties advanced for by Medicus, could be strengthened if parties were under a duty to renegotiate the contractual terms. Jan D. Lüttinghaus speaks in that regard of a freedom of contract *adaptation* (*Vertrags*anspassungs*freiheit*).[76] Yet, the wording of § 313 (1) BGB does not recognize a duty to renegotiate but merely a right to ask contract adaptation.[77] Nevertheless, the *Bundesgerichtshof* (BGH) read such a duty to renegotiate into § 313 BGB in 2011,[78] thereby resuscitating[79] the scholarly debate on the issue.[80] Notwithstanding that decision, leading scholars generally stick at present to the wording of § 313 BGB, rather than to the decision of the BGH.[81]

Still, scholars suggest that renegotiations are certainly preferable over a judicial adaptation in terms of efficiency and respect of party autonomy, but that parties cannot be forced into renegotiations. That is what the preparatory works of the 2001 BGB reform seem to suggest, too: parties should endeavour to

75 D. Medicus, in *Festschrift für Werner Flume zum 70. Geburtstag*, p 645.

76 J. Lüttinghaus, 'Verhandlungen bei Störung der Geschäftsgrundlage', 213. *AcP* (*Archiv civilistische Praxis*) 2013, p 267.

77 See pertinently on this point C. Thole, 'Renaissance der Lehre von der Neuverhandlungspflicht bei §313 BGB?', 9. *JZ* 2014, p 444.

78 *BGHZ* 191, 139.

79 Formerly led by N. Horn, 'Neuverhandlungspflicht', 181. *AcP* 1981, p 255.

80 J. Lüttinghaus, 213. *AcP* 2013, p 266; C. Thole, 9. *JZ* 2014, p 443.

81 In that sense Pfeiffer, in *Staudinger Kommentar*, nr. 79. Finkenauer, in *Münchener Kommentar zum BGB*, nr. 122.

renegotiate, but the BGB does not impose a duty or *Obliegenheit* (see *infra* nr. 36) to do so on them.[82] That is justified by the difficulty of forcing parties into negotiations (see *infra* nr. 35).[83]

4.2. Current Crisis

26. Impact on creditor risk – As the three paradigm cases (see *supra* nr. 1) show, the current crisis has had and continues to have a considerable impact not only on debtors, but also on creditors. The frustration of purpose can provide a suitable doctrine to solve these cases of materialization of creditor risk. The tenant of a shop that is closed because of governmental measures is a common example of frustrated purpose. These types of cases are characteristic of the current crisis. But also the student in his student housing could rely on the frustration, provided it has been made plain that attending classes on campus was central to his agreement. The case of the boy not wanting to attend his dance classes, however, has little to no chances of success. After all, not having to fear to get a disease might have been part of the believed circumstances, yet it is unlikely that such a consideration was central to the contractual agreement.

These results appear consistent with our intuition of reasonable outcomes to those cases. That is confirmed by the fact that French[84] and Belgian[85] judges reach similar results in the current situation. However, in the absence of an adequate doctrine, they must base these reasonable outcomes on somewhat stretched arguments.

27. Reliance on frustration of purpose – The fitness of the doctrine of frustrated purpose to deal with the current crisis is confirmed by current German[86] scholarship[87] and case law.[88] Given that German law provides for a doctrine suited to deal with cases of frustrated purpose, cases where the creditor risk materialized

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82 'Insbesondere sollen die Parteien zunächst selbst über die Anpassung verhandeln', BT-Drs. 14/6040, p 176.

83 Finkenauer, in *Münchener Kommentar zum BGB*, nr. 122.

84 See P. Jacquot, *AJDI* 2021, p 99.

85 Vred. Brugge, 28 May 2020; J.P. Schaerbeek, 22 Jun. 2020, J.P. Woluwé-Saint-Pierre, 2 Jul. 2020; in M. Higny & H. Vyncke, *Juridische panoplie bij pandemie? Eerste rechtspraak m.b.t. COVID-19 becommentarieerd/Panoplie juridique face à une pandémie ? Les premières décisions commentées en matière de COVID-19*, pp 29, 31, 34.

86 The Dutch doctrine of frustration also appears to be the most reliable and adequate basis for the type of cases presently dealt with. See the analysis by J.M van Noort, 9. *Bb* 2020, p 176; C.E. Drion, 'Corona en het recht', 12. *NJB (Nederlands Juristenblad)* 2020, p 813.

87 To cite but a few: Stadler, in *Bürgerliches Gesetzbuch* (18th edn. 2021), nr. 18; Pfeiffer, in *Staudinger Kommentar*, nrs. 13.1–13.5; S. Jung, 14. *JZ* 2020, p 715; A. Schall, 8. *JZ* 2020, p 388; M.-P. Weller, M. Lieberknecht & V. Habrich, 15. *NJW* 2020, p 1017.

88 For instance OLG München, 17 Feb. 2021, 13. *NJW* 2021, p 948; OLG Dresden, 24 Feb. 2021, *BeckRS* 2021, 2461; OLG Dresden, 15 Feb. 2021, 13. *NJW* 2021, p 953.

can adequately be dealt with. Indeed, the outcomes *and reasoning* in cases of creditor risk materialization are rather consistent and convincing – all the more when compared to the rather disparate and inconsistent decisions in French and Belgian law. Take for instance the decision of the *Oberlandesgericht* (OLG) *Karlsruhe* of 24 February 2021[89] which states very pertinently:

> (1) The corona-related closure order of a shop neither constitutes a material defect of the rented property nor an impossibility of the landlord to provide the service.
>
> (2) The assumption of the unreasonableness of the payment of rent in the context of § 313 BGB requires an assessment of the circumstances of the individual case, in which the decline in sales, possible compensation through online trade, public benefits, saved expenses, e.g., through short-time work, or assets through unsold and still saleable goods are to be taken into account.[90]

The OLG is, independently of its final decision, perfectly equipped to deal with cases of the tenants of closed shops due to § 313 BGB. The criteria of assessment formulated in § 313 BGB allow for a balanced and nuanced outcome in cases of frustration of purpose.

28. Confirmed hypothesis – This confirms the hypothesis we have formulated in the introduction, namely that a considerable part of the difficulties arising through the current crisis in contract law issues are due to the failure of French and Belgian law to take the materialization of the creditor risk into account. At present that can only, and quite inadequately, be done relying on Article 1722 of the French and Belgian *Code civil* or via the prohibition to abuse of ones right. In my eyes both Belgian and French law of obligations would prove to be better equipped to deal with crises as the current one if they were able to deal specifically with cases of frustration of purpose, albeit under a more general doctrine of frustration as is the case under among others German, Dutch or English law. This approach however, leads to additional issues of delimitation

89 OLG Karlsruhe, 6. *NZM (Neue Zeitschrift für Miet- und Wohnungsrecht)* 2021, p 224.

90 Translation by the author. Original text: '*1. Die coronabedingte Schließungsanordnung eines Geschäfts begründet weder einen Sachmangel der Mietsache noch eine Unmöglichkeit der Leistungserbringung des Vermieters.*

2. Die Annahme der Unzumutbarkeit der Mietzahlung im Rahmen von § 313 BGB setzt eine Würdigung der Umstände des Einzelfalls voraus, bei der der Rückgang der Umsätze, mögliche Kompensation durch online-Handel, öffentliche Leistungen, ersparte Aufwendungen, zB durch Kurzarbeit, oder Vermögenswerte durch nicht verkaufte und noch verkaufbare Ware zu berücksichtigen sind'.

between the doctrine of *force majeure*, hardship (or imprévision) and frustration. It may therefore technically be more desirable to rely on a specified doctrine[91] of frustrated purpose.[92]

Hereinafter a few issues that are relevant from the comparatist perspective shall be addressed.

5. Comparatist Considerations

5.1. Creditor Risk in Other Legal Systems

29. Frustration of purpose in English and Dutch law – Among others, English and Dutch law know a doctrine of frustration that can provide for a frustration of purpose too (see *supra* nr. 20). For a contractual agreement to be frustrated, English law requires not only that 'the thing undertaken would, if performed, be a different thing from that contracted for'[93] but that it also be 'a thing *radically* different from that which was undertaken by the contract'.[94] That implies a comparative test: 'the court must first ascertain what it is that the contract requires of the parties and then it must compare the performance in the changed circumstances with that originally undertaken'.[95] When the change between that what had been undertaken and what is currently to be performed is *radically* different, a case of frustration is present. Dutch law requires for the circumstances to be so sufficiently changed that it becomes unreasonable to hold parties to their obligations.[96]

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91 See on this point J. Esser, 'Wandlung von Billigkeit und Billigkeitrechtssprechung im modernen Privatrecht', in *Summum Ius Summa Iniuria; Individualgerechtigkeit und Schutz allgemeiner Werte im Rechtsleben* (Tübingen: Mohr Siebeck 1963), p 37: '*Es gibt uns hier den Hinweis, wie wir mit der vagabundierenden Billigkeit zweckmäßig verfahren sollten, wenn wir die Rechtssicherheit in den Gebieten wieder herstellen wollen, in denen heute Zumutbarkeitsfragen rätselhaft bleiben. Innerhalb solcher Reservate darf dann allerdings der Institutionsschutz und die Frage der Rechtssicherheit aus der Interessenabwägung ausscheiden, weil sie durch den Einbau der Ermessensklauseln schon beantwortet sind*'. And further '*Billigkeit ist eben das Übergehen van kategorische brauchbaren Merkmalen, ja das Absehen von generellen Konfliktslagen und ihrer gerechten allgemeinen Reglung zugunsten der hic et nunc gerechten Entscheidung. Die moderne Jurisprudenz sollte solche Unica neutralisieren und absorbieren. Nicht sie gehören in die Judikatursammlung, sondern die Neubildungen, die für Fälle Ähnlicher Art grundsätzlich gelten sollen und dürfen. Wir können hier von programmatischer Rechtsfortbildung sprechen, die gleichfalls oft aus emotionalen Billigkeitserwägungen geboren und doch festen dormatischen und systematischen Stand sucht und behauptet*'. J. Esser, in *Summum Ius Summa Iniuria*, p 39.

92 On the comparatist aspects see A.E. Örücü, in *Encyclopaedia of Comparative Law*, p 572.

93 Lord Radcliffe in *Davis Contractors Ltd* v. *Fareham UDC*, [1956] AC 696 (HL) 728-29.

94 Lord Radcliffe in *Davis Contractors Ltd* v. *Fareham UDC*, [1956] AC 696 (HL) 728-29. Italics added.

95 E. McKendrick, *Contract Law* (Oxford: Oxford University Press, 9th edn. 2020), p 690.

96 C.H. Sieburgh, *De verbintenis in het algemeen, 6-III* (Deventer: Kluwer 2018), nr. 439. See also E. Hondius & H.C. Grigoleit, 'Overview: Germany and related jurisdictions', in *Unexpected circumstances in European Contract Law*, pp 71-72.

30. Discharge and adaptation – Under English law, a frustrated contract can generally not be adapted. Parties can only be discharged of a frustrated contract.[97] Dutch law, much like German law, provides for the adaptation of the contract.[98] The existence of a duty to renegotiate is disputed, as is the case under German law. Yet, Dutch scholars seem generally more favourable to such a duty to renegotiate.[99]

31. Historical perspective on frustration of usefulness – This attention for the purpose of a right is not novel, even if it enjoys rather little attention in contemporary scholarship. Indeed, Hugo Grotius's doctrine of *repugnantia* takes the *finis actus*, the purpose of the engagement, into account when assessing whether a performance has become impossible.[100] This same attention for the purpose of a contractual agreement was also present in §378 I of the ALR (Algemeines Landrecht) (General State Laws of the Prussian States) (1794) which stipulated that every party to the contract could withdraw from it, if the attainment of the purpose of the contract had become impossible because of changed circumstances. That purpose of the contract either flows from the declared purpose or the very nature of the agreement.[101]

32. Creditor risk – It follows from the foregoing, that German law is not the sole system – neither contemporarily nor historically speaking – that provides for the materialization of the creditor risk due to changed circumstances. This finding further supports the position that the creditor risk ought to be taken into account under French and Belgian law too. Otherwise, a private law system turns out to be largely unprepared for crises that touch wide arrays of society, as the current crisis does.

That these legal systems do not take the creditor risk into account in cases of changed circumstances is all the more surprising as these legal systems acknowledge the *existence* of such a creditor risk.

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97 Law Reform (Frustrated Contracts) Act 1943, 1. (1) with a slight correction in 1. (2) and (3). See J. Cartwright, *Contract Law. An Introduction to the English Law of Contract for the Civil Lawyer* (Oxford: Hart Publisher 2007), pp (241-242) at 713.

98 Article 6:258, 1. NBW.

99 C.H. Sieburgh, *De verbintenis in het algemeen, 6-III*, nr. 440. See also E. Hondius & H.C. Grigoleit, 'Overview: Germany and related jurisdictions', in *Unexpected circumstances in European Contract Law*, p 75. See in the context of the current crisis J.M van Noort, 9. *Bb* 2020, p 176.

100 H. Grotius, *De iure belli ac pacis libri tres in quibus ius naturae et gentium item iuris publici praecipua explicantur* (B.J.A. de Kanter-Van Hetting Tromp 1631), p 423; A. Thier, 'Legal history', in E. Hondius & H.C. Grigoleit (eds), *Unexpected circumstances in European Contract Law*, p 23.

101 '*Wird jedoch durch eine solche unvorhergesehene Veränderung durch die Erreichung des ausdrücklich erklärten, oder aus der Natur des Geschäfts sich ergebenden Endzwecks beyder Theile unmöglich gemacht, so kann jeder derselben von dem noch nicht erfüllten Vertrage wieder abgehn*'. In A. Thier, in *Unexpected circumstances in European Contract La*w, p 26.

33. Creditor risk under French and Belgian law – While French and Belgian law do not provide for a doctrine of frustration of purpose, they nevertheless recognize the existence of a risk for the creditor that lies in the loss of purpose of the right to the creditor. That is so for instance in Article 1719, 2° of the French and Belgian *Code civil* which stipulates that the landlord must maintain the rented good fit for the purpose it had been rented for. Yet, the recognition of such a creditor risk, does not go together with a provision aimed at the materialization of a creditor risk due to changed circumstances. Admittedly, Article 1722 of the French and Belgian *Code civil* provides for that case, but is limited to the destruction of the good due to *force majeure* and is limited to tenancy law. The insufficiency of this provision in the current circumstances has already been dealt with (see *supra* nr. 16).

5.2. Renegotiations

34. Debated issue – The question as to whether in a case of frustration, and thus also in a case of frustration of purpose, parties should first renegotiate their contractual agreement is debated (see *supra* nrs. 25 and 29). The feasibility of forcing parties into negotiations is considered particularly problematic, as it cannot be legally enforced. While parties can formally be forced to negotiate, it seems impossible to force them to have the intention to bring these negotiations to a fruitful outcome. A few insides gained through the present comparative exercise, seem relevant.

35. The issue of renegotiations – In order to grant parties more control over the modification of the contract terms according to the changed circumstances, parties might renegotiate the contract terms themselves. Such a renegotiation remains faithful to the *pacta sunt servanda* principle as parties agree on new contract terms.[102] Furthermore, it leaves the adaptation to the persons best acquainted with the contract, namely the parties. Also, renegotiations are less costly and time-consuming than a lawsuit.[103] Yet, imposing negotiations on parties is problematic insofar as negotiations presuppose that all concerned parties are interested in coming to a new agreement. Typically, that will not be the case in the scenario's presently dealt with. Indeed, it will generally be more advantageous for one of the parties to stick to the old agreement. As soon as one of the parties has no real interest in the success of the negotiations, they are flawed.[104]

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102 E. Hondius & H.C. Grigoleit (2011), in *Circumstances in European Contract Law*, pp 9-10.
103 J. Lüttinghaus, 213. *AcP* 2013, p 275.
104 J. Lüttinghaus, 213. *AcP* 2013, p 276.

36. *Obliegenheit* – This imbalance between parties can be remedied by relying on what a German jurist would call an *Obliegenheit.* An *Obliegenheit* is a legal *mechanism* mainly studied in Germany[105] and Switzerland[106] but also increasingly in France[107] and Belgium.[108] It imposes a duty of cooperation on a creditor. Yet, the creditor cannot be legally forced to execute the duty in question. If, however, he fails to act accordingly, he loses (part of) his right or the exercise thereof. As the duty is one of cooperation – i.e., the creditor must act in a manner that is helpful or useful to the debtor – the fulfilment of the duty by the creditor is in the interest of the debtor. The peculiarity and originality of the *Obliegenheit* is that as the creditor who does not act according to his duty of cooperation loses (part of) (the exercise of) his right, it becomes in the interest of the creditor to act in the interest of the debtor as well. Thus, by imposing an *Obliegenheit*, a specific constellation of interests is created. An example of this is the general requirement of a formal notice by a creditor claiming performance of his right under Belgian law. If the creditor fails to give formal notice to his debtor, he cannot be forced to do so, yet he will not be able to enforce his right until he has given formal notice. The creditor himself suffers a disadvantage of his failure to live up to the *Obliegenheit.*

Relying on an *Obliegenheit* to renegotiate after circumstances have changed thus seems particularly suited. The party having the most interest in maintaining the contract, i.e., the creditor as the party requesting performance, has to enter into renegotiations. If the creditor fails to do so according to his best efforts, the

105 See S. Hähnchen, *Obliegenheiten und Nebenpflichten. eine Untersuchung dieser besonderen Verhaltensanforderungen im Privatversicherungsrecht und im allgemeinen Zivilrecht unter besonderer Berücksichtigung der Dogmengeschichte* (Tübingen: Mohr Siebeck 2010), p 350; A. Fatemi, *Die Obliegenheit zur Due Dilligence beim Unternehmenskauf* (Düsseldorf: Nomos 2009), p 249; G. Rühl, *Obliegenheiten im Versicherungsvertragsrecht* (Tübingen: Mohr Siebeck 2004), p 400.

106 T. Ehrensperger, *Strukturen und Verletzung von Obliegenheiten im Schweizerischen Privatrecht (unter Ausschluss des Versicherungsrechts)* (Zürich: University of Zürich 2004), p 150.

107 See B. Freleteau, *Devoir et incombance en matière contractuelle* (Paris: LGDJ 2017), p 633; F. Luxembourg, *La déchéance des droits Contribution à l'étude des sanctions civiles* (Paris: L.G.D.J. 2007), p 472.

108 T. Hick, 'L'Obliegenheit et les devoirs – Pour une étude structurée des normes de comportement en droit privé', *TBBR (Tijdschrift voor Belgisch Burgerlijk Recht)* 2022, to be published; T. Hick, 'Corona-Obliegenheit: evenwichtig middel voor zieke contracten in deze crisis?', 412. *Juristenkrant* 2020, p 11; M. Houbben, 'Quelques considérations en faveur de l'intégration de l'incombance en droit privé belge', *Ann. Dr Louvain (Annales de Droit de Louvain)* 2016, p 91; P.A. Foriers, 'Les incombances en droit positif belge – L'exemple d'une notion à bannir', in M. Morsa & P. Gosseries (eds), *Le droit du travail au XXIe siècle: liber amicorum Claude Wantiez* (Bruxelles: Editions Larcier 2015), p 565; M. Fontaine, 'Obliegenheit, incombance?', in H. Cousy, C. Van Schoubroek, C. Uytterhoeven & A. Robijns (eds), *Liber Amicorum Hubert Claessens. Verzekering: theorie en praktijk/Assurance: théorie et pratique* (Antwerpen: Maklu 1998), p 151; M.E. Storme, *De invloed van de goede trouw op de kontraktuele schuldvorderingen* (Brussel: E. Story-Scientia 1990), pp 197–228, nrs. 196–234; M.E. Storme, 'De invloed van de goede trouw op de contractuele schuldvorderingen', *RW (Rechtskundig Weekblad)* 1990, p 137.

debtor can require the modification of the contract terms or the termination of the contract. Take the case of the tenant of a shop closed because of governmental measures. He is the creditor of the right of tenancy, but also the debtor of the obligation to pay rent. If he finds himself in a situation of frustrated purpose, an *Obliegenheit* to renegotiate will be placed on the landlord who has to negotiate according to his best efforts. If the landlord fails to do so, he will see his right to receive payment adapted by a judge. If the landlord fulfils the *Obliegenheit*, the contract either will be adapted should parties reach an agreement or be upheld by a judge if the landlord has deployed his best efforts to renegotiate, while the renegotiations fail nevertheless. Such a situation creates optimal incentives for the parties.[109] Indeed, entering into negotiations and maintaining them according to his best efforts thus is more advantageous for the creditor as he maintains a say over the modification of contract terms, while he would lose such a say if he leaves the modification up to the judge. If the creditor does live up to this *Obliegenheit*, but renegotiations fail anyway the debtor suffers the consequences thereof as the modification of the contract cannot be imposed.

In that sense, such an *Obliegenheit* would create both a more elegant and effective mechanism than the current one that exist in Article 6:111 Principles of European Contract Law (PECL)[110] or Article III.-1:110 DCFR.[111] While the solution of Article 6:111 PECL is considered too burdensome by leading scholars,[112] the solution in Article III.-1:110 (3) c sets the wrong incentives[113] as

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109 Comp. J. Lüttinghaus, 213. *AcP* 2013, p 277. See also M. Schmidt-Kessel & K. Mayer, in *Elgar Encyclopedia of Comparative Law*, p 842.

110 (1) A party is bound to fulfil its obligations even if performance has become more onerous, whether because the cost of performance has increased or because the value of the performance it receives has diminished.

(2) If, however, performance of the contract becomes excessively onerous because of a change of circumstances, the parties are bound to enter into negotiations with a view to adapting the contract or terminating it, provided that:

(a) the change of circumstances occurred after the time of conclusion of the contract

(b) the possibility of a change of circumstances was not one which could reasonably have been taken into account at the time of conclusion of the contract, and

(c) the risk of the change of circumstances is not one which, according to the contract, the party affected should be required to bear.

(3) If the parties fail to reach agreement within a reasonable period, the court may:

(a) terminate the contract at a date and on terms to be determined by the court; or

(b) adapt the contract in order to distribute between the parties in a just and equitable manner the losses and gains resulting from the change of circumstances.

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

111 See S. Stijns, P. Wéry, et al., in *De hervorming van het Burgerlijk Wetboek*, p 22.

112 See E. Hondius & H.C. Grigoleit (2011), in *Unexpected circumstances in European Contract Law*, p 10.

113 J. Lüttinghaus, 213. *AcP* 2013, p 272.

it is up to the debtor to engage negotiations before being able to call upon a judge to adapt the agreement.[114]

37. Legal basis – It is obvious, that imposing an *Obliegenheit* on a creditor is a strong and constraining measure. That begs the question of an adequate legal basis for imposing of such a measure. Even though *Obliegenheiten* do exist in most legal systems – often not recognized as such – they cannot legally emerge out of nowhere. In that sense, our argument is *de lege ferenda.* Yet, in many legal systems, mechanisms do exist that allow to implement the *Obliegenheit* – but those mechanisms often remain somewhat vague and unspecific.[115] How the mechanism of the *Obliegenheit* can be implemented in the respective legal systems, if it is deemed desirable, outpasses the scope of the present article and shall not be discussed in further detail. As a rule of thumb, open norms imposing on parties to act in good faith are useful temporary solutions which should ultimately be consecrated.[116]

6. Conclusion

38. The current crisis has considerably changed the circumstances that many contracts were based on. Those changes lead to considerable difficulties in the performance of the contract. Yet, these problems may not only arise in the performance of the contractual obligations, but also in the enjoyment of the contractual rights. Nevertheless, both French and Belgian systems of contract law appear unsuited to deal with those latter cases in which the enjoyment of a right has been impeded. The hypothesis of the present article was that this inability leads to considerable difficulties of dealing with a wide array of cases, illustrated by the paradigm cases.

39. That hypothesis has been confirmed based on a comparative exercise that first shows to what extent French and Belgian approaches to changed circumstances are debtor centrist and secondly describes how German, Dutch and English law are better equipped to deal with the identified cases. The latter legal systems provide for a doctrine of frustration which can also take the impediment of enjoyment of a right, and more precisely the loss of purpose of a contractual right, into account. That doctrine of loss of purpose has proved able to solve the identified cases in a more coherent way. The doctrine offers an adequate method to assess whether a contract needs to be adapted (or discharged in the case of English law) because of the materialization of the creditors risk while taking the specific circumstances of

114 '(d) the debtor has attempted, reasonably and in good faith, to achieve by negotiation a reasonable and equitable adjustment of the terms regulating the obligation'.

115 Think of the concerns regarding the doctrine of the prohibition of abuse of rights set out here above (see *supra* n. 17).

116 J. Esser, in *Summum Ius Summa Iniuria*, p 22.

each case into account. This does not imply that a creditor will be able to rely on it in all of the paradigm cases, which in any case would not seem reasonable in the light of their specific circumstances.

40. It is my suggestion that both French and Belgian law would be better equipped to deal with the current crisis if they were able to take the frustration of purpose into account. That is all the more the case as both French and Belgian law actually do recognize the existence of a creditor risk, yet are unable to adequately deal with its materialization due to changed circumstances. Whether, when implementing such a doctrine of frustration of purpose, a duty or *Obliegenheit* of renegotiation should be imposed on parties is an open and debated question. Irrespective of its desirability, I formulated a suggestion of how the incentives to parties facing the materialization of the creditors risk, could be optimally set by relying on an *Obliegenheit* of renegotiation.

41. This suggestion is plainly *de lege ferenda* and may seem in that regard somewhat idealistic. Yet, even in the absence of the implementation of such a doctrine of frustrated purpose into French and Belgian law, it is relevant to understand why French and Belgian law have such a hard time to deal with many of the contract law cases rising in the current crisis. Such understanding allows a better perspective on the (inadequate) existing solutions: Article 1722 of the French and Belgian *Code civil* and the prohibition of the abuse of rights. Therefore, even in the absence of the implementation of a doctrine of frustrated purpose, the insights presented hereinabove should prove relevant and useful to our understanding of current contract law.