THE LEGAL ECHO OF THE PANDEMIC: ENGLISH, GERMAN AND CZECH PRIVATE LAW BETWEEN CONTRACTUAL RISK AND PUBLIC INTEREST – WHICH LEGAL REGIME HANDLES COVID-19 DISRUPTIONS MOST EFFECTIVELY?

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Abstract: *The COVID-19 pandemic profoundly challenged the principles of private law across Europe, exposing each legal system's underlying philosophy of contractual stability and fairness under extraordinary circumstances. This paper examines how England, Germany, and the Czech Republic addressed pandemic-related contractual disruptions, focusing on their respective mechanisms of risk allocation and hardship relief.*

The comparative analysis reveals that, while all three jurisdictions recognized the severity of the pandemic, the approaches they pursued diverged sharply in scope and effect. English law, faithful to its common law roots, maintained a strict adherence to freedom of contract and pacta sunt servanda, limiting judicial intervention to rare cases of frustration and narrowly interpreted force majeure clauses, in essence eschewing consideration of the broader pandemic context affecting contractual relations. The Czech Republic, though equipped with a newly codified hardship rule and a broad statutory framework for state compensation, exercised these tools only sparingly; its courts displayed marked hesitation to reinterpret private contractual relations in light of the pandemic's implications.

In contrast, German law emerged as the most adaptive system. By effectively applying Section 313 BGB on interference with the basis of the transaction, the judiciary managed to recalibrate contractual equilibrium without undermining legal certainty. German courts consistently recognized COVID-19 as a fundamental disturbance justifying equitable adjustment rather than termination, thereby operationalizing the clausula rebus sic stantibus in a socially responsive manner.

The comparative outcome demonstrates that only the German approach achieved a balanced synthesis between stability and fairness. Yet the experience also points forward: as pandemics become foreseeable risks, the exceptional doctrines invoked during COVID-19 may lose their exceptional character, compelling future convergence toward stricter foreseeability standards and greater contractual self-responsibility.

Keywords: *Hardship doctrine, force majeure, contractual risk allocation, frustration, pandemic relief mechanisms*

INTRODUCTION

With its wide-ranging effects across society, the COVID-19 pandemic constituted an unprecedented event in recent history. The private law sector was severely affected, as contractual parties were often taken by surprise and had to struggle for relief considering looming payment deadlines and performance obligations.

The aim of this paper is to compare three markedly different approaches within the private law sector–namely those of England, Germany and the Czech Republic–to

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pandemic-related contingencies and to show which system is best suited to address the disruptions caused by the crisis, especially which relief mechanisms prove most favorable. For this purpose, we adopt a broader perspective, extending the analysis to areas more commonly associated with public law, such as state liability and insolvency law, in order to provide a clearer picture of the risk allocation each jurisdiction opted for.

While the inquiry reveals several similarities, it also brings to light distinct particularities that stem from the fundamentally different legal traditions to which the jurisdictions belong–common law and civil law–together with their respective historical and economic backgrounds.

Although the jurisdictions under consideration pursued different underlying concepts in their legal responses to the pandemic, all of them recognized the necessity of short-term measures aimed at cushioning its most severe effects. In this regard, temporary interventions in areas such as tenancy and insolvency law may briefly be mentioned; however, since they do not display significant divergences across jurisdictions, they are not the principal focus of this article. Instead, this analysis emphasizes the broader conceptual approaches and guiding principles through which the respective legal systems sought to address the disruptions caused by the pandemic, particularly in their attempt to balance the interests of private law parties and to provide adequate relief through the implementation of longer-term measures.

I. COMPARING THE THREE SYSTEMS

I.1 The English Approach

The English contract law addressed the pandemic-related disruptions primarily through the modern law of frustration, based on two main pillars: the common contractual practice of including a *force majeure* clause within the express contract terms and the common law doctrine of frustration developed by the courts.

In the face of contractual contingencies, the common law has traditionally been restrictive, tending to refuse judicial remedies that might interfere with party autonomy. In line with this tradition, the principles of *pacta sunt servanda* and freedom of contract strongly influenced the courts' approach when confronted with the hardship cases of the pandemic. Contract interpretation was carried out in a rather formal manner, with little emphasis on the socio-economic context of the pandemic.

I.1.1 Force majeure Clauses During the Pandemic

As doctrine claims that parties explicitly and tacitly stipulate the allocation of all kinds of risks, even those connected with unforeseen change in circumstances, the starting point for English judges was the consideration of the contractual risk allocation between the parties, with explicitly stipulated clauses potentially precluding the application of the frustration doctrine. To make provision for a change of circumstances in the contract, the intended allocation of risk was often laid down explicitly in the agreement through *force majeure* or other clauses (like material adverse-change or hardship clauses). In their various formulations, they anticipated, in substance, the possibility of a supervening event beyond the parties' control, either factual or legal, which may affect the performance of a contract (such as the pandemic causing employees to be sick and thus unable to work).[1]

In *European Professional Club Rugby v. RDA Television LLP*,[2] a *force majeure* clause expressly mentioning "epidemic" allowed discharge of a rugby broadcasting contract due to COVID-19 causing season cancellation.

Most contracts were not this straightforward, as clauses often contemplated certain risks more vaguely. In *Financial Conduct Authority v. Arch Insurance (UK) Ltd.*,[3] the *Supreme Court* held that disease clauses covering notifiable diseases within a specified radius of business premises applied to pandemic losses. Insurers' argument that only local outbreaks were covered was rejected; a direct causal link between a specific local case and closure was not required.

Since the outcome of the litigation potentially affected 370,000 policyholders, it had a public interest dimension. This meant that the COVID-19 pandemic itself was considered as a defining element of the context and could not be disregarded, contrary to many other cases.

In general, courts repeatedly rejected the idea that COVID-19 triggered more generally phrased *force majeure* clauses: "Hindrance" to pay an accrued debt required a *"significant degree of difficulty*", approaching, albeit falling short of, impossibility.[4]

"Inability" was viewed to set an even higher bar than just "hindrance" or "delay", explicitly excluding short-term delays from triggering the clause. Like considerations regarding frustration, inability depends on whether the likely duration would undermine the commercial venture. As the restrictions were likely to end within a few weeks, an inability to perform was not found.[5]

I.2 Frustration in the Commercial Context

One legal concept repeatedly invoked during the pandemic in order to address the unique circumstances of the COVID-19 pandemic in the contractual context and to achieve a certain balance of interests is the doctrine of frustration: When either, after contract conclusion, its substance has become impossible (frustration of contract) or the commercial purpose has been destroyed (frustration of purpose), the contract is terminated automatically and the parties are released from their obligations.[6]

According to *Davis Contractors v. Fareham*, which coherently summarizes the prevailing standard, frustration occurs *"whenever the law recognizes that without default of either party a contractual obligation has become incapable of being performed because the*

[1] DE VERNEUIL SMITH, P. – KRAMER, A. – DAY, W. COVID-19, Brexit, and Russia Sanctions: Force Majeure, Frustration and Illegality in English Law: A Detailed Guide Preview. *3 Verulam Buildings (3VB)*. 2023, pp. 3; PÉDAMON, C. – VASSILEVA, R. Contractual Performance in COVID-19 Times: Does Anglo-French Legal History Repeat Itself? *European Review of Private Law*. 2021, Vol. 29, No. 1, pp. 32.

[2] European Professional Club Rugby v. RDA Television LLP [2022] EWHC 50 (Comm).

[3] Financial Conduct Authority v. Arch Insurance (UK) Ltd. and Others [2021] AC 649.

[4] Litasco SA v. Der Mond Oil and Gas Africa SA [2023] EWHC 2866 (Comm).

[5] NKD Maritime Ltd. v. Bart Maritime (No. 2) Inc [2022] EWHC 1615 (Comm).

[6] Lauritzen A/A v. Wijsmuller B.V. (The Super Servant Two) [1989] EWCA Civ 6; National Carriers v. Panalpina [1980] UKHL 8; PERRIELLO, L. Terminating or Renegotiating? The Aftermath of COVID-19 on Commercial Contracts. *Comparative Law Review*. 2020, Vol. 11, No. 2, p. 91.

circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract (*Lord Radcliffe*).”[7]

In practice, a successful application regularly failed due to the high hurdles set by case law: The doctrine was only meant to apply in absolutely exceptional cases, as it is widely considered a strong remedy that is not intended to make up for poor bargaining, thus *“must not be lightly invoked and must be kept within very narrow limits*”.[8]

Courts often relied on the implied risk allocation in their contractual interpretation of the contract terms.

In the field of aircraft leases, due to the temporary grounding of aircrafts around the world to contain the pandemic outbreak, the question arose whether restrictions on air passenger flights imposed by the authorities of the host state due to the COVID-19 pandemic could frustrate an aircraft lease.

Courts consistently held that asserting frustration in a commercial lease is extremely improbable. The express terms clearly allocated risk: the lessee bore all operational and maintenance risks, along with potential commercial rewards. The courts rejected any claim of a frustrated common purpose, stating profitability was solely the lessee's concern. The rent obligation continued in virtually all circumstances. Under this “dry lease,” the lessor's duties are minimal–essentially only ensuring quiet possession–which sets a very high bar for frustration.[9]

In a commercial lease case, tenants argued frustration when a cinema became illegal to operate due to government restrictions. They cited a rent cesser clause and claimed a failure of the contract's basis, as both parties intended the premises for cinema use. The court rejected their claim. The rent cesser clause's wording did not cover pandemics, so it did not apply. The court also found no gap requiring an implied term, as the risks were already allocated by the contract. Finally, there was no failure of basis because the landlord had not guaranteed a specific use; the risk of being unable to operate a cinema fell solely on the tenant.[10]

Another question occupying the courts' attention was whether the temporary suspension of a lease, or alternatively its termination, was possible, since the supervening event, the pandemic, often did not last the entire length of the contract.

In a very instructive case, issued as *Bank of New York Mellon (International) Ltd. v. Cine-UK Ltd.*,[11] the court evaluated *“quantitatively the claim in terms of the time left on the [contract] after the supervening event is likely to subside, [and then] qualitatively evaluate whether the performance has become radically different*”[12] which would present a new situation that could justify a departure from the agreed allocation of risk. It decided that the lockdown regulations imposed due to the pandemic, in theory, qualified

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[7] Davis Contractors Ltd. v. Fareham UDC [1956] UKHL 3. This definition has been repeatedly applied by courts, recently in Canary Wharf Management Limited v. European Medicines Agency [2019] EWHC 335 (Ch).

[8] Lauritzen A/A v. Wijsmuller B.V. (The Super Servant Two) [1989] EWCA Civ 6; BERRIGAN, D. Making Lease Payments a Lessor Problem. *Georgia Law Review.* 2022, Vol. 57, No. 1, pp. 415–416.

[9] Salam Air SAOC v. Latam Airlines Group SA [2020] EWHC 2414 (Comm); Wilmington Trust SP Services (Dublin) Ltd. v. Spicejet Ltd. [2021] EWHC 1117.

[10] London Trocadero (2015) LLP v. Picturehouse Cinemas Ltd. and Others [2022] EWHC 2591 (Ch).

[11] Bank of New York Mellon (International) Ltd. v. Cine-UK Ltd [2021] EWHC 1013 (QB).

[12] Ibid., No. 209.

as a supervening event. However, in the context of a lease of 15 years or more, with the lease still having more than a year to run after the disruption had ceased and the ordered closures of commercially used premises not expected to last more than eighteen months, the court did not consider the duration of the supervening event in relation to the entirety of the contract length a significant enough period to amount to frustration of the whole contract which could justify a departure from the agreed allocation of risk.

The idea of temporary frustration was rejected altogether by the court, stating that frustration terminates a contract and with it, the obligations cease, a suspension or revival of the contract is not possible.

The judgment further considered a change of the common law approach in light of the unprecedented circumstances, questioning whether to adapt its principles of contractual interpretation, potentially transferring the burden of the present emergency by reallocating the risks. It weighed in on the interest of the business owners that lack turnover they desperately needed, but also considered the other parties involved, namely trustees for others, who have invested in those funds for their own financial well-being and thus rely upon their return. It ruled, however, that legal certainty remains paramount and contractual rights are to be applied by settled principles, which are the basis of this judgment.[13]

Courts prioritized the plain meaning of express contract terms over the broader pandemic context. In a decision regarding the Premier League's resumption with a modified schedule in empty stadiums, the court ruled that fee reductions for broadcasting rights were unjustified. It determined that the "fundamental format" of the competition remained unchanged because matches were still played and broadcasted. The court dismissed the absence of fans–and its impact on entertainment value or game outcomes–as irrelevant to what the purchaser had bought.[14]

What emerges is the predominant view that commercial contracts lack social context, which means substance of the exchange are only the express terms with the principal obligations.

This strict approach is attributed to the conception of commercial contracts as *"fundamentally competitive and adversarial relationships*",[15] in which parties approach the interaction from their own commercial standpoint, so the contract is not the outcome of a common purpose, but the result of rival negotiations driven by different objectives.[16]

I.3 Fairness Considerations

Some lower courts suggested that the strict approach of pursuing self-interest in traditional contract law, under some circumstances, requires modification. In doing so, they recognized certain forms of relational contracts, which imply a term of good faith between the contracting parties.[17] However, The *Court of Appeal* reiterated the elusiveness

[13] Ibid.
[14] The Football Association Premier League Ltd. v. PPLive Sports International Ltd. [2022] EWHC 38 (Comm).
[15] MITCHELL, C. What does Covid-19 teach us about English contract law? *Legal Studies*. 2024, Vol. 44, No. 2, p. 324.
[16] Canary Wharf (BP4) T1 Limited v. European Medicines Agency [2019] EWHC 335 (Ch).
[17] Yam Seng Pte Ltd. v. International Trade Corpn [2013] EWHC 111 (QB).

of the concept of good faith, which requires a high level of trust and confidence *and "should not be used to avoid orthodox and clear principles of English Contract law*".[18]

English common law thus largely resisted the implication that commercial contracts include some norms of good faith.

In the context of commercial contracts, a successful assertion of frustration has been virtually impossible.[19]

In the field of consumer contracts, another aspect was added to the equation: the consumer protection policy, which requires consumer contracts to be fair to be legally valid. According to Section 62 [4] of the Consumer Rights Act 2015 (CRA 2015), this is not the case "*if, contrary to the requirement of good faith […] a significant imbalance in the parties' rights and obligations*" is caused. However, while a court was likely to pay close attention to terms and conditions of a consumer contract, previous attempts to invalidate contract terms have not fared well in courts, with the test being narrowly interpreted by the judges.[20]

The disproportionately high share of the loss being allocated to the consumer in several cases[21] was criticized as being against the consumer protection policy. However, *Mitchell* acknowledged the ambiguity of the judge's task at hand, as it is *"not a judicial task to mould common law doctrine to fit a consumer protection agenda*" and contract law is largely seen as offering little toward policy goals like consumer protection, a judicial conviction which COVID-19 likely reinforced. This tension stems from consumer protection policies clashing with common law contract principles. Balancing them proves challenging, as consumer welfare goals conflict with market-individualism that allows discharge only narrowly.[22]

Indeed, common law principles left consumers badly protected, forcing them to rely on illegality and frustration doctrines that rarely aligned with their interests.

II. THE GERMAN RESPONSE TO THE CRISIS

The German response to the fundamental changes caused by the circumstances of the COVID-19 pandemic took a rather distinct form.

In addition to the well-defined impossibility rule which applied in cases involving fixed-date performances that could not be rendered, German contract law relied heavily on its general hardship clause in Section 313 Civil Code (BGB), the interference with the basis of the transaction,[23] which is often described as tailor-made for situations of fun-

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[18] Candey Ltd. v. Basem Bosheh and Another [2022] EWCA Civ 1103.

[19] Exceptionally, a US court excused payment of rent via frustration of purpose, *UMNV 205-207 Newbury LLC v. Caffé Nero Americas Inc.* (Mass. Superior Ct., Feb. 8, 2021, 2084CV01493-BLS2): The lease limited use to operating a Caffé Nero themed café, permitting takeout only from the sit-down menu. The court held that while the *force majeure* clause addressed impossibility, it failed to cover frustration of purpose–where performance remained possible but the contract's purpose was wholly defeated.

[20] See e.g. ParkingEye Ltd. v. Beavis [2015] EWCA Civ 402.

[21] E.g., Neil Willis v. Offley Place Hotel, Oxford County Court, April 7, 2021.

[22] MITCHELL, C. *What does Covid-19 teach us about English contract law?* pp. 318–319.

[23] § 313 of German Civil Code: *(1) If circumstances that became the basis of a contract have undergone serious change since the contract was concluded and if the parties would not have concluded the contract or would*

damental change, as it is designed to restore fairness between the parties under altered and adverse circumstances.

Given the number of unspecified legal terms contained in Section 313, its potential wide scope of application and the openness of the legal consequences it provides, the judiciary was heavily tasked to provide guiding principles and criteria suitable to a multitude of cases brought about by the pandemic. Courts therefore played a central role in defining the contours and practical reach of hardship relief in German law.

The relatively minor importance of *force majeure* clauses and other contractual stipulations demonstrates how under German contract law, parties are generally not understood to have established a comprehensive contractual risk allocation in advance. Instead, the resolution of pandemic-related contractual disturbances was, for the most part, left to statutory mechanisms, above all Section 313.

II.1 The Balancing Act between *pacta sunt servanda* and the *clausula rebus sic stantibus*

Due to its sensitivity to social instances, German contract law puts a strong emphasis on balancing out the implications of the *pacta sunt servanda* principle. Therefore, its counterpart plays a key role: the *clausula rebus sic stantibus*, according to which, every legal transaction is subject to the condition that the circumstances remain the way they were when concluding the contract. The transaction is therefore invalid if the circumstances change in a way that the parties would not have concluded the contract had they foreseen the development.[24]

This principle has a long tradition and led German law to develop the legal concept "Störung der Geschäftsgrundlage", which today offers well-established case law with distinct case groups. Originally derived from the general good faith provision of the original German Civil Code in 1900, at last, the concept of interference with the basis of the transaction was codified in Section 313. The aim was to maintain the strict requirements of the established concept.[25]

II.2 The Argument of Impossibility During the Pandemic

Due to Section 313's strict subsidiarity, an application of Section 275, impossibility, precluded any further consideration of an interference with the basis of the transaction.

In times of COVID-19, that was particularly the case regarding shutdown-related closures of fitness studios: In a number of cases, courts found that it was legally impossible

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have concluded it with different contents had they foreseen this change, then 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 required to uphold the contract without alteration. […] (3) If adaptation of the contract is not possible or if one party cannot reasonably be required to accept it, then the disadvantaged party may rescind the contract. In the case of continuing obligations, the right to terminate takes the place of the right of rescission.

[24] FINKENAUER, T. *§ 313, Störung der Geschäftsgrundlage [*Interference with the Basis of the Transaction]. In: G. Hirsch – F. Montag – F. Säcker (eds.). *Münchener Kommentar zum Bürgerlichen Gesetzbuch* [Munich Commentary on the Civil Code]: BGB. 9th Ed., Munich: C. H. Beck, 2022, No. 20.

[25] Legislative rationale, see BT-Drs. 14/6040, p. 176.

for the customers of the gym to attend it. The lockdown was considered significant enough to not only cause a mere temporary impossibility, but instead, the purpose of the contract as a whole–the frequent gym uses to achieve fitness goals–was put in question, justifying treating a temporary interference the same as permanent impossibility.[26]

Gym operators belonged to the group of businesses hit hardest by state-imposed COVID-19 restrictions. To avert a wave of refund claims, Art. 240 (5) Introductory Act to the Civil Code (EGBGB) allowed organizers of cancelled events and operators of closed recreational or cultural facilities to satisfy otherwise impossible performance (Section 275 Civil Code) with a voucher instead of a cash refund.

Large events were cancelled and high-traffic facilities closed because they exceeded attendance limits, so immediate repayment duties would have triggered severe liquidity shortages and insolvencies. As tickets and gym memberships are typically discretionary purchases for consumers, whereas the entrepreneurs' existence was at stake, shifting this economic burden to consumers was considered justified.[27]

The pandemic also caused an almost complete standstill of traveling, both due to the illegality of traveling to certain areas and due to the global risk of infection.

For package travel contracts, special impossibility rules dealing with extraordinary circumstances applied: According to Section 651h Civil Code, in case of a rescission of the contract, in principle, the price was to be refunded and if necessary, compensation was to be paid to the tour organizer. However, no compensation was required, if unavoidable, extraordinary circumstances would arise at the destination that would significantly impair the execution of the trip or the transportation, leading to unreasonable risks.[28]

The COVID-19 pandemic constituted such an unavoidable, extraordinary circumstance. The existence of a travel warning issued by the Federal Foreign Office or an assessment by another expert body (e.g. WHO) represented a strong indication for a significant health risk at the destination. Similarly, an impairment was deemed significant enough, if, because of regulatory measures, a quarantine at the destination was necessary or other restrictions affected the freedom of movement; also, the closure of local sights constituted an impairment, as did rules on face masks and social distancing. Part of the comprehensive assessment of the situation was also individual circumstances and attributes, such as the traveler belonging to a group at risk of an infection.[29]

[26] BGH [Federal Court of Justice], Judgment of 4 May 2022, No. XII ZR 64/21, NJW 2022, 2024.

[27] Legislative rationale, see BT-Drs. 19/18697, p. 5, 8; KAULBACH, A.-M. – SCHOLL, B. Die vertragsrechtlichen Regelungen in Art. 240 EGBGB: Voraussetzungen, Rechtsfolgen, offene Fragen [The Contractual Provisions in Art. 240 EGBGB: Requirements, Legal Consequences, Open Questions]. In: Daniel Effer-Uhe – Alica Mohnert (eds.). *Vertragsrecht in der Coronakrise* [Contract Law During the COVID-19 Crisis], 1st Ed., Baden-Baden: Nomos, 2020, p. 142.

[28] SCHMIDT, A. Corona-Krise und Reiserecht [COVID-19 Crisis and Travel Law]. In: *Weber kompakt, Rechtswörterbuch [Weber kompakt, Legal Dictionary], 10th Ed.*, 2024.

[29] BGH, Judgment of 30 August 2022, No. X ZR 66/21, NJW 2022, 3707; MEIER, P. Aktuelle Probleme im Reiserecht durch die Corona-Krise [Current Issues in Travel Law Due to the COVID-19 Crisis]. In: Daniel Effer-Uhe, D. – Alica Mohnert (eds.).*Vertragsrecht in der Coronakrise, 1st Ed.* Baden-Baden: Nomos, 2020, pp. 187–188; SCHMIDT, A. *Corona-Krise und Reiserecht [COVID-19 Crisis and Travel Law].*; WOITKEWITSCH, C. Auswirkungen der Covid-19-Pandemie auf zivilrechtliche Rechtsverhältnisse [Impacts of the COVID-19 Pandemic on Civil Law Relationships]. *Neue Juristische Wochenschrift (NJW) [New Journal of Jurisprudence].* 2022, No. 19, p. 1136.

II.3 Interference with the Basis of the Transaction

While Section 275 was quite straightforward, applying the well-established, yet unspecified terms under which the "hardship clause" in Section 313 would operate in the context of the pandemic, posed quite the challenge for the judiciary.

Already its applicability was discussed: Being an exceptional rule under normal circumstances, Section 313 governs individual contracts, concerning the *inter partes* relation between individual parties (not entire societies); however, the pandemic presented a plethora of different cases which were all shaped by the disruptions of the crisis and its state-imposed measures, often inter-connected and not entirely separable from each other. It was therefore questioned whether this civil law measure was an appropriate tool to deal with the wide-ranging effects of such broad interferences.[30]

By introducing Art. 240 (7) Introductory Act to the Civil Code, the legislator acknowledged the severity of the pandemic and subsequent measures in the commercial lease sector. It also provided clarity, as the provision created the rebuttable presumption that, where lease premises could not be used at all or only to a limited extent due to state-imposed COVID-19 measures, a disturbance in the basis of the transaction within the meaning of Section 313 was present. This confirmed that the hardship concept in Section 313 was indeed capable of addressing a crisis with effects extending across society.

This was integral and in line with ensuing case law, which, in the absence of contrary evidence, assumed that *bona fide* contracting parties would have concluded the contracts under different terms, had they foreseen the possibility of a pandemic and the associated risk, not one-sidedly burdening one party, thus largely applying the provision.[31]

The focus of judicial interpretation thus shifted toward the substantive requirements, so whether, given the changed and adverse circumstances, a contracting party could not reasonably be expected to adhere to the unchanged terms of a contract, considering all its specific circumstances and particularities surrounding the contract. This needed careful analysis of foreseeability and allocation of risk.

In terms of the foreseeability of such a pandemic scenario, the danger of the SARS virus was already known in 2012; nonetheless, the devastating impact of a potential shutdown affecting the basis of the transaction was not present in public perception and appeared relatively unrealistic.[32]

A key feature of the German legal approach to pandemic-related disputes was the courts' willingness to reassess contractual risk distribution. Because state interventions were deemed extraordinary "general risks" beyond the control of either party, courts ruled that the resulting burdens exceeded standard contractual allocations. Consequently, rather than holding one party responsible, the courts required the risk to be shared between both parties to address circumstances not contemplated in the original agreement.[33]

In the case of commercial lease contracts, this meant that a restriction of use and closure of premises due to publicly imposed measures went beyond the risk connected to

[30] FINKENAUER, T. § 313, Störung der Geschäftsgrundlage. [*Interference with the Basis of the Transaction*].
[31] BGH, Judgment of 11 January 2023, No. XII ZR 101/21, NZM 2023, 243.
[32] PERRIELLO, L. *Terminating or Renegotiating? The Aftermath of COVID-19 on Commercial Contracts,* p. 86.
[33] BGH, No. XII ZR 101/21, *op. cit.*; BGH, Judgment of 13 July 2022, No. VIII ZR 317/21, NJW 2022, 2830.

the ordinary purpose of use which the lessee could be expected to bear. Rather, both parties had to bear that risk.[34]

Whether the adherence to the original contract indeed was unreasonable for the lessee and justified an intervention by the court, however, was assessed for each case individually:[35]

On one hand, the lessee had to substantiate the disadvantages caused by the closure and the restrictions, considering the decline in turnover for the specific lease object.[36]

Circumstances also factored in were duration of closures and government-imposed limits on the size of sales areas and access restrictions such as "2G" or "2G+",[37] because it completely or at least partially excluded potential customers from visiting stores without being able to influence this themselves in the short term.[38]

In a case regarding the operation of a restaurant, the lessee successfully established its financial issues, with the revenue from the restaurant not even covering the rent, which even led to an insolvency application by the tax office. The court considered the recognizable circumstances obvious in light of the changes in the gastronomy sector, with restrictions on the number of guests and closure of facilities being generally known due to regular publication in the press.[39]

Besides, the countermeasures taken by the lessee to mitigate the imminent losses were relevant, even including the consideration of potential counter-measures not actually taken–an example being the setting up of an online shop or the offering of a 'pick up' service to alternatively make profit.[40]

An actual threat to the economic existence of the tenant was not required but had to be factored in if it existed.[41]

On the other hand, to avoid overcompensation, the lessee's efforts to compensate for impending losses were part of the consideration, such as financial benefits and savings, including state aid to compensate for losses suffered by the restrictions and saved ex-

[34] SCHÜLLER, P. BGB § 536 Mietminderung bei Sach- und Rechtsmängeln [Rent Reduction for Physical and Legal Defects]. In: Klaus Schach – Michael Schultz – Peter Schüller (eds.). *BeckOK Mietrecht. [Beck's Online Commentary on Tenancy Law]. 36th Ed. No. 38.* Munich: C. H. Beck; similarly, BRINKMANN, J. Niemand zahlt mehr Miete!?–Die Corona-Krise und ihre Auswirkungen auf die Pflicht zur Mietzahlung [No One Pays Rent Anymore!?–The COVID-19 Crisis and Its Impacts on the Obligation to Pay Rent]. In: Daniel Effer-Uhe – Alica Mohnert (eds.). *Vertragsrecht in der Coronakrise, 1st Ed.* Baden-Baden: Nomos, 2020, p. 174.

[35] SCHÜLLER, P. *op. cit.*, § 536, No. 39a.

[36] BGH, Judgment of 13 July 2022, No. XII ZR 75/21, NJW-RR 2022, 1303.

[37] The German abbreviation for "genesen und geimpft" = recovered and vaccinated, "+" = tested.

[38] BGH, No. XII ZR 75/21, *op. cit.*

[39] BGH, Decision of 16 November 2021, No. VIII ZB 21/21, NJW-RR 2022, 449.

[40] BGH, Judgment of 12 January 2022, No. XII ZR 8/21, NZM 2022, 99; JUNG, S. Coronabedingte Schließungen während des ersten Lockdowns–Bewährungsprobe für die Störung der großen Geschäftsgrundlage [COVID-19-Related Closures During the First Lockdown–A Test Case for the Doctrine of Interference with the Basis of the Transaction]. *Deutsches Steuerrecht (DStr). [German Tax Law].* 2022, Vol. 60, No. 11, p. 563; LORENZ, EGBGB, Art. 240 § 7 Störung der Geschäftsgrundlage von Miet- und Pachtverträgen [Art. 240 § 7 Interference with the Basis of Lease and Tenancy Agreements]. In: Wolfgang Hau – Roman Poseck (eds.). *BeckOK BGB. [Beck's Online Commentary on the German Civil Code].* 70th Ed., Munich: C. H. Beck.

[41] LEO, U. § 4 Mietvertragsphase. Rechtsprobleme während der Vertragslaufzeit [§ 4 Tenancy Contract Phase. Legal Issues During the Contract Term]. In: Jürgen Fritz – Günther Geldmacher – Ulrich Leo (eds.). *Gewerberaummietrecht* [Commercial Tenancy Law], 5th Ed., Munich: C. H. Beck, 2024.

penses in the calculation. This contains savings from short-time work and benefits provided by the lessee's business closure insurance.[42]

In a case in which the lessee's presentation lacked further explanation that could have established a causal connection to the state-imposed restrictions and did not include any specification of saved expenses, the substantiation of a causal link was not considered sufficient, despite absolute numbers and percentage rates quantifying the decrease in turnover.[43]

The above considerations show the nuanced stance courts adopted in evaluating hardship claims under Section 313. This sophisticated approach extended beyond the provision's prerequisites: A key aspect of the discussion was how to fairly allocate the pandemic's burden in terms of the legal consequences.

With respect to the primary legal consequence under Section 313, the adaptation of contract,[44] judges were granted a wide margin of discretion which was only limited in a way that the contract adjustment was required to not go beyond what is necessary for the relief of the burden exceeding the reasonable level ('to the extent that').[45] This posed a difficult balancing act, considering all aforementioned factors possibly affecting both the quality and quantification of such claims.

Considering this, some lower courts suggested a generalized approach of an automatic "50:50" adaptation, allocating the parties' risks evenly.[46] This was rejected by the *Federal Court of Justice*, which instead voted in favor of an individual assessment of all the relevant facts, balancing both the disadvantages suffered with reasonable countermeasures. While in principle, the risk of the pandemic was to be allocated equally between parties, since the pandemic was caused by neither party nor one party alone could bear the risk associated with it, the varying actual conditions required a weighted distribution of the burden in each individual case.[47]

II.4 A Restrictive Perspective

The indiscriminate application of the "interference with the basis of the transaction" principles to commercial contracts regardless of its context did not find universal approval.

Powerful voices among legal scholars questioned the unforeseeability of the pandemic, in particular the context of business and commercial transactions. Some voted for a stricter standard, re-visiting the foreseeability arguments which often made the adherence to the contract unreasonable, at least when it comes to commercial tenancy law–the fact that the tenant acts with profit-making intention was deemed to alter the threshold

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[42] BGH, No. XII ZR 75/21, *op. cit.*; BGH, Judgment of 16 February 2022, No. XII ZR 17/21, NJW 2022, 1378; BGH, No. XII ZR 8/21, *op. cit.*

[43] BGH, Judgment of 23 November 2022, No. XII ZR 96/21, NZM 2023, 77.

[44] As a subsidiary legal consequence, the contract may end either by rescission or, for continuing obligations, by termination.

[45] BGH, Judgment of 2 March 2022, No. XII ZR 36/21, NJW 2022, 1382.

[46] OLG Dresden [Higher Regional Court Dresden], Judgment of 24 February 2021, No. 5 U 1782/20, openJur 2021, 6721; AG Dortmund [Local Court Dortmund], Judgment of 27 April 2021, No. 425 C 7880/20, openJur 2021, 20406.

[47] BGH, No. XII ZR 8/21, *op. cit.*; also, BGH, No. XII ZR 17/21, *op. cit.*

of reasonableness and with it the applicability of Section 313:[48] *Leo* reiterates that in particular commercial tenants regularly will have been aware of a latent risk of a pandemic outbreak and thus could have foreseen it. According to him, the Ebola outbreak in 2014, which caused a spread across all countries, was a warning and the waiver of a precautionary clause for epidemics or cases of *force majeure*, which are quite common in those types of contracts, at least since then a deliberate risky business decision.

In case of turnover-dependent rent payments, some courts even precluded the applicability of Section 313 due to a participation in the risk by the landlord.[49]

Nonetheless, this consideration found only limited application; courts firmly adhered to their approach of reallocating risks, thereby preventing hardship cases arising from the pandemic to the greatest extent possible.

III. THE CZECH LEGAL SYSTEM'S SOLUTION

Despite its historical inspiration and obvious similarities with the German legal system, Czech private law shows several features that shaped the legal response to the COVID-19 crisis. Two aspects deserve particular attention.

First, the Czech Civil Code (OZ) contains a hardship provision, Section 1765,[50] which is a relatively recent innovation and remains far from firmly established within the Czech legal order. The pandemic thus provided a unique opportunity to answer the question to what extent this provision may retrospectively alter the balance of obligations between contracting parties and whether it may assume greater significance in future crisis contexts.

Second, Czech law reveals a tendency toward what may be described as a more "socially oriented" approach: At least in theory, crisis legislation imposes far-reaching burdens on the state, requiring it to carry a not insignificant share of the harm caused by its own restrictive measures. This legislative policy had the potential to overshadow the operation of hardship relief rules by shifting the center of responsibility from private parties to the public sphere.

In both respects, the judiciary played a decisive role in shaping the practical relief granted. This stands in notable contrast to the rather broad range of possibilities that the legislation itself, in theory, seemed to allow.

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[48] LEO, U. Pandemischer Lockdown im Gewerberaummietverhältnis als Störung der Geschäftsgrundlage: Ein großes Missverständnis? [Pandemic Lockdown in Commercial Tenancy Relationships as Interference with the Basis of the Transaction: A Major Misunderstanding?]. In: A. Kappus (ed.). *Neue Zeitschrift für Miet- und Wohnungsrecht (NZM). [New Journal for Rental and Housing Law]*. 2021, No. 7, pp. 249, 252.

[49] LG Stuttgart [Regional Court Stuttgart], Judgment of 19 November 2020, No. 11 O 215/20; LG Heidelberg [Regional Court Heidelberg], Judgment of 30 July 2020, No. 5 O 66/20.

[50] § 1765 of Czech Civil Code: *(1) If a change of circumstances occurs that is so fundamental as to create a particularly gross disproportion in the rights and obligations of the parties by unduly increasing the costs of performance or unduly diminishing the value of the subject matter of the performance, the affected party shall have the right to demand from the other party the reopening of negotiations on the contract, provided it proves that it could not reasonably have foreseen or influenced the change and that the circumstance arose or became known to the affected party only after the conclusion of the contract. The exercise of this right does not entitle the affected party to postpone performance.* (*2) The right under paragraph 1 shall not arise for the affected party if it assumed the risk of the change of circumstances.*

III.1 The Hardship Clause

Like the German Civil Code, Section 1765 Czech Civil Code provides for the possibility to adjust the contract terms in case of hardship. This requires a substantial change in circumstances which creates a gross imbalance in performance between the parties, in the absence of an assumption of risk by one side. If the conditions are met, the disadvantaged party may request renegotiation, and, if that fails, ultimately under Section 1766 the adjustment or termination of the contract by the court.

Since no relevant hardship cases reached the *Supreme Court* in the context of the pandemic, lower courts have been confronted with the further development of consistent criteria to substantiate the vague statutory prerequisites, enabling more concise handling of situations which affect the contractual equilibrium.

Although courts set a high threshold for what constitutes a significant change of circumstances,[51] the disturbances of the COVID-19 pandemic appear to meet this standard, especially as natural disasters and drastic political and economic changes are typically deemed qualifying events.[52]

The key requirement for the application of the hardship provision is a gross disproportion of performance between the parties, a disturbance of the contractual equilibrium, either by a disproportionate increase in the costs of performance of the contract or a reduction in its value.

Thus far, the *Supreme Court* has provided little guidance on the intensity of this criterion, merely requiring the change in circumstances to produce an "obviously unfair" result.[53] While, to some extent, fairness considerations are indeed a valid reason for the existence of the hardship clause, generally speaking, it is a problematic measure when assessing a provision's applicability: Usually, a change in circumstances will be unfair to one party, while the adjustment of the contract will be detrimental to the other–thus, a hardship clause would be hard to apply in any case. This goes against the basic idea of hardship, redistribution of the inconvenience.[54]

In practice, successfully proving a gross disproportion shaped up to be rather difficult:

Due to the scarcity of conclusive lower court precedents, claimants frequently relied on broad arguments regarding their financial deterioration during the COVID-19 pandemic.

In one instance, an IT company argued that a 70% revenue drop constituted hardship warranting rent relief. The court rejected this, noting that financial statements proved the company remained solvent enough to pay the rent. Crucially, the claimant failed to argue that the office premises themselves had lost value during the mandatory work-from-home period.[55]

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[51] One required a shocking (decision of the Regional Court in České Budějovice, Czech Republic, of 4 April 2022, No. 7 Co 70/2022), another one an extreme change (decision of the Municipal Court in Prague, Czech Republic, of 8 November 2022, No. 30 Co 333/2022).

[52] Compare the "Expert Case", which specifically lists natural forces, illness, and broad political and economic conditions: decision of the Supreme Court, Czech Republic, of 1 February 2023, No. 28 Cdo 2989/2022.

[53] See decision of Supreme Court, Czech Republic, of 22 May 2019, No. 26 Cdo 1670/2018.

[54] MIKA, B. Limitations for the application of the hardship clause in the Czech Republic. In: Nicole Grmelová – Petr Tomčiak (eds.). *Horizons of Law in Business and Finance*. 2023, p. 72.

[55] Decision of the District court in Prague 3, Czech Republic, of 31 March 2023, No. 20 C 232/2020.

Conversely, a fast-food restaurant owner did argue that the rental value had decreased, citing reduced foot traffic and general movement in the area. While the court found this legal theory more plausible, it ultimately dismissed the claim because the owner failed to provide an objective quantification of exactly how much that value had declined.[56]

This means, a successful claim of a gross disproportion would have to quantify the economic struggle and focus on the performance under the contract, and it cannot be too general or merely be based on subjective statements.[57] To successfully assert hardship, the focal point of any consideration thus should have been the contractual equilibrium, which must be severely affected. However, according to the courts, this was virtually never the case.

Overall, Czech courts seemed reluctant to thoroughly consider the application of the hardship clause–even considering the undisputed relevancy of the pandemic as a change beyond the parties' control. In practice, the redistribution of the burden of a change in circumstances, at least between private parties, did not happen.

III.2 Damage Compensation by the State

In absence of a private law instrument that reallocates the financial burdens of the pandemic between contracting parties, the Czech crisis statutes which contain broad compensation clauses offered potentially substantial remedies, stipulating a compensation duty of the state. In this regard, the Czech system is exceptional: Its provisions are not limited to cases of maladministration or to partial compensation of harm caused by the pandemic-related state measures; rather, at least in theory, they impose on the state a far-reaching responsibility for the burdens caused by extraordinary circumstances.[58]

This powerful tool of compensation has its roots in statutory provisions predating the COVID-19 crisis. Czech law had already established a framework for dealing with extraordinary events through several specific acts:

Act No. 240/2000 Coll., hereinafter the *Crisis Act*, includes the possibility of pandemic-related measures and is connected to the declaration of a state of emergency under the *Constitutional Act* No. 110/1998 Coll.[59]

The *Public Health Protection Act*, Act No. 285/2000 Coll., authorizes a wide range of interventions to protect public health, and the *State Liability Act* (Act No. 82/1998 Coll.) provides for state liability in cases of maladministration or for damage caused by unlawful administrative acts.

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[56] Decision of the District court in Prague 2, Czech Republic, of 2 August 2021, No. 10 C 1/2021.

[57] MIKA, B. *Limitations for the application of the hardship clause in the Czech Republic*, p. 74. More details see decision of the District court in Prague 9, Czech Republic, of 1 June 2021, No. 60 C 294/2020; decision of the Municipal Court in Prague, Czech Republic, of 2 March 2023, No. 21 Co 385/2021; decision of the District court in Příbram, Czech Republic, of 26 May 2022, No. 13 C 218/2021.

[58] For more see also ELISCHER, D. – TŮMA, M. Dopady pandemie covid-19 do různých oblastí soukromého práva s důrazem na oblast náhrady škody [Impacts of the COVID-19 Pandemic on Various Areas of Private Law with Emphasis on Damages]. In: Jan KYSELA, J. – ŘEPA, K. a kol. *Reakce právního systému České republiky na covidovou pandemii. [Reaction of the Legal System of the Czech Republic to the COVID Pandemic]*. Prague: Leges, 2022, pp. 215–248.

[59] Constitutional Act No. 110/1998 Coll., Constitutional Act on the Security of the Czech Republic.

When the first wave of COVID-19 hit the Czech Republic, a state of emergency was declared, which allowed for pandemic-related counter-measures under the *Crisis Act*. As the state of emergency eventually expired in February 2021 and thus the authorization for pandemic measures under the framework ceased, a new statute was adopted, the so-called *Pandemic Act* (Act No. 94/2021 Coll.), which introduced extraordinary measures applicable specifically in response to COVID-19.

Taking together, these provisions establish a system in which the state assumes a principal role in bearing the risks associated with crisis-related emergency measures. This translates, at least on paper, into a wide-ranging duty of the state to compensate for damages, thereby shifting a significant share of the pandemic's economic burden away from private parties.[60]

In that regard, the *Supreme Court of the Czech Republic* has successively issued three significant decisions delineating the scope of compensation for damages arising from measures adopted during the COVID-19 pandemic under the special regime of the *Crisis Act*. At first glance, the Court's approach may appear to fluctuate over time, or indeed seem inconsistent; however, a detailed analysis reveals a logically evolving jurisprudence that addresses two distinct legal questions.

In its first decision[61] of August 2023 and the second[62] of November 2024, the Supreme Court addressed a fundamental yet critical issue, answering the question under which statute the claims of entrepreneurs should be assessed. Lower courts had routinely dismissed these claims on the grounds that government resolutions and ministerial regulations constitute „generally binding regulations" (normative acts), for which the state is not liable under standard rules, or that there was no „individual decision" as required by the general *State Liability Act*.

The *Supreme Court* fundamentally rejected this approach and established a clear thesis: All measures adopted during the state of emergency for the purpose of managing the pandemic possess the nature of crisis measures under the *Crisis Act*. Therefore, the special liability regime under Section 36 of this Act, which takes precedence over general legislation, must be applied to these measures. The Court emphasized that this special liability is strict (objective)–i.e., independent of fault–and applies even to measures with general applicability, its purpose being to compensate for actual harm.

Both decisions were groundbreaking for plaintiffs. In them, the Court vacated the judgments of the lower instances and remanded the cases for further proceedings with instructions to assess the claims specifically under the *Crisis Act*.

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[60] This idea has also found support in doctrine. Given that crisis situations involve threats to public interests (goods), the damage should be compensated from public budgets, and this applies also to lost profits of entrepreneurs (see MELZER, F. Poskytování náhrad za újmy vyvolané mimořádnými opatřeními Ministerstva zdravotnictví po jejich zrušení. [Providing Compensation for Damages Caused by Extraordinary Measures of the Ministry of Health after Their Revocation]. *Bulletin advokacie. [Bulletin of Advocacy]*. 2020, No. 6, pp. 15–23; MELZER, F. Poskytování náhrad za újmy vyvolané krizovými opatřeními v průběhu koronavirové pandemie. [Providing Compensation for Damages Caused by Crisis Measures During the Coronavirus Pandemic]. *Bulletin advokacie. [Bulletin of Advocacy]*. 2020, No. 4, pp. 13–22; SVOBODA, T. K povaze krizových opatření, odpovědnosti za škodu a ochraně subjektivních práv (2. část) [On the Nature of Crisis Measures, Liability for Damage and Protection of Subjective Rights (Part 2)]. *Právní rozhledy. [Legal Perspectives]*. 2021, No. 10, pp. 348–357.

[61] Decision of the Supreme Court, Czech Republic, of 31 August 2023, No. 30 Cdo 63/2023.

[62] Decision of the Supreme Court, Czech Republic, of 13 November 2024, No. 30 Cdo 1101/2024.

The third decision[63] from late 2024 subsequently demonstrated the boundaries of this special regime. Here, the *Supreme Court* was no longer addressing whether the *Crisis Act* should be applied–that was established. Instead, it assessed whether all substantive conditions of the Act were met in the specific case, which could then lead to a successful claim for damages.

In the first step, the provision requires the adoption of a crisis measure during a state of emergency. This means a state of emergency must have been declared, with a specific crisis measure (e.g., government resolution) adopted within its framework. Here, a valid government resolution declaring the state of emergency undisputably existed.

The key condition lies in the wording of Section 36 of the *Crisis Act* itself: the state is liable for damage caused by "the activity of the body implementing the crisis measure against an individually determined subject."

The Court held that while a government resolution prohibiting retail sales at certain times constitutes a crisis measure, it is in the nature of a generally binding regulation addressed to an indeterminate group of entrepreneurs. No individually targeted activity by a state body against the specific plaintiff (such as the requisitioning of their specific goods) occurred. Consequently, the plaintiff's damage arose solely as a consequence of general regulation affecting an entire sector. As the prerequisite of an individually determined interference by state power was not fulfilled, no claim arose under Section 36 of the *Crisis Act*.

This means that despite the apparent wide scope of its damage compensation regime, the Czech state, in practice, rarely provided relief to private law parties from the damage caused by state-imposed measures.

Short-term relief measures aside, the specific crisis-related regimes did not have a significant impact on the dissolution of the financial problems caused to many during the pandemic.

CONCLUSION

The comparative analysis of the three systems reveals stark differences in their philosophies of risk allocation during the COVID-19 private law disruptions. Through their diverging views on the relationship between contractual intent and judicial power to reshape an agreement, they balance fairness and legal certainty in vastly different ways.

Both German and Czech law provide, at least in theory, effective and powerful mechanisms to specifically address hardship situations resulting from the COVID-19 pandemic and related government measures. However, whereas in Germany the reallocation of risk between private parties was implemented in practice by the judiciary with authority and clarity, the cautious attempts in the Czech Republic to apply the recently introduced *rebus sic stantibus* rule to such cases failed already in lower courts. Despite its existence and apparent resemblance to established hardship concepts, the Czech provision has scarcely realized its potential.

[63] Decision of the Supreme Court, Czech Republic, of 26 November 2025, No. 30 Cdo 2060/2024.

This was also not offset by the expansive Czech framework of state compensation, which seems to suggest a redistribution of risk toward the state. While such an approach would offer a more socially oriented solution, it remained theoretical, constrained by Supreme Court limits on "individually determined" measures.

In terms of the outcome, this ultimately resembles the English approach, which clearly rejects any *ex post* judicial correction of hardship cases.

The solution adopted by the English legal system is hardly surprising, given its origins in the common law, which, with its commercial and historical background, places a high value on contractual freedom, party autonomy, and the bargained-for exchange. A focus on fairness and good faith considerations, as inherent to continental law systems, is scarcely discernible here. Accordingly, any distinction between impossibility and hardship remains largely unmade. The approach of adhering to express terms offers minimal judicial relief but maximum predictability and thus contractual certainty–well-suited for sophisticated commercial parties, yet harsh for consumers and small businesses.

Explicitly excluding the short-term relief measures, which provided temporary remedies in many legal systems worldwide, of those compared, only the German legal system truly recognized the fact that the COVID-19 pandemic had devastating effects on the economy and, very importantly, profound financial consequences for many individuals. Whereas English and Czech courts were reluctant to account for the pandemic's specific circumstances, preferring instead to adhere to the parties' original allocation of risk, German courts–driven by the social dimension of its civil law–widely recognized the crisis's severity and its consequences for contractual relations. Given the pandemic's unprecedented nature in modern times, they rightfully acknowledged the necessity to re-assess and adjust the contractual risk allocation in a systematic yet nuanced case-by-case approach, while preserving *pacta sunt servanda*.

Yet common law offers a vital lesson, particularly post-COVID with known pandemic risks. Recurring global crises undermine the argument of unforeseeability, a cornerstone of hardship clauses. German scholars already urged stricter standards for commercial parties; future pandemics will potentially demand this across all cases, converging toward England's approach where negotiated bargains govern.

German law alone truly did justice to the hardship principle during the COVID-19 pandemic, particularly shielding vulnerables, making it most effective in unprecedented times. English and Czech precedents, however, indicate a shift: in foreseeable future crises, courts may prioritize contractual stability over intervention, once again challenging continental hardship doctrines.