Nagoya University

Graduate School of Law

Doctoral Dissertation

THE IMPLEMENTATION OF A STATUTORY PROVISION ON THE PERFORMANCE OF CONTRACTS AFFECTED BY CHANGED CIRCUMSTANCES IN VIETNAM

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Date of Submission: 2024/6/25

Acknowledgments

The journey of obtaining a Ph.D. has been the most challenging and transformative experience of my academic life. I owe my achievements to my beloved family, whose presence motivated me to pursue this path.

I want to express my sincere gratitude to Professor Dai Yokomizo for taking on the role of my academic supervisor and guiding me through the dissertation process. I am deeply grateful to my former academic supervisor, Professor Giorgio Fabio Colombo, for dedicating his time to my writing and encouraging me to overcome challenges over the past four years. I would like to extend my heartfelt thanks to my academic sub-supervisors, Professor Takafumi Matsuda and Professor Sean Mcginty, for their invaluable comments and advice throughout my dissertation. I am thankful to Professor Masako Murakami for providing valuable comments during the mid-term presentations. I am grateful to Professor Paul Lege for his commitment to helping me improve my academic writing skills.

I appreciate the scholarship provided by the Ministry of Education, Culture, Sports, Science and Technology (MEXT). I sincerely thank Professor Ryoko Tomioka and Ms. Tomoe Ogaki from the International Student Support Office of the Graduate School of Law for their kind assistance. I am thankful to my former professors, Professor Saori Okuda and Professor Eriko Tomita, for their continuous encouragement and support. I would also like to express my special thanks to my colleagues, whose support made this journey possible.

With sincere gratitude,

LE Thi Kim Oanh

Abstract

This thesis explains the reasons for the ineffective application of the law on changed circumstances by Vietnamese courts. Changed circumstances is an institute of contract law that allows judicial intervention to modify or terminate contracts when significant changes in circumstances make performance onerous or pointless for the parties. While scholars have extensively discussed the elements of the changed circumstances doctrine and the legitimacy and scope of judicial intervention in contractual relationships, there has been little information on the possibility of successful transplanting of this theory in a socialist legal system where the courts have a limited function in legal interpretation, as in Vietnam. The thesis applies the theory of legal formants, particularly the idea that a successful legal transplant from one system into another might require adjustments of the related components of the receiving legal system. The comparative study in this thesis shows that in three jurisdictions, Germany, France, and Japan, the legislature intentionally kept the formulation abstract and assigned a central role to the courts in elaborating vague components of the doctrine. This finding challenges the traditional view that courts in Vietnam must rely solely on official legislative interpretation. Law-makers must articulate their position on the disputed elements of the doctrine, including the scope of application, parties' duty to renegotiate, and the hierarchy between termination and adaptation of contracts, as Vietnamese courts do not have as much freedom in deciding these issues. The proposition, however, is that if the law allows courts to intervene in contracts, the law must empower them to interpret statutory provisions when handling individual disputes.

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Chapter I: Introduction

Chapter I introduces the main aspects of the thesis. This chapter starts with an explanation of the principle of changed circumstances, which is the subject of the thesis. Then, it describes the scope of the study and the concept of legal formants before presenting problem statements and research questions. This chapter also includes the elaboration of the methodology and objectives of the research. The last part briefly mentions the structure of the thesis.

1.1 The principle of changed circumstances

This section explains the term "changed circumstances" used in this thesis and examines the definition, origin, and essential role of the principle of changed circumstance (the PCC) in contract law. It will then outline different approaches and fundamental issues regarding the PCC in national and international laws.

1.1.1 Definition of the principle of changed circumstances

The PCC is a legal institution of contract law that can be triggered when unexpected events occur that significantly alter the contractual equilibrium, even if the performance of the contract remains possible in the strict sense. The PCC typically allows the affected party to request renegotiation. If the renegotiation process is unsatisfactory, the parties may ask the court to adjust or terminate the contracts, and the extent of the court's authority depends on the jurisdiction in question. The PCC is often referred to as the "hardship doctrine." This thesis will use these two terminologies interchangeably with the same meaning.

The PCC is one of the counter-doctrines of the principle *pacta sunt servanda* of contract law.[1] The principle *pacta sunt servanda* is a cornerstone of contract law that most jurisdictions recognize and require that parties be bound to what they are promised in the contract;

[1] Ingeborg Schwenzer and Edgardo Muñoz Prof, "Duty to Renegotiate and Contract Adaptation in Case of Hardship," *Uniform Law Review* 24, no. 1 (2019), https://doi.org/10.1093/ulr/unz009.

consequently, the law imposes remedies on parties in breach of contract, such as damages and specific performance.[2] The underlying notion of the sanctity of contract is rooted in the principle that when parties enter into a contract with autonomy, they undertake particular risks.[3] Neither the parties nor the courts possess the unilateral authority to upset this allocation of risk.[4] A fundamental purpose of contracts is allocating risks between the parties in an exchange. When making a contract, parties can never be sure about future performance, which creates risks. However, there might always be risks that are beyond the scope of the limits of human capacity; therefore, *pacta sunt servanda* is not an absolute and rigid principle that strictly holds parties to contractual obligations in all circumstances, and contract law contains counter principles that excuse nonperformance of the contract. There are two groups of counter tenets to *pacta sunt servanda*, including impossibility (or *force majure*) and the PCC.[5] These excuse doctrines are designed to redistribute the losses and gains between parties fairly and equitably in the case of unfortunate events. The doctrine of impossibility was established by Roman law and has a more extended history than the PCC. The Roman original principle of *impossibilium nulla est obligatio* stated that "there is no obligation to the impossible," meaning that a party cannot be held liable for an unforeseeable accident or an event that no one could have prevented.[6] The Roman doctrine of impossibility influences most continental contract laws and common law countries.[7] For example, Article 1218 of the French Civil Code amended in 2016 defines force majeure as an event beyond the debtor's control that prevents contractual performance, and which parties could

[2] Klaus Peter Berger and Daniel Behn, "Force Majeure and Hardship in the Age of Corona: A Historical and Comparative Study," *McGill Journal of Dispute Resolution* 6, no. 4 (2020).
[3] Berger and Behn.
[4] Peter J. Mazzacano, "Force Majeure, Impossibility, Frustration & the Like: Excuses for Non-Performance; the Historical Origins and Development of an Autonomous Commercial Norm in the CISG," *Nordic Journal of Commercial Law* 2011, no. 2 (2011): [i]-54; Klaus Peter Berger and Daniel Behn, "Force Majeure and Hardship in the Age of Corona: A Historical and Comparative Study," *McGill Journal of Dispute Resolution* 6 (2020 2019): [i]-130.
[5] John J. Gorman, "Commercial Hardship and the Discharge of Contractual Obligations under American and British Law Note," *Vanderbilt Journal of Transnational Law* 13, no. 1 (1980): 108.
[6] James Gordley, "Impossibility and Changed and Unforeseen Circumstances," *American Journal of Comparative Law* 52, no. 3 (2004): 514; Ingeborg Schwenzer, "Force Majeure and Hardship in International Sales Contracts," Victoria University of Wellington Law Review 39, no. 4 (April 2009): 709-726, 710.
[7] Ingeborg Schwenzer, "Force Majeure and Hardship in International Sales Contracts Wider Perspectives," *Victoria University of Wellington Law Review* 39, no. 4 (2009 2008): 710; Werner Lorenz, "Contract Modification as a Result of Change of Circumstances," in *Good Faith and Fault in Contract Law*, 2012, 357, https://doi.org/10.1093/acprof:oso/9780198265788.003.0014.

not have reasonably foreseen at the contract's conclusion and cannot avoid its effects. Legal consequences of force majeure include suspension of contractual performance or termination of contract.[8]

The PCC is based on the canon law doctrine of the *clausula of rebus sic stantibus*, which posits that contracts are binding only when the circumstances remain unchanged.[9] The ground for release under the PCC was that the contractual bargain is based not only on the parties' explicit consent, but also on certain shared and implicit assumptions that relate to the change or non-change of particular circumstances.[10] In addition, since the late 19th century, there have been considerable changes in social-economic conditions and the role of contracts. At that time, contracts became more complex with more transitional commercial transactions and adhesion contracts. Early termination of a contract can be costly and inefficient, so it is more desirable from the point of view of market efficiency, to adapt the contract to new circumstances. Based on this background, the contract does not only involve the allocation of risk, but has a social value that requires fairness and decency in commercial dealings. This contextual approach to contracts considers contracts not purely on internal linguistic considerations, but with surrounding circumstances such as prior negotiations and the course of performances. Consequently, there were neoclassical contract theories, such as reallocating risk and contractual equilibrium.[11] Moreover, in addition to co-drafted contracts, there were adhesion contracts where only one party drafts the contract. This kind of contracts did not fully reflect the concept of party autonomy in allocation risks. Therefore, binding parties to the contract in all circumstances would lead to the situation that all the risk and all the attendant loss will generally be left to lie where it falls, which

[8] Article 1218 French Civil Code admended in 2016. The English version translated by Professor John Cartwright is available at https://www.trans-lex.org/601101/_/french-civil-code-2016/.
[9] *Clausula of rebus sic stantibus* is the theory discussed by jurist in the Middle Ages. Fontaine, Marcel. "Chapter 1: The Evolution of the Rules on Hardship From the First Study on Hardship Clauses to the Enactment of Specific Rules." In Fabio Bortolotti and Dorothy Ufot, *Hardship and Force Majeure in International Commercial Contracts: Dealing with Unforeseen Events in a Changing World* (Kluwer Law International B.V., 2019), 14.
[10] Berger and Behn, "Force Majeure and Hardship in the Age of Corona," 87; Mazzacano, "Force Majeure, Impossibility, Frustration & the Like."
[11] K.M. Sharma, "From 'Sanctity' to 'Fairness': An Uneasy Transition in the Law of Contracts?," *NYLS Journal of International and Comparative Law* 18, no. 2 (1999).

is usually on the disadvantaged parties.[12] One approach to addressing the necessity of redistributing risk throughout contract execution could involve the contracting parties establishing a risk-allocation clause within their agreements. This provision would enhance the contract's predictability and outline the allocation of risks and losses between the parties if a catastrophic change in circumstances occurs. However, agreement on risk allocation in a contract would only sometimes work for adhesion contracts where only one party drafts the document.

There are also cases where the contracting party becomes unhappy with the contract's risk and loss allocation and pursues a contract claim in courts. Therefore, the PCC is a vital framework for contracting parties to readjust the distribution of risks after the contract has been established.[13] Taking a broader perspective, contracts, in addition to their role as instruments of private law between parties, possess public dimensions that facilitate economic transactions and contribute to societal stability. The breakdown of a contract can potentially result in significant social repercussions. For example, failures in contractual relationships may produce social consequences that extend beyond the individual contract and contracting parties, such as people losing homes, or business closures.[14] In a discussion of contracts amid the COVID-19 pandemic, Hart emphasized the need for practical solutions to these contracts, as breaches of contract can lead to major social consequences, and contracts and contract law are indeed integral to the systemic problems.[15] Therefore, in addition to the hardship clause in a contract, the PCC in contract law would provide a "systemetic relief."[16] While the principle of *pacta sunt servanda* is the essential foundation of the market system, in response to the dynamics of economic markets, which are increasingly beyond the control of the parties, the PCC is necessary in extreme cases to provide a legal regime for the subsequent allocation of risk.[17]

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[12] Danielle Kie Hart, "If Past Is Prologue, Then the Future Is Bleak: Contracts, COVID-19, and the Changed Circumstances Doctrines," *Texas A&M Law Review* 9, no. 2 (2021): 381.
[13] Hart, 356.
[14] Hart, "If Past Is Prologue, Then the Future Is Bleak," 354.
[15] Hart, 357.
[16] Peter Hay, "Frustration and Its Solution in German Law," *The American Journal of Comparative Law* 10, no. 4 (1961): 345, https://doi.org/10.2307/838474; K.M. Sharma, "From 'Sanctity' to 'Fairness': An Uneasy Transition in the Law of Contracts?," 27.
[17] Hannes Rösler, "Hardship in German Codified Private Law – In Comparative Perspective to English, French and International Contract Law," *European Review of Private Law* 15, no. Issue 4 (August 1, 2007): 513, https://doi.org/10.54648/ERPL2007028.

Force majeure and the PCC share some common prerequisites in that they both require an unexpected event that is beyond the parties' control and unforeseeable to parties at the time of contract conclusion. However, these doctrines differ in the following key respects. *Force majeure* generally applies to cases of impossible performance. In contrast, the hardship doctrine provides relief even when the performance remains possible but there has been a fundamental change in the equilibrium between that performance and what the affected party would receive in exchange. In addition, hardship provides for more flexible remedies, including the right of the affected party to request renegotiation and judicial intervention to restore the contractual equilibrium.[18] Generally, the primary relief of hardship is adapting the contract to new circumstances,[19] with termination as the last resort when adaptation is unreasonable.

The line between the two doctrines may be difficult to draw when the doctrine of impossibility covers practical impossibility. In German jurisdiction, according to Article 275 (2) BGB, impossibility is applicable when performance "requires an expenditure of time and effort that… is grossly disproportionate to the obligee's interest in performance."[20] Jurist Reinhard Zimmermann named this scenario a "practical impossibility" and emphasized that the crucial aspect of this situation is a gross disproportion between the debtor's effort and the creditor's interest in receiving performance.[21] A classical illustration of practical impossibility is the paradigmatic ring case, which relates to a contract to sell a ring. Before the seller transferred the ring to the buyer, the ring fell into a lake. Retrieving the ring would require draining the lake, incurring expenses that exceed thousands of times the ring's value. Considering that the creditor's interest in the ring remains unchanged, the costs of recovery placed on the debtor are unreasonable. The exchange of performance is grossly inefficient in economic terms because the

[18] Harry M. Flechtner, "The Exemption Provisions of the Sales Convention Including Comments on Hardship Doctrine and the 19 June 2009 Decision of the Belgian Cassation Court Uniform Sales Law," *Annals of the Faculty of Law in Belgrade - International Edition* 2011 (2011): 90–91.
[19] Rösler, "Hardship in German Codified Private Law – In Comparative Perspective to English, French and International Contract Law."
[20] Article 275 (2) German Civil Code. The English version is available at https://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html.
[21] Reinhard Zimmermann, *The New German Law of Obligations: Historical and Comparative Perspectives* (Oxford University Press, 2005), 44.

performance cost vastly exceeds the performance's utility.[22] The following oil case is a typical example of hardship.[23] In this case, the price of oil increased dramatically due to the oil crisis in 1973, so the oil import company refused to perform its contract with a city, who was the buyer, because the continuation of performance without a price adjustment should be considered unreasonable. In the actual case, the German Federal Court of Justice (Bundesgerichtshof) (BGH) did not allow the application of the PCC in Article 313 of the BGB on hardship to grant relief because the increase in the oil price was foreseeable. However, should other conditions have been present, this case would have fallen within the scope of the PCC, but not with the impossibility doctrine because there was no gross disproportion in the performance exchange. In particular, the cost increase led to a parallel rise in utility on the side of the obligee; therefore, the cost-utility ratio did not show gross disproportion. The risk of market shifts is, in principle, borne by the obligor, unless it meets the threshold of the PCC, especially when the exchange of performance is grossly unfair. Due to the blurred boundary between these two doctrines, some legal systems, such as English law, treat them under the same doctrine of frustration.

1.1.2 Variety and convergence in approaches to the principle of changed circumstances

There are relatively different approaches to the PCC in various jurisdictions, especially regarding the scope of application and the possibility of judicial intervention in contracts. Many continental legal systems accept the PCC.[24] While some civil law countries like Germany and France have codified the PCC into their civil codes, some jurisdictions rely on scholarly formulations, as seen in the case of Japan. Germany codified the PCC in the Civil code in 2002 under the name Störung der Gschäftsgrundlage at Article 313 BGB.[25] Article 313 BGB is the

[22] Rösler, "Hardship in German Codified Private Law – In Comparative Perspective to English, French and International Contract Law," 494.
[23] BGH 8.2.1978, JZ 1978, 235.
[24] Schwenzer, "Force Majeure and Hardship in International Sales Contracts Wider Perspectives"; Daniel Girsberger and Paulius Zapolskis, "Fundamental Alteration of the Contractual Equilibrium under Hardship Exemption," *Jurisprudencija* 19, no. 1 (2012): 122; Ingeborg Schwenzer and Edgardo Muñoz, "Duty to Renegotiate and Contract Adaptation in Case of Hardship," *Uniform Law Review* 24, no. 1 (March 1, 2019): 150, https://doi.org/10.1093/ulr/unz009.
[25] Ewoud Hondius and Christoph Grigoleit, eds., *Unexpected Circumstances in European Contract Law*, The Common Core of European Private Law (Cambridge: Cambridge University Press, 2011), 61–63, https://doi.org/10.1017/CBO9780511763335; Egidijus Baranauskas and Paulius Zapolskis,

codification of doctrine established by German courts to deal with disputes arising from the rapid inflation after World War I. Article 313 BGB stipulates that every contract has fundamental circumstances emanating from the primary intention of the parties which cannot be achieved without the existing circumstances.[26] In common law jurisdictions, the United States recognized the same doctrine called it commercial impracticability.[27] Section 2-615 of the Uniform Commercial Code 1951 states that the doctrine of impossibility includes impractability because of extreme hardship.[28] This section discharges a seller's contractual duty to deliver goods when performance has been rendered commercially impracticable "because of unforeseen supervening circumstances not within the contemplation of the parties at the time of contracting."[29] In English law, a doctrine closely resembling the PCC is known as frustration of contract. To determine if the contract is frustrated, the court constructs the contract's terms. It examines the relevant surrounding circumstances when contracting to see what parties have contemplated and whether the unanticipated events were beyond their contemplation.[30] Lord Radcliffe describes the doctrine of frustration as follows: "… without fault of either party, a contractual obligation has become incapable of being performed because the circumstances in which performance is called

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"The Effect of Change in Circumstances on the Performance of Contract," *Jurisprudencija* 118, no. 4 (2009): 206–7.

[26] Joern Rimke, "Force Majeure and Hardship: Application in International Trade Practice with Specific Regard to the CISG and the UNIDROIT Principles of International Commercial Contracts," 1999, https://www.cisg.law.pace.edu/cisg/biblio/rimke.html.

[27] John J. Gorman, "Commercial Hardship and the Discharge of Contractual Obligations under American and British Law Note," *Vanderbilt Journal of Transnational Law* 13, no. 1 (1980): 108; Ingeborg Schwenzer, "Force Majeure and Hardship in International Sales Contracts," *Victoria University of Wellington Law Review* 39, no. 4 (2008): 711–12, https://doi.org/10.26686/vuwlr.v39i4.5487.

[28] Gorman, "Commercial Hardship and the Discharge of Contractual Obligations under American and British Law Note," 1980.

[29] Mineral Park Land Co. v. Howard was the first United States case to excuse non-performance on grounds of commercial impracticability. Defendants had contracted to take all the gravel and dirt needed for certain work from plaintiff's land. Defendants request to release obligation after discovering that the remaining dirt and gravel was below water level and would cost much more to remove. Plaintiff sued to recover damages for breach of contract; defendant claimed impracticability. Clearly, the taking of more dirt and gravel was not literally impossible. The California Supreme Court excused defendant's non-performance of the contract: "A thing is impossible in legal contemplation when it is not practicable; and a thing is impracticable when it can only be done at an excessive and unreasonable cost…where the difference in cost is so great as here, and has the effect, as found, of making performance impracticable, the situation is not different from that of a total absence of earth and gravel"; see more at Gorman, 111.

[30] Gorman, 129.

for would render it a thing radically different from that which was undertaken by the contract."[31] Noticeably, hardship, inconvenience, and material loss, do not amount to frustration.[32] While United States law requires impracticable performance, English law requires that unexpected events render performance fundamentally or radically different.

In terms of legal effects, civil law traditions often emphasize contract adaptation through renegotiation or court intervention to keep the contract viable in light of new conditions. If adaptation is not possible, courts may decide to terminate the contract. Among the legal systems that have recognized the PCC in contract law, the German approach is relatively permissive regarding contract adaptation, with Article 313 of the Civil Code expressly authorizing the court to adapt or terminate the contract. In contrast, common law traditions favor contract termination without court interference. For example, the doctrine of frustration discharges parties from the contract.[33]

In the context of international law, most international and European contract law instruments, such as the Principles of International Commercial Contracts (PICC), the Principles of European Contract Law (PECL), and the Draft of a Common Frame of Reference 2008 (DCFR) stipulate the PCC. The PICC, PECL, and DCFR contain comparable provisions related to hardship, providing remedies such as contract adaptation and termination. Article 6.2.3 of the PICC is viewed by certain courts as an international standard for the PCC. The provisions in the PICC and PECL have influenced the development of the law concerning the PCC in Vietnam. While the PICC, the PECL, and the DCFR explicitly provide for rules in case of a change of circumstances, the CISG does not contain a specific provision dealing with PCC issues. Article 79 of the CISG does not expressly mention hardship or force majeure, but of an "impediment." This article exempts a party from paying damages if the breach of contract is due to an impediment beyond its control. As a result of the ambiguous wording in Article 79 and the fact

[31] Davis Contractos Ltd. v. Fareham Urban District Council, [1956] A.C. 696, available at https://www.trans-lex.org/311200/_/davis-contractos-ltd-v%C2%A0fareham-urban-district-council%C2%A0%5B1956%5D-ac-696/.
[32] Gorman, "Commercial Hardship and the Discharge of Contractual Obligations under American and British Law Note," 1980, 130–31.
[33] Coronation cases (*Krell v. Henry* [1903] 2 K. B. 740)

that the drafters of the CISG rejected a proposal to include hardship provisions relieving the debtor of its obligation when a radical change in the underlying circumstances occurs during the CISG adaptation process, in the first years after the CISG entry into force, some scholars argued that there was no room for consideration of hardship in Article 79, but only force majeure.[34] However, Schwenzer notes that over time, more and more judicial and arbitral decisions and scholarly works have tended to accept that Article 79 does indeed cover hardship.[35] Schwenzer compares the conditions for hardship and force majeure and concludes that hardship should be considered as a particular situation governed by the principle of *force majeure* because these provisions share requirements regarding the sphere of risk of the aggrieved party and the unforseeability of the unexpected event. The only difference is that in hardship cases, performance in the strict sense is possible, but too onerous. Consequently, Schwenzer suggests that the term impediment in the CISG covers both hardship and *force majeure*.[36]

Although each legal system has adopted different solutions for cases of changed circumstances, national and international solutions of the PCC show remarkable similarities. They emphasize the principle of *pacta sunt servanda*. Consequently, all laws set high thresholds and require that the event in question fundamentally alter the contract's balance and not fall within the normal or accepted risk of the injured party. Risk allocation is one of the critical criteria when evaluating the PCC threshold. The determination of risks requires courts to consider the unique nature of a specific contract and interpret this contract in that context. Generally, courts presumed that the obligor of highly speculative contracts bears the risk involved in price changes.[37] In addition, hardship is applicable in exceptional cases, but not in typical price fluctuations.[38]

1.1.3 Fundamental issues

[34] Schwenzer, "Force Majeure and Hardship in International Sales Contracts," 713.
[35] Schwenzer, 713.
[36] Schwenzer, 715.
[37] See Oberlandesgericht Hamburg, 28 Feb 1997, No. 167, CISG-online 261; Cited at Schwenzer, 715.
[38] Schwenzer, 716; Joseph Lookofsky, "Impediments and Hardship in International Sales: A Commentary on Catherine Kessedjian's 'Competing Approaches to Force Majeure and Hardship,'" *International Review of Law and Economics*, Conference on Commercial Law Theory and the Convention on the International Sale Of Goods (CISG), 25, no. 3 (September 1, 2005): 434–45, https://doi.org/10.1016/j.irle.2006.02.008.

Whether changed conditions can release the debtor from its contractual obligations has repeatedly led to heated debates.[39] One central point of contention is the courts' authority to intervene and adjust contractual terms. The conflict arises due to concerns about potentially infringing upon the principle of the sanctity of contracts and disrupting the stability of contractual relationships. The differing views on the issue of judicial intervention in contractual relationships are due in part to the fact that legal traditions approach contract law differently. While common law emphasizes the role of the contract as the law between parties, civil law perceives contracts as a tool for governing risks and supporting the socio-economic system. Furthermore, there are distinctions in the normative function of courts; courts in common law countries decide cases whereas civil law courts aim to strengthen fairness and justice.[40]

Common law jurisdictions define the contract as a private transaction between private parties and foremost, a risk allocation tool[41] and often ignore the profound social consequences associated with contractual relationships. For example, the U.S. law conceives contracts as a tool to respect freedom since the emancipation of enslaved people in 1863. As a result, *pacta sunt servanda* became one of the important principles of contract law. Under this concept about the role of contract law, which includes the norms of autonomy and personal responsibility, judicial allocation of the risks from hardship is seen as interference with the parties' freedom. In the U.S., the only role of the courts is to interpret and then enforce the parties' agreement as made.[42] The U.S. doctrine of commercial impracticability permits renegotiation or equitable adjustment of the contract when termination or strict compliance would not serve the purpose of justice. However, the courts have been extremely reluctant to interfere with negotiations between the parties. The

[39] Schwenzer, "Force Majeure and Hardship in International Sales Contracts," 710; Schwenzer and Muñoz, "Duty to Renegotiate and Contract Adaptation in Case of Hardship," March 1, 2019, 150.
[40] In the U.S, for example courts generally proved reluctant to excuse a party's nonperformance on grounds of economic or commercial hardship; see more at Gorman, "Commercial Hardship and the Discharge of Contractual Obligations under American and British Law Note," 1980, 107, 114.
[41] Jan H. Hendrik Dalhuisen, "What Does the Transnationalisation of the Commercial Contract Mean? Is There a New Model and Are There Minimum Standards? Is There a Law and Economics Perspective?," *SSRN Electronic Journal*, 2017, 32, https://doi.org/10.2139/ssrn.3055808.
[42] Hart, "If Past Is Prologue, Then the Future Is Bleak"; K.M. Sharma, "From 'Sanctity' to 'Fairness': An Uneasy Transition in the Law of Contracts?"

decision was heavily criticized in one significant case in which the judge adjusted the contract.[43] Thus, impracticability is a dead black-letter principle with little impact on contract disputes.[44] In general, in the eyes of common law lawyers, the civil law of contract is anthropomorphic and indulgent.

Civil law jurisdictions value the social role of contract law and contractual fairness.[45] Apart from explicit contract commitments, the principle of good faith governs parties' behaviors. Good faith requires parties to perform according to the moral standard of cooperation. This principle restricts the binding force of contracts to what the parties intend to commit to. In light of the principle of good faith, the civil law family is more receptive to accepting relief in unexpected circumstances that render the performance of a contract onerous.[46] The diverse standpoints of contract law are the subject of persistent and heated controversies among common law and civil law traditions about justifying the doctrine of changed circumstances.

Domestic and international laws are diverse regarding the obligation to renegotiate in cases of changed circumstances. The duty to renegotiate refers to the extra-contractual obligation to attempt to adjust contract terms before resorting to the courts. While some laws expressly specify the duty to renegotiate, some are silent on this. For example, hardship provisions in the PECL and the DCFR explicitly state that parties must attempt renegotiation.[47] Article 6:111(3)(c) of the PECL imposes sanctions for refusing or breaking off negotiations in bad faith. Article 6.2.3 PICC does not clearly state the obligation to renegotiate but entitles the affected party to the right to request renegotiations. To some scholars, the right to request renegotiations would imply the other party's duty to renegotiate because Article 1.7 PICC requires parties to act in good faith.[48] Similary, good faith is a profound principle that allows many civil law jurisdictions to

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[43] Rashika Bajpai and Mrinal Pandey, "Advocating Contract Adaptation in International Arbitration: A Necessity in the COVID-19 Era?," *NUALS Law Journal* 15, no. 1 (2020): 27.
[44] Larry A. DiMatteo, "Legal Tradition Bias in Interesting The CISG: Hardship as Case in Point," in *The Transnational Sales Contract* (Wolters Kluwer, 2022), 133.
[45] Rösler, "Hardship in German Codified Private Law – In Comparative Perspective to English, French and International Contract Law," 512.
[46] Berger and Behn, "Force Majeure and Hardship in the Age of Corona."
[47] Article 6:111(2) of the PECL 1999, Article Ill - 1:1 10(3)(d) of the DCFR 2008.
[48] Ingeborg Schwenzer and Edgardo Muñoz, "Duty to Renegotiate and Contract Adaptation in Case of Hardship," *Uniform Law Review* 24, no. 1 (March 1, 2019): 149–74, https://doi.org/10.1093/ulr/unz009.

mandate renegotiation.[49] The new provision on imprévision of the French Civil Code requires parties to go through renegotiation steps. In German law, the silence of Article 313 BGB on this duty leads to different interpretations.[50] While some authors advocate for an obligation to renegotiate, the prevailing view adheres to the exact words of the provision, which permits parties to seek a court's intervention directly.[51] Schwenzer argues that the law should not compel parties to renegotiate because constructive and cooperative renegotiation through coercion is ineffective. Even when the law does govern the renegotiation process, it is not feasible to determine bad faith behaviors because hardship cases often involve complex issues.[52]

Another ongoing debate is the need for a more precise and detailed regulation of hardship. In most national laws and international legal instruments, the PCC is defined in the abstract[53] and leaves ample room for courts to interpret it.[54] Some of the most challenging questions concern whether the changes are fundamental enough to warrant application of the PCC,[55] and who bears the risk of unexpected modifications and to what extent. Another question is, by what standards can the court adjust or terminate the contract? Although the PCC rules at the national and international levels share the exact requirements for exemption under this principle, namely the fundamental alteration of the contractual equilibrium, none of these legal systems' legal discourses elaborate on this condition.[56] While the commentary in Article 6.2.2 of

[49] Dalhuisen, "What Does the Transnationalisation of the Commercial Contract Mean? Is There a New Model and Are There Minimum Standards? Is There a Law and Economics Perspective?," 33.
[50] Schwenzer and Muñoz, "Duty to Renegotiate and Contract Adaptation in Case of Hardship," March 1, 2019, 155.
[51] Peter Schlechtriem, "The German Act to Modernize the Law of Obligations in the Context of Common Principles and Structures of the Law of Obligations in Europe," *German Law Archive*, 2002, https://ouclf.law.ox.ac.uk/the-german-act-to-modernize-the-law-of-obligations-in-the-context-of-common-principles-and-structures-of-the-law-of-obligations-in-europe/.
[52] Schwenzer and Muñoz, "Duty to Renegotiate and Contract Adaptation in Case of Hardship," March 1, 2019, 152.
[53] Luigi Montefusco, "Interpreting the Conditions for Imprévision: The Goals of the Reform Projects as a Decisive Tool for French and Belgian Courts," *J. Civ. L. Stud.* 13 (2020): 2.
[54] For example, one author stresses that Article 313 BGB on the PCC is "open-textuered" and legislators empower the courts to validate the doctrine of hardship. See at Hannes Unberth and Angus Johnston Basil Markesinis, *The German Law of Contract: A Comparative Treatise*, *The German Law of Contract : A Comparative Treatise* (Hart Publishing, 2006), 324, https://doi.org/10.5040/9781472559814.
[55] Schwenzer and Muñoz, "Duty to Renegotiate and Contract Adaptation in Case of Hardship," March 1, 2019, 151.
[56] Daniel Girsberger and Paulius Zapolskis, "Fundamental Alteration of the Contractual Equilibrium Under Hardship Exemption," *Jurisprudencija: Mokslo Darbu Žurnalas* 19, no. 1 (2012): 136.

the 1994 edition of the PICC suggested that a change that reaches 50 percent or more could be considered a fundamental change, the subsequent 2004 edition does not specify a precise threshold. While Schwenzer held that Article 79 CISG covers hardship cases, this scholar emphasized that the question of which hardship cases constitute grounds for excuse under Article 79 remains controversial. There are no complete answers to these questions. Still, courts and scholars have attempted to formulate specific formulas for reallocating risk and adjusting contracts. Some courts have set forth specific rules in their decisions for evaluating the conditions for applying the PCC to foster legal certainty. When ascertaining whether an alteration amounts to the PCC, courts consider the circumstances of the individual case, such as whether the contract is short-term or long-term, the financial situation of the obligor, and the respective trade sector.[57]

The time of unexpected changes that could trigger the application of hardship law is an another issue. There have been different views as to whether hardship should cover changes that already existed at the time of contract conclusion, but both parties did not realize their existence. The PICC, the PECL, and most national laws treat this mutual mistake according to the principle of mistake. In German law, however, the principle of changed circumstances covers mutual mistakes about basic assumptions. The reasons for these distinctions lie in the differing scope of the doctrine of mistake, as well as in the different legal remedies of these doctrines and the preference given to them by the legislators of the jurisdictions concerned. For example, German legislators govern basic assumption errors under the umbrella of the PCC because the PCC offers more flexible solutions and the German doctrine of mistake does not cover this classification of mistake.[58]

There is ongoing debate regarding the legitimacy of judicial adaptation of contracts and the hierarchy between adaptation and termination. Some legal systems prefer adaptation over termination of a contract, while others favor termination over adaptation. Additionally, some do not establish a hierarchy between these two remedies.[59] When discussing hardship in

[57] Schwenzer, "Force Majeure and Hardship in International Sales Contracts," 716.
[58] Basil Markesinis, *The German Law of Contract: A Comparative Treatise*, 328, 343, 347.
[59] Schwenzer and Muñoz, "Duty to Renegotiate and Contract Adaptation in Case of Hardship," March 1, 2019.

international transactions, Schwenzer opposes contract adaptation by an adjudicator due to the belief that the intervention of courts or arbitrators frequently results in longer delays and proves less efficient than collaborative solutions by parties.[60]

The application of the PCC was historically rare, particularly in common law countries, due to its exceptional nature and the desire to uphold the integrity of contracts. However, there were specific periods when the PCC became particularly relevant, such as during fundamental societal changes or crises, including hyperinflation, world wars, and pandemics, which significantly impacted contract performance. There is an increasing trend in many countries to include hardship as a statutory principle of contract law.[61] French courts were initially reluctant to embrace the notion of judicial adjustment, but in 2016, legislators incorporated hardship provision (imprévision) into the Civil Code in Article 1195. This article authorizes judges to modify or terminate contracts at the parties' request. Legal recognition of the doctrine of imprévision represents a sharp shift in the approach to hardship. The recent COVID-19 pandemic has triggered a resurgence of interest in the PCC, leading to an increasing number of disputes brought before the courts. As a result, notable landmark cases have shaped and advanced courts' approaches to applying the PCC. Additionally, legal scholars have engaged in extensive discussions on the topic, recognizing the importance of the PCC in addressing current disputes and anticipating future challenges. Some authors predict that the COVID-19 pandemic will lead to litigation and arbitration over the application of this concept for years to come.[62] These developments warrant further exploration and deliberation on the PCC to address relevant present and future disputes adequately.

1.2 The scope of the study

[60] Schwenzer and Muñoz, 162.
[61] Schramm Alexander, "The English and German Law on Change of Circumstances: An Examination of the English System and Potential Advantages of the German Model," *Anglo-Ger. LJ* 4 (2018): 34; R. Uribe, "The Effect of a Change of Circumstances on the Binding Force of Contracts. Comparative Perspectives," January 1, 2011.
[62] Berger and Behn, "Force Majeure and Hardship in the Age of Corona," 80.

As a doctrine of contract law, there are various angles to analyze the PCC, such as its necessity, judicial intervention into contracts, its regulation, its implementation, and in domestic jurisdiction or transnational contract law, its application by courts or arbitration. This thesis primarily focuses on analyzing the implementation of the PCC in the Civil Code of Vietnam by courts in dealing with disputes belonging to their authority. The thesis examines the practical implementation challenges of the PCC within the Vietnamese context. With this premise, this thesis extensively elaborates on the issues surrounding the judicial application of the PCC. Additionally, the thesis addresses the shortcomings of current laws regarding the conditions for applying the doctrine, demonstrating how these legal issues impact the effectiveness of PCC implementation.

It is important to note that the scope of this thesis is limited to domestic disputes. Although the thesis discusses hardship cases in international contracts, particularly those resolved by international courts and arbitration applying similar principles to the PCC found in international regulations like the PICC, the PECL, and the CISG, the focus of this research is on extracting essential points for courts when evaluating the conditions for applying the PCC and techniques for adapting contracts. Transitional disputes, which require the application of different sets of laws and necessitate harmonization in using the PCC, are not the central focus of this thesis. Moreover, the benchmark for determining the threshold above for which a case of hardship exists differs for international transactions than for domestic contracts. For example, in most decisions dealing with hardship under Article 79 CISG, the courts concluded that even a price increase or decrease of more than 100% was insufficient to grant relief on unexpected circumstances.[63] Generally, courts set higher demands for parties in international transactions for the assessment of risks. For example, in one case, a German court refused to grant relief for unexpected circumstances even though the price of the goods increased by 300 percent. The court

[63] Schwenzer, "Force Majeure and Hardship in International Sales Contracts," 716.

reasoned that in a trade sector, with highly speculative traits, the threshold for allowing hardship should be raised.[64]

This thesis examines the shortcomings of Vietnam's legislation concerning hardship, which poses challenges for the courts in its application, particularly with regard to the conditions and consequences of hardship. Although many scholars have pointed to another problem in the hardship law, namely the lack of explicit mention of the authority of arbitrators to help parties resolve hardship cases, with the rule referring only to the power of the courts, the thesis deliberately refrains from engaging in this debate. Instead, the thesis focuses on the application of the hardship law by the courts, which is relevant not only to the hardship law itself but also to the unique role of the courts in the Vietnamese legal system. In addition, academics, practitioners, and legislators in other jurisdictions are debating whether arbitrators have the power to adapt contracts. Examining this question requires a thorough analysis of arbitration rules and the general principles of international contractual laws. For example, granting arbitrators the power to adapt contracts could conflict with the intangibility of contracts, which requires that contract modification be based on the parties' agreement. Furthermore, as far as arbitration matters are concerned, one of the fundamental rules of arbitration is that arbitrators must respect the will of the parties.[65]

In addition, it is essential to emphasize that although the thesis analyzes the regulation and application of hardship provisions in international and European contract law instruments, the focus will be on how courts and arbitrators interpret hardship conditions in individual cases. The reference to these provisions and their application helps to clarify the influence of international trend on the development of Vietnamese law on this field. The thesis will not address debates such as whether or not CISG Article 79 covers hardship or whether hardship provisions in the PICC should be used as a general principle of international contract law.

1.3 Legal formants

[64] OLG Hamburg, 28 February 1997, No 167, CISG-online 261. This case is cited at Schwenzer and Muñoz, "Duty to Renegotiate and Contract Adaptation in Case of Hardship," March 1, 2019, 153.
[65] Pascale Accaoui Lorfingl. "Chapter 2: Adaptation of Contracts by Arbitrators: Realities and Perspectives." In Bortolotti and Ufot, *Hardship and Force Majeure in International Commercial Contracts*, 42.

Sacco used the word “formants” to describe a country's body of law, which includes various elements such as statutory rules, the formulations of scholars, and judicial decisions. Judges might not decide exactly what the statutes were meant to provide for because other matters influence judicial decisions, such as the judge’s background and scholarship. The components of legal formants might include sources that may not be strictly legal, like ideological statements in socialist laws. [66] Legal formants cover aspects recognized in constitutions as sources of law and those not formally recognized. Sacco called the non-recognized formants “living law" (diritto vivente).[67] Reinhard Zimmermann used the term living law to refer to legal doctrines that courts and scholars acknowledge, including the principle of change of circumstances in German law.[68]

Sacco writes in regard to the relationship between different legal formants that the number of legal formants and their comparative importance varies enormously from one system to another. The relative importance of a legal formant depends upon its capacity to influence others. In addition, Sacco stresses that the disharmony between one legal formant and another in the same legal system may be great or small. For example, the disharmony between the Civil Code and its interpretation is significant in France but less conspicuous in Germany. Among legal formants, Sacco stresses the vital role of the creative power of judges because the law cannot be applied without judicial interpretation.[69]

Sacco found that legal formants within a system are only sometimes uniform, and often contradictory. Sacco suggested that analyzing case law is essential even with civil law tradition because a case might contain operational rules not included in the Civil code but followed by the courts. He suggests it is necessary to recognize the diversity of legal formants and their proper roles, and to pay attention to the specific operational rules that courts follow. He disagrees with

[66] Rodolfo Sacco, “Legal Formants: A Dynamic Approach to Comparative Law (Installment I of II),” *The American Journal of Comparative Law* 39, no. 1 (1991): 1, https://doi.org/10.2307/840669.
[67] Rodolfo Sacco, “Legal Formants: A Dynamic Approach to Comparative Law (Installment II of II),” *The American Journal of Comparative Law* 39, no. 2 (1991): 343, https://doi.org/10.2307/840784.
[68] Zimmermann, *The New German Law of Obligations: Historical and Comparative Perspectives*, 3.
[69] 2 Sacco, “Legal Formants,” 1991, 344.

the traditional view that in civil law countries, the law is explained by saying that the legislature enacts a statute, scholars discover its meaning, and judges, assisted by their conclusions, give the statute a precise application through their decisions. Sacco argues that this view is unrealistic because each element is only a part of the law.

A comprehensive understanding of legal formants in Vietnam is essential for analyzing the operation of hardship law because the enforcement of this contract law principle depends on several factors, not only the statutory provisions themselves but other elements of the legal system, including the rules on legal interpretation, the role and discretion of judges in dispute resolution, and the perspective on contract law. These legal factors influence how Vietnamese courts interpret, understand, and apply the PCC.

Another critical finding of Sacco relevant to this thesis is that when an element of legal formants of a single system changes through borrowing foreign legal rules, other elements do not move simultaneously.[70] Therefore, when adopting a foreign law institution, the receiving country must carefully consider how to adapt the new law into the unique domestic conditions of their legal system. Implementing the principle of hardship in Vietnam is particularly relevant here as legislators borrowed this doctrine from foreign laws. When discussing comparative law, Sacco wrote: "Sometimes lawmakers have borrowed a rule or institution expecting that they would learn how to apply it appropriately later on." [71] There was a lack of preparation for enforcing the new law on the PCC before lawmakers incorporated this principle into the Vietnamese Civil Code.

Alan Watson invented the term "legal transplant" in 1974 in "Legal Transplants: An Approach to Comparative Law."[72] Legal transplant has become a significant and common concept in comparative law.[73] Watson suggests the possibility of transplanting law, asserting that

[70] Sacco, 342, 394.
[71] Sacco, "Legal Formants," 1991, 1–3.
[72] John W. Cairns, "Watson, Walton, and the History of Legal Transplants," *Georgia Journal of International and Comparative Law* 41, no. 3 (2012): 660; Alan Watson, "From Legal Transplants to Legal Formants," *American Journal of Comparative Law* 43, no. 3 (1995): 27.
[73] John W Cairns, "Watson, Walton, and the History of Legal Transplants" 41 (n.d.): 639.

there is no necessary connection between laws and the societies in which they operate.[74] Laws are often borrowed and can function in different societal contexts. The detachment of legal transplants from the society of origin has faced criticism from other scholars. Some debate that Watson's work is positivist, neglecting social factors, appearing superficial, and lacking systematization.[75] Gunther Teubner, a well-known legal sociologist, wrote an influential article debating Watson's theory. Teubner considered Watson's perspective on legal transplant a misleading metaphor and originated the idea of a "legal irritant." [76] Teubner used the term "legal irritant" rather than "legal transplantation" to describle the process of importing and exporting legal concepts. While the term transplant implies a seamless transfer, Teubner argues that legal institutions cannot simply be transferred among legal sytems but require careful implantation and nurturing. Indeed, the borrowed rules will not remain unchanged in the new system; rather, the new rules act as an irritation that triggers further structural changes in the borrowing legal framework.[77] In addition, labor lawyer Kahn-Freund, the most critical reviewer, raised concerns about the translatability of rules and institutions, emphasizing the importance of understanding social and political backgrounds. Kahn-Freund claimed that "the use of the comparative method requires a knowledge not only of the foreign law but also of its political context." [78]

Watson's theory of legal transplants posits that legal rules can be successfully borrowed even when the recipient system's circumstances differ significantly from the donor system. However, he overlooks the need for comprehension of the social and political conditions for a new law to work in the new system. Sacco developed the idea of legal transplant in line with the theory of legal formants.[79] This thesis employs the idea that the borrowing country must be aware of the differences or even conflicts of the new law with the existing elements of that country's

[74] Kurt Schwerin, "Comparative Law Reflections: A Bibliographical Survey," *Northwestern University Law Review* 79, no. 5 & 6 (1985 1984): 1329.
[75] For the detail discussion of arguments, see Cairns, "Watson, Walton, and the History of Legal Transplants," n.d., 641–42.
[76] Gunther Teubner, "Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergencies," *The Modern Law Review* 61, no. 1 (1998): 12, https://doi.org/10.1111/1468-2230.00125.
[77] Teubner, 12.
[78] O. Kahn-Freund, "On Uses and Misuses of Comparative Law," *The Modern Law Review* 37, no. 1 (1974): 27.
[79] Cairns, "Watson, Walton, and the History of Legal Transplants," n.d., 671.

legal formants and find a way to adapt and integrate them appropriately so that the new law can work within the new system. When a system borrows a rule or institution from another system, it must integrate it with its existing regulations and institutions. This process can be challenging because the borrowed rule or institution may differ significantly from the existing ones. The system must overcome these differences and find a way to incorporate the borrowed rule or institution in a way that is consistent with its overall framework. In other words, successful legal transplantation requires legislators to find ways to appropriately integrate new laws within the new system.[80]

Legal transplants may cause multiple formants to exist within a single legal system, each influenced by different factors from the original jurisdiction. The legal formants theory allows for the analysis of each of these influencial components, making it possible to identify their respective contributions to legal outcomes in the receiving country.[81] Professor Loriatti tested the utility of this theory in a recent comparative law project for the purpose of legal harmonization in Europe. Specifically, the European Land Registry Association has employed the theory of legal formants to investigate the possibility of certain rights being transferable across various legal systems within the European Union. This enterprise examined the operational rules on the registration procedures of land rights in several countries rather than mere declamatory norms. Professor Loriatti highlighted the deconstructive capacity of legal discourse and the importance of critically analyzing and reinterpreting a legal institution within the context of specific legal systems.[82] She emphasized that the force of legal formants theory lies in its ability to construct legal principles that accurately reflect the realities of legal systems.[83]

1.4 Problem statement

[80] J. G. Sauveplanne, *Codified and Judge Made Law: The Role of Courts and Legislators in Civil and Common Law Systems*, Mededelingen Der Koninklijke Nederlandse Akademie van Wetenschappen, Afd. Letterkunde, Nieuwe reeks, d. 45, no. 4 (Amsterdam ; New York: North-Holland, 1982), 400.
[81] Antonio Gambaro and Michele Graziadei, "Legal Formants," in *Elgar Encyclopedia of Comparative Law* (Edward Elgar Publishing Limited, 2023), 456–57, https://www.elgaronline.com/display/book/9781839105609/b-9781839105609.formants.xml.
[82] Loriatti Elena, "Comparative Law Method and Legal Formants as Catalysts of Normative Realities," in *The Grand Strategy of Comparative Law: Themes, Methods, Developments*, ed. Luca Siliquini-Cinelli, Davide Gianti, and Mauro Balestrieri (Taylor & Francis, 2024).
[83] Elena.

This study argues that the current elements of the legal system in Vietnam do not provide the necessary conditions for the effective enforcement of new laws on hardship. The PCC offers a legal regime for redistributing risks arising from unexpected changes during contract performance and to restore contractual equilibrium. However, the law on PCC is distinctive in its inherent ambiguity and context-dependence, highlighting that it depends on the judge's assessment of individual cases.[84] Whether in jurisdictions that recognize the PCC in their civil codes, such as Germany, or in jurisdictions where the PCC exists at the doctrinal level established by jurists, judges play an important role in formulating rules for making fundamental decisions on a case-by-case basis. While it is impossible to create complete legal guidelines for the application of the PCC, foreign court practices and scholarly works have at least contributed to the development of basic rules for the application of the PCC, such as protecting the sanctity of the contract as much as possible, carefully considering the essential circumstances of the case, and focusing in particular on the issue of risk allocation. In sum, when courts intervene in the contract to restore the contractual balance based on the PCC, an excellent legal provision on the PCC is insufficient because applying this principle requires a high degree of creativity on the part of the courts.

Vietnamese judges have little discretion in applying the law and often depend primarily on instructions from the legislature and the Supreme Court. Therefore, despite including the PCC in the Civil Code to strengthen consistency and legitimacy in dealing with contract disputes arising from unforeseen changes, applying the new law needs to be sounder and more consistent. Most of the literature suggests that legislators should provide formal guidance to the courts to complete the statutory provisions on hardship laws. Yet, given the highly contextual nature of the PCC, legislators cannot give complete instructions.

Nevertheless, this principle's inherent nature is the common challenge for judicial application in most of the corresponding national and international provisions. To compensate for the high degree of abstraction of the law, foreign courts have established ground rules for

[84] Basil Markesinis, *The German Law of Contract: A Comparative Treatise*, 325.

applying this principle and carefully examine the basic conditions of a particular case. In addition, the shortcomings of Vietnam's hardship law contribute to the inefficiency of its judicial application. In particular, the law on the PCC has problems, such as the underestimation of risk allocation conditions and the absence of clear criteria enabling judges to discern between adaptation and termination of contracts. The law requires courts to measure what would arise from contract termination against the cost of contract performance if adapted to decide whether to terminate or adjust contracts. In the commentary book titled "Commentary on the New Provisions of the Civil Code 2015," Professor Do Van Dai, one of the drafters, wrote*: "*According to Article 420(3), when being requested by one or both parties, the court is given discretion as to termination or adaptation of the contract, but to give priority to contract adaptation."[85] However, there are others who construe Article 420 so that it puts termination of the contract as the priority remedy. Likewise, the text of the hardship provision is subjective as to the scope of the power of the courts. It is unclear if the parties only request to amend the contract, can the court decide to terminate, or if the parties only ask for the termination, can the court decide to adapt. These legal imperfections make it even more problematic for courts to apply this novel contract provision.

Although the Vietnamese Civil Code incorporates the PCC to enhance the consistency and legitimacy of dispute resolutions of contracts affected by unexpected changes, the judicial application of this new law needs to be more consistent and well reasoned. While foreign courts tend to apply the doctrine of changed circumstances in a strict sense, Vietnamese courts accept hardship with a relative lack of caution. Relevant judicial decisions show that in applying the PCC law, judges have not considered available remedies for nonperformance, such as force majeure, and have yet to evaluate all conditions outlined in the Civil Code thoroughly, but have relied on some particular requirements. As for the consequences of hardship, in all the cases accepting the hardship claims, judges decided to terminate the contract without considering the possibility of adjusting the agreement. The unfounded application of the new law on the PCC

[85] Translated by the author. Do Van Dai, *Commentary on the New Provisions of the Civil Code 2015 [Bình Luận Khoa Học Những Điểm Mới Của Bộ Luật Dân Sự 2015]*, Hong Duc Publisher (Nhà Xuất bản Hồng Đức), 2016.

could lead to its misuse by parties to escape from a contract. In addition, such abusive behaviors would result in the failure to achieve the original goal of the legislature, namely to strengthen the uniformity and legality of the treatment of hardship cases. This thesis states that correcting the PCC law, providing basic guidelines, and clarifying judicial powers are essential steps to achieving the intended goals of the PCC.

1.5 Research questions

This thesis recommends a practical and feasible way to implement Vietnamese law in changed circumstances. The author proposes that legislators amend the conditions of the hardship provision by including requirements regarding the objective allocation of risk and clarifying unclear parts about the duty to renegotiate and the hierarchy between adaptation and termination. The synthesis of primary standards and elaboration on the fundamental issues of the doctrine of hardship in this comparative analysis can provide a reference for Vietnamese lawmakers to provide essential criteria for applying the hardship law. At the same time, the thesis proposes that it is indispensable for Vietnam to give judges the function of law interpretation because it is crucial for judges to apply the ambiguous hardship doctrine in specific cases.

This study seeks to address the following key research questions: How can the Vietnamese legal system be adapted to implement the law on hardship effectively? To what extent and in what way could the legislature provide basic guidelines for applying the hardship law? What strategies should Vietnam employ to improve the ability of the judicial system to deal creatively and fairly with hardship-related disputes?

1.6 Methodology

This thesis uses comparative, historical studies and case law review methods to collect and analyze data for addressing the research questions. In regards to national laws, primary sources include the civil codes and court decisions. The primary method used in this thesis is functional comparative law, which involves comparing the application of the principle of hardship by foreign courts through a comprehensive analysis of legal frameworks in those

countries. The thesis explicitly compares the jurisdictions of Germany, Japan, and France because they have identical or at least comparable approaches to hardship and other relevant legal formants. When dealing with the PCC law in each system, the focus will be on the position of the PCC provisions amongst different contract law rules and the interaction between the various elements of that legal system in enforcing the PCC law. Contextual comparison is essential because Vietnamese lawmakers borrowed the hardship principle from foreign law, and the transplant law process requires understanding the nature of the society that generated the borrowed rule. Before addressing the existence and application of the PCC in each jurisdiction, this paper analyzes other remedies that could be invoked by the aggrieved party, including force majeure, the rules of mistake, and the principle of good faith. For example, regarding the relevant time factor of unexpected changes, whether or not the PCC should cover changes that already exist before the conclusion of the contract depends on whether or not the law of mistake of the relevant jurisdiction covers this situation. If the law provides that mutual mistakes about the basic circumstances of a contract lead to the nullity of the contract, then the change of circumstances that already existed at the time of the conclusion of the contract does not fall within the scope of the PCC.[86] Therefore, analyzing the interplay of the hardship exemption with the traditional exclusion regime is vital.

Germany was chosen as a comparison because it was the first jurisdiction to establish case law for change of circumstances, and the German codification of the hardship doctrine has influenced other domestic and international contract laws.[87] Vietnamese jurists referred to provisions of the German Civil Code in the process of drafting the hardship principle, and the current provision of the Vietnamese Civil Code resembles parts of the German model. German courts have a long history of applying the hardship principle, and have developed essential rules for its application. Early relevant German case law dates back to the 1920s in the aftermath of hyperinflation following World War I. More recently, the application of the doctrine resurfaced with the Covid-19 pandemic. This paper analyzes the German approach to the PCC in terms of its

[86] Schwenzer, "Force Majeure and Hardship in International Sales Contracts," 718.
[87] Zivkovic Velimir, "Hardship in French, English and German Law," *Strani Pravni Zivot*, 2012, 259.

academic formulation, normative regulation, and application by the courts. The study identifies the specific role of the relevant legal formants in the PCC implementation process, including the contributions of scholars, connected contract law principles, and the role of judges. The comparison with German law provides basic knowledge about the development process of the PCC in contract law, the background conditions of the German legal system required for the enforcement of the PCC, and the ground rules established by scholars and judges on controversial issues in the application of the PCC, such as what the basic circumstances of a contract are, what elements judges must consider in assessing whether the circumstances meet the requirements for invoking the PCC, and how courts can adjust or terminate the contract.

Japan was chosen as a comparative country because it is a compelling example of the central role that courts and scholarly contributions play in enforcing the PCC, even in the absence of specific legislation. The PCC has found its way into Japanese jurisprudence through the work of Japanese scholars who have learned from the German approach. However, there is no explicit legislative provision on the PCC in Japan. Japan is a civil law country where the laws passed by the legislature are the primary source of law, and in the area of contract law, the primary source is the Civil Code, and the courts have no legislative function. Although Japanese scholars established the doctrine of changed circumstances long ago, recent legislators intensively debated whether to codify this principle into the Civil Code and ultimately rejected the PCC proposals. However, the absence of a law on the PCC does not mean that Japanese courts ignore the possibility of a contract modification to restore the disturbed contractual balance when needed. In the past, lower courts have applied existing principles of contract law and the doctrine of changed circumstances developed by scholars to adjust contracts, especially in times of crisis. Although the Supreme Court has never accepted the PCC for contract adjustment, it highlights essential standards for applying the PCC in its decisions. Thus, a comparison with Japan highlights the differences in the PCC enforcement, which depend on each country's roles of the courts, academia, and codified law.

Among civil law countries, France used to be by far the least responsive to the PCC in law, as the old version of its Civil Code contained no solutions for hardship cases in private

contracts. The courts accepted this doctrine for contract adjustment, but only in administrative cases. In civil law, there have been a few cases in which the judge intervened in the contract to restore the contractual balance, but these were met with significant pushback. However, the codification of imprévision, the corresponding principle of the PCC, in the 2016 amendment to the French Civil Code marks a significant change in the approach to PCC. The new law on hardship gives courts the power to adjust or terminate contracts. The codification of the PCC in the Civil Code at least confirms the need for hardship as a legal regime for the reallocation of risks in contracts. Due to the tremendous international influence of the French Civil Code, this modernization is significant for law reformers in many foreign jurisdictions that have used the Code as a model or a source of inspiration to make their laws.[88] Vietnam has also used the French Civil Code as a model.[89] The French proposal for the new provision on imprévision appealed to Vietnamese lawmakers and became one of the main reference points for revising the Civil Code.

In addition to national laws, this paper examines the provisions of international initiatives in soft law instruments such as the PICC, the PECL, and their applications. These contract law instruments contain provisions comparable to the PCC and have influenced hardship regulation in domestic laws,[90] including in Vietnam. In addition, although CISG Article 79 does not mention hardship, whether this article actually covers hardship or not has been highly debated.[91] However, scholars in the field of hardship observed that recently more and more judgments and arbitral decisions, as well as scholarly writings, accept the idea that Article 79 CISG does cover hardship situations.[92] This thesis compares the similarities and differences in the PCC provisions in these legal documents. It draws on scholarly discussions and relevant case law to identify the standards for applying the PCC. A better understanding of the PICC's hardship

[88] Solene Rowan, "The New French Law of Contract," *International and Comparative Law Quarterly* 66, no. 4 (2017): 806.
[89] Rowan, 809.
[90] Fontaine, Marcel. "Chapter 1: The Evolution of the Rules on Hardship From the First Study on Hardship Clauses to the Enactment of Specific Rules." In Bortolotti and Ufot, *Hardship and Force Majeure in International Commercial Contracts*, 14.
[91] Fontaine, Marcel. "Chapter 1: The Evolution of the Rules on Hardship From the First Study on Hardship Clauses to the Enactment of Specific Rules."
[92] Schwenzer and Muñoz, "Duty to Renegotiate and Contract Adaptation in Case of Hardship," March 1, 2019, 154.

regulations could facilitate an adequate interpretation and application of hardship laws in Vietnam, given that the PICC's hardship provisions have been adopted into national laws, including Vietnam's Civil Code.[93]

In addition to comparative analysis, the thesis applies historical study to examine the concepts of hardship from its historic origin over different paths. Understanding the source of hardship is essential because it explains why a given jurisdiction needs hardship, why traditional principles of contract law are insufficient, and what grounds justify the application of hardship. The thesis will examine when parties can invoke hardship to deal with unallocated risks from unprecedented changes in circumstances. Since the laws on the PCC in the comparative jurisdictions are the codification of case law, the thesis needs to trace the development of this doctrine by examining case law even before the codification of the PCC into the Civil Code. Moreover, in all comparative jurisdictions, the PCC law is closely tied to prior case law and jurisprudence, so it is appropriate to take a historical perspective when analyzing these laws.[94] When incorporating hardship doctrine into the Civil Code, German legislators did not aim to change the previous case law's approaches, but rather legalize the basic aspects of the doctrine of changed circumstances as elaborated by the courts.[95] Therefore, prior case law is essential in comprehending German hardship law.[96] For example, Article 313 BGB does not determine the hierarchy between adaptation and termination; by looking at the historical development of this law, one can see that preference should be given to adaptation because one of the reasons why German legislators looked to another legal doctrine was to find a legal regime to keep the contractual bond. In particular, before having a statutory basis for hardship to deal with contracts affected by inflation after WWI, German courts attempted to enlarge the doctrine of impossibility to cover economic impossibility. However, case law illustrated that utilizing the doctrine found in the BGB suffered from flaws, including the vagueness of the notion of economic impossibility

[93] Girsberger and Zapolskis, "Fundamental Alteration of the Contractual Equilibrium Under Hardship Exemption," 142.
[94] Zimmermann, *The New German Law of Obligations: Historical and Comparative Perspectives*, 4.
[95] Basil Markesinis, *The German Law of Contract: A Comparative Treatise*, 324–25.
[96] Zivkovic Velimir, "Hardship in French, English and German Law," 253.

and the limitation of remedy, namely the discharge of contracts.[97] Moreover, tracing the historical development of the PCC through case law is important because the application of this doctrine depends on the facts of individual cases.[98]

1.7 Objectives

The thesis draws attention to the core issues Vietnamese courts face when applying hardship law and proposes how to effectively integrate new laws on hardship in the Vietnamese legal system. The author states that the efficient implementation of the PCC in the Vietnamese context requires adjustments to domestic legal formants. Legal formants need to be reviewed, including providing judges more discretion in law application, amending provisions in the Civil Code on hardship, and providing basic standards for applying the law on the PCC. The thesis highlights the specialties of the Supreme Court in Vietnam in providing legal guidance to judges. Utilizing this unique role of the Supreme Court could be an ideal solution to improving the consistency in applying hardship. The proposed adjustments aim to pave the way for the effective incorporation of PCCs into the Vietnamese legal system, thereby contributing to a more equitable resolution of contractual disputes. Knowledge of the trends and approaches of comparative law on the PCC law could be beneficial to Vietnamese lawmakers in establishing effective mechanisms for implementing the new PCC legislation.

1.8 Structure overview

The thesis is structured into four main chapters to comprehensively explore the application of the principle of hardship within the Vietnamese judicial system and compare it with German, Japanese, and French laws, as well as some international law instruments. Chapter I serves as an introduction, providing an overview of the research topic. It explains the concept of the principle of hardship and introduces the idea of legal formants as a tool for understanding the relevant legal factors in different countries. This chapter furthermore states the thesis's problem

[97] Basil Markesinis, *The German Law of Contract: A Comparative Treatise*, 328 See more at Chapter 3 (3.2) on German law.
[98] Basil Markesinis, 325.

statement, methodology, and hypothesis. Chapter II describes legal formants in Vietnam that are relevant to the implementation of hardship law. This chapter then discusses the problem of hardship law and its implementation in Vietnam.

Chapter III focuses on a comparative study of German, Japanese, and French laws. It highlights the critical role of German courts in applying the principle of hardship and formulating significant rules through judge-made law. These rules serve as valuable references for Vietnam in applying the principle of hardship. As for Japanese law, the thesis examines how the hardship doctrine finds its way into judicial decisions. A comparative study with French law focuses on the recent provision on *imprévision* in the Civil Code and the diversity of its interpretation. This chapter aims to examine the respective roles of positive law, the courts, and academics in each jurisdiction regarding the application of the doctrine of hardship. In addition to national laws, this chapter analyzes hardship provisions in international instruments and their applications, focusing on discussions of substantive issues and remedies in related case law.

Chapter IV synthesizes the comparative approaches to the fundamental issues of hardship law and compares them to Vietnamese conditions. According to the comparative study, the common formula for the doctrine of hardship to function in a legal system is the interaction between the various legal formators, including the role of legislators in drafting prospective legislation, the role of academics in formulating doctrines and interpreting the law, and the role of the courts in drafting judicial rules that put abstract statutory provisions into practice. Depending on each situation, the importance taken by each legal formant may differ, but the courts' role in interpreting the law is indispensable. This chapter then sets forth the critical standards established by academics and the courts for dealing with fundamental issues relating to the application of hardship legislation. These issues include applicable requirements, the obligation to renegotiate, and the hierarchy between two solutions: adaptation and termination of contracts. The second part of Chapter IV summarizes the main findings and restates the thesis statement. The thesis recognizes the difficulties inherent in utilizing the doctrine of changed circumstances to uphold fairness and justice in adjudication while also preserving the integrity of contracts and the stability of contractual relationships. It underscores the importance of

legislators establishing clear standards for the implementation of the law on changed circumstances. Furthermore, the thesis contends that the absence of judicial authority to interpret the law could hinder the effectiveness of judicial application of this legal concept.

Chapter II: Background

This chapter addresses the issue of the inconsistent application of the PCC by Vietnamese courts and provides insights into the causes that contribute to these problems. This chapter will begin by examining the context of legal formants that influence the implementation and the process of enacting PCC law. This chapter will outline the contents of PCC law and review relevant literature on the enforcement of the PCC. The objective of this chapter is to highlight the identified problems in applying PCC law, the points of agreement among existing literature, and the gaps where disagreements or insufficient discussions exist regarding how to enhance the effectiveness of PCC law in Vietnam. This chapter will underscore the significance of this thesis and its potential contributions to addressing the challenges in applying PCC law.

2.1 Legal formants

The comprehension of relevant legal formants is important to evaluate the advantages and disadvantages for the implementation of the doctrine of changed circumstances in Vietnam. These legal formants include the sources of contract law, the methods of interpreting law, and other contract law principles that deal with unexpected circumstances. This part introduces these contents to provide the context for understanding the doctrine of changed circumstances in the Vietnamese legal system.

2.1.1 Sources of contract law

The formal sources of law in Vietnam are the Constitution, laws, legislations, and judicial precedents. The highest legal document is the Constitution, under which two primary codes exist—the Civil and Criminal Code. The Civil Code of 2015 serves as the principal source in contract law, while the Commercial Law governs commercial contracts. Specific regulations relating to particular types of contracts can be found in specialized laws like insurance and labor laws. Authorities enact various regulations, including decrees by the government, circulars by ministries, and resolutions by the Supreme Court. Decrees and circulars offer guidance and procedures for the application of the law. The Council of Justices of the Supreme People's Court

(SPC)[99] ensures systematic and unified law application by issuing resolutions, which provide guidance on the implementation of legislative provisions, binding all courts.[100] These resolutions hold significant importance in judicial practice, and judges frequently refer to them. From a practical viewpoint, these resolutions function as a derivative version of the stare decisis principle.

In addition to traditional written sources of law, Vietnam has recognized judicial precedents as sources of law since 2015.[101] Precedents in Vietnam are distinctive from the common understanding of precedents in their creation and function. The 2014 Law on the Organization of People's Courts provides a particular procedure for making precedents. Accordingly, the Council of Justices of the SPC has the authority to select, develop, and promulgate precedents from among high-quality judicial decisions.[102] Precedents have defeasibly binding effects, implying that the court must follow precedents in cases that share similar facts unless there are compelling reasons not to do so.[103] If the court chooses not to apply a precedent in a case with similar legal situations, the judgment must explicitly state the reason for this deviation.[104]

Furthermore, precedents are supplementary to positive law, as Article 6 of the Civil Code stipulates that courts should resort to precedents only when solutions are not available in positive law and customary law. On the one hand, these features of "socialist precedent" show that Marxist legal positivism, nevertheless, is the dominant influence in the Vietnamese legal system.[105] On the other hand, the adoption of precedents marks the dynamic adaptation of

[99] The Council of Justices of the SPC is composed by 14 judges chaired by the Chief Justice.
[100] Article 21 of the Vietnamese Law on Promulgation of Legislative Documents 2015 (amended in 2020), available at http://img2.caa.gov.vn/2016/07/28/02/35/802015Law-on-The-Promulgation-of-Law.pdf.
[101] Article 6, the Vietnamese Civil Code 2015, available at https://faolex.fao.org/docs/pdf/vie198573.pdf.
[102] Article 22(2,c) of the Vietnamese Law on Organization of the People's Courts 2014, available at https://vanbanphapluat.co/law-no-62-2014-qh13-on-organization-of-people-s-courts
[103] Ngoc Son Bui, "The Socialist Precedent," *Cornell International Law Journal* 52, no. 3 (2019): 435.
[104] Article 8, Resolution No. 04/2019/NQ-HDTP dated 18th of June, 2019 on process for selecting, publishing and applying precedents [Nghị quyết số 04/2019/NQ-HDTP về quy trình lựa chọn, công bố, và áp dụng án lệ]
[105] Bui, "The Socialist Precedent," 424.

contemporary socialist law.[106] The emergence of precedents as a source of law in a legal system shaped by legal positivism conveys the norm that the judiciary plays a role in protecting justice and fairness. For example, the promulgated precedents on civil law issues show the purpose of protecting fairness and parties' legitimate rights.[107] The adoption of precedents reflects contemporary changes in the role of courts.

Apart from formal legal resources, judges in Vietnam sometimes have the option to seek guidance from higher-level courts on applying specific provisions to particular cases. Additionally, the Supreme Court issues "Official Letters" (known as "công văn" in Vietnamese) to guide law applications based on the summary of adjudication experiences.[108] Although this non-official guidance is not legally binding, it holds practical importance in guiding the resolution of cases in lower courts. There have been cases where courts cited these guidance letters as grounds for their judgment decisions. However, these documents usually lack detailed legal reasonings to justify their solutions.[109]

In regards to the role of legal scholarship, Vietnam does not have an extensive body of commentary where authors present and analyze legislation, as seen in other countries like Germany.[110] Scholarly writing does not hold significant persuasive value in judicial decision-making, and the law does not allow judges to cite academic opinions since these opinions are not formal sources of law. The absence of scholarly works directly apparent in judicial decisions can be explained by the fact that Vietnamese law comprises exhaustive written sources of statutory and legislative documents. Judges predominantly employ the deductive method to find solutions to legal issues.[111] Rather than relying on scholarly opinions, judges are accustomed to justifying

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[106] Bui, 424.
[107] Bui, 439.
[108] John Gillespie, "Exploring the Limits of the Judicialization of Urban Land Disputes in Vietnam," *Law and Society Review* 45, no. 2 (2011), https://doi.org/10.1111/j.1540-5893.2011.00434.x.
[109] Kien Tran, Nam Ho Pham, and Quynh-Anh Lu Nguyen, "Negotiating Legal Reform through Reception of Law: The Missing Role of Mixed Legal Transplants," *Asian Journal of Comparative Law* 14, no. 2 (December 2019): 186, https://doi.org/10.1017/asjcl.2019.36.
[110] Heikki E. S. Mattila, "Cross-References in Court Decisions: A Study in Comparative Legal Linguistics," *Lapland Law Review*, January 1, 2011.
[111] See Vo Tri Hao, "Legal Interpretation Role of the Courts" [Vai Trò Giải Thích Pháp Luật Của Tòa Án], Journal of Legal Science (Tạp chí khoa học pháp luật), no 3/2003. Accessed January 2, 2021. http://101.53.8.174/hcmulaw/index.php?option=com_content&view=article&id=237:tc2003so3vttagt&catid=93:ctc20033&Itemid=106.

their decisions by referencing a written legal text or unofficial guidance from higher courts to support their decision-making process.

2.1.2 Legal interpretation

Modern legal systems can be roughly divided into three main categories: socialist law, common law, and civil law. Vietnam is one of the few countries that still adhere to a socialist legal system after the collapse of the Soviet Union in the twentieth century. Socialist legal systems are grounded in Marxist-Leninist socio-economic theory and Soviet law.[112] This ideological foundation continues to influence the Vietnamese state, characterized by concepts such as Marxist legal positivism, socialist legality, and democratic centralism. Marxist legal positivism does not view the law as inherently moral, but rather as an instrument shaped by officials to fit socio-economic conditions. Socialist legality holds that law stems from the state and equates law with written or positive law. Democratic centralism, which is applied to the organization of state institutions, rejects the separation of state powers and subordinates the judiciary to the legislature. Consequently, the courts are prohibited from creating law and are bound by the application of legal rules.[113] This ideological framework means that statutory provisions are the primary source of law in Vietnam, with the Civil Code as the cornerstone of contract law. However, these statutory provisions often contain abstract and nuanced language that requires further interpretation for application to specific cases. The Standing Committee of the National Assembly has exclusive authority to interpret the laws, reflecting the centralized government structure in which the National Assembly represents all branches of government.[114] The National Assembly oversees all branches of state power and directly administers legislation, including the Constitution and laws. In contrast, administrative and judicial powers are delegated

[112] Bui, "The Socialist Precedent," 423; René David and John E. C. Brierley, *Major Legal Systems in the World Today: An Introduction to the Comparative Study of Law* (Simon and Schuster, 1978), 18.
[113] Bui, "The Socialist Precedent," 426.
[114] Article 3(3) of the Vietnamese Law on Promulgation of Legislative Documents 2015.

to the government and the courts.[115] As a result of this centralized governance, judges are forced to strictly adhere to the literal interpretation of the law and have no discretion in interpretation.[116]

However, in contemporary Vietnamese socialist law, there is a dynamic regarding the power of courts to interpret the law. Firstly, from a theoretical perspective, the lack of judicial interpretation power poses challenges to judges in handling individual cases due to the inherently vague nature of civil cases. Scholars have suggested allowing judges to interpret the law to address these challenges.[117] Secondly, local scholars have observed instances in court practice where judges do interpret the law. For example, judges have used the principle of good faith to modify contracts, indicating some discretion in the application of law. Thirdly, the formal recognition of precedent as a source of law indicates a new function of the courts in interpreting the law by clarifying and interpreting ambiguous and general provisions in legislation that are sources of divergent views and judicial applications.[118] Vietnam introduced a formal system of precedents in 2017. Professor Bui Ngoc Son believes that the dynamic adaptation of socialist ideology in modern socialist legal systems is one of the explanatory factors for accepting precedents.[119]

2.1.3 Contract law principles related to the principle of changed circumstances

The PCC is a legal mechanism introduced into Vietnamese contract law to address risks arising during contract performance after the contract has been concluded and to restore contractual equilibrium. However, the PCC is not the only legal basis for redistributing risks and resolving issues related to unforeseen changes. Before adopting the PCC, existing principles were the legal basis for equitable solutions to contracts affected by unanticipated events, including force majeure and good faith. Ewoud named these principles "boundary principles" to the

[115] More details at Dao Tri Uc and Nguyen Thu Trang, “The Role of Court Proceedings in the Development of Vietnam's Legal System” [Vai trò của hoạt động xét xử của tòa án trong quá trình phát triển hệ thống pháp luật Việt Nam], Journal of Legislative Studies (Tạp chí Nghiên cứu lập pháp), no. 18(274), 9/2014.
[116] According to Article 103 of the Constitution, judges are required to strictly adhere to the law during adjudication and have no discretion beyond what is provided by the law.
[117] Tran, Pham, and Nguyen, “Negotiating Legal Reform through Reception of Law.”
[118] Bui, “The Socialist Precedent,” 440.
[119] Bui, 423.

PCC.[120] Although these principles share, to some extent, the scope of application and legal effects, they are different principles that fulfill different functions. Good faith is the legal principle that serves as the basis for justifying the adaptation of the contract in the event of hardship before the hardship becomes an independent legal institution. Where hardship exists as a contract law principle, good faith is vital in guiding the interpretation of ambiguous elements of hardship provisions. The principle of good faith is essential to the interpretation of hardship rules. For example, although PICC 6.2.3 does not expressly mention the duty to renegotiate, it stipulates that the affected party is "entitled to request renegotiate," some authors interpret that the PICC imposes such an obligation stemming from the principle of good faith in Article 1.7.[121] The scope of hardship may overlap with *force majeure* and the rules of mistake. In such cases, it is essential to clarify the position of hardship in contract law.

Before 2015, *force majeure* was the only provision exempting contractual obligations for breach of contract. This principle continues to be recognized in the Vietnamese Civil Code of 2015 under Article 156, which defines force majeure as an objective event that "is not able to be foreseen and which is not able to be remedied by all possible necessary and admissible measures being taken."[122] According to Article 351 of the Civil Code, the law provides relief to a party who fails to fulfill contractual obligation due to a force majeure event. From the above provisions, the *force majeure* clause is only applicable when four conditions are met simultaneously:

1. The performance of the contract becomes impossible due to the causal relationship with the force majeure event.
2. The event that occurs must be objective, meaning that the parties are not at fault and cannot control the occurrence of that event. Objective events can be natural disasters, fires, epidemics, or events created by humans, such as war or changes in policies and laws.

[120] Hondius and Grigoleit, *Unexpected Circumstances in European Contract Law*.
[121] Schwenzer and Muñoz, "Duty to Renegotiate and Contract Adaptation in Case of Hardship," March 1, 2019, 155.
[122] Article 156 of the Civil Code, available at https://www.wipo.int/wipolex/en/legislation/details/17200.

3. The parties cannot foresee these changes, so they cannot reasonably predict them when entering the contract.
4. The affected party cannot overcome the effects of unexpected difficulties even though this party has made necessary efforts to seek measures to avoid or minimize the damage.

The law is not specific about whether the evaluation of foreseeability should be made at the time of contract conclusion or before or during the contract performance. However, some scholars believe that evaluating the foreseeability at the time of contract signing is reasonable because the rights and obligations of the parties are determined at the time of contract formation based on analysis and the forecasting of future performance capabilities. This understanding is also a common approach in many countries and international law. In other words, when signing, the parties have a justifiable reason to believe that the force majeure event will not occur. The concept of foreseeability within the scope of force majeure needs to be assessed from a legal perspective because if it is considered absolute, then everything in life can be anticipated. For example, scientists have predicted the cyclical nature of pandemics, but they cannot be sure about the timing, location, and extent of the impact of pandemics. Hence, mandating contracting parties always to foresee such vague events would be unreasonable.[123] The final condition is that the affected party cannot overcome the effects of unexpected difficulties even though this party has made necessary efforts to seek measures to avoid or minimize the damage. Contracts have binding value, and parties must try to fulfill their commitments even if the implementation process encounters difficulties. If there are still available remedies that the party has yet to utilize, then they have not made the maximum efforts to manage the damage.

Article 126 of the Civil Code stipulates that in cases where a contract is formed due to the mistake of one or both parties, leading to frustration of the intended purpose, the party who has misunderstood the situation has the right to ask the court to declare the contract void. However, this provision does not apply if the purpose of the contract has been achieved or if the

[123] Tran Chi Thanh, "Application of the Principles of Force Majeure and Changed Circumstances in Vietnam in COVID-19 Pandemic" [Áp Dụng Quy Định Pháp Luật về Sự Kiện Bất Khả Kháng và Thực Hiện Hợp Đồng Khi Hoàn Cảnh Thay Đổi Cơ Bản Trong Bối Cảnh Dịch COVID-19 Tại Việt Nam]," Journal of Law and Practice (Tạp Chí Pháp Luật và Thực Tiễn), no. 43 (2020): 91.

parties can immediately rectify the misunderstanding, thereby enabling the purpose of the civil transaction to be accomplished. This article governs both the mistakes of one party and common mistakes by both parties. Although this article does not stipulate the time the mistake was made, scholars suggest interpreting this provision as the PICC prescribes that a mistake is an erroneous assumption relating to facts or law existing when the contract was concluded. (Article 3.2.1. Definition of mistake).[124] The only remedy for a mistake is the cancellation of the contract. Prof. Do suggests that the law should enable the mistaken party the right to ask the other party to modify the content of the transaction; if the other party does not accept or cannot make the modification, the mistaken party has the right to ask the court to declare the transaction null and void. Courts tend to apply the only remedy provided by law. For example, in a 2016 decision, a court of appeal overturned the trial judgment and held that the contract was void based on the mistake rule. The fact is that a seller transferred ownership of a 252 m^2 plot of land to a buyer. However, after concluding the contract, the buyer found that the land was 50 m^2 smaller than the area described in the certificate presented by the seller. The seller took legal action to declare the contract void on the grounds of mistake. The court of first instance rejected the mistake claim and ruled that the buyer had to reimburse the seller for the value of the land, which was lower than stipulated in the contract. However, the court of appeal ruled that the contract was void due to the mutual mistakes made by both parties regarding the actual surface area of the land.[125]

Good faith was adopted from French law and became one of the fundamental principles of contract law recognized in the Civil Code of 2015. Article 3 of the Civil Code defines the scope of application of the principle of good faith, encompassing all contract negotiation, performance, and termination stages. As a fundamental principle, parties must adhere to the principle of good faith, even if the contract does not explicitly stipulate it. Failure to act in good

[124] Do Van Dai, "Mistakes in Contract Provisions: Shortcomings and Directions for Amendment of the Civil Code Part 2." [Nhầm lẫn trong chế định hợp đồng: những bất cập và hướng sửa đổi Bộ luật Dân sự phần 2, Electronic Journal of Law Study (Tạp chí Nghiên cứu Luật điện tử), available at: https://vibonline.com.vn/bao_cao/nham-lan-trong-che-dinh-hop-dong-nhung-bat-cap-va-huong-sua-doi-bo-luat-dan-su-phan-2.]. This article discusses about the provision on mistake in the old version of the Civil Code, however, the cited content holds true for the new law.

[125] Judgment No. 10/2016/DS-PT dated on September 20, 2016 by Cao Bang Province Court. [Bản án số 10/2016/DS-PT ngày 20/9/2016 của Tòa án nhân dân tỉnh Cao Bằng], available at https://congbobanan.toaan.gov.vn/2ta1053t1cvn/chi-tiet-ban-an.]

faith implies violating the fundamental principle of contract law. However, it is essential to note that this principle remains abstract, with no specific criteria established to determine what constitutes good faith. Additionally, the law does not provide any distinct remedies or measures to address violations of the principle of good faith and honesty. Under the civil laws of continental countries, judges might rely on the principle of good faith when they need to supplement and clarify contractual terms and statutory provisions.[126]

Whether violating the principle of good faith constitutes a fundamental breach of contract and serves as a basis for contract termination under Article 423 of the Civil Code remains unclear. Judicial practice has shown that determining whether a party has acted in good faith depends on the specific circumstances of each case and relies on the discretion of the adjudicating authorities. In certain instances, courts have referred to the principle of good faith to assess the extent of a party's fault when considering the amount of compensation in contract termination. For instance, in a 2019 appellate court decision, the People's Court of Ho Chi Minh City ruled that the defendant, who was the seller of the land, acted in bad faith by signing a deposit contract to sell the land to the plaintiff but later entered into a transfer contract for the same plot of land with another person without informing the buyer in the deposit contract. The court concluded that this action violated the principle of good faith stipulated in Article 3 of the Civil Code. Consequently, the court imposed a fine on the defendant when terminating the deposit contract.[127]

2.2 The adoption of the principle of changed circumstances in the Vietnamese Civil Code

This part introduces the judicial context preceding the reform of the Civil Code. In 2015, Vietnam made significant amendments to its Civil Code, and one of the fundamental changes

[126] Shimada Makoto (島田 真琴), "Termination of a Continuous Contract and Good Faith under Japanese and English Law.," *Keio Daigaku (慶應法学)* 38 (2017): 15.

[127] Judgment No. 356/2019/DS-PT, April 24, 2019of the appellate court, People's Court of Ho Chi Minh City, regarding the dispute over a deposit contract. [Bản án số 356/2019/DS-PT, ngày 24/04/2019 của Tòa phúc thẩm Tòa án Nhân dân thành phố Hồ Chí Minh về tranh chấp hợp đồng đặt cọc]; Nguyen Minh Hang and Phan Hoai Nam, "Principle of Good Faith in the Context of Civil Contracts in Vietnam." [Nguyên Tắc Thiện Chí Trong Bối Cảnh Hợp Đồng Dân Sự Tại Việt Nam], Journal of Law and Practice (Tạp chí Pháp luật và Thực tiễn), no. 51 (2022): 32. Accessed July 3, 2023. https://tapchi.hul.edu.vn/index.php/jl/article/view/113.

was the inclusion of hardship in Article 420. The adoption of the provision on hardship aimed to align Vietnamese contract law with international standards and address the challenges faced by domestic courts in handling disputes arising from unforeseen circumstances.

2.2.1 The motives for adopting the principle of changed circumstances

Prior to the introduction of the PCC, Vietnamese courts struggled with enforcing contracts when their equilibrium was fundamentally altered due to factors such as significant increases in the price of the subject of the contract. Such situations did not fall within the scope of the *force majeure* principle, which excuses liability when contract performance becomes impossible. Courts handled these cases differently. Some courts utilized the principle of good faith to adjust contract terms, avoiding rigid outcomes, while others strictly upheld the original contracts. For instance, in a 2006 Supreme Court decision involving a real estate contract, the court adjusted the contract's price to reflect the current market condition.[128] The contract was for transferring a commercial property valued at VND 7.8 million, with the buyer paying VND 4.8 million and the seller agreeing to lend the buyer the remaining amount. In 1994, the seller filed a lawsuit seeking to rescind the contract.[129] However, the cassation court determined that the contract remained legally effective and ordered the parties to continue performing it. Notably, the court ruled that the buyer must pay the outstanding amount based on the current market price (thời giá) calculated at the time of the trial. Professor Do Van Dai, a prominent scholar in the field of civil law in Vietnam, commented that the court's application of the current market price amounted to an adjustment of the contract.[130]

Conversely, in two other cases where the price of contract performance increased significantly in 2007 and 2008, appellate courts rejected requests from adversely affected parties

[128] Cassation Decision No. 14/2006/DS-GĐT dated on June 06, 2006 by the Judges' Chambers of the Vietnamese People's Supreme Court on the Dispute of Property Right.
[129] Do Van Dai, "About Adaptation of Contracts in Changed Circumstances" [Bàn thêm về điều chỉnh hợp đồng khi hoàn cảnh thay đổi], Journal of Legislative Studies *(*Tạp chí Nghiên cứu lập pháp) 13, no. 293 (July 2015). http://lapphap.vn:80/Pages/tintuc/tinchitiet.aspx?tintucid=210176.
[130] Do Van Dai, "About Adaptation of Contracts in Changed Circumstances".

to change the contract prices.[131] Due to the absence of a specific legal regime for adapting contracts, courts intervened in contract disputes by applying the principle of good faith. However, the extent of court intervention based on good faith before the adoption of the PCC relied on judges' discretion, leading to inconsistencies in judicial decisions.[132]

Typically, hardship attracts the attention of legislators and courts in the event of a crisis or exceptional period affecting contracts, such as pandemics or economic crises. Considering the socio-economic situation in Vietnam at the time, the need to deal with hardship cases was less urgent than in Germany after the First World War.[133] The introduction of the PCC into Vietnamese law sought to provide courts with a new regime for resolving relevant disputes more predictably and uniformly, harmonizing Vietnamese law with international and foreign law. During the Civil Code of 2015 drafting process, the Government responsible for drafting confirmed these underlying motives.[134]

2.2.2 The process of adopting a provision on changed circumstances in the Civil Code

This section describes the path of the development of the PCC law in Vietnam. It emphasizes that the PCC law resulted from mixed legal transplants of foreign and international law, especially French law, German law, the PICC, and the PECL. The government was responsible for preparing the draft for the amended civil code to submit to the National Assembly. The government started the drafting process by reviewing the result of implementing the old Civil Code in September 2012.[135] The hardship provision in the first draft was titled

[131] Le Minh Hung, "Adaptation of Contracts in Changed Circumtances, Foreign Law and Lessons for Vietnam" [Điều Khoản Điều Chỉnh Hợp Đồng Do Hoàn Cảnh Thay Đổi Trong Pháp Luật Nước Ngoài Và Kinh Nghiệm Cho Việt Nam], Journal of Legislative Studies *(*Tạp chí Nghiên cứu Lập pháp*),* no. 13 (293), 2009.

[132] Ngo Thu Trang and Nguyen Duc The Tam, "Implementing Contracts in the Event of Fundamental Changes in Circumstances" [Thực hiện hợp đồng khi hoàn cảnh thay đổi cơ bản], Journal of State and Law (Tạp chí Nhà nước và Pháp luật), no. 1/2017: 60-67.

[133] Basil Markesinis, *The German Law of Contract: A Comparative Treatise*, 329.

[134] Resolution No. 100/NQ-CP on August 20, 2013 by the Government on law development.

[135] Decision No. 1322/QD-TTg on September 18, 2012 by the Prime Minister on approving the plan for reviewing the implementation of the Civil Code; Ministry of Justice. Report No. 151/BC-BTP on the Implementation of the Civil Code 2005. July 15, 2013. (Bộ Tư pháp. Báo cáo số 151/BC-BTP về tổng kết thi hành bộ luật dân sự năm 2005. Ngày 15 tháng 7 năm 2013.); Prime Minister's Office; Decision No. 1441/QD-TTg on August 16, 2013, regarding the assignment of responsible agencies for drafting law and ordinance projects under the 2014 Program (Thủ tướng Chính phủ. Quyết định số

"Contract adjustment in case of changed circumstances" and was located in Article 430.[136] This article stipulated four applicable conditions. Firstly, changed circumstances fundamentally alter the balance of interests between the parties. Secondly, the change must occur after the conclusion of the contract. Thirdly, the changed circumstances could not have been reasonably foreseen at the time of contract conclusion. Fourthly, the risk arising from the changed circumstances is not a risk the affected party should bear. If these requirements are met, parties are required to renegotiate. When parties fail to reach an agreement within a reasonable period, the court may terminate or adjust the contract to allocate the damages and benefits arising from the changed circumstances fairly and equitably. Article 430 adds that the court may compel the party who refuses or disrupts the negotiations in bad faith to compensate for damages.[137] This draft adopted the concept of the alternation of contractual equilibrium in hardship provisions of the PICC. The requirement regarding risk allocation was inspired by German law on changed circumstances. In addition, Article 430 borrowed the PECL's stipulation regarding the sanction for bad faith renegotiation.

In the explanatory report on the draft proposals, the Ministry of Justice (MoJ) clearly stated that the hardship provision in the PICC was the reference for the Vietnamese proposals.[138] Following the publication of the first proposal for discussion, the government gathered opinions and indicated two opposing approaches to the PCC proposal. The first opinion agreed with the proposal that allows judges to adapt the contract and maintains that this judicial intervention does not interfere with the freedom of the parties in the contract but is instead a detailed application of the principle of limitation of the exercise of civil rights stipulated in the Civil Code.[139] Limitations on the exercise of civil rights prevent anyone from abusing their rights to the

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1441/QD-TTg ngày 16/8/2013 về phân công cơ quan chủ trì soạn thảo các dự án luật, pháp lệnh thuộc Chương trình năm 2014; Ministry of Justice, "Detailed Explanation of the Draft Amended Civil Code" [Bản thuyết minh chi tiết Dự thảo bộ luật dân sự sửa đổi], 2014.

[136] The author translated the Article.

[137] Ministry of Justice, "Draft of the amended Civil Code" [Dự thảo bộ luật dân sự sửa đổi]. June 17, 2014.

[138] Ministry of Justice, "Detailed Explanation of the Draft Amended Civil Code" [Bản thuyết minh chi tiết Dự thảo bộ luật dân sự sửa đổi], 2014.

[139] Article 10 of the Civil Code 2015 stipulates that: " Individuals and legal entities shall not abuse their civil rights to cause harm to others, to violate their obligations, or to pursue other unlawful purposes."

detriment of other parties, and this limitation is a reason for the court to adjust the contract to ensure a balance between the advantages of the contracting parties, provided the law stipulates a specific and high threshold for judicial intervention. On the contrary, others disagree with the PCC's proposal, believing that as far as the legal result is concerned, the law should not allow the court to intervene in the contract because this intervention is not in keeping with the nature of the contract, which is the vehicle of the parties' will, and because this solution is not feasible in practice.[140] The Standing Committee of the National Assembly defended the approach allowing judicial adaptation of the contract because in practice, there were cases where the circumstances of the contract had changed so significantly that continuation of the original contract would cause severe damage to one of the parties, or even entail a risk of bankruptcy. The standing committee, therefore, proposed that the proposal be maintained.[141] Based on the first round of discussions, the MoJ revised the proposal to ask for public deliberation. The second proposal mainly keeps the text of the first version. Public deliberation is a procedure applied to fundamental changes that lawmakers consider especially necessary for all citizens to participate in and have their ideas heard. The proposal on hardship was one of ten significant civil code transformations subject to deliberation.[142] The opinions on the draft generally focused on whether the PCC conflicts with the principle of freedom of contract and whether the court should adapt the contract. The final version of the PCC enacted by the National Assembly in 2015, named "Performance of Contracts upon Change of Fundamental Circumstances" (Article 420) contained the following:

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[140] Appendix III, Key Issues Requesting Citizens' Opinions on the Draft Civil Code (Amended) (Issued with Decision No. 01/QD-TTg dated January 2, 2015, by the Prime Minister promulgating the Government's Plan on obtaining the opinions of the people regarding the draft amendments to the Civil Code) [Phụ lục III, Các vấn đề trọng tâm xin ý kiến nhân dân về dự thảo Bộ luật Dân sự (Sửa đổi ban hành kèm theo Quyết định số 01/QĐ-TTg ngày 02 tháng 01 năm 2015 của Thủ tướng Chính phủ ban hành Kế hoạch của Chính phủ về việc tổ chức lấy ý kiến Nhân dân đối với dự thảo Bộ luật dân sự (sửa đổi)].

[141] National Assembly Standing Committee. Report No. 1002/BC-UBTVQH13 on November 22, 2015, explaining, receiving feedback, and revising the draft of the amended Civil Code. (Ủy ban Thường vụ Quốc hội. Báo cáo số 1002/BC-UBTVQH13 ngày 22/11/2015 giải trình, tiếp thu, chỉnh lý Dự thảo Bộ luật dân sự sửa đổi.)

[142] Resolution 857/NQ-UBTVQH13 in 2014 by the Standing Commitee of National Assembly on Organizing the Collection of Public Opinions from the People on the Draft Civil Code [Nghị quyết 857/NQ-UBTVQH13 năm 2014 tổ chức lấy ý kiến Nhân dân về dự thảo Bộ luật dân sự]; Thủ tướng Chính phủ [Prime Minister's Office]. Số: 01/QĐ-TTg [Decision No. 01/QD-TTg]. Hà Nội, ngày 02 tháng 01 năm 2015 [Hanoi, ngày 02 tháng 01 năm 2015]. Quyết định ban hành kế hoạch tổ chức lấy ý kiến nhân dân đối với dự thảo Bộ luật Dân sự (sửa đổi) [Decision on issuing a plan to collect public opinions on the draft Civil Code.

1. The change of circumstances shall be deemed fundamental when it meets all the following conditions:
a) The circumstances changed due to objective reasons that occur after the conclusion of the contract;
b) At the time of concluding the contract, the parties could not foresee a change in circumstances;
c) The circumstances changed so significantly that if the parties knew the changes in advance, they would not have concluded or concluded with entirely different content;
d) The continuation of the contract without a change in the contract would cause severe damage to one party;
dd) The party having interests adversely affected adopted all the necessary measures in its ability, by the nature of the contract, to prevent or minimize the extent of the effect.
2. If basic circumstances change, the affected party may request the other party to renegotiate the contract in a reasonable period.
3. If the parties cannot reach an agreement on amending the contract within a reasonable period, any of the parties may request a court to:
a) Terminate the contract at a specific time;
b) Amend the contract to balance the lawful rights and interests of the parties due to basic changes of circumstances. The court may only decide to amend the contract if the termination of the contract would cause more significant damage than the cost to perform the contract if it were modified.
4. In negotiating amendments and terminating the contract and the court handling the case, the parties must continue to perform their obligations under the contract unless otherwise agreed.

Article 420 of the Civil Code governs two main contents: the conditions and legal effects of the PCC. As for conditions, there must be a fundamental change of contractual circumstances. The changes must happen after the conclusion of the contract, unforeseeable to parties at the time of contract's conclusion. The changes must be beyond the control of the affected party, and the changes must significantly affect the contract in a way that could cause severe damage to one party. Unlike previous PCC proposals, the final provision does not include risk allocation as a condition.

Article 6.2.3 of the PICC defines hardship as follows: 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. In addition:

(a) the events occurred or become known to the disadvantaged party after the conclusion of the contract;

(b) the events could not reasonably have been taken into account by the disadvantaged party at the time of the conclusion of the contract;

(c) the events are beyond the control of the disadvantaged party; and

(d) the risk of the events was not assumed by the disadvantaged party.[143]

Article 420 of the Vietnamese Civil Code and Article 6.2.3 of the PICC are generally identical in describing the objective and unforeseeable characteristics of changes in circumstances. There are, however, substantial differences. The first noticeable dissimilarity is that the PICC expressly requires that the disadvantaged party has not assumed the risk of events, whereas Vietnamese law does not. Another divergence concerns the impact of modifications to the contract. The beginning of Article 6.2.3 of the PICC stresses that "There is hardship where the occurrence of events fundamentally alters the equilibrium of the contract." Contractual equilibrium refers to the proportion between the cost of performing the contract and its value. The requirement to fundamentally alter the equilibrium of the contract recalls the mission of hardship, which is to rebalance the advantages between the parties that have been disrupted by fundamental changes in circumstances. Vietnamese law does not require a fundamental alteration of the contractual equilibrium, but rather severe damage to one of the parties.

Article 420 of the Civil Code emphasizes that the parties must continue to perform the contract even in the process of dispute resolution. Article 420 is not applied automatically, but has to be demanded by the parties. Article 420 operates when the contract does not have a changed circumstances clause accounting for the contingency of such an event. Article 420 of the Civil Code lets the affected party request the other to renegotiate the contract. Moreover, if parties cannot reach an agreement, either party is entitled to request the court to terminate or adapt the contract. Although Article 420 does not clarify the criteria or scope of adaptation of the contract, it does expressly state that adaptation aims to balance the lawful rights and interests of parties that the changed circumstances have disrupted. This goal of contract adaptation is the same as the PICC regulation in Article 6.2.3.[144] Noticeably, Article 420 of the Civil Code inserts unclear criteria for courts to weigh between termination and adaptation, which is: "The court may

[143] The PICC 2016, https://www.unidroit.org/wp-content/uploads/2021/06/Unidroit-Principles-2016-English-bl.pdf

[144] Article 6.2.3(4) of the PICC: If the court finds hardship it may, if reasonable,
(a) terminate the contract at a date and on terms to be fixed, or
(b) adapt the contract with a view to restoring its equilibrium.

only decide to amend the contract if the termination of the contract would cause greater damage than the cost to perform the contract if it is modified." Most legal scholars understand that this provision means the lawmakers considered termination a priority solution in case of changed circumstances.[145]

In summary, the Vietnamese PCC law was adapted based on referencing foreign law to fill the contract law gap for consistent and fair dealing with contracts affected by unexpected circumstances. Legislators believed that recognizing this principle did not interfere with the freedom of contracts, but was a reflection of reasonable limitations of freedom, and recognition of the PCC provides the court a legal tool to help parties rebalance the contractual relationship when catastrophic consequences significantly alter it. Article 420 contains similarities with hardship provisions in the PICC, especially since both empower courts to adapt contracts. However, certain unclear, even arbitrary parts of Article 420 create challenges for the courts in their application and deserve to be examined in greater depth. Article 420 does not require the disturbance of contractual equilibrium as a condition, but instead underlines the severe damages to the affected party. In addition, while the previous two proposals of Article 420 included risk allocation in the threshold of hardship, lawmakers deleted this requirement in the final version. The text of Article 420 considers termination as a priority remedy over adaptation of the contract. The language of Article 420 is vague and ambiguous regarding the contract's circumstances and the extent to which the court may adapt the contract. Does the adjustment have to be within the limits proposed by the parties? If the court adjusts the contract without the parties' consent, does that action violate the scope of the court's authority in civil litigation? One of the basic principles of civil litigation in Vietnam is that the scope of judicial power is within the scope of the petitum.[146] Furthermore, the law is unclear as to whether the suggested modification binds the

[145] For details, see Part 2.4.2 on literature review of this chapter.
[146] See The Vietnamese Civil Code 2015, Article 5: "*Involved parties' right to decision-making and self-determination 1. The involved parties shall have the right to decide whether to initiate civil lawsuits, petition jurisdictional Courts to settle the civil cases. The Courts ... shall settle the civil cases only within the scope of such lawsuit petition...*", available at https://www.economica.vn/Content/files/LAW%20%26%20REG/92_2015_QH13%20Civil%20Procedure%20Code.pdf

judge or may adjust the proposed modification or even terminate the contract if he finds it is the best solution.

2.3 Court application

This section offers an analysis of court cases. The new law on changed circumstances came into force in 2017 and has attracted disputant parties, particularly in light of the COVID-19 pandemic that has disrupted contractual relations. The Covid-19 pandemic has been affecting a wide range of contracts. In this context, the instinctive reaction of lawyers is to dip into their legal toolbox to see what tools they can utilize to solve the legal problems that have arisen, hence the increase in the number of cases in which the doctrine is invoked. Pandemic-related litigation provides an opportunity to examine the new law's effectiveness.

2.3.1 Case review

The thesis selects and examines eight judicial decisions. Through these judgments, it is evident that courts are relatively open to applying the PCC when appropriate. This judicial position can be explained by the fact that although the PCC is a relatively new principle in Vietnam, some judges may have had prior experience employing the principle of good faith to resolve contractual disputes. Additionally, Vietnamese courts approach civil cases with the perspective that they are not merely rigid neutral parties determining winners and losers, but also fulfilling the social function of preserving fairness and equity. Therefore, the concept of interfering in contractual relationships is not unfamiliar to judges. However, the outcomes of these cases reveal the problem of arbitrariness, where in some instances, judges applied the PCC with an insufficiency of cautiousness and without adequately considering the surrounding circumstances.

As predicted by most Vietnamese scholars, the causes for the overly facile and arbitrary judicial application of the PCC partly stem from the vagueness of the PCC itself and the inadequate legal guidance and interpretation of this principle. Due to the lack of concrete

regulations, applying such an ambiguous law necessitates judges' discretion to interpret the law in specific situations. However, Vietnamese judges currently do not possess such discretion.

The first case was judgment No.46/2020/DS-PT dated March 12, 2020, by Binh Duong Appellate Court on a land dispute (Case 1). In this case, the court accepted a hardship claim and terminate of the contract due to a significant fivefold increase in immovable property value. The real state sales contract, signed in 2009, related to the transfer of land rights from the plaintiff, a real estate company, to the defendant, Ms. D. After paying 45% of the price, the buyer did not pay the remaining amount. On December 21, 2017, the seller sent a notice to the buyer demanding payment of the outstanding amount. If the buyer did not pay within three months, the contract would be terminated as provided in the contract termination clause. Since the buyer did not pay the unpaid amount, the seller filed an action to cancel the contract for breach of the payment obligation. However, the buyer wanted to continue the contract. The price of the land rights increased from 1.2 million VND/m^2 to 6 million VND between 2009 and the trial day.

The court concluded that the delay in the performance of the payment obligation was partly due to the negligence of both parties in exchanging information (both parties had changed their contact information without notifying the other party) and that there was insufficient evidence to terminate the contract on the grounds of breach of contract. However, the court judged that the significant increase in the value of the real estate by five times constituted a change in circumstances and terminated the contract based on this basis. Then, to restore the contractual equilibrium, the court demanded that the seller return the price paid at the market value at the time of the trial.

In this case, contrary to the provisions of the Civil Code, the court applied the PCC to terminate the contract despite the absence of a request by the parties. As a condition for applying this principle, the court considered only the change in the price of the right to land as the decisive factor in determining whether or not there was a change in circumstances. The court should have considered other requirements stipulated in Article 420 of the Civil Code. In particular, the court should have given specific reasons for whether the price increase was substantial, whether the increase was unforeseeable or unattributable, and whether the performance of the original

contract would have been harsh to the seller. As the court confirmed, the delay in the performance of the contract due to the negligence of both parties brought about the performance process amid rising land prices. Therefore, the court was not justified in recognizing the doctrine of change of circumstances as such change was attributable to the parties. The court did not consider whether it was foreseeable for a professional real estate company. This seller wished to terminate the contract so that the value of the real estate would increase fivefold within ten years. Finally, concerning the remedy of change of circumstances, the court ignored the possibility of adaptation of the contract and decided to terminate the contract, even though the seller desired to continue the contract.

The second case was judgment No. 43/2020/DS-PT dated March 12, 2020, by the People's Appellate Court of Tuyen Quang Province on a dispute regarding a plantation contract (Case 2). The court terminates the contract without the parties' request merely because the unexpected event is objective. This case concerns a plantation contract between the plaintiff, Forestry Company P, and the defendant, Mr. Tran Van C. According to the contract, Company P rented land from the Tuyen Quang Provincial People's Committee as production forest land and would pay rent annually. On September 20, 2018, Company P signed a contract with Mr. C to provide seedlings and fertilizer, and Mr. C would take care of the forest land. However, on November 5, 2019, the Tuyen Quang Provincial People's Committee recovered Company P's land. The company informed Mr. C of the acquisition decision and proposed terminating the contract. However, Mr. C did not agree with the amount of compensation. Therefore, Company P brought the case to court to terminate the contract.

The court applied the PCC in Article 420 of the Civil Code to terminate the contract. The Court explained the rationale for applying hardship provisions as follows: "The contract is still in the stage of performance, but due to the objective reason of change of circumstances, Company P offers to terminate the contract… Mr. Tran Van C also agreed to terminate the contract."[147] The

[147] Judgment No. 43/2020/DS-PT dated on March 12, 2020 by the People's Appellate Court of Tuyen Quang Province, pages 6,7. [Bản án số 43/2020/DS-PT về tranh chấp hợp đồng trồng rừng ngày 29 tháng 10 năm 2020, TAND tỉnh Tuyên Quang]. Translated by the author.

court found that the acquisition of the land by the government was an objective and unexpected event that amounted to a fundamental change in the basic circumstances of the contract.

It is unreasonable to terminate the contract based on Article 420 of the Civil Code in this case because if the forestry company were deprived of the right to use the land, the performance of the contract would become impossible. The court should have considered applying the rule of *force majeure* if the facts met the other conditions. Even though there was the possibility to apply the PCC, the courts relied solely on the objectivity of the state's foreclosure decisions without assessing whether the lessor could have foreseen the possibility of land acquisition in advance. The Vietnamese Law on Land 2013 expressly stipulates the possible situations and the procedures for land acquisition by the state. Accordingly, the state may recover land for national economic development, and at least 180 days before the land recovery, the competent state agency must notify the person whose land is to be recovered in detail of the plan for land recovery.[148] This legal regulation on land acquisition was already in place when both parties signed the land lease contract, so in principle, the acquisition risk belongs to the lessor.

The third case was judgment No.133/2021/DS-PT dated August 07, 2021, by Ca Mau Appellate Court on a lease contract dispute. The court states that when the lessee of a business premises can no longer carry out its business purposes at the leased premises due to the government's COVID-19 containment order, the basic circumstances of the contract are deemed to have changed. The court applied both the PCC and *force majeure* principles to terminate the contract. The plaintiff leased the defendant's house as a training school. The lease agreement was signed on August 1, 2018, and the lease term was three years, from October 1, 2018, to September 30, 2021. The lessee deposited 45 million Vietnam dong with the condition that the deposit would be forfeited if the lessee breached the contract. Article 8 of the contract includes an arrangement for contract termination due to *force majeure*. From February to May 2020, lessees could not use their offices due to the government's Covid countermeasure that requires closing offices and schools, so the lessor waives the lessee's rent for that period. On February 26, 2020, the lessee sent a notice of termination, claiming that COVID-19 constituted *force majeure*, but

[148] Article 67 of Vietnamese Land Law 2013 (Luật đất đai Việt Nam năm 2013).

the lessor disagreed. On June 26, 2020, the lessee announced a unilateral termination of the contract because it could not continue its business activities due to a *force majeure* event. However, the lessor disagreed that COVID-19 was a *force majeure* event under the contract's provisions because the lessee still needed to take all necessary steps to overcome it. The lessor argued that the epidemic did not affect the lessee to such an extent that the contract had to be terminated as the lessee had started a new business in another location not affected by COVID-19 since February 2020. The lessor regarded the lessee's unilateral termination as a breach of contract and filed a lawsuit against the lessee, seeking compensation.

The Court of Appeal held that the request by the lessee to terminate the contract was justified on the grounds of hardship. Specifically, the court found that Government Directive No. 16/2020 on the containment of COVID-19 had resulted in a decrease in the number of students enrolled in the lessee's educational institution and thereby caused a significant decrease in its income; at the same time, the lessee still had to pay staff salaries and other expenses. This directive is applicable nationwide and requires social distancing and suspension of operations of non-essential services for 15 days, starting from April 1, 2020. The court also responded to the lessor's claim that the lessee operated business activities at a new facility; the court ruled that there was no evidence that these activities were profitable. The court concluded that these facts constituted changed circumstances as stipulated in Article 420 of the Civil Code. Interestingly, the court inferred from the parties' behaviors to conclude that in response to this unexpected situation, the lessor expressed his willingness to terminate the contract and take back the property because if not, "the plaintiff [the lessor] would not have requested the defendant to restore the property to its original condition and set a date for handing over the property."[149] Finally, the court decided to terminate the contract without compensation based on both the PCC and force majeure.

It is unsound to infer that the tenant was not in a good financial position simply because there is no evidence of whether the tenant's other business activities were beneficial. The lessee should have proved that it had no income from other facilities to ensure its ability to pay the rent.

[149] Translated by the author.

The court did not consider that the lessor had exempted the lessee from paying rent for the period when it was forced to close down its leasing operations on the premises at the government's request. The court made an improper inference about the parties' intentions from their conduct to conclude that they had renegotiated and agreed to terminate the contract. The sequence of actions by both parties, including the tenant persistently sending a unilateral notice to terminate the contract due to *force majeure* and the landlord's response after affirming their disagreement with the termination due to *force majeure*, setting a date for the return of the property, and demanding compensation for contract breach constitute procedures for unilateral contract termination as opposed to the renegotiation process to terminate the contract under Article 420(2), as the court determined.

The fourth case was judgment No. 01/2018/KDTM-PT dated 22/01/2018 on the People's Court of Da Nang credit contract dispute (Case 4). The court dismissed the hardship claim because there was no change in the basic circumstances of the contract. Bank A and Company T signed a credit agreement on October 30, 2015, and this loan was guaranteed by the land use right of Mr. D under a guarantee agreement between the bank and Mr. D (Mr. D was a director of Company T at the time). Since Company T failed to pay the loan, the bank filed a lawsuit demanding that the bank liquidate Mr. D's collateral if Company S failed to pay the debt. After the mortgage contract was signed, the board of directors removed Mr. D from his position as a director of Company T and assessed that his management was unproductive. Therefore, Mr. D asked the court to terminate the mortgage contract on the grounds that the basic circumstances of the mortgage contract had fundamentally changed. The Court of Appeals dismissed Mr. D's request because *"Mr. D's resignation as director does not affect the guarantor's mortgage or constitute a change of basic circumstances of the guarantee contract. A change in the circumstances of performance of a contract must be entirely objective, independent of the subjective intentions of the contracting parties."* The court ruled that Mr. D's status as the director of company T was not a fundamental aspect of the guaranteed contract. Furthermore, the court determined that Mr. D's removal from his position did not constitute an objective change, failing to meet the requirement for the objectivity of the change as outlined in Article 420 (1, a).

The guarantee contract, in this case, is considered a special contract because the adaptation or termination of this type of contract is relevant to the legitimate rights of the bank as a third party. While one could logically deduce that Mr. D's motivation for entering into the guaranteed contract was because he was the director of the company to which he had associated benefits, the court did not consider such motivation of the guarantor as a basis for the contract's circumstances.

The next case was by High People's Court in Da Nang at Cassation Decision No. 48/2022/DS-GĐT dated September 9, 2022, regarding the dispute of a lease contract (Case 5). On March 24, 2020, the plaintiff entered into a lease contract with the defendant. The plaintiff rented a house in S Ward, H City, for five years to establish a training facility for disabled people. The plaintiff made total rental payments for the first three years on the contract signing date and prepared the necessary facilities and personnel for business operations. However, due to the outbreak of the COVID-19 pandemic, from March 27, 2020, to May 8, 2020, and from July 29, 2020, to September 5, 2020, the plaintiff was unable to conduct business activities due to the Decisions of the People's Committee of Quang Nam Province on Covid-19 prevention. Furthermore, from October to December 2020, H City experienced continuous heavy rain and severe floods, significantly affecting the plaintiff's business facility. The plaintiff requested negotiations with the landlord to adjust the rental contract, but the parties failed to reach an agreement. On February 26, 2021, the plaintiff sent a written notice to terminate the lease contract and then filed a lawsuit for exemption of responsibility to pay the penalty for unilateral termination of the contract, invoking the Covid-19 pandemic as a *force majeure* event under Article 351(2) of the Civil Code.[150]

The defendant disagreed with the termination on the grounds of *force majeure* because when concluding the contract, many countries, including various areas in Vietnam such as H City, had already experienced the COVID-19 outbreak, and the tenant was aware of the pandemic. In that context, the contents of the contract regarding rental price, duration of the

[150] Article 351(2) of the Civil Code provides that a party who is unable to fulfill its obligations due to force majeure events shall be exempt from civil liability.

contract, and payment method manifested the pandemic situation. Specifically, the tenant proposed a 5-year lease term instead of the lessor's proposed three years; the rental price was only half of the price before the pandemic, and the tenant requested that neither party unilaterally terminate the contract. If the lessee terminated the contract, they would have to bear a penalty of 840,000,000 Vietnam dong. Based on the above points, the defendant believed that the tenant took advantage of the pandemic to secure the premises at a favorable price and then prevented the lessor from terminating the contract, even though the pandemic situation had improved and local rental prices had increased. Therefore, the tenant's request for unilateral termination of the lease contract was due to their subjective will, not the COVID-19 pandemic as a *force majeure* event.

The court of first instance[151] dismissed the tenant's claim for exemption from the obligation to pay penalty on the grounds of *force majeure*. The plaintiff appealed the first instance judgment. The appellate court held for liability exemption to pay the penalty for unilateral termination of contract, but on the grounds of the PCC. The case involved a legal issue regarding whether there were sufficient grounds to exempt liability when unilaterally terminating the contract due to *force majeure*. In reality, the lessee had unilaterally terminated the contract and returned the leased premise to the lessor. The appellate court and the court of cassation accepted the lessee's request for exemption from civil liability upon terminating the contract. However, contrary to the force majeure ground claimed by the lessee, the court, at its discretion, applied the PCC under Article 420 of the Civil Code. The court's application of the PCC to exempt the lessee from liability upon unilateral contract termination was not a proper application of the provisions on unilateral contract termination and the PCC. Specifically, the PCC is not the basis for exempting liability when unilaterally terminating the contract; instead, it serves as a foundation for modifying or terminating a contract. Article 420 of the Civil Code also emphasizes that parties must continue to perform their obligations during the dispute resolution process.

[151] Judgment No. 81/2021/DS-ST dated September 29, 2021 of the People's Court of Hoi An City, Quang Nam Province.

Moreover, when evaluating the conditions for applying the PCC, the court based its judgement solely on the unforeseeable nature of the pandemic, ignoring the impact of the pandemic on the lessee's performance of obligations or the parties' agreement on risk allocation related to the pandemic in the contract. The facts of the case demonstrate that when the contract was signed during the outbreak of the pandemic, the parties had agreed to a certain degree of risk allocation, as evident in Article 7 of the contract, where they anticipated that if the use of the leased premises was disrupted due to the government's Covid-related measures, the lessee would be exempt from rent payment and the contract would be extended accordingly. When choosing the contract termination option, the court failed to clarify that alternative solutions were not applicable since the parties had effectively terminated the contract, and the lower court had already declared the contract terminated.

The sixth case was judgment No. 37/2022/DS-PT on July 12, 2022, by Dak Nong appeal court on the dispute over a lease contract and the claim for compensation for damages due to one party's contract termination (Case 6). In September 2018, Mr. H (the defendant) signed a lease contract to rent Mr. Th and Mrs. H’s land for 20 years to build a coffee bean storage warehouse. In December 2018, the tenant sent a written notice to the landlord requesting renegotiation or termination of the contract because the location of the land and surrounding transportation conditions were inconvenient, and the rent was relatively high. Since the negotiation was unsuccessful, in January 2019, the tenant notified the contract termination based on the PCC under Article 420 of the Civil Code. The landlord filed a lawsuit seeking compensation for the expenses incurred in preparing the land for the tenant's use as a warehouse.

The court of first instance in Dak R'Lap district rejected the plaintiffs' request. The appellate court ruled in favor of the plaintiffs because the arguments provided by the tenant for termination of the contract under the PCC did not meet the conditions as provided in Article 420. The court should have provided detailed reasoning for this ruling. In this case, all the circumstances that the defendant pointed out existed at the time of contracting and had not changed. Therefore, the court should have not applied the PCC to this case because the

defendant’s poor estimation about the ability to operate its business at the leasing land had lead to the difficulties.

The seventh case was judgment No. 510/2022/DS-PT, People's Court of Ho Chi Minh City, on the dispute over a lease contract, requesting a declaration of nullity of the notarized document, amendment of the lease contract, and fulfillment of payment obligations arising from the power of attorney and termination of the power of attorney (Case 7). A married couple, Mr. N and Mrs. L, signed a contract with Company V to lease two houses, their joint assets, in June 2018. According to the contract, the lease term was ten years, and the tenant transferred 100% of the rent to Mrs. L's account. In June 2021, Mr. N and Mrs. L divorced but did not divide their assets. Mr. N requested to modify the contract to split the rent payment, with 50% going into each person's account. The court ruled that there were insufficient grounds to modify the payment method in the lease contract. According to the appellate court (section 3.2), there were three reasons why the agreement on the payment method between Mr. N and Mrs. L in the lease contract could not be modified. Firstly, it did not satisfy the five conditions under Article 420(1); secondly, according to Article 420, the parties must have agreed to modify or have negotiated for a reasonable period without success, but Mr. N failed to prove this; and thirdly, Mr. N and Mrs. L divorced, but had not separated their assets.

The court cited Article 420 even though the parties did not make that request. Modifying the agreement regarding property after the divorce is the subject of family law, but not within the scope of the PCC. When evaluating the requirements in Article 420, the court construed that the parties must have attempted renegotiation before resorting to the courts. Furthermore, the court concluded that the circumstances of the case did not meet the five conditions stipulated in Article 420 of the Civil Code; however, the court did not provide specific reasoning. It is hard to deduce the inclination of the courts to apply the law on hardship from a judgment that does not specify the grounds. Nevertheless, this case provides a clue that in the court's view, the provision on hardship in the Civil Code provision on hardship encompasses an obligation to renegotiate.

The last case was by Ben Cat Town Court, Binh Duong in judgment No. 29/2021/DS-ST, dated June 11, 2021, concerning the dispute relating to a contract for the sale of a house

(Case 8). In July 2010, Company P entered into a contract to sell an apartment to Mr. C for 203,962,500 Vietnam dong (unit price of 3,675,000 Vietnam dong/m^2). The payment schedule was divided into two installments: the first installment was 30% of the property value, and the second installment was 70% of the property value. If the buyer failed to make payment within 45 days from the payment due date, the other party had the right to terminate the contract unilaterally. After making the first payment of 78,795,293 Vietnam dong, Mr. C failed to fulfill his payment obligation. Despite Mr. C's breach of payment obligation, Company P completed granting ownership certificates to Mr. C in October 2014. In May 2020, Company P filed a lawsuit requesting the cancellation of the contract and seeking compensation for breach of contract following the agreement, amounting to 61,188,750 Vietnamese dong. According to Article 427(2) of the Civil Code 2015, when a contract is canceled, that contract is void from the signing date, and parties must reimburse each other for what has been received and compensate for relevant damages.

The court accepted Company P's request to cancel the apartment sales contract. Regarding the obligation to compensate and return the values exchanged between the two parties, the court ruled that the cancellation of the contract was Mr. C's fault. Although Company P was not at fault as it had no obligation to urge the buyer, Mr. C, to meet the payment obligation, the company failed to prove that it had taken necessary measures to urge Mr. C to fulfill it. Therefore, Company P had to share in the fault of prolonging the contract implementation process. The court assessed the value of the apartment at the time of the trial to be 320,000,000 Vietnam dong, equivalent to a unit price of 5,765,765 Vietnam dong/m^2. Thus, the current value of the portion Mr. C paid equaled 123,387,371 Vietnam dong. Due to the increase in land prices, the court ruled that the execution of the contract when the circumstances had fundamentally changed according to the provisions of Article 420 of the Civil Code, and there was a need to balance the rights and obligations of the parties. Mr. C was not required to compensate Company P for contract violation.

Although the court did not expressly cite the principle of good faith, when analyzing the fault of parties for non-performance of the contract, the court held that the seller had an

obligation to urge the buyer to fulfill the payment obligation even though the contract did not stipulate this obligation. Therefore, the court decided that the selling party had a share of the fault resulting in the contract's non-performance. The court cited the PCC when assessing the amount the parties needed to reimburse each other when the contract was terminated. In this case, the seller had to refund the amount the buyer had already paid. According to the contract, the buyer has to compensate the seller for damages because it breached the payment obligation. However, the court believed that the increase in land price constituted a fundamental change in circumstance under Article 420 of the Civil Code. Finally, the court applied both the principle of good faith and the PCC to balance the parties' interests by exempting the seller from compensation for damages resulting from the breach of contract. The court applied the PCC to reevaluate parties' obligation of reimbursements and compensation for breach of contract, which is out of the application scope of Article 420.

2.3.2 Key insights from analysis of judicial decisions

Vietnamese law on hardship has some abstract components that need to be interpreted based on individual situations, especially regarding the basic circumstances of contracts and the conditions of application, and some undefined parts of substantive aspects that lead to diverse opinions among scholars, especially regarding the hierarchy and criteria judges use to decide between termination and adjustment of contracts. This analysis of a handful of judgments illustrates how the judiciary proceeds on these issues. In general, Vietnamese courts are relatively open to applying the PCC. Concerning guaranteed contracts, which involve the interests of a third party, the court held that the implied motivation that led the guarantor to enter into the contract did not constitute the basis of the contract.[152] In another decision, the court ruled that a party's misjudgment at the time of the conclusion of the contract did not qualify as a changed circumstance within the meaning of Article 420(1).[153]

[152] Case 4.
[153] Case 6.

Judicial practice provided some insights into the courts' decision-making on the choices between adaptation and termination of contracts. In one case, the court held that termination was the only possible remedy because the parties had terminated the contract; therefore, the court terminated the contract on the date the parties had terminated the contract.[154] In another case, the court did not consider the possibility of adjustment because both parties requested termination of the contract.[155] Although Article 420 does not explicitly refer to the duty to renegotiate, the court has held that parties have such a responsibility in one decision. In that case, the parties' failure to attempt renegotiation became one of the reasons the court dismissed the hardship claim.[156]

A closer look at the court decisions reveals problems with the courts' application of hardship law. The first problem is that while the law explicitly requires courts to apply the PCC only when the parties request it, in most cases, the court used its discretion to apply the PCC even when parties' requests were based on other legal grounds.[157] The second problem is that there are cases where courts have applied the PCC to cases that fall outside the scope of the PCC, such as to settle a matter related to the spouse's property.[158] In addition, there were cases where the court applied the PCC when performance became impossible, which should have fallen within the scope of the force majeure principle.[159] There was a case where the court even applied the PCC and force majeure simultaneously to terminate the contract for economic hardship.[160]

The third problem is that in evaluating conditions for the application of the PCC, courts tend to rely on one or more specific conditions, such as the objectivity of the change,[161] the increase in price,[162] or the unpredictability of the change, without taking into account all the requirements set out in Article 420 (1).[163] In Case 2, for example, the court failed to consider the distribution of risks between the parties in the contract. In most of the decisions examined, the

[154] Case 4.
[155] Case 2.
[156] Case 7.
[157] Case 1, 2, 3, 7, and 8.
[158] Case 7.
[159] Case 2.
[160] Case 3.
[161] Case 2.
[162] Case 1.
[163] Case 5.

court did not fully evaluate fundamental elements relevant to the application of the PCC, such as the particular characteristics of the contract, the term of the contract, the ability of each party to assess the risks, and the actual impact of the changed circumstances on the affected party's performance of the contract. Finally, the court opted to terminate the contract in most cases under examination. There was no case in which the court, in deciding to terminate the contract, carefully weighed termination against adaptation, as required by Article 420 (2). There were cases in which the court decided to terminate the contract simply because the parties had terminated the contract or because the lower court had decided to do so.[164] Article 420 does not regulate the process of renegotiation between the parties. In interpreting this process, there was a case where the court subjectively and arbitrarily concluded from the conduct of the parties that they had agreed to terminate the contract, when in fact, the conduct of parties in the case showed that the plaintiff unilaterally terminated the contract and demanded release from the corresponding liability. In contrast, the defendant demanded compensation from the plaintiff for termination of the contract.[165]

In general, Vietnamese courts are relatively unrestricted in applying the PCC. However, it is a new principle imported from abroad. Foreign courts exercise the power to decide hardship cases with utmost caution due to the risk of undermining contractual enforceability and concerns about excessive interference of courts in contractual relations between parties. This trend in the application of the PCC by Vietnamese courts can be explained by the traditional conception of the court's function that the role of courts is not only to decide right and wrong based on the parties' evidence, but also to serve as an institution that provides justice on behalf of the state. Thus, courts often assist parties in gathering evidence to resolve civil disputes and have experience intervening in contracts to reconcile the parties' interests. Insufficient consideration of the requirements and remedies for the doctrine of change of circumstances may lead to the affected party abusing its right to terminate the contract to avoid liability. This fact raises concerns about whether recognizing this doctrine in law will help resolve the problems of

[164] Case 4.
[165] Case 3.

uncertainty and arbitrary judicial interference with contracts that arose before the amendment of the Civil Code. Vietnamese courts face with the problem of specifying the ambiguous elements of the PCC since the inherent nature of PCC requires case-by-case assessment by judges.[166] However, the vauge contents of the PCC does not necessarily indicate that courts treat hardship cases without the necessary standards. Comparative analysis shows that foreign courts base their decisions on specific rules that judges or academics elaborate.

2.4 Literature review

This part provides an overview of the state of literature before and after the recognition of the PCC in the Civil Code. Before the introduction of the new provision in the Civil Code, academic work concentrated on the need for a new legal framework for contracts affected by unexpected events other than force majeure. At that time, force majeure was the only legal provision for excusing non-performance in contract law, which required that the performance of the contract became impossible. Scholars argue that force majeure is insufficient to govern cases where contract performance is technically possible because there are situations where contract performance is technically possible. In these circumstances, enforcement of the original contract was unreasonable for the affected party. Some authors suggested that Vietnam adopt the foreign hardship doctrine to fill the gap in remedies for the non-performance of contracts. In this sense, most studies introduce the content of the PCC into the context of international and domestic laws.[167] After the new Civil Code recognized the PCC, scholars mainly addressed concerns about

[166] Montefusco, "Interpreting the Conditions for Imprévision: The Goals of the Reform Projects as a Decisive Tool for French and Belgian Courts," 242; Girsberger and Zapolskis, "Fundamental Alteration of the Contractual Equilibrium Under Hardship Exemption," 184.
[167] Pham Duy Nghia, "Adjusting Asymmetric Information and Risk Management in Vietnamese Contract Law" [Điều chỉnh thông tin bất cân xứng và quản lý rủi ro trong pháp luật hợp đồng Việt Nam], Journal of Legislative Studies (Nghiên cứu lập pháp), no. 5, 2003: 38-46, 39; Kieu Thi Thuy Linh, "Pre-contractual Obligations and Contract Adjustment due to Changed Circumstances in the Context of Amendments of the Civil Code" [Nghĩa vụ tiền hợp đồng và điều chỉnh hợp đồng do hoàn cảnh thay đổi trong bối cảnh sửa đổi Bộ luật dân sự], Journal of Law (Tạp chí Luật học), special issue, 2015; Ngo Quoc Chien, "Adaptation of Contract due to Changed Circumstances and the Reform of the Civil Code 2005" [Điều chỉnh hợp đồng khi hoàn cảnh thay đổi cơ bản và việc sửa đổi BLDS năm 2005, Journal of Legislative Studies (Tạp chí Nghiên cứu Lập pháp), no. 15 (295), August 2015; and Do Van Dai, "About Adaptation of Contracts in Changed Circumstances" [Bàn thêm về điều chỉnh hợp đồng khi hoàn cảnh thay đổi.], Journal of Legislative Studies (Tạp chí Nghiên

the feasibility of applying the new law on the PCC in light of the unclear elements of Article 420 on the PCC itself.

2.4.1 Before the adoption of the principle of changed circumstances in 2015

In a publication in 2003, Prof. Pham Duy Nghia critically examined the role of contract law in dealing with contract risks. He argued that the current contract law, the first Civil Code of 1995, must be updated in its approach to dealing with such risks. Prof. Pham pointed out shortcomings and deficiencies in the existing provisions of the Civil Code on contract risk management. These included the principles of good faith in contract formation and performance, the right to postpone contract performance, force majeure, and voidable contracts based on deception. He emphasized that these regimes did not provide a sufficient legal framework for managing contract risks and did not take into account all situations that require risk allocation, including hardship cases. Prof. Pham suggested that contract law should be used not only to distribute risk but also to reallocate ex-post risks, referring to risks that arise after the contract's conclusion. He suggested that the Civil Code should contain standard rules for redistributing these post-contractual risks. Professor Pham suggested that Vietnam consider adopting the hardship provision in Article 6.2.2 of the 1994 PICC to address these problems. However, the Civil Code amended in 2005 did not include a hardship principle. Although Professor Pham's paper did not address the content of the hardship provision in the PICC in detail, his study revealed the gap in Vietnamese law regarding the redistribution of contractual risks. He presented the availability of post-contractual risk management rules in international legal instruments that could fill this gap in Vietnamese contract law.[168]

Professor Le Minh Hung did a brief survey on the PCC in several foreign laws, including in France, Germany, Italy, England, the Netherlands, Portugal, the United States, and African countries such as Egypt, Syria, and Algeria. He presented the literal contents of hardship

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cứu lập pháp) 13, no. 293, July
2015. http://lapphap.vn:80/Pages/tintuc/tinchitiet.aspx?tintucid=210176.

[168] Pham Duy Nghia, "Adjusting Asymmetric Information and Risk Management in Vietnamese Contract Law" [Điều chỉnh thông tin bất cân xứng và quản lý rủi ro trong pháp luật hợp đồng Việt Nam], Journal of Legislative Studies (Nghiên cứu lập pháp), no. 5, 2003: 38-46.

provisions in the PICC and PECL. Professor Le's research showed that many countries tend to acknowledge hardship as a legal basis for adjusting contracts when necessary. Professor Le stated that specific Vietnamese laws, such as the Law on Insurance Industry and the Law on Procurement, allow for contract adjustment. For example, Article 20 of the Insurance Industry Law of 2000 allows premium adjustments if the insured's risk level increases. However, these provisions do not apply to ordinary contracts, given the limited scope of application of specific laws. Professor Nguyen's research indicated that courts have used the principle of good faith to adjust contracts or required parties to renegotiate in some hardship-related cases. After evaluating such judicial applications, Professor Le concluded that the judiciary's approach has been inconsistent due to the lack of a legal framework regarding the PCC. Professor Le suggested that Vietnam refer to the hardship provision in the PICC and emphasized that the hardship law should focus on the adjustment of the contract as the priority solution, with the termination of the contract as a last resort; otherwise, the hardship principle would have the same function. In conclusion, Professor Le outlined the main contents of a proposal on hardship for Vietnam. He suggested that since the adaptation of the hardship principle could be a fundamental change in contract law, the process of adopting the PCC should be gradual, including the teaching of the PCC at law schools, the introduction of the resolution by the Grand Bench of the Supreme Court, and finally the adoption into the Civil Code.[169]

During the draft law on PCC in the 2015 Civil Code Reform Project, Professor Ngo Quoc Chien commented on the proposed provisions on hardship in the draft. In the article, Professor Ngo introduces legislative provisions on hardship in several national laws, including Italian, German, New Zealand, Peruvian, the PICC, and PECL. He examined the availability of specific provisions in certain Vietnamese laws governing specific types of contracts that allow parties to renegotiate contracts and cited cases in which the Supreme Court has adjusted contract prices when the market price of the contract subject changed significantly. The comparative

[169] Le Minh Hung, "Adaptation of Contracts in Changed Circumtances, Foreign Law and Lessons for Vietnam", [Điều Khoản Điều Chỉnh Hợp Đồng Do Hoàn Cảnh Thay Đổi Trong Pháp Luật Nước Ngoài Và Kinh Nghiệm Cho Việt Nam], Journal of Legislative Studies *(*Tạp chí Nghiên cứu Lập pháp*),* no. 13 (293), 2009.

study with foreign laws and examination of ad-hoc judicial intervention into contracts by Vietnamese courts demonstrated that recognizing hardship clauses in the Civil Code aligns with the general international trend and meets the demands of Vietnamese judicial practice. His comments focused on the legal consequences of hardship. Although the draft provided for the cancellation of a contract as one of the legal consequences of hardship, he noted that this remedy is not justified because cancellation implies that the contract was not valid from the beginning and not necessarily a case of hardship from which the parties could have obtained some benefit. Therefore, he suggested that the contract be terminated rather than rescinded. Second, Professor Ngo's point to the draft concerned the scope of the judge's authority in determining when to adjust or terminate the contract. He argued that the draft gives judges too much discretion in deciding when to adjust or terminate a contract. He suggested that the law should set a specific date for judges, such as when the unexpected event occurred, when a party filed the lawsuit, or when the court decided.[170] Commenting on the draft of the hardships provision, Kieu Thi Thuy Linh gave a brief overview of hardship regulations in Germany, Italy, the PICC, and the PECL. She noted that the draft is generally identical to German law and international codes. She suggested adding the condition of risk distribution to ensure that the hardship is objective for the parties.[171]

Among the studies presented during the drafting process of the Civil Code 2015, the work of Professor Do Van Dai, a lecturer at Ho Chi Minh City University of Law, an arbitrator at the Vietnam International Arbitration Center (VIAC), and a member of the editorial team of the Civil Code 2015, has had considerable influence on contemporary law.[172] Professor Do presented comments based primarily on comparative French Civil Code reform concerning the PICC and

[170] Ngo Quoc Chien, "Adaptation of Contract due to Changed Circumstances and the Reform of the Civil Code 2005" [Điều chỉnh hợp đồng khi hoàn cảnh thay đổi cơ bản và việc sửa đổi BLDS năm 2005, Journal of Legislative Studies (Tạp chí Nghiên cứu Lập pháp), no. 15 (295), August 2015.
[171] Kieu Thi Thuy Linh, "Pre-contractual Obligations and Contract Adjustment due to Changed Circumstances in the Context of Amendments of the Civil Code" [Nghĩa vụ tiền hợp đồng và điều chỉnh hợp đồng do hoàn cảnh thay đổi trong bối cảnh sửa đổi Bộ luật dân sự], Journal of Law (Tạp chí Luật học), special issue, 2015.
[172] Do Van Dai, "About Adaptation of Contracts in Changed Circumstances" [Bàn thêm về điều chỉnh hợp đồng khi hoàn cảnh thay đổi.], Journal of Legislative Studies (Tạp chí Nghiên cứu lập pháp) 13, no. 293, July 2015. Available at http://lapphap.vn:80/Pages/tintuc/tinchitiet.aspx?tintucid=210176.

PECL.[173] In his commentary book on the Civil Code, Professor Do stated that analyzing foreign law and examining issues in pre-2015 Vietnamese judicial decisions played an essential role in the proposals for the new Civil Code. The drafting process of the PCC in Vietnam occurred at the same time as the reformed French Civil Code proposal, and the French proposal on the doctrine of imprévision inspired Vietnamese law. The doctrine of imprévision is the counterpart of the concept of changed circumstances under Vietnamese law. The 2016 French Civil Code, in Article 1195 recognized the theory of imprévision. This Article stipulates that if, due to unforeseen changes in circumstances, the performance of a contract becomes excessively burdensome for the parties and the parties are unable to reach a settlement, the court may, at the request of the parties, modify or terminate the contract.[174] Professor Do confirmed that the legal recognition of the PCC is not only in line with the demands of Vietnamese judicial practice, but also with international trends regarding the recognition of hardship. He noted that international rules of contract law, including the PICC and PECL, recognize the principle of hardship, and many countries have regulated or plan to regulate this principle. In particular, he referred to the French draft amendment to the Civil Code published in 2012 and emphasized that this French draft includes provisions on hardship. In addition, he added that the content of hardship is in line with the principle of good faith in Article 6 of the Vietnamese Civil Code. The Vietnamese draft on PCC (Article 442) lists three conditions for PCC to apply: the circumstances have changed after the conclusion of the contract; the change in circumstances could not reasonably have been foreseen at the time the contract was concluded; and the risk arising from the change in circumstances is not assumed by the affected party. Professor Do suggested deleting the last condition regarding risk for three reasons. Firstly, this condition is both conceptually and practically unsound; secondly, this condition is covered by the condition regarding the foreseeability of a change in circumstances. Finally, he added that while the risk allocation condition in the draft is similar to that in the PICC and PECL, the current discussion on hardship

[173] Do Van Dai, "About Adaptation of Contracts in Changed Circumstances".
[174] French Civil Code 2016, Article 1195, accessed 25 May, 2018, https://www.trans-lex.org/601101/_/french-civil-code-2016/#head_36.

provisions in those regulations raises the question of whether the risk allocation condition is necessary or whether the condition is not necessary because the foreseeability condition covers it.

2.4.2 After the adoption of the principle of changed circumstances in 2015

Following the introduction of the PCC into the Civil Code, legal experts raised concerns about potential interpretation problems and challenges in effectively applying the new law. Since Vietnamese judges are not empowered to explain the law but rather are highly dependent on it,[175] implementing an unclear principle such as the PCC with specific legal guidance could lead to efficiency. In response, researchers endeavored to shed light on the wording of Article 420 by comparing it to relevant provisions in foreign and international laws and court decisions. Most studies concluded that legislators must provide an official interpretation and clear guidance on applying Article 420 of the Civil Code.

Professor Nguyen Minh Hang's research focused on the practical application of the PCC by foreign courts, as it should provide valuable insights into the interpretation and application of the new law. First, Professor Nguyen emphasized that hardship as an exception to the principle of *pacta sunt servanda* should only be applied in exceptional cases. Courts must exercise caution and consider the rarity of its application. Second, Professor Nguyen suggested that the principle of good faith should be considered when interpreting ambiguous elements of the PCC. Even if the law does not explicitly regulate the renegotiation process, parties should negotiate in good faith. In addition, parties affected by a hardship should not abuse it to unjustifiably avoid or delay contractual obligations.

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[175] Vietnamese law does not empower the judge hearing an individual case to provide legal interpretation, but instead this power belongs to the National Assembly Standing Committee, see Article 3(3) of the Vietnamese Law on Promulgation of Legislative Documents 2015 (amended in 2020) provides: *"Explanation for the Constitution, Law, or Ordinance means a work of Standing Committee of the National Assembly meant to clarify the ideas and contents of certain Articles, Clauses, and paragraphs in the Constitution, Law, or Ordinance in order that they are known, correctly and uniformly applied."* Available at http://img2.caa.gov.vn/2016/07/28/02/35/802015Law-on-The-Promulgation-of-Law.pdf; Nguyen Ngoc Khanh, *Contract Law in the Vietnamese Civil Code* [*Chế Định Hợp Đồng Trong Bộ Luật Dân Sự Việt Nam],* Justice Publishing House (Nhà xuất bản Tư Pháp), 2007, 114; Ngo Huy Cuong, "Some Features of Commercial Law in Vietnam", VNU Journal of Science Law, no. 27 (2011): 252-58.

The PECL specifically addresses compensation for parties not renegotiated in good faith. As for the remedy of contract modification, Professor Nguyen construes Article 420 so that courts should be more restrained in applying this remedy than in terminating the contract. The court should only modify the contract if termination would cause more significant harm. This approach prevents excessive interference by the courts with the parties' agreements, but presents challenges in evaluating the risks of termination and the costs of performing the contract. Professor Nguyen suggested referring to the commentary on PECL Article 6:111, which allows the court to modify specific provisions without fundamentally changing the core of the contract. The parties should not have been able to reasonably foresee the changes at the time of the conclusion of the contract. To determine unforeseeability, Professor Nguyen suggested using the PICC's interpretation that unforeseeability means that the parties could not have reasonably foreseen the changes at the time of contracting. For the condition of substantial disadvantage to a party (Article 420,d,1), Professor Nguyen analyzed five foreign cases and proposed to apply the test of the equilibrium of contract prescribed in the PICC. This assessment considers factors such as increased performance of the contract and the decrease in the value of the performance of the obligation.[176]

Scholar Nguyen Thi Lan Anh's research focuses primarily on interpreting the content of Article 420 by comparing it to the corresponding provisions in the PICC and PECL. She also analyzes the use of language in Article 420 and identifies potential challenges in its application. In terms of conditions, Nguyen suggests that the conditions in Article 420 are generally similar to those in the PICC and PECL. However, she suggests adding the condition that the parties must not be at fault for the occurrence of the changes. In addition, she recommends that legislatures specify that the contract's basic circumstances are those on which the parties relied upon when entering into the contract. As for the legal outcome, Nguyen interprets Article 420 as prioritizing

[176] Nguyen Thi Minh Hang and Tran Thi Giang Thu, "Proposing Interpretation and Application of Article 420 of the Civil Code 2015 on Contract Performance in Case of Fundamental Changes in Circumstances" [Đề xuất diễn giải và áp dụng Điều 420 BLDS năm 2015 về thực hiện hợp đồng khi hoàn cảnh thay đổi cơ bản], Journal of Foreign Economic Affairs (Tạp chí Kinh tế đối ngoại), issue 86 (2017). Available at: https://thongtinphapluatdansu.edu.vn/2017/08/13/de-xuat-dien-giai-v-p-dung-dieu-420-bo-luat-dn-su-nam-2015-ve-thuc-hien-hop-dong-khi-hon-canh-thay-doi-co-ban/.

termination of contracts over adjustments when confronted with this decision by the courts. However, she foresees a potential legal problem with the application of Article 420: namely, whether the court has the power to terminate the contract if the parties merely request that the contract be adjusted.[177]

Ngo Thu Trang and Nguyen Duc The Tam discussed Article 420 of the civil code. They pointed out that lawmakers should provide legal guidance as to the first condition mentioned in Article 420 (1c) about the content of the article, which requires that the changes are significant that if the parties knew in advance, they would not have concluded the contracts, or would have done so with totally different contents. The authors refer to decisions of German and Russian courts on the question of when the increase in performance costs constitutes a hardship. For example, some German courts have ruled that it is more than 150%, and some Russian courts more than 100%. Article 420 states that one criterion for the court to decide whether the contract should be terminated or adjusted is by taking the cost of performing the contract if it were adjusted and comparing it with the harm that could result from terminating it. The authors suggest that the legislature should provide legal guidance on the costs of contract performance and the harm caused by termination. The authors further stress the importance of amending the law to avoid making contract termination the primary remedy, as it contradicts the principle of upholding the validity of contracts. Additionally, they point out that while Article 6.2.3 of the PICC does not explicitly state a hierarchy between contract termination and adjustment, most PICC scholars advocate prioritizing contract adjustment over termination.[178]

In their article, Tran and Bui explore whether COVID-19 could be considered a hardship event under Article 420. They propose that the court refer to the corresponding comments in Article 6.2.2 of the PICC, explicitly highlighting the importance of not only the occurrence of the event, but also its progress when evaluating foreseeability. For example, contracts concluded

[177] Vu Thi Lan Anh , "Legal Issues Arising in the Performance of Contracts in the Event of Fundamental Changes in Circumstances" [Vấn đề pháp lý đặt ra trong việc thực hiện hợp đồng khi hoàn cảnh thay đổi cơ bản], Journal of State and Law, issue 5 (2016).
[178] Ngo Thu Trang and Nguyen Duc The Tam, "Implementing Contracts in the Event of Fundamental Changes in Circumstances" [Thực hiện hợp đồng khi hoàn cảnh thay đổi cơ bản], Journal of State and Law (Tạp chí Nhà nước và Pháp luật), no. 1/2017: 60-67.

after the appearance of COVID-19 in Vietnam still could be affected by COVID-19 as a hardship if the increase in COVID-19 cases reached a level that parties could not have reasonably anticipated. The authors argue that Vietnamese law lacks a specific condition regarding the sphere of risk of the obligor. This gap poses a problem since not all unforeseeable events should be considered as hardship, especially if these events fall within the sphere of risk for one of the parties. As far as the condition relating to significant changes is concerned, to the extent that parties, had they known in advance, would not have entered into the contract or would have done so with entirely different terms, the authors point out that this condition is unrealistic. They argue that it is not feasible to accurately determine the hypothetical intentions of the parties. Therefore, they suggest that detailed guidance on how to apply this condition is necessary.[179]

2.4.3 Achievements and gaps in the literature

Overall, the literature review demonstrates significant achievements in understanding and advocating for the inclusion of hardship provisions in Vietnamese contract law. Scholars agree on the necessity of a legal framework to address hardship cases, favorably recommending the adoption of foreign hardship principles to achieve consistency with international practices. This consensus supports the notion that recognizing hardship clauses would enhance post-contractual risk management and bring Vietnamese contract law in line with global standards. Moreover, the literature highlights the compatibility of the PCC with Vietnam's legal tradition, emphasizing the existing laws allowing contract modifications and the courts' previous application of good faith principles to adjust contracts. Using a comparative method in many studies enriches the analysis by drawing insights from foreign jurisdictions' provisions and practices regarding hardship.

Further, the literature identifies challenges in interpreting the PCC, mainly due to its vague wording, and suggests looking to foreign court applications for guidance. Scholars

[179] Tran Chi Thanh and Bui Thi Quynh Trang, "Applying the Legal Regulations on Force Majeure Events and Contract Performance in the Context of the Covid-19 Pandemic in Vietnam" [Áp dụng quy định pháp luật về sự kiện bất khả kháng và thực hiện hợp đồng khi hoàn cảnh thay đổi cơ bản trong bối cảnh dịch Covid-19 tại Việt Nam], Journal of Law and Practice (Pháp luật và thực tiễn), no. 43 (2020): 87-101.

recognize the exceptional nature of the PCC and urge courts to exercise caution when applying it. The importance of providing detailed guidelines to judges for deciding between contract termination and adaptation is also a common point of agreement. Existing research provides a robust foundation for understanding the significance of the PCC in Vietnamese contract law. It paves the way for further developments in the field while acknowledging the need for specific guidance to ensure effective implementation and interpretation.

The literature review reveals significant gaps in understanding the specific conditions for applying the PCC, particularly concerning risk allocation in hardship cases. While some authors advocate for explicit provisions stating that unexpected changes should not be considered risks the affected party assumes, others argue that the unpredictability requirement already covers the risk allocation issue. Furthermore, there are diverse ways of comprehending the content of Article 420 regarding the hierarchy between termination and adaptation of the contract. While some construe that Article 420 posits termination as a priority solution and advocate this approach because it will limit the court's intervention in contracts, others suggest that Article 420 should be amended in a way that adaptation should be more focused on fostering the sanctity of contracts.

Existing academic work primarily focuses on the issues surrounding Article 420. Some scholars suggest modifying Article 420 and providing subordinate regulations interpretating the law. However, it is essential to acknowledge that even a perfect legislative provision does not guarantee sufficient enforcement of the PCC, as there are other legal formants at play, and the scope for authorities to provide systematic instructions in this area of law is relatively limited due to its highly contextual nature. Though comparisons with foreign laws are common in the literature, a comprehensive comparative analysis has yet to be conducted to uncover the distinct features of legal formants in each jurisdiction and their impact on the practical effectiveness of implementing the PCC. A comprehensive analysis of the PCC must consider this doctrine within the context of other relevant factors, including principles of contract law on non-performance, specific features of judges' power in Vietnam, and the status of scholarship in the field. The current initiatives to interpret Article 420 of the Civil Code are primarily based on a comparative

study of the presence of hardship law in foreign and international provisions and some decisions dealing with those hardship issues. However, it is vital to look at hardship law with the objective of adapting it to the Vietnamese context.

Chapter III: Comparative Study

This chapter contains a comparative analysis of the relevant national and international law principles. This chapter traces the development of the doctrine of changed circumstances in selected civil law jurisdictions from early case law to the adoption and application of the law. It includes an analysis of the formants that help to explain the diverse approaches adopted by foreign countries, including the role of judges, academics, and legislators. The study of judicial decisions is essential to identify the doctrine's applicable conditions and remedies. In addition, comparative analysis with international legal instruments provides more insight into substantive elements, which helps to draw lessons to improve Vietnamese law.

3.1 The doctrine of disturbance of contract foundations in German law

The German Civil Code expressly stipulates the doctrine of changed circumstances. Before the codification, scholars and courts elaborated on its contents, and these elaborations played an important role in the codification process and its implementation. This part analyses the development of the doctrine in Germany and its features.

3.1.1 Historical evolution of the doctrine of disturbance of contract foundations

In Germany, the doctrine of hardship in contract law has attracted academic discussions since the middle of the 19th century with the theory of presupposition (Lehre von der Voraussetzung) formulated by Bernhard Windscheid[180] in his monograph entitled “Die Lehre des römischen Rechts von der Voraussetzung” in 1850.[181] However, the legislature rejected Windsheid’s proposal to incorporate this doctrine into the Civil Code of 1990 because of concerns concerning its impact on the stability of contract law. Nevertheless, scholarly doctrines and judicial decisions since the early 20th century have sought ways to resolve contracts affected

[180] Windscheid is the father of the German Civil Code (BGB). Hannes Unberth and Angus Johnston Basil Markesinis, *The German Law of Contract: A Comparative Treatise*, *The German Law of Contract : A Comparative Treatise* (Hart Publishing, 2006), 17, https://doi.org/10.5040/9781472559814.
[181] Basil Markesinis, 319.

by the socioeconomic upheavals of World War I in Germany and eventually became the primary source for the codification of hardship doctrine in the Civil Code in 2002. This chapter presents two leading theories that have significantly influenced the development of hardship doctrine, including Windscheid's theory of presupposition and Oertmann's theory of the basic foundation of contracts. In addition to the scholars, the German courts played a substantial role in creating specific rules for applying the PCC in dispute resolution. The content of court decisions later became a fundamental part of the codification of the principle in the reform of the BGB in 2002. Although these decisions are old, courts and scholars still rely on their rulings to interpret the applicable PCC law. Analyzing the academic literature and case law on PCC theory provides a basis for studying and understanding German hardship law's purpose, content, and practical application.

Germany developed the theory of changed circumstances in response to a practical need to address the fate of contracts heavily affected by domestic socioeconomic changes. After World War I, the German economy suffered great turmoil, manifested by the drastic devaluation of the German mark. At the end of 1923, the mark value had a trillionth of its 1914 value (1,200,400,000,000 RM equaled one 1914 RM). This financial crisis in the aftermath of World War I is unprecedented and stands out in world history.[182] This economic crisis upset a number of contracts.[183] German contract law did not provide a reasonable legal solution to these impacted contracts at the time. The former Article 257 on the impossibility of the BGB governed only cases where the performance had strictly become impossible; therefore, it did not provide a solution for a number of cases presented before the courts where performance was not generally and objectively impossible for everyone but was impossible, especially for the debtor.[184] However, the absence of a provision in the Civil Code addressing situations in which a contract is significantly affected by an unexpected change does not necessarily mean that the courts will

[182] Basil Markesinis, 329; Dawson describes this social economic situation of Germany as "universal and mounting despair" and "a national catastrophe" that needs the help of courts to find out solutions, John P. Dawson, "Effects of Inflation on Private Contracts: Germany, 1914-1924," *Michigan Law Review* 33, no. 2 (1934), https://doi.org/10.2307/1280779.
[183] K.M. Sharma, "From 'Sanctity' to 'Fairness': An Uneasy Transition in the Law of Contracts?"
[184] Zimmermann, *The New German Law of Obligations: Historical and Comparative Perspectives*, 140.

enforce the original contractual provisions without exception. The severity and exceptional nature of the economic trouble in Germany during this period justified that courts employed unique ways to handle affected contracts in the case law of the 1920s.[185] The German courts, with their acknowledgment of social values in contracts, flexible interpretation of the principle of contract binding, and innovative role in legal interpretation, operate within a unique legal cultural context. This context allows them to creatively identify legitimate grounds for balancing the binding nature of contracts with considerations of contractual fairness. In the BGB 1990, German lawmakers rejected the concept of *clausula rebus sic stantibus* in Canon law, which states that a contract is subject to the implied condition that the circumstances existing at its conclusion do not change. At that time, when the focus was on the concepts of economic freedom and private autonomy, German law aimed to ensure the old maxim *pacta sunt servanda*, which required the faithful performance of contractual obligations unless it was physically impossible. However, the German approach to *pacta sunt servanda* differs from that of strict common law in that this principle only applies to things the parties intend to do. Likewise, German law did not view contracts as a pure expression of the autonomous will of the parties, but in the context of other extralegal components, such as the nature of the industry and the motivation of the parties, rather than as a rigid variable related to the term of the contracts.[186] Furthermore, German law requires contractual behaviors to meet the standard of good faith, which later allows courts to evaluate non-contractual elements, such as changes in circumstances and their impact on the debtor's economic situation in times of crisis. In particular, § 157 BGB provides that contracts are to be interpreted in good faith, but not limited to only the actual terms of the contract.[187] As for the creative role of the courts, Germany is one of the civil law countries whose primary source of law is the civil code enacted by the legislature, but in practice, the legislature deliberately keeps the provisions of the code in general terms and leaves room for the courts to interpret them to keep the law up to date and even develop new judiciary-made rules. These features of the German legal system permit courts to develop new theories for actively dealing with hardship cases to

[185] Basil Markesinis, *The German Law of Contract: A Comparative Treatise*, 121.
[186] Hay, "Frustration and Its Solution in German Law," 1961, 345–48.
[187] Hay, 356.

overcome the Code's rigidity and provide wide-ranging relief in frustrating cases.[188] The absence of a specific law might lead to a situation in which it is unfair and inequitable to force parties to unconditionally perform their original contract when the contracting parties face disproportional changes in socioeconomic conditions. To address this problem, courts have sought ways to mitigate significant unfairness by extending the principle of impossibility to cover economic impossibility, such as a situation where compliance with the contract as initially agreed would violate the principle of good faith and impose an undue financial burden on the debtor. Similarly, relying on the principle of good faith outlined in Article 242 BGB and the doctrine of the "basis of the transaction" (*Geschäftsgrundlage*) of Oertmann, courts allowed for the readjustment of obligations based on the doctrine of "collapse of the basis of the transaction" (*wegfall der Geschäftsgrundlage*).[189]

Good faith is one of the critical general principles of the law of obligations in Article 242 of the German Civil Code. This article states: "The debtor is obliged to perform in good faith." The BGB comprises five books: the general part, the law of obligations, property law, family law, and inheritance law. The first book, the general part, is especially abstract and contains general principles that apply to all private law. It follows from the structure of the Civil Code that the duty to act in good faith is always the primary duty and that exercising any right and performing any legal obligation is subject to this basic rule.[190] The general provisions of the Civil Code, including the principle of good faith, allow for a more nuanced approach to statutory interpretation with a flexible and fair understanding of the law by evaluating social and ethical considerations over and above the strict wording of the statutory provisions.[191]

The following are essential cases in which the court introduced the concept of commercial impossibility and applied the principle of good faith to justify judicial interference with contracts. The first case in which the Supreme Court introduced the concept of commercial

[188] Hay, 369–70.
[189] Zivkovic Velimir, "Hardship in French, English and German Law," 256; Lorenz, "Contract Modification as a Result of Change of Circumstances," 366.
[190] Basil Markesinis, *The German Law of Contract: A Comparative Treatise*, 20; RGZ 107, 78, cited at Firoozmand Mahmoud Reza, "Changed Circumstances and Immutability of Contract: A Comparative Analysis of Force Majeure and Related Doctrines," *Bus. L. Int'l* 8 (2007): 170.
[191] Hay, "Frustration and Its Solution in German Law," 1961, 361.

impossibility occurred in 1904. The defendant agreed to sell the plaintiff a large quantity of a particular type of flour made from a secret recipe at the defendant's mill. Unfortunately, a fire destroyed the mill prior to delivery. Before this disaster, the seller had delivered a larger quantity of this flour to another buyer. According to Article 279 of the former German Civil Code, if the subject matter of the contract is described by class, as long as the delivery of that class is possible, the debtor is responsible for the impossibility of delivery, even if the debtor is not at fault.[192] In this case, the special flour was still available, although the buyer had already shipped this package of goods to the other buyer. However, the court released the debtor from its obligation to perform the contract because it considered the procurement of substitute supplies from distant foreign markets so complex that it would be impossible.[193] In this first case, the court extended the principle of impossibility to cases where the cost of performance imposed an excessive burden on the debtor while the value of the performance to the creditor remained unchanged.

In addition to expanding the doctrine of impossibility, the courts also relied on the principle of good faith to release the duty to perform or adjust contract prices. Courts allowed the judicial modification of contracts to allocate the burdens resulting from a change in circumstances only if both parties desired the contract to continue and only in the event of extraordinary circumstances. About the latter condition, exceptional circumstances may exist if unexpected circumstances would drive the debtor to economic ruin due to the increase in performance costs (the defense of ruination) or if the enforceability of the original contract would be contrary to good faith due to the disruption of the equivalence between performance and counter-performance. In RGZ 100, 129 (1920), the Supreme Court accepted the claim for a price increase after considering the unpredictability of economic developments when concluding the contract. Parties entered a lease agreement for a business premises in 1912 for eight years. According to this contract, the landlord was obliged to supply steam for the tenant's business

[192] The same rule is at Article 276 I 1 BGB. See more at Basil Markesinis, *The German Law of Contract: A Comparative Treatise*, 326.
[193] Reichsgericht 23 February 1904, RGZ 57,116, 119. Discussed at Lorenz, "Contract Modification as a Result of Change of Circumstances," 366.

operations. The parties agreed to a fixed annual rent. During the performance of the contract, the landlord incurred significant additional costs to fulfill its obligation to supply steam following a massive increase in coal prices and demanded an additional payment from the tenant.[194] The Court found that Article 242 of the BGB on good faith provided a basis for relief on the grounds of unreasonableness (Unzumutbarkeit - unconscionable burden). Since this general principle justified the termination of the contract, it must also be permissible to amend the contract if both parties wished to continue it. Similarly, in 2RGZ 103, 177 at 178-179 (1921), the Supreme Court rejected the claim for specific performance of a wire supply contract. Although the debtor's threat of economic ruin did not exist, the Supreme Court held that inflation disrupted the balance of contractual performance because the debtor would not receive the equivalent value of its performance. According to the court, insisting on the performance of the contract in this situation would have been contrary to the principle of good faith.[195]

The utilization of the principle of good faith to find a fair solution to a contract affected by a crisis has limitations as it may result in unjustifiable discrimination between the affected party and the opposing side, especially in cases involving revaluation and financial ruin, as described below. Revaluation cases are where the court applies the revaluation doctrine to revalue the monetary obligation to reflect the actual value of the current currency. In 09 RGZ 107, 78 at 87-92 (1923), the court departed from the prevailing statutory principle of the nominalism treatment of debts to relieve money obligations affected by inflation. The plaintiff had mortgaged property in German South-West Africa. In 1920, he paid off the loan to the defendant-mortgagee and sought to compel the defendant to cancel the mortgage register (*Grundbuch*). The defendant resisted on the basis that because of the runaway inflation, the nominal amount of the payment did not represent the value of the mortgage debt. The Supreme Court upheld this defense, stating that according to Article 242, the debtor cannot force a creditor to accept worthless paper money as payment for a debt. The problem was that this revalorization increased the value of the original obligation but did not allow the party adversely affected by the

[194] Reichsgericht 21 March 1920, RGZ 100,129, 133-4. Discussed at Lorenz, 368.
[195] Hay, "Frustration and Its Solution in German Law," 1961, 350–60.

depreciation or the increased burden of the performance to claim against the other party for part of or all of the loss. [196] Furthermore, the excessive use of good faith may lead to a departure from positive law to provide equitable decisions on a case-by-case basis. The case-law approach could be subjective, with a heavy dependence on the specific circumstances of each case rather than on established legal principles.[197]

In another case decided in 1920, the court accepted a manufacturer's claim to increase the price on a sales contract on the grounds of the defense of ruination. The sole distributor of Opel Moto-Cars had made a contract of sale with a buyer based on a price listed in February 1919. The manufacturer had raised these prices considerably due to the rapid inflation of the post-war period. The court held that, in principle, the seller must bear the risk of price increases. However, in this case, the distributor had made about thirty similar contracts, and fulfilling all these contracts at an agreed-upon price would have ruined his business and resulted in immediate bankruptcy. Nevertheless, in a judgment in 1921, the Supreme Court criticized the release of contract obligation on the grounds of the defense of ruination because this defense might lead to an unjustifiable distinction between a wealthy debtor and an impecunious debtor, and the risk of bankruptcy belongs to every debtor. Finally, the court abandoned the defense of ruination and [198] instead of relying on it, the court put forth the theory of disproportion of performance and counter-performance caused by an unexpected supervening change of circumstances. According to this new judicial doctrine, if the contract equilibrium is radically disturbed, it would be contrary to the standards of good faith to hold the creditor to the obligation initially agreed. This decision marked the transition to a new general theory of disturbed equilibrium to deal with the problem of changed circumstances.[199]

Oertmann's doctrine of the basic transaction substantially influenced several Supreme Court decisions. The basis of the transaction, according to this theory, is the “assumption made by one party which has become obvious and acquiesced to by the other” that certain

[196] Hay, 372.
[197] Hay, 372.
[198] Basil Markesinis, *The German Law of Contract: A Comparative Treatise*, 327.
[199] Reichsgericht 29 November 1921, RGZ 103,171, 173. Discussed at Lorenz, “Contract Modification as a Result of Change of Circumstances,” 367.

circumstances that they both regard as necessary are either extant or will come about, even though the parties did not expressly state these assumptions in their declarations when making the contract.[200] Oertmann's doctrine is the development of the doctrine of tacit presupposition (*Lehre von der Voraussetzung*) by Prof. Windsheid. According to Windscheid's doctrine, contracting parties usually assume that legal consequences will occur only under certain circumstances. Suppose the change in circumstances upsets this assumption; the promisor should have the right to demand rescission of the contract because it is not always fair and reasonable to insist on performing a contractual promise.[201] Legislators once incorporated Windsheid's theory as a regime to govern unexpected changes in circumstances in the first draft of the BGB; however, in the end they rejected this doctrine because of the fear that legal certainty and the security of commercial dealings would be in great danger if one party were allowed to pass on its contractual risk to the other party. Nonetheless, the doctrine of Windsheid indicates that it is necessary to find a way to balance the binding force of the contract, the certainty of the law, and equity, even if a solution for a fair balance between these values is challenging.[202] Prof. Windsheid estimated that although his theory is "Thrown out by the door, it will always re-enter through the window."[203] The theory of presupposition by Windsheid is subjective because it requires the assessment of parties' implied intentions, and the hopes and expectations of the parties are relevant to the contract. Oertmann's theory made a vital shift compared to Windsheid's by being grounded on more objective criteria independent of the parties' will.[204] According to Oertmann, one party must manifest the assumption during the contract formation process and that must be recognized by the other party.[205] Oertmann's theory has become famous because the

[200] P Oertmann, Die Geschäftsgrundlage: Ein neuer Rechtsbegriff (1921) pp 37-8, cited at Lorenz, 369; Basil Markesinis, *The German Law of Contract: A Comparative Treatise*, 322; Mitja Kovac and Cristina Poncibò, "Towards a Theory of Imprévision in the EU?," *European Review of Contract Law* 14, no. 4 (December 19, 2018): 368, https://doi.org/10.1515/ercl-2018-1021.
[201] Lorenz, "Contract Modification as a Result of Change of Circumstances," 362.
[202] Lorenz, 362.
[203] Basil Markesinis, *The German Law of Contract: A Comparative Treatise*, 321.
[204] Firoozmand Mahmoud Reza, "Changed Circumstances and Immutability of Contract: A Comparative Analysis of Force Majeure and Related Doctrines," 183.
[205] Basil Markesinis, *The German Law of Contract: A Comparative Treatise*, 322.

Supreme Court cited it in numerous leading cases.[206] The theoretical contribution of Oertmann's theory of the basic transaction is that the basis of the contract should not be considered artificially as belonging to the express content of the contract, but as an integral part of the entire factual context of the transaction. Therefore, extra-contractual factors and considerations not expressly or implicitly stated may still be relevant.[207]

The crucial role of the German courts in elaborating detailed rules for the application of the scholarly established doctrine of changed circumstances. Lorenz has deduced from judgments of the German federal courts that in some cases the references to the Oertmann theory are "mere ornaments" and "the decisions in these cases depend very much on particular facts of each case, and the allocation of risk inherent in each type of contract seems to be the most important element to consider whether the basic of the transaction is collapsed."[208] In practice, courts lean on the specific facts of each case and carefully examine the matter of who should bear the risk of hardship in determining whether there was a collapse of the basis of the transaction and whether binding the creditor to the initially promised performance is contrary to the principle of good faith.[209]

Case law suggests that the courts will not release the debtor from its obligation if a specific risk falls exclusively on that party. RGZ 103, 328, 333-4, February 3, 1922 was the first case in which the Supreme Court applied the Oertmann doctrine.[210] Parties concluded a land transfer agreement in May 1919. Before the transfer, the price of the land increased rapidly due to the sudden depreciation of the currency. The Supreme Court relied on Oertmann's theory and held that the basis of this contract was the equivalence of performance but that the devaluation of the currency destroyed this basis; therefore, it required the lower court to consider adjusting the price. Professor Kegel notes that, in this case, the decisive criterion the court relied on was whether the risk was a general risk or a specific risk belonging to the creditor. Specifically, one

[206] Lorenz, "Contract Modification as a Result of Change of Circumstances," 370; Berger and Behn, "Force Majeure and Hardship in the Age of Corona: A Historical and Comparative Study," 121.
[207] Hay, "Frustration and Its Solution in German Law," 1961, 361.
[208] Lorenz, "Contract Modification as a Result of Change of Circumstances," 370.
[209] Lorenz, 370.
[210] Berger and Behn, "Force Majeure and Hardship in the Age of Corona: A Historical and Comparative Study," 121.

cannot allocate the risk of monetary devaluation caused by war to one party alone because the general public must bear this risk.[211]

Courts carefully consider the distribution of risk arising from the contract terms. Although the BGH has acknowledged that parties generally conclude a contract assuming that performance and counter-performance are of equal value, this principle does not apply if parties delimit their sphere of risk. In 1978, the Supreme Court decided a case concerning a contract concluded in 1972; the plaintiff had ordered specific quantities of heating oil from the defendant, an oil importer, at a fixed price. However, due to the energy crisis arising from the armed conflicts in the Middle East in 1973, the price increased considerably, and the defendant requested that the plaintiff adjust the price. The BGH did not release the buyer from its contractual obligation because the parties had agreed to a fixed price, so the defendant assumed the risk of price fluctuations. Even if this assumption of risk were limited to regular fluctuations, the defendant should have recognized as early as mid-1973 that further drastic price increases were imminent.[212]

There are cases where the Supreme Court overlooks the appropriate allocation of contractual risk, favoring ambiguous equitable considerations instead, even though such risk is a specific risk that belongs to the contracting party. In Bundesgerichtshof 16 January 1953, the BGH released the buyer from his obligation on the ground that his intended use of the products was frustrated. The plaintiff agreed to produce 600 pneumatic drills for the defendant. The model of this drill was already outdated, but the defendant intended to send them to East Germany, where there was still a market for this type of drill. The producer knew the buyer's intent to resale the drill in East Germany. After the producer had produced More than 200 pieces of drills, the Berlin Blockade disallowed the delivery of such goods to East Germany. In principle, the buyer of this contract must bear the risk of being unable to resale the drill to East Germany.

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[211] Gerhard Kegel, Hans Rupp, and Konrad Zweigert, *Die Einwirkung Des Krieges Auf Verträge in Der Rechtsprechung Deutschlands, Frankreichs, Englands Und Der Vereinigten Staaten von Amerika*, *Die Einwirkung Des Krieges Auf Verträge in Der Rechtsprechung Deutschlands, Frankreichs, Englands Und Der Vereinigten Staaten von Amerika*, 2019, https://doi.org/10.1515/9783111414911; Lorenz, "Contract Modification as a Result of Change of Circumstances," 370.

[212] Bundesgerichtshof 8 February 1978, BGH, JZ 1978, 235, 236, cited at Lorenz, "Contract Modification as a Result of Change of Circumstances," 374.

However, the BGH stated that the defendant's motive to resale drills to East Germany constitutes the basis of the transaction. Scholars criticize the Supreme Court's approach in this case because the court underestimated the matter of risk allocation.[213]

Thus, since the 20th century, German scholars and courts have sought subsidiary solutions other than the existing codified provisions to the contractual obligations seriously affected by changing times. Notable academic theories of the time included Windscheid's theory of presumption and Oertmann's theory of the fundamental basis of contract. Windscheid's approach emphasized that a contract consists not only of expressly agreed terms but also contains implied understandings of the terms of performance of those obligations. Oertmann developed Windscheid's theory further by introducing the concept of the basis of the contract. According to Oertmann, only tacit understandings that determine the obligations in the contract and are known to both parties are relevant when reviewing contractual obligations in changed circumstances. Oertmann described such shared assumptions as the basis of the agreement.

The Supreme Court initially applied a broader interpretation of the impossibility provision and the standard of good faith in the Civil Code to handle cases of economic impossibility when the performance costs increased significantly. However, relying on these two codified provisions sometimes constitutes discriminatory treatment between economically strong and weak parties, as in the case of the defense of ruination, and insufficient to provide a uniform approach because of a lack of guidelines. Therefore, the Supreme Court attempted to formulate new doctrines derived from the wording of the Code, introduced the theory of disproportion between performance and counter-performance, and supported Oertmann's theory of the basis of transactions. However, it is essential to note that the court did not rely solely on doctrinal works but primarily on the issue of risk allocation in the particular contract. After finding the disturbance of the equivalence of contractual obligations, the court will first examine whether a law or the contract has assigned such risk to one of the parties to decide whether judicial

[213] Bundesgerichtshof 25 May 1977, BGH, NJW 1977, 2262, 2263; Bundesgerichtshof 19 April 1978, BGH, NJW 1978, 2390, 2392, cited at Lorenz, 375.

interference is necessary to rebalance the contract fairly and equitably. By relying on the contractual allocation of risk, the court avoids relying solely on vague equitable grounds.

3.1.2 Provisions on disturbance of contract foundations in the Civil Code

The civil code reform in 2002 codified the doctrine of the basis of transaction of Oertmann and juridical elaborating rules into Article 313 BGB under the title "Interference with the basis of the transaction." This provision stipulates that:

> (1) 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.
>
> (2) It is equivalent to a change of circumstances if material conceptions that have become the basis of the contract are found to be incorrect.
>
> (3) If adaptation of the contract is not possible or one party cannot reasonably be expected to accept it, the disadvantaged party may revoke the contract. In the case of continuing obligations, the right to terminate takes the place of the right to revoke.[214]

Article 313 regulates the prerequisites and legal consequences of changed circumstances for contracts. As the name of this article suggests, the first condition is the collapse of the basis of the contract or the incorrectness of mutual conceptions at the time of concluding the contract. The second condition is that, from the point of view of the contractual or statutory distribution of risk and other circumstances, the unchanged performance of the contract would be unreasonable for one of the parties. If these conditions are met, the disadvantaged party can apply to the court to adjust or terminate the contract. There are nominal elements that require further interpretation as to what is the basis of a contract, how to allocate the risk, how to assess the significance of a modification, and how to determine whether it would be unreasonable for a party to maintain the original contract. Article 313 emphasizes that assessing these requirements depends on examining the circumstances of the individual case. Article 313 provides flexible remedies,

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[214] German Civil Code, English Version, at https://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#p1146, accessed on March 23, 2023.

including renegotiation between the parties and adjustment or termination by the courts. However, this article is silent about whether the non-aggrieved party is obliged to enter into renegotiation, as well as the hierarchy between adjustment and termination.

There is no clear definition of the term "basis of the contract." The courts generally define the basis of the transaction as the ideas shared by both parties at the time of the conclusion of the contract, or the ideas recognizable by one party and not objected to by the other party about the existence of certain present or future circumstances which form the basis of their contractual intention.[215] The contract does not have to mention these assumed circumstances expressly.[216] Courts have held that purely subjective aspects, such as unilateral motives or personal intentions to resell the goods at the intended price, are not part of the basis of the contract.[217] However, if the other party was aware of the intended purpose and benefited from it somehow, this type of purpose can form the basis of contracts. For example, the court considered a contract for the sale of hammer drills to the German Democratic Republic (GDR) to be frustrated when the Berlin Blockade made delivery impossible, and there was no other potential market for the hammer drills as they were already obsolete. In this case, the buyer knew the seller's intention to resell the obsolete rotary hammers specifically for the GDR market.[218]

Article 313 is applicable when there are problems with the basis of the contract. The scope of these problems includes when the basis of the contract never existed due to a mistake in the common underlying assumptions (paragraph 2, Article 313) or when the performance is possible in principle but has become impracticable or the value of the consideration has changed significantly; or the basis has collapsed because parties cannot fulfill the purpose of the contract.[219] In principle, the debtor bears the risk of events that destroy its assumptions about the

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[215] BGH 1.6.1979, BGHZ 74, 370, 372; BGH 28.4.2005, BGHZ 163, 42, 48. Cited at Hannes Rosler, "Changed and Unforeseen Circumstances in German and International Contract Law.," *Slovenian L. Rev.* 5 (2008): 488.
[216] Rosler, 489.
[217] Oberlandesgericht Frankfurt NJW 1952, 508; cf. BGH Betriebsberater 1957, 164, cited at Hay, "Frustration and Its Solution in German Law," 1961, 363.
[218] Alexander Schramm, "The English and German Law on Change of Circumstances: An Examination of the English System and Potential Advantages of the German Model," *Anglo-German Law Journal* 4 (2018): 37–38.
[219] Basil Markesinis, *The German Law of Contract: A Comparative Treatise*, 319.

viability of its transaction. However, if the contract becomes worthless to the party seeking relief due to the frustration of purpose, Article 313 BGB could apply. German law treats the error in shared basic assumptions under the doctrine of changed circumstances because the mistake regime at Article 119 BGB does not cover this category of mistakes. If the mutually mistaken assumption of the parties forms the basis of the contract, the court applies the doctrine of the basic foundation of transactions.[220]

OLG Bremen NJW 1953, 1393, Case No. 100 was the first case in which the court dealt with frustration of the purpose of the contract. The plaintiff rented a sports hall from the defendant for a remarkable performance by a well-known singer. The rent was to amount to 15 percent of the profits. The plaintiff had to cancel the performance because the singer fell ill, and demanded repayment of the money paid. The Bremen Higher Regional Court ruled in favor of the plaintiff. The court considered that the rental agreement was not a simple rental of a hall but a hall for a specific purpose known to the other party, so this purpose had become the basis of the transaction.[221]

The following are some examples of the collapse of the subjective contractual basis. BGHZ 37, 44, case no. 103, concerned a contract in 1959 in which the plaintiff sold a plot of land to the defendant, assuming that the defendant would fulfill the building obligations; both parties were aware of the planning difficulties because the land was not yet subject to building regulations. Despite this knowledge, they believed that they would soon be able to overcome these problems. However, this was yet to be the case at the time of the trial in 1967. The plaintiff demanded the return of the land and a declaration that the contract was invalid. The court upheld the claim because both parties knew of the risk of not being allowed to build on the property. However, they had mistakenly assumed that this risk would not materialize. The fundamental change in the basis of the contract was, therefore, so significant that the execution of the agreement in the form agreed initially was contrary to good faith.[222] Another classic example of mutual mistake is BGH, 8.6.1988, NJW 1988, 2597. When concluding a contract for the sale of a

[220] OLG München, MDR 1950, 672; BGHZ 25, 390, 392.
[221] This case is cited at Basil Markesinis, *The German Law of Contract: A Comparative Treatise*, 343.
[222] Basil Markesinis, 346–48.

work of art, both parties assumed that the artist of the painting was not the well-known German painter Leibl. Shortly after the purchase, it turned out that Leibl was the artist of the work of art in question, which considerably increased the value of the painting. The BGH assumed a change in circumstances because of a mutual assumption error regarding the basis for calculating the price.[223]

Article 313 BGB emphasizes that the aggrieved party can only invoke hardship defense if the changed circumstances are not part of the contractual or statutory risk typically assigned to him. This requirement emphasizes that a normal financial loss or mere inconvenience in the contract's performance is insufficient.[224] In BGH NJW 1984, 1746, case no. 106, the court dealt with a dispute over the shipment of German beer to Iran, some of which arrived in a damaged condition. The parties then agreed that the buyer (the defendant) would reduce the original price of the next shipment of beer as compensation for the damaged beer. However, the rise of the fundamentalist regime in Iran made additional orders unattainable. As a result, the plaintiff did not receive the promised compensation. The buyer claimed the total loss of the defective delivery. The Federal Court of Justice assumed that in commercial transactions, the risk of not being able to dispose of the goods generally falls within the buyer's sphere of risk; however, the lower court had rightly pointed out that the dispute case was not a sales contract, but a transaction in which the defendant was to compensate the plaintiff for its loss. If the compensation in the settlement did not materialize, the parties did not want to allocate the damages to the buyer alone. The court ordered the defendant to pay half of the profit that the plaintiff would have made if the events in Iran had not disrupted the compensation agreement. In this case, the court's approach to the PCC is legalistic as it pays more attention to the allocation of risk and the surrounding circumstances.[225]

In its decision of February 8, 1978 (BGH JZ 1978, 235), the Bundesgerichtshof confirmed the importance of the risk distribution criteria by closely examining the contractual

[223] Rösler, "Hardship in German Codified Private Law – In Comparative Perspective to English, French and International Contract Law," 496.
[224] Rösler, 496.
[225] Rösler, 496.

distribution of risk between the parties. In 1972, the defendant, an oil importer, undertook to supply the plaintiff with oil in installments at a fixed price. After the Yom Kippur War in October 1973, the price of oil rose sharply by six times. The defendant asked the plaintiff to adjust the price of oil. The plaintiff rejected this proposal and warned that it would regard any supply interruption as a breach of contract. The oil importer stopped the oil supply, and the plaintiff demanded from the defendant the amount he had to pay to obtain his oil from another source. The Bundesgerichtshof upheld the claim. The court acknowledged that a contract requires that performance and consideration are equally valued. However, the contract and its accompanying circumstances could indicate how the parties intended to delimit their respective spheres of risk. A fixed price clause in the contract indicated that the defendant accepted the risk of price fluctuations. Although the assumption was limited to normal fluctuations and not unexpected increases, as in the present case, the court considered that the defendant should have realized that further price increases were imminent and that it could have absorbed their impact by stockpiling oil while the price was still manageable.[226] BGH NJW 1977, 2262 furthermore emphasizes the objectively ascertainable distribution of risk. The property developer sold houses with direct heating from his power plant. Shortly after the conclusion of the contract, the prices for coal and oil rise considerably. The Bundesgerichtshof held the builders to their contractual promises, even though they suffered considerable damage because the changed circumstances were clearly within the builders' sphere of risk. Furthermore, the court argued that the builder was a large company that could absorb such losses. These cases illustrate that the courts have changed their positions to focus more on the assumption of risk rather than equity.[227]

As far as the remedies provided for in Article 313 BGB are concerned, the aggrieved party can demand an adjustment from the other party, and the law is silent as to whether the other party is obliged to enter into the negotiation process demanded by the aggrieved party. There are varying views among academics and the courts on the duty to renegotiate. Some advocates advocate such a duty to renegotiate under German law because requiring a duty to renegotiate

[226] Basil Markesinis, *The German Law of Contract: A Comparative Treatise*, 344–45.
[227] Basil Markesinis, 344–45.

may lead to cheaper and quicker results;[228] the other side follows the precise wording of the provision, which does not mention such a duty to attempt in good faith to renegotiate an adaptation of the contract.[229]

When negotiations between the parties fail, they have the right to request court intervention. Article 313 BGB grants the court the power to modify or terminate the contract without relying on the parties' will.[230] Article 313 BGB does not stipulate a hierarchy between the adaptation and termination of contracts, granting the court discretionary authority. In practice, the court typically prioritizes seeking the possibility of modifying the contract, and only if the contract cannot be modified does it proceed to terminate it.[231] Preference is given to adjustment over termination, as the principles of contractual loyalty and commercial security dictate the maintenance of contractual relationships to the greatest extent possible.[232] Termination, however, is an available consequence when there are no justifiable and reasonable solutions for adaptation. For example, in BGH NJW 1976, 565, case no 105, a football club transfers a player to another club. Both parties did not know that before the transaction, the player accepted bribes to lose a game. The Bundesgerichtshof held that the doctrine of the fundamental disturbance of the basis of a transaction is applicable in this case because the bribery was a serious matter that had frustrated the common assumptions of the parties. The Bundesgerichtshof also pointed out that

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[228] Hannes Rösler, "Hardship in German Codified Private Law – In Comparative Perspective to English, French and International Contract Law," *European Review of Private Law* 15, no. 4 (August 1, 2007), https://kluwerlawonline.com/journalarticle/European+Review+of+Private+Law/15.4/ERPL2007028; Schwenzer and Muñoz Prof, "Duty to Renegotiate and Contract Adaptation in Case of Hardship," 155.

[229] Antonios G. Karampatzos, "Supervening Hardship as Subdivision of the General Frustration Rule: A Comparative Analysis with Reference to Anglo American, German, French and Greek Law," *European Review of Private Law* 13, no. Issue 2 (2005): 134, https://doi.org/10.54648/erpl2005009; "Changes in Circumstances and the Revision of Contracts in Some European Laws and in International Law In N. Horn (Hrsg.), Adaptation and Renegotiation of Contracts in International Trade and Finance, Studies in Transnational Economic (Law Vol. 3), 1985, S. 15–29," in *Norbert Horn, Gesammelte Schriften*, 2016, 15, https://doi.org/10.1515/9783110474183-025; Uribe Rodrigo Momberg, "Change of Circumstances in International Instruments of Contract Law. The Approach of the CISG, PICC, PECL and DCFR," *European Review of Private Law 479.8 (2011).* 479, no. 8 (2011): 260.

[230] Rösler, "Hardship in German Codified Private Law – In Comparative Perspective to English, French and International Contract Law," 385.

[231] Basil Markesinis, *The German Law of Contract: A Comparative Treatise*, 20; GermanFederal Supreme Court judgment, 30 September 2011 -VZR 17/11 = BGHZ 191, 139, para 25, Schramm Alexander, "The English and German Law on Change of Circumstances: An Examination of the English System and Potential Advantages of the German Model," 40–41.

[232] Hay, "Frustration and Its Solution in German Law," 1961, 364.

the defendant club had to bear the risk originating in its sphere of influence. The event had made the player worthless for both parties to the contract. Thus, no modification was possible other than to order the complete rescission of the transaction followed by the return of the transfer fee.[233]

It is essential to distinguish between the notion of impossibility in Article 275 of the Civil Code and hardship in Article 313 of the Civil Code, as in some cases, the line between these two positions can be blurred. Article 275 BGB provides as follows:

> 1. The claim to performance is terminated in so far as performance is impossible for the debtor or for everyone.
> 2. The debtor may refuse to perform insofar as this would require an effort which, having regard to the substance of the obligation and the requirements of good faith, would be grossly disproportionate to the creditor's interest in such performance. In determining the effort reasonably to be expected from the debtor it must also be considered whether the debtor is responsible for the failure to perform…

The BGB distinguishes practical impossibility (faktische Unmöglichkeit) from economic impossibility (wirtschaftliche Unmöglichkeit). Economic impossibility is governed by Article 313 BGB.[234] Practical impossibility means that the fulfillment of contracts is technically possible but unreasonable because the costs far exceed the benefits of fulfillment. These two famous cases illustrate the differences between practical impossibility in Article 275 (2) and changed circumstances in Article 313 BGB. The ring case concerns impossibility, and the oil case represents changed circumstances. The ring case involves a contract for the sale of a ring. Before delivery, the ring falls into a lake and sinks to the bottom. It is technically possible to recover the ring by draining the lake and using a metal detector. However, the effort involved is grossly disproportionate to the value of the ring and the debtor's interest, which remains unchanged. From a macroeconomic point of view, the ring's recovery is, therefore, a waste of resources, and the exchange of services is grossly disproportionate. In the oil case (BGH 8.2.1978), an oil import company refused to fulfill its contract with a city because the continuation of the service

[233] Basil Markesinis, *The German Law of Contract: A Comparative Treatise*, 346–48; Peter Hay, "Frustration and Its Solution in German Law," *The American Journal of Comparative Law* 10, no. 4 (1961): 364, https://doi.org/10.2307/838474.
[234] Reinhard Zimmermann, "Remedies for Non-Performance," *Edinburgh Law Review* 6, no. 3 (2002), https://doi.org/10.3366/elr.2002.6.3.271; Zimmermann, *The New German Law of Obligations: Historical and Comparative Perspectives*, 45–46.

without a price adjustment had to be considered unreasonable due to the increase in the oil price as a result of the oil crisis in 1973. In this specific case, the BGH did not allow the application of Article 313 because the increase in oil price was foreseeable. However, although this case may fall under Article 313 BGB, it can never fall under Article 275 because the cost increase led to a parallel increase in benefits on the debtor's part. In this case, the cost-benefit ratio is not grossly disproportionate. The obligor must bear the risk of fulfilling the contract, and market shifts are typical cases of a parallel and proportional increase in costs and benefits the obligor bears unless there is a case of hardship. In summary, practical impossibility concerns an exchange of economically highly inefficient performances because the costs far exceed the benefits. The provision of changed circumstances deals with a grossly unfair exchange of performances because the price paid for performance is significantly lower than the cost of performance.[235]

As far as the operation is concerned, Article 313 BGB is strictly a subsidiary. In order to find solutions to contracts affected by unforeseen events, the courts must first determine whether the parties have agreed on solutions in the contract terms, such as flexible price clauses. If the contract does not answer, the court must find possible remedies in other provisions of contract law. Article 313 BGB can only be applied if neither agreements nor contract law provide solutions.[236]

3.1.3 The operation of the law on disturbance of contract foundations in the COVID-19 Pandemic

The doctrine of changed circumstances is exceptional, meaning only circumstances such as wars, economic crises, or pandemics can trigger its application. The global outbreak of COVID-19 in 2020 is a typical scenario that activates the application of this defense and becomes a critical period for reviewing the effectiveness of Article 313 BGB. In response to the pandemic, the German government took preventative measures such as lockdowns, significantly impacting

[235] Rösler, "Hardship in German Codified Private Law – In Comparative Perspective to English, French and International Contract Law," 493–95.
[236] Sauveplanne Jean Georges, *Codified and Judge Made Law: The Role of Courts and Legislators in Civil and Common Law Systems* (New York: Amsterdam, 1982), 106.

contract fulfillment. The legislator proactively addressed the challenges of COVID-19 and introduced a special law named Article 240 of the Introductory Act to the German Civil Code (EGBGB), which entered into force on 1 April 2020. Section 2 of the EGBGB protects tenants from termination of tenancies for non-payment of rent during the monthly periods affected by COVID-19. Although this provision offers tenants temporary protection from contract termination, it does not relieve them of the responsibility to meet their rental obligations. Therefore, the court has to decide whether to review the tenant's obligation to pay the rent.[237] Section 7 of the EGBGB codifies a refutable statutory presumption that if, as a result of government measures combatting COVID-19, the lessee cannot use the leased land or premises for his operations or can only do so subject to severe impairments, this situation qualifies as a material change of the circumstances in the meaning of Article 313(1) BGB. This assumption covers non-residential leases for land or premises.[238]

Due to the pandemic, there has been a notable increase in requests before courts for contract adjustments.[239] BGH, 12 Jan. 2022, XII ZR 8/21 was the first decision when the Federal Court of Justice applied Article 313 BGB on changed circumstances to find equitable solutions to contracts affected by COVID-19. This decision holds significance as the BGH outlined crucial criteria for applying hardship regulations to contracts influenced by the pandemic. Professor Meyer Olaf regards this decision as providing a "textbook ruling."[240]

Regarding the facts, the case concerning a commercial lease signed in 2013 where the tenant, a prominent fashion chain (defendant), agreed to rent a commercial promise for a textile store. The government's general lockdown to combat the COVID-19 mandated retail stores, including the tenant's one, to close from 19 March 2020 to 19 April 2020. Therefore, the tenant refused to pay the rent for April 2020 because this party could not use the rented premises for

[237] Olaf Meyer, "Obligation to Pay Rent for Commercial Premises During the Covid-19 Lockdown: The German Federal Court of Justice on the Distribution of Risk Between Tenants and Landlords," *European Review of Private Law* 31, no. 2–3 (2023): 579.
[238] Wahnschaffe Christian Johannes, "The Impact of Covid-19 in German Contract Law," *Opinio Juris in Comparatione*, 2020.
[239] Meyer, "Obligation to Pay Rent for Commercial Premises During the Covid-19 Lockdown: The German Federal Court of Justice on the Distribution of Risk Between Tenants and Landlords," 577.
[240] Meyer, 577.

commercial purposes. Consequently, the landlord initiated legal proceedings to claim the unpaid sum.[241] In this case, the legal issue is to what extent the tenant bears the risk associated with the government's pandemic prevention lockdown.

In the initial ruling, Chemnitz's Regional Court (Landgericht) directed the tenant to pay the total rent. However, in the subsequent appeal proceedings, the Higher Regional Court (Oberlandesgericht OLG) of Dresden overturned the judgment and, invoking Article 313 of the BGB, modified the contract by halving the rent. Before examining the possibility of relying on a changed circumstances defense, the BGH affirmed that Article 313 BGB is a secondary recourse, functional only in unique, extraordinary circumstances. The court carefully investigated potential remedies within other contractual and statutory provisions. Specifically, the court examined whether the tenant could assert a rent reduction based on material defects in the leased property, as outlined in Article 536(1) BGB.[242] This provision relieves the tenant of the obligation to pay rent for the period during which the suitability of the rental object for contractual use is suspended. In German contract law, material defects typically pertain to specific rental property conditions.[243] In this instance, the governmental restrictions on opening the tenant's retail store during the pandemic did not arise from the characteristic nature of the rental property. However, they affected all identical businesses in the entire federal state uniformly. The lockdown did not restrict the potential use of the rental property but instead impacted the commercial prosperity of the leased premises.[244] Hence, the defense based on defects in the rental premises, as stipulated in Article 536 BGB, was deemed irrelevant. The BGH furthermore assessed the relevance of the concept of impossibility under Article 275 BGB. This provision discharges a debtor from fulfilling impossible obligations. The BGH clarified that Article 275 was not fitting in the present

[241] Meyer, 578.
[242] Anwalt de services AG, "Gewerberaummiete in Zeiten von Covid 19 (nach § 313 BGB) / Business space rent in times of Covid 19," January 31, 2023, https://www.anwalt.de/rechtstipps/gewerberaummiete-in-zeiten-von-covid-19-nach-313-bgb-business-space-rent-in-times-of-covid-19-201437.html.
[243] Meyer, "Obligation to Pay Rent for Commercial Premises During the Covid-19 Lockdown: The German Federal Court of Justice on the Distribution of Risk Between Tenants and Landlords," 580.
[244] Meyer, 581; Letizia Coppo, "The Impact of Pandemics on the Landlord-Tenant Relationship: An Italian Reading of the German Federal Court's Solution," *European Review of Private Law* 31, no. 2–3 (2023): 605.

case, as the landlord had already granted the tenant the use of the rented premises, fulfilling its contractual obligations. Furthermore, the landlord had not provided any contractual guarantee that the tenant could operate business activities even during a pandemic.[245]

After confirming that the contractual and statutory provisions did not prove any possible answers, the BGH examined the requirements for applying Article 313 BGB. The BGH evaluated these three conditions: a) there is a severe change in a circumstance that was the basis of the contract; b) the parties would not have concluded the contract or would have concluded it differently if they had foreseen this at the time of conclusion; c) at least one of the parties cannot reasonably be expected to adhere to the unchanged contract in the specific individual case. The court considered that the facts of the case at hand meet with the first requirement regarding the fundamental element of interference with the basis of the transaction because the risk of not being able to use the rental property for the envisaged purposes of the tenant resulting from state's intervention which exceeded the ordinary risk of usability of the tenant. In Section 7 EGBGB, the legislator expressed a rebuttable presumption that there is a severe change in the inherent basis of the contract if commercial premises are not usable or usable only with considerable restrictions by the tenants because of governmental measures to combat the COVID-19 pandemic.[246] Regarding condition b, the court presumed that parties would have entered into the lease agreement with different terms if they had anticipated the potential occurrence of a pandemic and the associated risk of business closure due to government orders at the time of concluding the lease in 2013. The court anticipated that reasonable parties to a lease agreement would not have unilaterally imposed the economic risk associated with such circumstances solely on the tenant. Instead, they would have incorporated provisions in the agreement to allow for rent adjustments in the event of such unforeseen situations.[247] Noticeably, regarding the normative condition of whether it is unreasonable to allocate the risk to one party, the BGH held that the court must consider comprehensive factors, including both the situations of

[245] Meyer, "Obligation to Pay Rent for Commercial Premises During the Covid-19 Lockdown: The German Federal Court of Justice on the Distribution of Risk Between Tenants and Landlords," 581.
[246] Meyer, 583.
[247] Meyer, 583.

the tenant and the landlord, to weigh the interest between the two parties, and forbids a blanket solution. In principle, the tenant bears the risk associated with the capacity to benefit from using the rental property. However, in this case, the BGH found that the risk of store closure is not typical, making it unreasonable to assign the risk to the tenant exclusively.[248] About the tenant side, the court looked closely at financial loss, particularly the decline in turnover.[249] This economic hindrance does not need to be severe enough to pose an existential threat to the tenant. Furthermore, the court assessed the potential assistance that could have offset the tenant's losses and whether the financial aid could alleviate the tenant's economic hardships. Considering these three conditions, the BGH concluded that Article 313 BGB applies to equitably distributing the risks associated with the pandemic between the tenant and landlord.

After determining the applicability of Article 313 BGB, the BGH addressed how to adjust the contract. The court held that the lower court's division of the risk in half based on generalized rates was unreasonable and lacked a comprehensive weighing of the disadvantages suffered by the tenant and the landlord's interests. Accordingly, the BGH overturned the lower court's decision and remanded it for a new one. Although the BGH did not specify the distribution of risks between the parties, it outlined criteria to be considered for a possible adjustment of the contract, particularly examining the extent to which the associated risk should be assigned to the tenant and the landlord. Regarding the tenant's side, the court took into account the following factors: a) potential loss of turnover related only to the specific rental object in this dispute, not the corporate group's turnover; b) measures the tenant had taken or could have taken to reduce impending losses; c) financial aid received by the tenant from the state as compensation for pandemic-related disadvantages; and d) expected benefits from business insurance. The court emphasized disregarding the threat to the tenant's existence (Existenzgefährdung).[250] While a

[248] SKW Schwarz-Justyna Lidia Nivinski, "Contractual Adjustments Due to Disturbance of the Basis of the Contract," Lexology, July 5, 2022, https://www.lexology.com/library/detail.aspx?g=7deec276-2b2f-4a72-b9bc-97dd7830f707.
[249] Nivinski.
[250] COVID-19 and commercial leases: Case-by-case contract adjustment-the new decision of the Federal Court of Justice, "Covid-19-and-Commercial-Leases---the-New-Decision-of-the-Bgh---14-Jan-2022.Pdf," accessed February 27, 2023,

case-by-case approach by German courts is necessary to find justifiable solutions for each situation, this leads to high uncertainty about the outcome of risk distribution by courts.[251] Additionally, the tenant is disadvantaged in hardship claims as this party bears the burden of demonstrating the necessity of adapting the contract.[252]

BGH, 12 January 2022, XII ZR 8/21 addressed a central issue brought before German courts amid the COVID-19 pandemic – the equitable distribution of risks associated with the pandemic in leasing contracts. The BGH underscored the subordinate nature of the doctrine of changed circumstances by prudently exploring the potential applicability of other contractual mechanisms. Only when none of these alternatives prove applicable does the BGH turn to assess the necessity of relying on the changed circumstances provision. Despite the pandemic significantly affecting the basis of contracts, the BGH emphasized that such interference does not automatically warrant a contract adaptation. Instead, the court must thoroughly examine individual circumstances, including tenant losses and financial assistance received, to determine if holding the tenant accountable for full rent payment would be unreasonable. Regarding risk redistribution under Article 313 BGB, the BGH stressed the inappropriateness of a general fifty-fifty risk split. These views were affirmed in subsequent BGH decisions on 16 February 2022 (file No. XII ZR 17/21) and dated 2 March 2022 (file No XII ZR 36/21).[253]

3.1.4 Summary

Regarding the substantive elements of hardship in German law, the application of Article 313 BGB requires a thorough evaluation encompassing factual, hypothetical, and normative elements. These criteria entail an examination of the alteration in contractual circumstances, the

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https://www.freshfields.jp/48f050/contentassets/1a1ab4ce2af64332a6859dae754924c1/covid-19-and-commercial-leases---the-new-decision-of-the-bgh---14-jan-2022.pdf.

[251] Meyer, "Obligation to Pay Rent for Commercial Premises During the Covid-19 Lockdown: The German Federal Court of Justice on the Distribution of Risk Between Tenants and Landlords," 585.

[252] Meyer, 585.

[253] Andersen, Litigation and Arbitration Newsletter, Extraordinary change in economic relations, Litigation solutions, "20221018-LA-Newsletter-Final.Pdf," accessed February 27, 2023, ; SKW Schwarz-Justyna Lidia Nivinski, "Contractual Adjustments Due to Disturbance of the Basis of the Contract," Lexology, July 5, 2022, https://www.lexology.com/library/detail.aspx?g=7deec276-2b2f-4a72-b9bc-97dd7830f707.https://pl.andersen.com/wp-content/uploads/2022/10/20221018-LA-newsletter-final.pdf; SKW Schwarz-Justyna Lidia Nivinski, "Contractual Adjustments Due to Disturbance of the Basis of the Contract," Lexology, July 5, 2022, https://www.lexology.com/library/detail.aspx?g=7deec276-2b2f-4a72-b9bc-97dd7830f707.

unforeseeability at the contract's conclusion, and the unreasonableness of maintaining the contractual obligations.[254] The development of the doctrine of changed circumstances in this jurisdiction reflects a departure from conventional equity considerations, emphasizing a more objective scrutiny of risk distribution.

As for the roles of legislators, judiciary, and academia, the doctrine of changed circumstances primarily evolves as judge-made law influenced by academic insights. Court decisions illustrate the judiciary's commitment to providing relief in extraordinary hardship, showcasing their struggles to establish a clear theoretical foundation and develop a consistent approach.[255] Expanding the concept of impossibility and reliance on the good faith standard has provided a legal framework for courts to find justifiable solutions for contracts affected by crises. However, these techniques have weaknesses due to the ambiguity of economic impossibility, the limited remedy of contract discharge,[256] and the potential unfairness of the defense of financial ruin. In response to the need for a new theory, the Supreme Court took a significant turn by introducing the theory of disproportion of performance and counter-performance resulting from an unexpected change in circumstances.

Article 313 BGB codifies key elements established by case law and introduces normative elements open to judicial interpretation. While the Civil Code is the primary source of contract law in this civil law system, the significance of case law in changed circumstances cases is evident, demonstrating the dynamic interaction between academia and jurisprudence in shaping substantive rules for applying the doctrine. The principle of good faith in the BGB grants judges significant power to develop legal doctrine, even within a civil law system. The Supreme Court's authoritative decisions are a source of new legal norms passed on to lower courts, akin to precedents in common law systems. [257] Hence, landmark decisions are essential for comprehending Article 313 BGB. The Supreme Court in the recent COVID-19 related case

[254] Valentin Jentsch, "On the Need for Codification in European Contract Law : Adaption or Termination of Contractual Obligations in Times of Pandemic," Working Paper (European University Institute, 2021), https://cadmus.eui.eu/handle/1814/72139.
[255] Hay, "Frustration and Its Solution in German Law," 1961, 361.
[256] Basil Markesinis, *The German Law of Contract: A Comparative Treatise*, 328.
[257] Dawson, "Effects of Inflation on Private Contracts: Germany, 1914-1924," 178.

rejected of a blanket risk categorization and stressed case-by-case assessmen.[258] This wisdom application prevents likely abuse of the aggrieved party and arbitrary outcomes of litigation.[259]

3.2 The doctrine of changed circumstances in Japanese law

Different from the German case, Japan does not have any provisions in the Civil Code about the principle of changed circumstances. However, the doctrine is widely recognized by scholars and courts. This part analyses the proportional roles taken by scholars, courts, and legislators in the development of the doctrine in Japan.

3.2.1 Doctrinal status

In Japan, legal scholarship plays a crucial role in drafting and interpreting laws, which is noticeable in two ways. First, a recognized scholarly work can influence a judge's decision on controversial or novel legal issues. Second, a systematic analysis of a legal case prepared by legal scholars can surpass the case's importance and potentially affect future interpretations of the law.[260] This importance of academic positions helps to explain why a legal scholar may influence courts to apply an influential doctrine without explicit statutory provisions, as seen in the case of the changed circumstances principle. The power of legal scholars is evident when courts adopt doctrines outlined in scholarly works, especially when there is no specific statutory provision on the subject.

Japan has no legal regulation on hardship after rejecting its inclusion in the Civil Code reform. Nonetheless, the theory of changed circumstances has gained recognition as a common theory (tsūsetsu), with extensive and rich research recognized academically as an independent principle in Japanese contract law.[261] Professor Masaaki Katsumoto's publication titled "Jijō

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[258] Meyer, "Obligation to Pay Rent for Commercial Premises During the Covid-19 Lockdown: The German Federal Court of Justice on the Distribution of Risk Between Tenants and Landlords," 585.
[259] Rösler, "Hardship in German Codified Private Law – In Comparative Perspective to English, French and International Contract Law," 511.
[260] Giorgio Fabio Colombo, "Nomophilacy and Beyond: Comparative Reflections on Judicial Precedents by Supreme Jurisdictions in Italy and Japan," *European Journal of Comparative Law and Governance* 2, no. 4 (November 11, 2015): 285, https://doi.org/10.1163/22134514-00204001.
[261] Nakamura Hajime (中村肇), "About Changed Circumstances and the Decision-Making Process [事情変更の顧慮とその判断過程について (1)(鳥居 (秋場) 淳子先生古稀記念号]," *Seijo*

henkō no gensoku" (The Principle of Changed Circumstances in Civil Law) in 1926 is considered the origin and most influential study on the principle of changed circumstances.[262] Katsumoto's theory, based on a thorough analysis of comparative law, mainly German law after the First World War,[263] gained acceptance among Japanese legal scholars.[264] Based on Katsumoto's theory, Japanese researchers, led by Professor Kiyoshi Igarashi since 1990,[265] have developed this theory through comparative studies with foreign and international laws.

Katsumoto's theory emerged in response to the need to address gaps in Japanese contract law. The first motivation is the inadequacy of the principle of impossibility in addressing unforeseen circumstances. Under Japanese law, impossibility results in discharge if the performance becomes impossible if the cause is not attributable to the party seeking discharge, as outlined in Article 415 (1) of the Civil Code. This article states: "If an obligor fails to effect performance in accordance with the tenor and purport of the obligation, the obligee may demand compensation for damages; the same shall apply where performance becomes impossible as a result of a cause attributable to the fault of the obligor."[266] While this rule on impossibility is abstract regarding the scope of impossible situations, case law illustrates that impossibility encompasses both absolute and extreme hardship cases.[267] Courts construed impossibility in the context of the "commercial sense of society" (shakai tsunen) standard.[268] The 2017 Reform codified this standard under Article 412 as "in the light of the contract or other sources of claims

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Hoūgaku [成城法学] 75 (2007); Kiyoshi Igarashi and Luvern V. Rieke, "Impossibility and Frustration in Sales Contracts," *Wash. L. Rev.* 42 (1966): 453.

[262] Nakamura Hajime (中村肇), "About Changed Circumstances and the Decision-Making Process [事情変更の顧慮とその判断過程について (1)(鳥居 (秋場) 淳子先生古稀記念号]"; Igarashi and Luvern V. Rieke, "Impossibility and Frustration in Sales Contracts," 452.

[263] Alfons H Puelinckx, "Frustration, Hardship, Force Majeure, Imprévision, Wegfall Der Geschäftsgrundlage, Unmöglichkeit, Changed Circumstances," *Journal of International Arbitration* 3, no. Issue 2 (1986), https://doi.org/10.54648/joia1986014.

[264] Igarashi and Luvern V. Rieke, "Impossibility and Frustration in Sales Contracts," 452.

[265] Igarashi and Luvern V. Rieke, 452.

[266] John O. Haley, "Rethinking Contract Practice and Law in Japan," *JE Asia & Int'l L.* 47 (2008): 57–58. The English translation of this article is also available at https://www.japaneselawtranslation.go.jp/en/laws/view/3494/en#je_pt3ch1sc2sb1at6.

[267] Puelinckx, "Frustration, Hardship, Force Majeure, Imprévision, Wegfall Der Geschäftsgrundlage, Unmöglichkeit, Changed Circumstances."

[268] Alba F. Fondrieschi, "Dealing With the Unpredictable: The Impact of the Covid-19 Crisis on Lease Agreements in the Italian and Japanese Legal Systems," *European Review of Private Law* 30, no. 5 (October 1, 2022): 30, https://kluwerlawonline.com/api/Product/CitationPDFURL?file=Journals\ERPL\ERPL2022040.pdf.

and the common sense in the transaction."[269] In 10 Minroku 1453, Gr. Ct. Cass., Nov. 15, 1904, the Great Court of Cassation, the prewar appellation for the Supreme Court, established a strict requirement that only absolute physical impossibility, rather than mere hardship, a justified impossibility. However, the leading case 19Minroku 327, Gr.Ct. Cass.,May 12,1913 represents a significant departure from a prior decision by suggesting that hardship alone, without the necessity of absolute physical impossibility, can be a valid ground for exchanging non-performance liability.[270] In relevant cases decided before and soon after the defeat of the Second World War, courts grants discharge where the performance was not impossible but constituted extreme hardship. An illustrative instance is Hōritsu Shimbun (r-Jo. 827) 24, Hakodate Dt., Ct., Oct. 9, 1912 where a shipowner filed a claim for damages against a salvage company for not fulfilling a salvage contract. Under the defendant's tow, the ship sank again due to high waves. The court concluded that salvaging the ship was impossible because the expenses involved in attempting a second refloating of the vessel surpassed the potential gains for the shipowner.[271] The commercial sense of society standard provides the courts with a flexible criterion. However, judicial application of the doctrine of impossibility remains rigid, emphasizing the *pacta sunt servanda* principle. This strict enforcement of contractual liability, in turn, led to the necessity of the doctrine of changed circumstances.[272] Furthermore, the doctrine of impossibility does not tend to provide solutions to extreme increases in the market price of the subject matter of the contract after contract formation.[273] To deal with the later situation, courts rely on the concept of changed circumstances to adapt the contract to new circumstances to provide equity in enforcing contracts.[274]

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[269] Article 412-2(1): 'If the performance of an obligation is impossible in light of the contract or other sources of claims and the common sense in the transaction, the obligee may not request the performance of the obligation'. Available at https://www.japaneselawtranslation.go.jp/en/laws/view/3494/en#je_pt3ch1sc2sb1at1.
[270] These cases are reported at Haley, "Rethinking Contract Practice and Law in Japan," 58.
[271] John Owen Haley, *The Spirit of Japanese Law*, vol. 6 (University of Georgia Press, 1998), 170; Hōritsu Shimbun (r-Jo. 827) 24, Hakodate Dt., Ct., Oct. 9, 1912 is cited at Haley, "Rethinking Contract Practice and Law in Japan," 59. In this case, however, the court did not grant the excuse because the change was deemed foreseeable.
[272] Haley, "Rethinking Contract Practice and Law in Japan," 61.
[273] Puelinckx, "Frustration, Hardship, Force Majeure, Imprévision, Wegfall Der Geschäftsgrundlage, Unmöglichkeit, Changed Circumstances."
[274] Puelinckx.

In the 1920s, the discussion of the corresponding doctrine in Germany greatly influenced Japan.[275] After the fall of the Tokugawa shogunate in the mid-19th century, Japan endeavored to modernize its law. The reform of the outdated Japanese feudal law is crucial to respond to the need for a modern legal system, particularly in international relations marked by unequal treaties that disadvantaged the Japanese side. The initial adoption of French law gave way to a gradual shift towards German law in the 1880s, as Germany was compatible with the Japanese political system, and codified laws came into force in Germany at the same time. The lingering influence of German law, reflected most notably in the Civil Code, continued even after World War II when the U.S occupation led to significant legal reforms under American influence.[276]

In the first publication on the doctrine of changed circumstances, Professor Katsumoto defines this doctrine as follows:

> The change of circumstances theory changes the effect of the law by making it more in accord with the rule of Good Faith. When the change in circumstances occurs, without the fault of either party, between the formation of the contract and the time fixed for performance, and when the change of circumstance was so unforeseeable and of such character that the continuation of the obligation to perform is inconsistent with the rule of Good Faith, then the legal obligation should, because of the change in circumstances, be governed by the principle of Good Faith rather than the stricter law.[277]

Professor Igarashi asserts that the success of the Katsumoto doctrine can be attributed to its foundation on the good faith concept, enabling the seamless integration of the principle of changed circumstances into civil law. Additionally, the doctrine's clarity in defining the conditions for and consequences of its application from the outset contributes to its effectiveness. [278] Scholarly consensus determines the essential conditions as Professor Katsumoto‘s formulation, which include substantial changes in the basic circumstances of the contract, unforeseeability of the change, non-attribution of the change to parties, and the

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[275] Nakamura Hajime (中村肇), “About Changed Circumstances and the Decision-Making Process [事情変更の顧慮とその判断過程について (1)(鳥居 (秋場) 淳子先生古稀記念号]”; Igarashi and Luvern V. Rieke, “Impossibility and Frustration in Sales Contracts,” 542.
[276] Hiroshi Oda, *Japanese Law*, Fourth Edition, Fourth Edition (Oxford, New York: Oxford University Press, 2021), 13–18.
[277] Cited at Igarashi and Luvern V. Rieke, “Impossibility and Frustration in Sales Contracts,” 452.
[278] Puelinckx, “Frustration, Hardship, Force Majeure, Imprévision, Wegfall Der Geschäftsgrundlage, Unmöglichkeit, Changed Circumstances.”

continuation of the original contract being contrary to the principle of good faith.[279] The consequences of invoking this doctrine include the adaptation and termination of contracts.[280]

After the formulation by Professor Matsumoto, the development of the doctrine of changed circumstances in Japan continued to be influenced by discussions of foreign law and the need for a contract law regime to handle unexpected circumstances resulting from the collapse of the bubble economy in the 1990s.[281] The debates since 1990 have primarily focused on the advantages and disadvantages of contract adaptation and the duty to renegotiate. Renegotiation allows parties to exercise their autonomy in resolving disputes rather than relying on court-mandated adaptations. This approach has several benefits: parties are more familiar with the details of their contractual relationships than courts. Attempting to resolve disputes through renegotiation aligns with the inherent norms of contractual relationships. Dispute resolution should be future-oriented, and the renegotiation process can facilitate this perspective. Nevertheless, establishing proper and feasible sanctions for violations of the duty to renegotiate is challenging, and a legal obligation to renegotiate does not guarantee an effective process.[282] Additional regulations are necessary to ensure the renegotiation process works appropriately and fairly, such as setting limitations for renegotiation, granting the right to unilaterally request contract revisions, or obligating parties to accept revision requests when renegotiation fails.[283] Supporters of contract adaptation suggest that the law should emphasize that the aim of the

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[279] L Nottage, "Economic Dislocation and Contract Renegotiation in New Zealand and Japan: A Preliminary Empirical Study," *Victoria University of Wellington Law Review* 27, no. 1 (1997): 85, https://doi.org/10.26686/vuwlr.v27i1.6124; Hiroyasu Ishikawa, "Contractual Crisis and the Doctrine of Change of Circumstances: The Results and Contexts of the Reform of Contract Law in Japan," in *Dealing with Crisis: The Japanese Experience and Beyond*, 2023, 87, https://doi.org/10.4337/9781035300662.00016; Paul Waer, "Frustration of Contracts in Japanese Law: The Doctrine of Changed Circumstances," *Law in Japan* 20 (1987): 191.

[280] Shugo Kitayama (北山 修悟), "The Principle of Changed Circumstances [事情変更の原則]," *Jurisuto Zōkan (ジュリスト増刊)* 『民法の争点』 (September 2007): 225.

[281] Shugo Kitayama (北山 修悟), 225; Ishikawa Hiroyasu (石川博康), "Contractual Crisis and the Doctrine of Changed Circumstances [契約上の危機と事情変更の法理]," in *危機対応の社会科学 下 [Kiki taiō no shakai kagaku]* (東京大学出版会, 2020), 33, https://www.utp.or.jp/book/b481716.html.

[282] Shugo Kitayama (北山 修悟), "The Principle of Changed Circumstances [事情変更の原則]," 225.

[283] Ishikawa Hiroyasu (石川博康), "Contractual Crisis and the Doctrine of Changed Circumstances [契約上の危機と事情変更の法理]," 41–42.

doctrine of changed circumstances is to maintain the continuity of contractual relationships. They also advocate for a clear process for judges to follow when adapting contracts. [284]

Katsumoto defines the basic circumstances of a contract as the objective factors that provide an essential basis for the parties to establish a legal act. This definition excludes parties' subjective perceptions or false predictions. These circumstances must be known to both parties when concluding the contract. The changed circumstances must have occurred after the creation and before the termination of this relationship.[285] The requirement of a substantial change in circumstances is similar to the rule on interference with the basis of the transaction set out in Article 313 of the German Civil Code, and it covers both hardship and frustration of purpose.[286] Thus, two matters need to be clarified: the scope of the doctrine and the method to evaluate the changed circumstances. Concerning the first question, a survey of case law illustrates that in many cases, the court applied the doctrine to situations concerned with economic onerousness, such as the increase of immovable value, the fluctuation of Japanese currency (yen) value due to inflation, and frustration of purpose. For example, in Fukuoka Dist. Ct., June 27, 1974, Hanrei Jihō (No. 759), the defendant intended to construct a nine-floor building on a parcel of land neighboring the plaintiff's. The construction would position the plaintiff's land between the building and a railroad. Seeking efficient utilization of this land, the plaintiff granted the defendant an option on the land in 1963. Six years later, in November 1969, the plaintiff's land was expropriated for the construction of the Shinkansen line. The defendant exercised the option in February 1970, having not initiated construction. Due to the decision to build the Shinkansen line, the original objective of the sales agreement, which aimed at the efficient use of the land, became unattainable. Furthermore, the price of land has surged approximately fivefold since the conclusion of the option agreement. The court deemed these circumstances to constitute a

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[284] Shugo Kitayama (北山 修悟), "The Principle of Changed Circumstances [事情変更の原則]," 227.

[285] Nakamura Hajime (中村肇), "About Changed Circumstances and the Decision-Making Process [事情変更の顧慮とその判断過程について (1)(鳥居 (秋場) 淳子先生古稀記念号]."

[286] Tokyo High Court, 26 Aug. 1955, 6 Kakyū minshū, pp 1698–1704; Tokyo District Court, 26 Nov. 1959, Hanrei Jihō (No. 210), pp 27–28; Fukuoka District Court, 27 Jun. 1974, Hanrei Jihō (No. 759), pp 86–87. Cited at Alba F. Fondrieschi, "Dealing with the Unpredictable: The Impact of the Covid-19 Crisis on Lease Agreements in the Italian and Japanese Legal Systems," *European Review of Private Law* 30, no. 5 (2022): 886, https://doi.org/10.54648/erpl2022040.

substantial change in the situation.[287] Judges tended to examine the circumstances objectively, not based on subjective circumstances relating to the parties. For instance, the court determined that the widespread destruction of houses in a specific area constitutes an objective change in circumstances for real estate contracts.[288]

The second condition is unforeseeability of the change. Assessing unforeseeability requires evaluating the available information to the parties at the time of contract conclusion. Noticeably, monitoring the situation's progress is crucial for determining the exceptional level of change. District courts have deemed the drastic inflation between 1944 and 1950, the depreciation of the yen value after 1945, and the rise in land prices between 1948 and 1956 unforeseeable. In the above-mentioned case, the Fukuoka District Court ruled that when granting an option to acquire immovable property in 1963, the parties could not have foreseen the government's 1969 decision to construct a Shinkansen line, dramatically altering the land's price.[289] Similarly, the speed or degree of the change is especially vital when determining foreseeability in inflation cases. According to some courts, while inflation may be predictable, a sudden increase in inflation may not be foreseeable.[290]

The court assesses the foreseeability of the change based on the nature of the contract. In the following case, the Supreme Court rejected the hardship claim when the change was foreseeable. The original contract involved the seller (A) and a buyer (Y's predecessor), who entered into a house transfer agreement in November 1944. Subsequently, X acquired the rights and obligations from A, demanding that Y deliver the house to X. Y, unaware of the transfer between A and X, needed the house due to war-related damage to his own property. Y claimed to cancel the contract based on the principle of changed circumstances, and the appellate court approved this claim. However, the Supreme Court declined to apply the doctrine, emphasizing

[287] Fukuoka Dist. Ct., June 27, 1974. See more at Paul Waer, "Frustration of Contracts in Japanese Law: The Doctrine of Changed Circumstances," *Law Japan* 20 (1987): 193.
[288] 8 Minshū 448, 449 (Sup. Ct., Feb. 12, 1954); Hanrei jiho (No.924) 70, 72 (Osaka High Ct., Nov. 29, 1978). Cited at Waer, 191.
[289] Hanrei jihō (No. 759) 86, 87, Fukuoka Dist. Ct., June 27, 1974. Reported at Waer, 193.
[290] Tokyo District Court, 19 August 1959, Hanrei Jihō 200: 22, and Kobe District Court, Itami Branch, 26 December 1988, Hanrei Jihō 1319: 139. These cases are cited at Ishikawa, "Contractual Crisis and the Doctrine of Change of Circumstances: The Results and Contexts of the Reform of Contract Law in Japan," 88.

that it is insufficient to cancel the contract solely because the war destroyed the house. The court highlighted that at the time of concluding the contract on November 21, 1944, there was a foreseeable possibility of war-related destruction. Therefore, the change in circumstances was deemed not unforeseeable.[291]

As Professor Ishikawa noted, of the four requirements of the changed circumstances doctrine, foreseeability has been the central issue in lower court decisions.[292] Failure to prove unforeseeability has been crucial in changed circumstances claims, as in 8 Minshū 234, Sup. Ct, Jan. 28, 1954. In 1944, the plaintiff sold a house to the buyer. Before the buyer completed the performance, a bombing raid destroyed the seller's own house (not the house sold to the buyer). The seller sued for rescission because he would never have sold the house without knowing this destruction. The court rejected the claim, assuming that the loss caused by the air raid was foreseeable when the parties entered into the contract.[293]

The third prerequisite of the doctrine of changed circumstances is non-attributability.[294] It states that the doctrine does not apply when circumstances change due to the acts or omissions of the aggrieved party.[295] A review of lower court decisions shows that it is rare for a court to find the circumstances unforeseeable but attributable to the debtor.[296] The final requirement is that the continued enforcement of the original contract would be contrary to good faith. Prof. Igarashi calls this requirement "unreasonableness,"[297] and notes that this condition has become critical in the decided cases. The assessment of unreasonableness requires the court to examine the material change in circumstances in light of good faith; therefore, establishing a uniform

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[291] The Supreme Court, January 28, 1950, Minshū Vol. 8, No. 1, 234 Nakamura Hajime (中村肇), "Regarding Recent Changes in the Theory of the Principle of Changing Circumstances [近時の 「事情変更の原則」 論の変容と 「事情変更の原則」 論の前提の変化について]," *Meiji Daigaku Hōka Daigakuin Ronshū [明治大学法科大学院論集]* 6 (2009): 120–21.

[292] Ishikawa, "Contractual Crisis and the Doctrine of Change of Circumstances: The Results and Contexts of the Reform of Contract Law in Japan," 86, 88.

[293] 8 Minshū 234. Reported at Igarashi and Luvern V. Rieke, "Impossibility and Frustration in Sales Contracts," 455.

[294] The English word "non-attributability" is used by Paul Waer at Waer, "Frustration of Contracts in Japanese Law: The Doctrine of Changed Circumstances."

[295] Waer, 196.

[296] Ishikawa, "Contractual Crisis and the Doctrine of Change of Circumstances: The Results and Contexts of the Reform of Contract Law in Japan."

[297] Igarashi and Luvern V. Rieke, "Impossibility and Frustration in Sales Contracts," 455.

standard is the most challenging.[298] In general, the following are manifestations of the use of good faith as the standard for assessing material change: the imbalance between the respective obligations, where one of the parties has acted in bad faith, where the performance of the contract has become meaningless to one of the parties, or where performance has become extremely difficult.[299]

The assessment of changed circumstances requires fact-specific analyses that depend on a case-by-case basis. For example, in 5 Minshū 36, Sup. Ct, Feb. 6, 1951, the court denied relief on the ground that although there was a change of circumstances, it was totally against good faith to grant the seller the privilege of the change of circumstances doctrine since he had already delayed his performance at the time of the change.[300] As for the facts, a homeowner sold a house for 80,000 yen. The buyer made a down payment of 20,000 yen, and the balance was to be paid in three months after the seller completed the transfer of title. For fourteen months (July 1945 to September 1946), while the value of the yen depreciated dramatically, the seller failed to complete the transfer. After completing the transfer, the seller demanded 240,000 yen instead of 60,000 yen because the currency's value had altered.[301] In another case, the seller agreed in a contract for the sale of land concluded in 1935 that he would have the right to repurchase the land within 20 years for a fixed price. Upon exercising this option in 1955, the land's value surged to approximately 620 times the agreed price, attributed to the inflation and considerable rise in land prices following Japan's World War II defeat. Although parties could not have foreseen this significant change in 1935, exercising this right was judged to be a substantial breach of good faith and equity.[302] Professor Nishihara comments on this case and emphasizes the importance of considering default in non-performance as an element when assessing whether the enforcement

[298] Igarashi and Luvern V. Rieke, 455.
[299] Puelinckx, "Frustration, Hardship, Force Majeure, Imprévision, Wegfall Der Geschäftsgrundlage, Unmöglichkeit, Changed Circumstances"; Fondrieschi, "Dealing with the Unpredictable: The Impact of the Covid-19 Crisis on Lease Agreements in the Italian and Japanese Legal Systems," 887.
[300] Puelinckx, "Frustration, Hardship, Force Majeure, Imprévision, Wegfall Der Geschäftsgrundlage, Unmöglichkeit, Changed Circumstances."
[301] 5 Minshū 36, Sup. Ct, Feb. 6, 1951, cited at Igarashi and Luvern V. Rieke, "Impossibility and Frustration in Sales Contracts," 456.
[302] Court of Appeal Sendai April 14, 1978, Kaminshū Vol. 9 No. 4, 669. Cited at Puelinckx, "Frustration, Hardship, Force Majeure, Imprévision, Wegfall Der Geschäftsgrundlage, Unmöglichkeit, Changed Circumstances."

of a contract is against good faith. However, Professor Nishihara argues that courts should not overlook another important aspect of good faith: the respective obligations. The mere fact that a debtor is in default does not automatically preclude the application of the doctrine of changed circumstances. Instead, the decision should depend on various factors, such as whether the agreement was speculative, whether the original price factored the burden of risk, and whether the buyer had reserved funds for the purchase or used them for other purposes during the default.[303]

As for remedies, it is controversial whether the court can modify the contract without the mutual consent of the parties.[304] Japanese scholars' views diverge on whether the court could adjust the contract contrary to the parties' agreement.[305] The first preposition, endorsed by the majority of scholars, is that the only remedy available to the court is termination if the parties cannot agree to modify the contract. This approach opposes an adjustment against the parties' will, as it potentially interferes with the principle of party autonomy.[306] If the debtor rejects the creditor's proposed modification, lower courts terminate the contract without ordering a modification to which the debtor refuses to assent.[307] For example, in 6 Kakyū minshū 1698, Tokyo High Ct., Aug. 26, 1955, a homeowner agreed to sell a house in 1942 for 24,500 yen in 1952. Later, the buyer demanded an amount of 3,600,000 yen, which was the property's current value. The buyer refused to pay the new price, and the court allowed the promisor to rescind the contract because the court believed that the seller's proposal that the buyer rejected was reasonable given the change in monetary value.[308] This tendency is consistent with the Japanese

[303] Nishihara, Saimusha no rikō chintaichū ni jijō ga henkō shita bawai to jijō henkō no gensoku no tekiyō (Application of the doctrine of changed circumstances where circumstances changed during obligor's delay in performance), in Hanrei Minji Hō 18, 19 (1963); cited at Waer, "Frustration of Contracts in Japanese Law: The Doctrine of Changed Circumstances," 198.
[304] Igarashi and Luvern V. Rieke, "Impossibility and Frustration in Sales Contracts," 460.
[305] Nottage, "Economic Dislocation and Contract Renegotiation in New Zealand and Japan: A Preliminary Empirical Study," 83; Igarashi and Luvern V. Rieke, "Impossibility and Frustration in Sales Contracts," 459.
[306] Waer, "Frustration of Contracts in Japanese Law: The Doctrine of Changed Circumstances," 201.
[307] Igarashi and Luvern V. Rieke, "Impossibility and Frustration in Sales Contracts," 459.
[308]This case is reported at Igarashi and Luvern V. Rieke, 459.

tradition of emphasizing renegotiation to resolve disputes between parties.[309] However, there were also decisions in which which courts approved a claim for modification of the agreed price, even against the other party's will to the contract.[310] For example, in May 1942, the plaintiff entered into a contract with the defendant to buy real estate for 2,700 yen, and the plaintiff had paid 1,200 yen. The plaintiff promised to pay the remaining amount in October of the same year after the completion of the registration of the transfer of ownership. Later, the parties agreed to increase the unpaid amount to 5,000 yen. In the same year, the plaintiff paid 2,000 yen of the unpaid amount and completed the registration of the transfer of ownership of part of the land in question. After that, the plaintiff filed a lawsuit to transfer the remaining tracts. The court held that executing the original agreement would be contrary to good faith, considering that the price had increased considerably due to facts not attributable to the parties. Therefore, the court revised the unpaid balance from 3,000 yen to 4,000 yen.[311] However, Japanese courts generally are conservative toward the remedy of adjustment; this approach might be explained from the cultural point of view that the parties' search for consensus and cooperation plays a more prominent role in Japan. In this context, it can be inferred that a contract adjusted by the courts is a contract that lacks spontaneous consensus and, as a result, encounters more opposition.[312] Thus, it is questionable whether a Japanese court would order an amendment that the promisee does not agree to rather than allow termination if one party rejects the requested amendment.

The existence of an obligation of the parties to attempt renegotiation is controversial. Some scholars favor a duty to renegotiate because it is a collateral duty subordinate to the principle of good faith.[313] This line of thought argues that the primary objective of the changed

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[309] Shimada Makoto (島田 真琴), "Termination of a Continuous Contract and Good Faith under Japanese and English Law."
[310] 9 Kakyū minshū 666 (Sendai High Ct., April 14, 1958), Igarashi and Luvern V. Rieke, "Impossibility and Frustration in Sales Contracts," 460.
[311] Hanrei jihō (No. 851) 222, 226 (Sapporo Dist. Ct., July 30, 1976), cited at Waer, "Frustration of Contracts in Japanese Law: The Doctrine of Changed Circumstances," 202.
[312] Fondrieschi, "Dealing with the Unpredictable: The Impact of the Covid-19 Crisis on Lease Agreements in the Italian and Japanese Legal Systems," 30.
[313] Nottage, "Economic Dislocation and Contract Renegotiation in New Zealand and Japan: A Preliminary Empirical Study," 85.

circumstances doctrine is to encourage good faith behaviors.[314] Furthermore, in other areas of contract law, lower courts have imposed the duty to renegotiate.[315] On the other hand, some suggest that this duty can only be required after the court has investigated and decided that there is a real possibility of changed circumstances.[316]

The theory of changed circumstances finds its way into Japanese contract law based on the principle of good faith (shingi in Japanese) and trust.[317] Good faith is a principle imported from the German Civil Code[318] recognized in the Japanese Civil Code, and elaborated on in detail by the courts. Good faith is a concept based on common sense, which means that one should not harm the other person, considering his or her reasonable expectations.[319] Article 1(2) of the Civil Code states, "The exercise of rights and the performance of duties must be done in good faith."[320] Although good faith may seem vague, the judicial elaboration of this principle in Japan is primarily certain and predictable. Various rules on the principles of good faith can be derived from court decisions, such as the duty of the parties to disclose material information to the other party during contract negotiations, the duty to discuss matters that parties have not provided for in the contract, or the restriction or limitation of rights under the contract if the exercise of such rights might cause unexpected losses to the other party, or the duty not to terminate a current contract without justifiable cause.

In addition to good faith, there is a similar concept of trust, an ancient Japanese social norm, and an essential uncodified rule.[321] The concept of trust indicates that mutual trust is the critical value that builds up social and economic activities. A community member cannot survive

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[314] Igarashi and Luvern V. Rieke, "Impossibility and Frustration in Sales Contracts," 460.
[315] T Uchida "Gendai Keiyakuho no Aratana Tenkai to Ippan Joko [New Developments in Contemporary Contract Law, and General Clauses] (3)" (1993) 516 NBL 25; Nottage, "Economic Dislocation and Contract Renegotiation in New Zealand and Japan: A Preliminary Empirical Study," 85.
[316] Nottage, 85.
[317] Haley, "Rethinking Contract Practice and Law in Japan," 61.
[318] Igarashi and Luvern V. Rieke, "Impossibility and Frustration in Sales Contracts," 455.
[319] Shimada Makoto (島田 真琴), "Termination of a Continuous Contract and Good Faith under Japanese and English Law.," 49.
[320] English version is available at https://www.japaneselawtranslation.go.jp/en/laws/view/3494/en.
[321] Tomohiro Yoshimasa, "The Effects of the Corona Crisis on Contractual Obligations under Japanese Law.," *Zeitschrift Für Japanisches Recht* 26.51 (2021): 21–32; Hiroshi Wagatsuma and Arthur Rosett, "Cultural Attitudes towards Contract Law: Japan and the United States Compared," *UCLA Pacific Basin Law Journal* 2 (1983): 84.

if he or she loses trust in the other members. This principle has evolved over the centuries and governs the business activities of Japanese society as a fundamental rule. When resolving disputes, Japanese judges cannot ignore the relationship of trust as a fundamental rule of conduct. Courts apply the principle of good faith and trust to bridge a gap between the results of strict application of the law and common sense.[322] Case law provides a relatively solid theoretical and practical basis for applying the principle of good faith and trust. Although court decisions are not a source of law, it is possible to find a specific rule applicable to a similar situation by analyzing court decisions. According to previous judgments, one of the justifiable grounds for terminating a continuing contract is when the breach of contract broke the relationship of trust between the parties, such as repeated non-compliance with the contract despite warnings from the other party.[323]

3.2.2 Judicial preposition and recent application

Before discussing the role of the courts in developing and enforcing the doctrine of changed circumstances, it is first essential to introduce the characteristics of the Japanese judiciary. Japanese judges are among the most competent and trustworthy in the world, and court decisions provide concrete and sound reasoning of high quality. Japan belongs to the civil law family,[324] where the responsibility for lawmaking is traditionally given exclusively to the legislature, and there is no stare decisis rule. However, the judgments of the Supreme Court have a de facto binding effect, and consistent adherence to precedent is deeply rooted in judicial values, similar to precedents in common law countries. In some cases, this binding effect arises from an express statutory provision: for example, under both the Japanese Code of Civil Procedure and the Code of Criminal Procedure, failure to follow a precedent of the Supreme Court or other higher courts by a judgment of a lower court may be grounds for appeal (Code of Civil Procedure, Article 318, Code of Criminal Procedure, Article 405). There are other reasons

[322] Shimada Makoto (島田 真琴), "Termination of a Continuous Contract and Good Faith under Japanese and English Law.," 13–31.
[323] Shimada Makoto (島田 真琴), "Termination of a Continuous Contract and Good Faith under Japanese and English Law."
[324] Colombo, "Nomophilacy and Beyond," 281–315.

why lower courts usually follow the decisions of the Supreme Court. First, Supreme Court judges are usually selected from renowned law professors, former professional judges, or prosecutors; their rulings are usually legally sound. The most important decisions of the Supreme Court are published in two collections called Haireishū and Saibanshū, which are compiled by a group of highly qualified research judges. Haireishū contains abridged versions of the judgments and commentaries by the rapporteurs to highlight the rules embodied in the decision, while Saibanshū includes the full versions of the decisions. These judgments are frequently read and cited by the lower courts. In addition, Japanese law requires that the judgments contain clear and sufficient legal reasoning for their decisions, which makes them very persuasive. In addition, lower court rulings that conflict with Supreme Court rulings are more likely to be overturned by the Supreme Court. The Supreme Court is tasked with ensuring the uniform application of the law, which includes overturning lower court rulings that violate the rules established by the Supreme Court. The Supreme Court is divided into two courts with different jurisdictions, the Pretty Bench (Shouhōtei) and the Grand Bench (Daihōtei).[325] If a decision conflicts with a previous Supreme Court ruling, the case is referred to the Grand Bench. The decisions of the Grand Bench have the potential to influence legislative changes. Even in cases where the law is not formally changed, the Supreme Court's interpretation is authoritative and can only be changed by the Supreme Court itself. Finally, a deviation from the Supreme Court's decision can have negative consequences for the careers of lower court judges. Although Japanese judges are professional judges, they are evaluated and reappointed every ten years. According to some commentators, the Cabinet strongly influences the appointment and career of judges, which means that individuals who are judged unfavorably by the Cabinet may have difficulty advancing their careers.[326] For these reasons, Supreme Court decisions have a quasi-precedential status, almost like common law precedent,[327] the courts have long played an essential role in the development of the law, both by interpreting provisions of the Civil Code and by recognizing and applying principles

[325] Colombo, "Nomophilacy and Beyond."
[326] Colombo.
[327] Shimada Makoto (島田 真琴), "Termination of a Continuous Contract and Good Faith under Japanese and English Law."

from other sources. The Civil Code is the fundamental source of contract law. The Civil Code, promulgated in 1896, draws inspiration from the German Code. Much like its German counterpart, the Japanese Civil Code features straightforward provisions, necessitating a significant role for judges and jurists in its interpretation. Consequently, following the Code's enactment, courts played a crucial role in establishing doctrines to address legislative gaps, and the doctrine of changed circumstances is one such judicial theory. Thus, analyzing judicial decisions is central to evaluations of contract practice and law.[328]

While Japanese lawyers broadly acknowledge the doctrine of changed circumstances, court judgments applying this doctrine are notably scarce. In the context of the highest court, only one historical court decision where the court permitted to terminate a contract based on this doctrine (the Great Court of Cassation, December 6, 1944, Minshū 23, 613).[329] In this case, the parties had entered into a contract in 1939 for the sale of land, with the plaintiff intending to construct a factory on the property. Following the plaintiff's down payment but before the subsequently extended deadline for final payment (July 31, 1941), price control regulations were enacted in 1940, requiring official approval of the purchase price. Despite the defendant's proper application for price control on July 9, 1941, the authority had not issued any decision by the payment deadline, and ownership registration had not been transferred. Accordingly, on August 1, 1941, the plaintiff notified the defendant of the intention to rescind the contract and claimed the return of the down payment. The court determined that under such circumstances, the buyer might be entitled to rescind, as it would be contrary to the principle of good faith to bind the parties to the contract amid prolonged uncertainty of administrative procedures. While subsequent cases have recognized the applicability of the doctrine of changed circumstances, this case is the sole reported decision in which the highest court granted relief under the doctrine of

[328] John O. Haley, "The Japanese Judiciary Maintaining Integrity, Autonomy, and the Public Trust," in *Law in Japan: A Turning Point*, 2007; Haley, "Rethinking Contract Practice and Law in Japan," 54.
[329] The Great Court of Cassation was the predecessor of the Supreme Court of Japan. It started to adopt the principle of changed circumstances in this decision. Nottage, "Changing Contract Lenses: Unexpected Supervening Events in English, New Zealand, U.S., Japanese, and International Sales Law and Practice," *Indiana Journal of Global Legal Studies* 14, no. 2 (2007): 399, https://doi.org/10.2979/gls.2007.14.2.385; Haley, "Rethinking Contract Practice and Law in Japan," 61–62.

changed circumstances.[330] This case, however, signified the principle of change in circumstances as a recognized component of Japanese law.[331]

In the fourteen decisions by the Supreme Court involving changed circumstances, the court consistently rejected the applicability of the changed circumstances doctrine in each case. This consistency highlights the stringent standards the Supreme Court applies in examining the conditions for relief under the doctrine. Notably, the Supreme Court has yet to indicate its stance on the numerous decisions in which lower courts applied the doctrine of changed circumstances to modify contracts.[332]

Heisei 8 (e) 255, the Supreme Court, dated July 1st, 1997, was the most important precedent in this area of law. This case involved a dispute over golf course memberships between the appellants and Morley International Inc. This company managed the Hanshin Country Club golf course (Morley International took over the golf course business from Dainipon Golf Kanko Co.). The golf course was prone to collapse due to poor construction, and in 1990, Morley closed the course for reconstruction. Following a costly improvement project, Morley requested its members to pay additional deposits for using the golf course. However, the appellants refused to bear any economic burden besides the money already deposited and sought confirmation of their golf course membership status. The main issue in the case was whether the principle of changed circumstance could be applied, and the lower court found that it could because it was practically impossible for Morley to bear the enormous cost of improvement work for the golf course. However, the Supreme Court held that it was not appropriate to apply this doctrine because the change in circumstances was foreseeable and attributable to Dainipon Golf Kanko Co., the party to the contract at its conclusion. Therefore, the Supreme Court found that Morley International Inc. was liable to the golf course members. In line with previous judgments, the Supreme Court, while not accepting the application of the doctrine in this specific case, affirmed the conditions for its application as proposed by scholars and set out standards to assess the relevant conditions.

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[330] 23 Minsh6 613 (Gr. Ct. Cass., Dec. 6, 1944), Haley, "Rethinking Contract Practice and Law in Japan," 62.
[331] Igarashi and Luvern V. Rieke, "Impossibility and Frustration in Sales Contracts," 453.
[332] Ishikawa, "Contractual Crisis and the Doctrine of Change of Circumstances: The Results and Contexts of the Reform of Contract Law in Japan," 86.

In particular, the court stressed that requirements of unforeseeability of the events and non-attributability of parties must be judged by the parties to the contract at the time of the contract formation, especially where there was a transfer of contractual status. In addition, the case suggested that the evaluation of conditions was relatively contextual.[333] Moreover, in this case, the court ruled that the risk of collapse by natural or artificial causes was foreseeable for construction in places with changing natural topography. The standard set out in this judgment by the Japanese Supreme Court has significant reference value for future cases.[334] Regarding the assessment of the condition of unforeseability, the Supreme Court emphasized that when the status of the first contracting party has been transferred to another, foreseeability and responsibility have to be judged concerning the original contracting party as transferor because the transferee company had no chance to provide for the change of circumstances at the time the business was transferred but had already determined in the original contract.[335] However, there was also a critical view that according to this opinion of the Supreme Court, companies managing golf courses have to bear the risk resulting from the change of circumstances after forming the membership contract in almost all cases in which golf courses have been developed artificially. However, this abstract approach to the foreseeability condition is problematic because if the degree of the change is too extensive to an unreasonable level, it may be against the principle of good faith and unfair to assign the whole risk to the golf course and the possibility of successfully invoking the doctrine of changed circumstances rule is unduly restricted unreasonably.[336]

Although the Supreme Court applied reluctantly with the concern of excessive interference in the private autonomy of parties,[337] the lower courts applied the doctrine in several

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[333] 野山宏, 最高裁判所判例民事解説民事篇（平成 9 年度）808 頁
[334] Rosler, "Changed and Unforeseen Circumstances in German and International Contract Law.," 5.
[335] Takahiro Fujita, "Law of Property and Obligations," *Waseda Bulletin of Comparative Law* 18 (n.d.): 73–77.
[336] Takahiro Fujita, "Law of Property and Obligations."
[337] Osamu Saida (齋田統), "About the Principle of Changed Circumstances [事情変更の原則について]," *Atomigakuen Joshidaigaku Manejimento Gakubu Kiyō (跡見学園女子大学マネジメント学部紀要)* 21 (2016): 67–79.

cases, suggesting that courts endorse the contents established by legal scholars.[338] The decisions by lower courts provide a good illustration of the threshold of this doctrine. The court only applies the doctrine where it considers it highly unfair and unreasonable to bind the creditor to the contract.[339] In this aspect, courts consider whether the creditor made efforts to avoid or minimize damages to be incurred by the other party. For example, in a case where the purchaser of carvings for a household Buddhist altar notified termination of the continuous purchase contract because of the severe depression of the Buddhist altars' market, the court adopted the doctrine of changed circumstances, taking into account that the purchaser offered to introduce other customers of such carvings in his place. However, the supplier refused such an offer for his reasons. (Tokyo DCJ 18 August 1987, Hanji 1274-98).[340]

Due to the Coronavirus crisis, Japanese courts have dealt with one of the most common issues: delay or non-performance in lease contracts.[341] Governmental measures to combat COVID-19, such as forcing all retail stores to close for a certain period and restricting people from going out, have significantly affected the ability of tenants in lease contracts to generate profit. Generally, tenants demand a decrease in rent payment. In Japan, however, under the coronavirus crisis, no reported cases have applied the theory of changed circumstances. Based on earlier judicial reluctance to grant relief under this ground, scholars predict that courts would probably be very reluctant to invoke this doctrine even during the COVID-19 pandemic. If there is a possibility that the courts might apply the doctrine, it is likely to be in cases of frustration of

[338] Nakamura Hajime (中村肇), "Regarding Recent Changes in the Theory of the Principle of Changing Circumstances [近時の 「事情変更の原則」 論の変容と 「事情変更の原則」 論の前提の変化について]."

[339] Nakamura Hajime (中村肇), "About Changed Circumstances and the Decision-Making Process [事情変更の顧慮とその判断過程について (1)(鳥居 (秋場) 淳子先生古稀記念号]."

[340] Shimada Makoto (島田 真琴), "Termination of a Continuous Contract and Good Faith under Japanese and English Law.," 30.

[341] Fondrieschi, "Dealing with the Unpredictable: The Impact of the Covid-19 Crisis on Lease Agreements in the Italian and Japanese Legal Systems," 30.

purpose because the consequences of allowing a party to terminate a contract in such a scenario are relatively minor compared to other cases.[342]

Japanese courts focus on the overall contract relationship rather than the specific rights and duties of the parties.[343] Generally, most decisions have favored the lessor, with the court's primary concern being avoiding abuses. The court decisions are primarily based on the judicial discretional "doctrine of breach of mutual trust" (信頼関係破壊の法理/shinrai kankei hakai no hōri),[344] according to which a lessor may terminate a lease contract only when the non-performance of the lessee amounts to a breach of mutual trust between the parties. Under this doctrine, courts had allowed landlords to terminate lease contracts for non-performance of the lessee's obligation to pay rent only when the non-payment continued for a certain period and when it amounted to a particular sum. When applying this discretional doctrine, courts may permit non-payment of rent for a lengthier period under the coronavirus crisis.[345] For example, some courts ruled that if the tenant had always met his obligations before the pandemic crisis, parties could trust the contract relationship, and it was fair to give the tenant another chance.[346]

During COVID-19, litigation demonstrates that Japanese jurists prefer responding to the crisis by applying existing rules flexibly.[347] The court adopts a fact-sensitive and contextual approach based on good faith and fairness.[348] Instead of strictly adhering to legal classifications like impossibility or changed circumstances, courts take a pragmatic approach, focusing on whether contracting parties can still perceive themselves as bound by contractual obligations. Judges prioritize finding a fair and reasonable solution by considering the circumstances of each

[342] Yoshimasa, "The Effects of the Corona Crisis on Contractual Obligations under Japanese Law.," 21–32.
[343] Fondrieschi, "Dealing with the Unpredictable: The Impact of the Covid-19 Crisis on Lease Agreements in the Italian and Japanese Legal Systems."
[344] Tokyo District Court, 20 Jul. 2021, Westlaw Japan, WLJPCA07208028; Tokyo District Court, 7 Jan. 2021, D1-Law.com, 29062392; Tokyo District Court, 24 Dec. 2020, Westlaw Japan, WLJPCA12248016; Tokyo District Court, 15 Dec. 2020, Westlaw Japan, WLJPCA12158013. These cases are cited at Fondrieschi, 877.
[345] Yoshimasa, "The Effects of the Corona Crisis on Contractual Obligations under Japanese Law."
[346] Tokyo District Court, 26 Aug. 2021, Westlaw Japan, WLJPCA08268006; Tokyo District Court 15 Oct. 2020, D1-Law.com, 29061350. Cited at Fondrieschi, "Dealing with the Unpredictable: The Impact of the Covid-19 Crisis on Lease Agreements in the Italian and Japanese Legal Systems," 878.
[347] Yoshimasa, "The Effects of the Corona Crisis on Contractual Obligations under Japanese Law."
[348] Fondrieschi, "Dealing With the Unpredictable," 891.

case before addressing the issue of legal rules. Even when referring to rules like impossibility or changed circumstances, their role appears to confirm decisions already made on a case-by-case basis. To some scholars, the relaxed approach of Japanese courts in dealing with contracts during the COVID-19 crisis is advantageous and suitable, as relying solely on abstract rules may not necessarily make a legal system fair or more effective.[349]

3.2.3 Rejection of the stipulation of hardship provision in the reform of the Civil Code

The law of obligations remained unchanged from the adoption of the Civil Code in 1896 until the reform in 2017. In 2009, a working group of legal scholars and Ministry of Justice (MOJ) officials was formed to draft amendments to update contract law. The aim of amending the Civil code was to respond to the social and economic changes since its enactment and to make the law more understandable to ordinary people. One way to achieve this is by codifying judicially established rules from court cases.[350] During the reform of the law of obligations, the doctrine of changed circumstances was framed as a legal system embodying the principle of good faith. There was little objection to construe the doctrine of changed circumstances as an independent legal institution, as it had been recognized in court cases and scholarly theories. However, concerns were raised regarding how to stipulate the conditions and legal consequences of the doctrine, as well as the necessity and potential effects of its codification.[351] Law-makers eventually dismissed the proposal of changed circumstances.

Although the draft committee made efforts to elaborate on the substantive aspects of the doctrine, there was a lack of consensus and clarification. The first proposal was made in 2008 and underwent several changes in response to debates until 2014.[352] The deliberations during the

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[349] Fondrieschi, 893.

[350] Tomohiro Yoshimasa (吉政 知広), "The Doctrine of Changed Circumstances [事情変更の法理]," in *債権法改正と民法学II 債権総論・契約(1)*, by 安永正昭, 鎌田薫, and 能見善久 (Tōkyō-to Chūō-ku: 商事法務, 2018), 449.

[351] Ishikawa Hiroyasu (石川博康), "Contractual Crisis and the Doctrine of Changed Circumstances [契約上の危機と事情変更の法理]," 43–44.

[352] For details about the proposals, see Tomohiro Yoshimasa (吉政 知広), "The Doctrine of Changed Circumstances [事情変更の法理]."

drafting process focused on two main issues: the necessity of codifying the doctrine of changed circumstances and how to elaborate on the substantive matters of the codified provisions. There was concern that codifying the doctrine would lead to an increase in abusive behaviors by contractors seeking to avoid contracts under difficult circumstances. There were also strong opponents to judicial adaptation of contracts. Consequently, the final proposal in 2014 was much narrower than the first proposal, adding supplementary elaborations to conditions limiting the scope of application of the doctrine and keeping termination as the only remedy.

Specifically, the draft in 2009 stipulated four conditions: first, there must be changes in the basic foundation of the contract, which refers to the circumstances that parties relied upon when concluding the contract. Second, the change must create significant imbalances between the interests of the contracting parties or frustrate the purpose of the contract. Third, the change must occur after the conclusion of the contract, and fourth, the change must have been unforeseeable to both parties at the time of contracting.[353] The final proposal in 2014 emphasized the exceptional nature of changes and their severe consequences. It limited the scope of application of the doctrine to changes caused by abnormal natural disasters or other equally significant reasons. Additionally, there must be a significant change in the circumstances on which the contract was based, and the enforcement of the original contract must be grossly unjust, harming the equity between the parties. The nature of the contract and social norms regarding transactions (torihiki ueno shakai tsūnen) were used as reference elements to evaluate this requirement.[354] During the drafting process, several proposals and discussions addressed the duty of renegotiation and judicial adaptation of contracts. However, in the final version in 2014, termination was the only legal remedy included.[355] Critics argued that large companies seeking to alter contracts in their favor could exploit the duty to renegotiate and judicial modification of contract to exert pressure on smaller companies. Moreover, a duty to renegotiate contracts would improperly infringe on parties' economic freedom. There was also wondering about the lack of

[353] Tomohiro Yoshimasa (吉政 知広), 451.

[354] Tomohiro Yoshimasa (吉政 知広), 466.

[355] Tomohiro Yoshimasa (吉政 知広), 465.

technical expertise of courts to rewrite contracts. Due to solid opposition voiced in public comments regarding the modification remedy, the revised proposal in 2014 decided to limit the effects of hardship to only the termination of contracts. Prof. Ishikawa suggests that this proposed text mirrors the requirements for the doctrine of changed circumstances established by judicial precedents.[356] Despite these discussions, there was little in-depth agreement on the substantive matters of the doctrine.

The debate about the necessity of codifying the doctrine of changed circumstances occurred throughout the drafting process. Even the revised proposal, which maintains termination as the only available remedy, faced objections. Concerns were raised that an explicit statement of the doctrine in statute might lead to abusive claims, consequently increasing unnecessary lawsuits.[357] Some feared that excessive restrictions in the code provisions might make the requirements for applying the stipulated doctrine more stringent than existing requirements established in case law.[358] Additionally, there were worries about the courts' capacity to intervene in contracts. Even without the doctrine of hardship, it was assumed that parties could find their own ways of dealing with disputes. Japanese contractors are supposed to rely on ex-post measures to address hardship, a practice confirmed by recent empirical research indicating little change over time. This trade custom partly explains why Japan has not codified the doctrine while many other countries have institutionalized it in law.[359] Another reason for avoiding the codification of a specific legal provision is the trust in judicial discretion to apply the doctrine, as courts have been doing without an express provision.[360] Despite the reform's objective to make the code more transparent,[361] some practitioners argued that the code should remain a

[356] Ishikawa, "Contractual Crisis and the Doctrine of Change of Circumstances: The Results and Contexts of the Reform of Contract Law in Japan," 91.
[357] Takashi Uchida, "Contract Law Reform in Japan and the Unidroit Principles," *Uniform Law Review* 16, no. 3 (2011): 710, https://doi.org/10.1093/ulr/16.3.705.
[358] Ishikawa, "Contractual Crisis and the Doctrine of Change of Circumstances: The Results and Contexts of the Reform of Contract Law in Japan," 92.
[359] Ishikawa Hiroyasu (石川博康), "Contractual Crisis and the Doctrine of Changed Circumstances [契約上の危機と事情変更の法理]," 35–39.
[360] Ishikawa Hiroyasu (石川博康), 43–44.
[361] Reasons for the reform of the civil code is available at https://www.moj.go.jp/ENGLISH/ccr/CCR_00002.html; Fondrieschi, "Dealing with the

fundamental law with limited detail, given the legal tradition where crucial rules are found in case law and interpretive theories.[362] The role of courts in interpreting code provisions is emphasized, with court rulings historically diverging from the original code contents to develop essential doctrines.[363] The MOJ admits that courts have effectively applied it in practice, although no statutory provision on changed circumstances has existed.[364] There is a view that courts have effectively resolved cases where contracts are affected by unexpected events by applying the principle of good faith.[365] The draft committee also admitted that one reason for abandoning the proposal on changed circumstances was the technical difficulties and lack of consensus on defining the scope of the application.[366]

After extensive debate, the reform excluded a hardship provision, meaning that courts would continue applying this doctrine based on existing case law and scholarship, as before the Civil Code reform in 2017.[367] Some argue that the decision to keep the doctrine outside the new Civil Code stems from the desire to provide courts with a more flexible instrument less subject to restrictions than codified rules. While judicial rules are flexible, they are not vague or unclear, having long been recognized by legal scholars and the courts.[368]

The deliberations during the drafting process of the proposal on changed circumstances reflect the complexity of balancing the need for legal transparency and predictability by

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Unpredictable: The Impact of the Covid-19 Crisis on Lease Agreements in the Italian and Japanese Legal Systems," 715.

[362] Uchida, "Contract Law Reform in Japan and the Unidroit Principles," 715.

[363] Ishikawa, "Contractual Crisis and the Doctrine of Change of Circumstances: The Results and Contexts of the Reform of Contract Law in Japan"; Tomohiro Yoshimasa, "The Principle of Pacta Sunt Servanda and Its Exceptions under Japanese Contract Law," in *Contract Law in Changing Times: Asian Perspectives on Pacta Sunt Servanda*, 2022, https://doi.org/10.4324/9781003358305-6.

[364] Legislative Council of Civil Law (Law of Obligation) Subcommittee Material 19-1 Civil, Civil Law (Comments on Admendments to Law of Obligations) [法制審議会民法（債権関係）部会 部会資料項目一覧, 部会資料１９－１ 民, 民法（債権関係の改正に関する検討事項(14)） available at https://www.moj.go.jp/content/000108371.pdf

[365] Ishikawa Hiroyasu (石川博康), "Changes in Circumstances Due to the Pandemic and Contract Revisions [パンデミックによる事情変更と契約の改訂]," *Sakai Kagaku Kenkyū (社会科学研究)* 72.1 (2021): 29–30.

[366] Tomohiro Yoshimasa (吉政 知広), "The Doctrine of Changed Circumstances [事情変更の法理]," 467.

[367] Ishikawa, "Contractual Crisis and the Doctrine of Change of Circumstances: The Results and Contexts of the Reform of Contract Law in Japan," 86.

[368] Fondrieschi, "Dealing With the Unpredictable," 886.

codifying judicially established rules with the flexibility to address changed circumstances. Among the various reasons raised for not codifying the doctrine, the most significant seems to be the immaturity of contractual theories on the technical aspects of a provision on changed circumstances. Although there was an argument that codification of the doctrine is unnecessary because courts have applied it without statutory backing, it is essential to remember that one of the main purposes of amending the Civil Code was to codify judicial rules to make the law more accessible to ordinary people. Similarly, the assumed fact that Japanese contractors have a custom of dealing with disputes through post-contract renegotiation was not the decisive element preventing the incorporation of the doctrine of changed circumstances. This doctrine has played its own role in exceptional circumstances, as demonstrated by Japanese court cases and scholarly theories. With the abandonment of the proposal for a provision on changed circumstances, lawmakers decided to leave the crucial task of elaborating this doctrine to the courts, and it is for scholars to develop theories on this matter.

3.2.4 Summary

Change of circumstances constitutes a fundamental principle in Japanese contract law under theoretical works and court decisions. Drawing inspiration from German legal theory and practice, Japanese scholars have tailored this principle to address their own legal system's unique legal needs and values. In academia and case law, there is a widespread consensus on the four conditions necessary for applying the hardship rule: substantial changes in fundamental circumstances, unforeseeability, non-attributability of the change, and contract performance consistent with the principle of good faith. The doctrine's scope covers both economic hardship and frustration of contract situations. Evaluation in such cases is guided by the principles of good faith and the trust rule developed through case law. Regarding unforeseeability, the Supreme Court has established a significant rule for its assessment. For instance, in cases where a golf course is artificially created by altering the natural structures of the land, the Court contends that the risk associated with this artificial land structure is foreseeable for the golf course. This approach, abstractly allocating risks of unexpected circumstances, has raised concerns about

potentially violating the principle of good faith, particularly if the magnitude of the disaster far exceeds the average risk. Despite these concerns, the Supreme Court's rules provide valuable guidance and underscore the strict application of the doctrine to truly exceptional cases.

Regarding remedies, there are deviating perspectives on judicial termination and adjustment of contracts, with the prevailing approach highlighting the courts' flexibility to decide based on the specific circumstances of each case. While courts may favor contract termination over modification in hardship cases, this does not inherently imply that contract modification is less favorable. Culturally, Japanese parties tend to renegotiate before resorting to court proceedings, indicating a preference for amicable settlements.

Despite extensive debates within the legislative and academic communities, the decision not to codify the changed circumstances rule in the 2017 reform of the Civil Code reflects a deliberate choice to maintain flexibility for the courts to decide on a case-by-case basis. Concerns about the potential escalation of litigation accordingly with the codification of the doctrine have directed to the legislature's rejection. The latest proposal for reforming this doctrine includes a high threshold and limited remedies (termination) to address these concerns. However, implementing an overly regimented approach could make it challenging for debtors to successfully invoke the doctrine, rendering the new hardship law ineffective.

The absence of a statutory hardship provision is mitigated by substantial academic research and the courts' experience in handling hardship cases. Apart from the hardship provision, other relevant legal mechanisms, such as special laws on payment reduction in tenancy agreements and the principle of good faith and trust, offer potential solutions to unexpected circumstances. During the COVID-19 crisis, Japanese courts demonstrated a flexible approach based on the principle of trust to reach fair solutions, irrespective of fitting into specific legal regimes for unexpected circumstances. While efficient in ensuring contractual fairness during

crises in Japan, this fact-sensitive approach assumes the courts' familiarity with applying non-statutory rules in dispute resolution.[369]

The deliberate simplicity and generality of the Japanese Civil Code empower the courts to adapt the law to current circumstances, with some decisions deviating from the Code's original content. Confidence in the courts' competence to apply the doctrinal principle without statutory regulation was one of the reasons critics opposed codifying the hardship principle as part of the law of obligations reform. Additionally, the quasi-precedential value of Supreme Court decisions and the substantial influence of legal scholarly opinions provide a favorable context for the judicial application of this doctrine. In the landmark case of Heisei 8 (e) 255 on July 1, 1997, the Supreme Court established crucial rules for the conditions of applying this principle.

The supreme courts and legislatures consistently show an apparent reluctance to entertain hardship applications, stressing that this doctrine should only be invoked in the rare and most exceptional cases. The Supreme Court's ongoing hesitance is evident in its refusal to acknowledge hardship applications; to date, this highest court has never accepted such applications and has refrained from commenting on instances where lower courts did entertain them. Regarding conditions, pivotal decisions from the Japanese Supreme Court have defined the parameters of changed circumstances and marked significant advancements. The court's rulings underscore that the threshold for a successful application for a change of circumstances is notably high. Even amidst the global pandemic, Japanese courts adhere to existing regulations when addressing cases involving changed circumstances. This tendency suggests, as argued during the 2017 civil code reform that Japanese courts are inclined to exhaustively explore solutions within the framework of other existing laws before resorting to the doctrine of changed circumstances.

3.3 The theory of Imprévision in French law

The recent reform of the French Civil Code finally incorporates the doctrine of changed circumstances under the heading of imprévision. This new provision shows a remarkable change

[369] Nakamura Hajime (中村肇), "About Changed Circumstances and the Decision-Making Process [事情変更の顧慮とその判断過程について (1)(鳥居 (秋場) 淳子先生古稀記念号]."

in the French approach to the doctrine because this jurisdiction has been traditionally reluctant to the idea of judicial adaptation of contracts. This part explains the motives for the changes in attitudes towards the doctrine of changed circumstances in France.

3.3.1 Traditional judicial reluctance toward the theory of Imprévision

The theory of imprévision, which means a lack of foresight, is the theory corresponding to changed circumstances in France.[370] The Civil Code underwent modernization in 2016 and incorporated a new provision on imprévision in Article 1195. This provision grants courts the authority to adapt or terminate contracts. However, how French courts would exercise this newfound discretion remains unclear. To comprehend Article 1195 of the Civil Code, examining the judicial approach to this theory before the reform is essential.[371]

Initially, courts in France rejected the theory of imprévision in civil and commercial cases.[372] The Cour de cassation, the highest court in civil matters, has been resistant to allowing the discharge or adjustment of contracts that have become excessively onerous.[373] This cautious inclination aligns with the primary objective of the Napoleon Civil Code, which aimed to mitigate judicial discretionality and confine judicial autonomy within specific boundaries.[374] In line with the prevailing scientific positivism and Enlightenment philosophy, which valued the freedom of contract, the Napoleon Code did not include any provisions on imprévision.[375] Former Article 1134 of the Civil Code emphasizes that: "Contracts lawfully entered into have the

[370] Sharma, "From 'Sanctity' to 'Fairness': An Uneasy Transition in the Law of Contracts?," 135.
[371] Catherine Pedamon, "The Paradoxes of the Theory of Imprevision in the New French Law of Contract: A Judicial Deterrent?," *Amicus Curiae* 112 (2017): 11.
[372] H. G. Beale, *Cases, Materials and Text on Contract Law* (Hart, 2010), 629; Kovac and Poncibò, "Towards a Theory of Imprévision in the EU?," 351; Leo M Drachsler, "Frustration of Contract: Comparative Law Aspects of Remedies in Cases of Supervening Illegality," *N.Y.L. SCH. L. REV.* 3, no. 1 (1957): 67.
[373] Luca E. Perriello, "Terminating or Renegotiating? The Aftermath of COVID-19 on Commercial Contracts," *Comparative Law Review* 11, no. 2 (2020): 83.
[374] Catherine Pédamon and Radosveta Vassileva, "Contractual Performance in COVID-19 Times: Does Anglo-French Legal History Repeat Itself?," *European Review of Private Law* 29, no. 1 (March 1, 2021), https://kluwerlawonline.com/api/Product/CitationPDFURL?file=Journals\ERPL\ERPL2021002.pdf.
[375] romaFrancesca Benatti, "The Imprevision in the Reformed Civil Code," *Revista de La Facultad de Jurisprudencia (RFJ)* 10 (2021): 158; Pedamon, "The Paradoxes of the Theory of Imprevision in the New French Law of Contract," 10.

force of law for those who have made them. They can only be canceled by mutual consent or for causes allowed by the law...".[376]

The 1804 Civil Code recognized only exception to the principle of *pacta sunt servanda* which is the principle of force majeure. The former Article 1148 of this code stated that no damages could be awarded if a debtor was prevented from fulfilling their obligation due to force majeure or a fortuitous event. However, the article did not define force majeure explicitly, leaving its application criteria to jurisprudence. Courts have interpreted this principle strictly. Accordingly, the event must be external, unforeseeable, and unavoidable.[377] In particular, unforeseen events must render the execution of the contract absolutely impossible, not just more onerous for a party.[378] The current Article 1218 of the Civil Code codified prior legal practice and clearly defined force majeure. Force majeure occurs when an event beyond the promisor's control prevents them from fulfilling their obligation. This event should not have been foreseeable when parties concluded the contract, and appropriate measures cannot avoid its effects.[379] Courts hesitate to relieve contractual obligations under the doctrine of force majeure when the performance becomes excessively onerous. One of the most demanding requirements is that the aggrieved party can rely on a force majeure excuse when no alternative solution is available, as the principle of good faith requires the promisor to use its best efforts to prevent the consequences of unexpected circumstances.[380] Before 1914, the only doctrine available for releasing a party from its obligations in changed circumstances was force majeure, and obtaining relief under this doctrine was extremely difficult in the courts.[381]

The *Canal de Craponne* case, dating back to 1876, stands as a famous and long-standing case law in contract law, addressing whether courts can adjust contractual terms to achieve

[376] The English version, translated by Georges Rouhette, Professor of Law, with the assistance of Dr. Anne Rouhette Berton, Assistant Professor of English, of the 1804 Civil Code is available at https://www.fd.ulisboa.pt/wp-content/uploads/2014/12/Codigo-Civil-Frances-French-Civil-Code-english-version.pdf.
[377] Pédamon and Vassileva, "Contractual Performance in COVID-19 Times," 7–8.
[378] Rene David, "Frustration of Contract in French Law The Treatment of Frustration of Contract in Foreign Legal Systems," *Journal of Comparative Legislation and International Law* 28 (1946): 12.
[379] Translated by Pédamon and Vassileva, "Contractual Performance in COVID-19 Times," 22.
[380] Cour de cassation Assemblée plénière 14 avril 2006, n°02-11.168, https://www.legifrance.gouv.fr/juri/id/JURITEXT000007051847, cited at Pédamon and Vassileva, 25.
[381] David, "Frustration of Contract in French Law The Treatment of Frustration of Contract in Foreign Legal Systems," 12.

fairness in light of new circumstances. The Cour de cassation rejected a claim to modify a contract based on the theory of révision pour imprévision (modification on the ground of unforeseeability).[382] The case involves an agreement established in 1567 between Canal de Craponne and local residents. De Craponne committed to constructing a canal in Pélissane. In return, the inhabitants agreed to pay a modest sum for the canal's maintenance canal because they got benefits from this project. Over three centuries, the contribution became insufficient to cover maintenance costs, leading the heirs of the de Craponne family to sue for an adaptation to the contract. The court of appeal adjusted the contractual amount by a contemporary price based on the principle of equity. However, the Cour de cassation overturned this decision, asserting that courts did not have the power to substitute new terms in a contract, even if deemed equitable.[383]

The decision was grounded in the binding force of contracts, enshrined in Article 1134 of the Civil Code (now Article 1103),[384] and motivated by the contract's sanctity, symbolizing the parties' autonomy and the imperative to ensure legal certainty by constraining the judicial role.[385] Essentially, the Cour de cassation read the *pacta sunt servanda* rule in absolute way[386] and held that the court of appeal had contravened Article 1134 by altering the maintenance costs for the Craponne canal. The court ruling emphasized that a court should only introduce new terms if the parties have explicitly agreed or unless a legal provision allows it.[387] Despite recognizing the apparent necessity of adapting fees, the court maintained that modification required explicit legal

[382] Civ 6 Mar 1876, Canal de Craponne, Reinhard Zimmermann and Simon Whittaker, *Good Faith in European Contract Law* (Cambridge University Press, 2000), 561; Konrad Zweigert and Hein Kötz, *Introduction to Comparative Law* (Clarendon Press, 1992), 524–27.
[383] English version of Cass civ, 6.3.1876, D 1876.I.93, translated by Tony Weir, Copyright belongs to Professor B. S. Markesinisavailable at https://law.utexas.edu/transnational/foreign-law-translations/french/case.php?id=1186; See more at Beale, *Cases, Materials and Text on Contract Law*, 1131; Zivkovic Velimir, "Hardship in French, English and German Law," 242; Tobias Lutzi, "Introducing Imprévision into French Contract Law - A Paradigm Shift in Comparative Perspective," in *The French Contract Law Reform: A Source of Inspiration?*, ed. Sanne Jansen and Sophie Stijns, IUS Commune: European and Comparative Law Series (Intersentia, 2016), 95, https://doi.org/10.1017/9781780685533.006.
[384] Montefusco, "Interpreting the Conditions for Imprévision: The Goals of the Reform Projects as a Decisive Tool for French and Belgian Courts," 201.
[385] Benatti, "The Imprevision in the Reformed Civil Code," 158–59.
[386] Rösler, "Hardship in German Codified Private Law – In Comparative Perspective to English, French and International Contract Law," 500–501.
[387] Rowan, "The New French Law of Contract," 820.

authorization.[388] This decision reflects the stance of civil courts,[389] driven by concerns that an alternative ruling could create unwarranted loopholes for parties seeking to evade contractual obligations and undermine legal certainty in contract law.[390] The subsequent decisions of the Cour de cassation confirm the strict approach to the theory of imprévision.[391]

The highest administrative court in France, the Conseil d'Etat, applies the theory of imprévision to administrative contracts under certain circumstances. In the landmark case of Gaz de Bordeaux 1916 (CE, 1916, req. No 59928), the Conseil d'Etat modified a contract between a utility company and a public entity, the Bordeaux city commune. The company agreed to provide gas for lightening the city streets. After the outbreak of World War I, the price of coal used for gas production increased significantly, and the company wanted to adapt the gas price to the changed circumstances. The initial court of first instance dismissed the claim. However, the Conseil d'État recognized the public interest in maintaining a continuous gas supply and granted the claim, modifying the contract based on the doctrine of imprévision. The gas company faced the risk of insolvency if it could not adjust the gas price, which would have jeopardized the city lighting in Bordeaux.[392] Therefore, the Conseil d'État deemed the price increase exceptional and ruled in favor of the affected party to ensure the uninterrupted provision of public services.[393] Furthermore, the Conseil d'État ruled that the increase in production costs due to coal prices was unforeseeable and extraordinary.[394] This decision, grounded in the public interest of maintaining

[388] Berger and Behn, "Force Majeure and Hardship in the Age of Corona: A Historical and Comparative Study," 18.
[389] Benatti, "The Imprevision in the Reformed Civil Code," 244.
[390] Berger and Behn, "Force Majeure and Hardship in the Age of Corona: A Historical and Comparative Study," 18.
[391] Cass civ, 6 June 1921, Bull civ, n° 95; Cass com, 18 January 1950, D 1950, 227; 18 December 1979, pourvoi n° 78–10.763, Bull civ IV, n° 339; civ 3, 30 May 1996, pourvoi n° 94–15.828, Contrats, conc, consom 1996, n° 185; com 18 Mar 2009, pourvoi n° 07–21.260, Bull civ III, n° 64. These cases are cited at Tobias Lutzi, "Introducing Imprévision into French Contract Law - A Paradigm Shift in Comparative Perspective," in *The French Contract Law Reform: A Source of Inspiration?*, ed. Sophie Stijns and Sanne Jansen, 1st ed. (Intersentia, 2016), 95, https://doi.org/10.1017/9781780685533.006.
[392] Rösler, "Hardship in German Codified Private Law – In Comparative Perspective to English, French and International Contract Law," 500–501.
[393] Zivkovic Velimir, "Hardship in French, English and German Law," 244; Hondius and Grigoleit, *Unexpected Circumstances in European Contract Law*, 147.
[394] Benatti, "The Imprevision in the Reformed Civil Code," 160.

the service cycle in the public sphere,[395] allowed for the readjustment of a gas supply contract. Despite acknowledging the imprévision doctrine, the Conseil d'État did not permit the parties to renegotiate the contract.[396] After World War I, the Conseil d'Etat applied the doctrine of imprévision several times in government contracts involving public works and utilities to modify or terminate contractual obligations if the performance of the contract had become excessively burdensome. The aim was to ensure public welfare and maintain contracts essential to public life's orderly conduct, a need not found in ordinary commercial contracts.[397]

In addition to administrative courts accepting the theory of imprévision for a public interest, there has been a growing embrace of contractual solidarity (solidarisme contractuel). This trend has laid a robust foundation for a fresh perspective on the theory of imprévision. The concept of contractual solidarity suggests a different approach to interpreting *the pacta sunt servanda* principle, giving more importance to the principle of good faith.[398] Under the influence of contractual solidarity, the commercial chamber of the Cour de cassation, in two rulings, determined that a party's refusal to renegotiate the contract in light of significant changes that have disrupted the initial contractual balance might constitute a violation of its duty to execute the contract in good faith.[399] Nevertheless, this relatively lenient application of the theory of imprévision by the Cour de cassation has resulted in only a minimal departure from the traditional approach. Some scholars argue that these decisions are specific to the circumstances of the cases and do not signify a broader paradigm shift. Furthermore, the outcomes in these cases involved a damage award for breaching the obligation to renegotiate rather than modifying the contract. Additionally, other chambers of the Cour de cassation have yet to confirm this approach.[400]

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[395] Natia Chitashvili, "Substantive Legal Prerequisites of Hardship and Scale of Legitimate Intervention of the Court into the Private Autonomy," *Journal of Law*, no. 2 (December 31, 2021): 76.
[396] Berger and Behn, "Force Majeure and Hardship in the Age of Corona: A Historical and Comparative Study," 118–19.
[397] Sharma, "From 'Sanctity' to 'Fairness': An Uneasy Transition in the Law of Contracts?," 135.
[398] Lutzi, "Introducing Imprévision into French Contract Law - A Paradigm Shift in Comparative Perspective," 2016, 96–97.
[399] Cass com, 3 November 1992, Huard, pourvoi n° 90–18.547, Bull civ IV, n° 338; 24 November 1998, pourvoi n° 96–18.357, Bull civ IV, n° 277. Lutzi, 97.
[400] Lutzi, 97.

3.3.2 Temporary measures and their limitations

Despite some lower court rulings favoring adaptation due to hardship, the Cour de cassation had maintained a strict stance even during the crises following World War I and II.[401] However, the limited judicial intervention in contracts does not necessarily mean that there is no recourse for parties facing extreme circumstances. In such situations, the Parliament has provided piecemeal solutions through temporary measures to address economic upheavals.[402] Alongside these temporary measures, special legislation was enacted to allow for the judicial revision of contracts in various sectors, including lease contracts, divorce, copyright, and public works.[403] These bottom-up provisions demonstrate lawmakers' willingness to create exceptions to the principle of the sanctity of contracts to assist specific categories of contractors facing significant imbalances due to major social changes.[35] The following introduces some of these particular laws to draw common approaches of legislators to unexpected circumstances and judicial inclination when enforcing these laws. In addition, this examination stresses the limitations of temporary legislation, emphasizing the need for a general top-down provision applicable to various contracts. Simultaneously, it provides context to analyze the interpretation and enforcement of the new article on the theory of imprévision in the civil code.

One example is the Act of Jan. 21, 1918, the Loi Faillot, (DP 1918.4.261), which applied to commercial contracts concluded before 1914.[404] This law allowed courts to terminate or suspend contract performance if war-related costs of performance or losses exceeded reasonable calculations made at the time of contracting. Article 3 of this law mandated parties to call for a conciliation before filing the claim. Nevertheless, the Cour de cassation restricted the application of this emergency legislation for legal certainty.[405] Additionally, the Act no. 49-547 of Apr. 22,

[401] Zivkovic Velimir, "Hardship in French, English and German Law," 244.
[402] Zivkovic Velimir, 244.
[403] Montefusco, "Interpreting the Conditions for Imprévision: The Goals of the Reform Projects as a Decisive Tool for French and Belgian Courts," 204.
[404] Drachsler, "Frustration of Contract: Comparative Law Aspects of Remedies in Cases of Supervening Illegality," 67; David, "Frustration of Contract in French Law The Treatment of Frustration of Contract in Foreign Legal Systems," 14.
[405] Pédamon and Vassileva, "Contractual Performance in COVID-19 Times," 9.

1949, D.1949.241 granted termination for contracts whose economic balance was upset by the war. Like the mentioned law of January 21, 1918, Article 3 of this law explicitly requires that parties try to renegotiate the contract by themselves before going to court, thus promoting freedom of contract.[406]

The most recent state intervention is the ordonnance n° 2020–306 of March 25, 2020, by the Government, addressing the effects of COVID-19 on contractual performance. This ordonnance aims to freeze contractual clauses imposing liability for non-performance during the legally protected period.[407] However, scholars observe that this ordonnance is patchy with specific and limited scopes, and the legal principles of standard contract law remain crucial in addressing challenges posed by the COVID-19 crisis.[408] Hence, the Civil Code reform needs to consider incorporating a new rule that would broadly apply to the majority of cases involving changed circumstances.

Hence, the bottom-up approach suggests that legislators addressed the issue of changed circumstances. Typically, the conditions triggering relief involve the upset of contractual balances between the duties and interests of parties. As for legal consequences, these laws generally encourage parties to renegotiate before resorting to litigation and grant courts the authority to adapt or terminate contracts in exceptional circumstances. The requirements and remedies of these statutes may offer insights into the interpretation of modern law regarding the theory of imprévision, as outlined in Article 1195 of the Civil Code. This thesis will revisit these approaches when discussing the conceptual aspects of Article 1195 in Part 3.3.4 of this chapter. Nonetheless, it is essential to note that these temporary legislations are sporadic, and courts have tended to apply them conservatively.

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[406] Pédamon and Vassileva, "Contractual Performance in COVID-19 Times"; Montefusco, "Interpreting the Conditions for Imprévision: The Goals of the Reform Projects as a Decisive Tool for French and Belgian Courts," 9.

[407] Circulaire du 26 mars 2020 de présentation des dispositions du titre I de l'ordonnance n° 2020–306 du 25 mars 2020 relative à la prorogation des délais échus pendant la période d'urgence sanitaire et à l'adaptation des procédures pendant cette même période, http://circulaires.legifrance.gouv.fr/pdf/2020/03/cir_44952.pdf, cited at Pédamon and Vassileva, "Contractual Performance in COVID-19 Times," 21.

[408] Pédamon and Vassileva, 22.

3.3.3 Shift in the courts' stance towards the theory of Imprévision

In response to unforeseen circumstances arising from World War I, courts turned to the theory of imprévision, influenced by the theories of solidarity and contractual justice.[409] The Cour de cassation has demonstrated a more lenient stance towards hardship cases, as evidenced by instances where courts have invoked the principle of good faith to amend contracts.[410] Over time, courts accepted various variants of the theory of imprévision, marked by recognizing a duty to renegotiate based on the principle of good faith.[411]

Before the reform, French courts exercised discretionary powers to revise civil contracts without an established general principle. The judicial revision did exist functionally in cases where courts did not expressly mention the notion of judicial revision of contract but actually modified the terms agreed upon by the parties. Since the early 1900s, Perrin and Maury contended that judicial interventions to modify contracts were taking place and advocated this judicial inclination.[412] Applying a functionalist approach, these scholars examined numerous court decisions where contracts were revised, emphasizing the practical outcomes rather than purported principles.[413] This study revealed two key findings: 1) Judicial revision is present in French contract law even in the absence of an established general principle, and 2) courts revise contracts based on two separate bases—either by hypothesizing the parties' intended course of action or by imposing an external standard on the parties, often grounded in the standard of fairness. Courts use flexible techniques such as reducing the contract price, substituting new terms, or narrowing the scope of a term to prevent opportunistic and abusive behaviors of parties and to achieve fairness.[414]

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[409] Cass. Com., 3 Nov. 1992, Huard, pourvoi no. 90-18.547; Cass. Com., 24 Nov. 1998, pourvoi no. 96-18.357. These cases are cited at Montefusco, "Interpreting the Conditions for Imprévision: The Goals of the Reform Projects as a Decisive Tool for French and Belgian Courts," 205, 207.
[410] Schwenzer, "Force Majeure and Hardship in International Sales Contracts," 711.
[411] David, "Frustration of Contract in French Law The Treatment of Frustration of Contract in Foreign Legal Systems," 13.
[412] Pierre Jr. Legrand, "Judicial Revision of Contracts in French Law: A Case-Study," *Tulane Law Review* 62, no. 5 (1988 1987): 966, 971.
[413] Legrand, 969.
[414] Legrand, 1048–50.

The French Civil Code provides fundamental contract law principles. These principles offer general guidance, facilitating the interpretation of contract law principles and filling gaps when necessary. Along with the principle of freedom of contract and the binding force of contract, good faith is one of the primary principles of contract law. Article 1104 of the reform Civil Code mandates that contracts must be negotiated, exectued, and performed in good faith. Compared with the 1804 Code, which required contracts to be performed in good faith, the reforms have codified case law, extending the principle of good faith to pre-contractual negotiations and formation stages. Although the new Code does not codify the principle that contract termination must be in good faith, previous case law has also shown that courts did not enforce termination clauses invoked in bad faith. Case law also suggests that good faith requires parties to conduct themselves ethically, displaying loyalty, cooperation, and coherence.[415]

One variant of the theory of imprévision is the gradual emergence of a duty to renegotiate in good faith.[416] The public interest can hardly justify the different treatment of public and private contracts. The commercial chamber of the Cour de cassation has departed from the traditional strict approach and used the notion of good faith to impose on commercial parties the obligation to renegotiate the contract in cases of hardship. In some cases in the 1990s,[417] the Cour de cassation ruled that the principle of good faith implies an obligation to renegotiate in cases of commercial impracticability. In the Huard case of November 3, 1992 (Rev. trim. dr. civ., 1993, 124), the Cour de cassation ordered a contracting party to pay damages for a breach of its obligation to perform in good faith. The court held that the refusal to renegotiate the contract terms after the other party's performance had become considerably more onerous constituted a breach of contract. In a later decision (March 16, 2004, D. 2004, 1754), the Cour de cassation further elaborated and confirmed this approach.[418] In these cases, the sanctity of the severely imbalanced contract jeopardized the parties' continued participation in the market. In the Nancy Court of Appeal, September 26, 2007, D. 2008.1120, the Court instructed the

[415] Rowan, "The New French Law of Contract," 813–14.
[416] Pedamon, "The Paradoxes of the Theory of Imprevision in the New French Law of Contract," 11.
[417] Com. 3 November 1992, Huard, no 90-18.547, Bull. civ IV no 338; Com. 24 November 1998, Chevassus-Marche,no 96-18.357, Bull. civ IV no 277, reported at Pedamon, 12.
[418] Rowan, "The New French Law of Contract," 821.

obligation to renegotiate a supply contract on the legal basis of good faith because the introduction of new legislation to reduce greenhouse gases had caused a significant imbalance in the contract against the economic interest of the supply company.[419] Similarly, in the Court of Appeal of Paris, Chamber 11, January 17, 2020, 18/01078, the Court emphasized that *"the obligation to perform the contract in good faith must encourage the parties to renegotiate the (imbalanced) contract."*[420] However, it is essential to note that the renegotiation is not obligated to result in an agreement. A failure to renegotiate a new price does not constitute a violation of the good faith principle. This approach aligns with previous decisions (Com. October 3, 2006, D.2007, at 765-770), which state that the party who refuses to change the contract terms cannot be held liable unless their conduct is abusive.[421]

Furthermore, the actual hardship status in French law can be seen indirectly from the decision of the Belgian court in the 2009 Belgian case (*Scafom International BV v. Lorraine Tubes S.A.S*).[422] When applying French law to deal with the case related to hardship, the court of first instance held that although French law formally rejected the theory of imprévision, the remedy of adaptation of contractual terms in situations of hardship is available under the doctrine of good faith.[423]

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[419] Pedamon, "The Paradoxes of the Theory of Imprevision in the New French Law of Contract," 12.
[420] Cited at Pédamon and Vassileva, "Contractual Performance in COVID-19 Times," 25.
[421] Pedamon, "The Paradoxes of the Theory of Imprevision in the New French Law of Contract," 13.
[422] The English version of this case is available at https://cisg-online.org/files/cases/7880/translationFile/1963_18923774.pdf. Article 79 of the CISG contains a highly controversial article titled "Impediment." The article does not explicitly mention changed circumstances. However, the unclear scope of impediments has led to divergent interpretations by courts and academics as to whether the term includes economic hardship. The CISG case law indicates a massive separation between judges from civil law and common law countries as to whether the courts should assist parties in adapting the contract in case of impediment under Article 79. One of the most debated cases is the Belgian Scaform International case 2009, where the Belgian Supreme Court exercised its discretion and changed the contract price on the ground that there had been a considerable rise of 70 percent in the cost of the materials. The Belgian Supreme Court interpreted Article 79 so that this provision contains an external gap that the hardship provision of the PICC could fill. For arguments for and against this decision, see Flechtner, "The Exemption Provisions of the Sales Convention Including Comments on Hardship Doctrine and the 19 June 2009 Decision of the Belgian Cassation Court Uniform Sales Law," 84–101; Yasutoshi Ishida, "CISG Article 79: Exemption of Performance, and Adaptation of Contract through Interpretation of Reasonableness - Full of Sound and Fury, but Signifying Something," *Pace International Law Review* 30, no. 2 (2018 2017): 331–82.
[423] Flechtner, "The Exemption Provisions of the Sales Convention Including Comments on Hardship Doctrine and the 19 June 2009 Decision of the Belgian Cassation Court Uniform Sales Law," 93.

Hence, despite the consistent rejection of the theory of imprévision, French courts have based on the principle of good faith to recognize an obligation to renegotiate.[424] This obligation is the forerunner of the right to request a renegotiation in Article 1195 of the Civil Code and reflects the spirit of dispute resolution through conciliation.[425] Still, the conditions for enforcing the duty of renegotiation have remained unclear, and, in general, the Cour de cassation supports its position that courts do not have the power to adjust the terms of contracts (Civ 3e, March 18, 2009, No. 07-21.260).[426] The enforcement of private agreements remains the primary purpose of contract law and leaves little room for hardship applications.[427] This uncertain disposition of the courts towards the theory of imprévision made legislative clarification necessary.[428]

3.3.4 The incorporation of the theory of Imprévision in the 2016 reform of the Civil Code

In 2016, France reformed the Civil Code and added an explicit provision on the theory of imprévision in Article 1195. The revised section came into force on October 1, 2016, through ordonnance n° 2016- 131 of February 10, 2016.[429] Article 1195 belongs to subsection one of the principle of the binding force of contracts, which is part of Chapter IV on the effects of contracts. This new article applies to contracts concluded after October 1, 2016. The incorporation of the theory of imprévision has been described as one of the most symbolic innovations of the reform,[430] as it departs from the prevailing judicial resistance, overturns the mentioned leading Canal de Craponne decision,[431] and recognizes the power of the courts to adapt and terminate the contract. Nevertheless, Article 1195 contains unclear elements that require interpretation by scholars and courts. Examination of the reasons and purposes of the reform in general and the incorporation of the theory of imprévision will guide the understanding of this new provision.

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[424] Benatti, "The Imprevision in the Reformed Civil Code," 161.
[425] Pedamon, "The Paradoxes of the Theory of Imprevision in the New French Law of Contract," 13.
[426] Pedamon, 12.
[427] Legrand, "Judicial Revision of Contracts in French Law," 1053; David, "Frustration of Contract in French Law The Treatment of Frustration of Contract in Foreign Legal Systems," 13.
[428] Pedamon, "The Paradoxes of the Theory of Imprevision in the New French Law of Contract," 12.
[429] Kovac and Poncibò, "Towards a Theory of Imprévision in the EU?," 351; Shannon Rose Selden et al., "Contract Enforceability in the Age of Covid-19 Roundtable," *Business Law International* 21, no. 3 (2020): 225.
[430] Benatti, "The Imprevision in the Reformed Civil Code," 162.
[431] Kovac and Poncibò, "Towards a Theory of Imprévision in the EU?," 352.

The introduction of imprévision meets the requirements of modernization, the pursuit of contractual fairness, and the improvement of the attractiveness of the legal system, as expressed in the Report to the President of the Republic relating to the Ordonnance no 2016-131 of 10 February 2016 (from now on the Report).[432] About the first objective, the Report demonstrates that French jurisdiction has lost its significance in the commercial community because of a lack of updates to meet international developments. The Report acknowledges that France is the last country to recognize the theory of imprévision.[433] In the increasing convergence between European member states recognizing the changed circumstances theory, with domestic laws moving towards accepting an independent principle,[434] many French academics and judges advocate a substantive reform.[435] The content of the new Article 1195 reflects the influence of other European countries that have responded to unforeseen circumstances, including the German doctrine of interference with the basis of contract and international soft laws, including the PICC and the PECL.[436]

Concerning the reform's goal of improving legal certainty and the attractiveness of French law, in 2006, the World Bank published the Doing Business report in which France was ranked forty-fourth for ease of doing business due to its economically inefficient and unpredictable law.[437] To reach this purpose, draftsmen used three methods in the reforms: codifying the judicially developed rules, introducing new articles, and incorporating the new provisions from a comparative perspective.[438] The legislators, knowing that the foresight of the legislator is limited, have chosen to keep the law opaque and brevity, and it is up to the judge to formulate the rules he needs to respond to the realities of the situation.[439] Overtime, the courts have developed rules that sometimes diverge from the provisions of the civil code, undermining

[432] Benatti, "The Imprevision in the Reformed Civil Code," 162.
[433] Pedamon, "The Paradoxes of the Theory of Imprevision in the New French Law of Contract," 10.
[434] Kovac and Poncibò, "Towards a Theory of Imprévision in the EU?," 66.
[435] Kovac and Poncibò, 351; Lutzi, "Introducing Imprévision into French Contract Law - A Paradigm Shift in Comparative Perspective," 2016, 105.
[436] See more at Part 3.3.4.2 and 3.3.4.3 of this chapter.
[437] Montefusco, "Interpreting the Conditions for Imprévision: The Goals of the Reform Projects as a Decisive Tool for French and Belgian Courts," 195, 197.
[438] Rowan, "The New French Law of Contract," 806.
[439] Basil Markesinis, *The German Law of Contract: A Comparative Treatise*, 18–19.

its pre-eminence and consistency of its enforcement. However, for the theory of imprévision, the related case law is rare. Thus, Article 1195 is not primarily a codification of judicial decisions but one of the main innovations of the reform, which seeks to promote legal certainty by preventing courts from creating new rules to adapt to new circumstances when applying the outdated civil code.[440]

The third objective of the reform is to strengthen contractual justice. As explained in the Report, the idea behind contractual justice is to maintain the contractual balance within the transaction by allowing the judge to balance or rebalance the contract.[441] The doctrine of contractual solidarity further supported the idea of contractual justice. Through the lens of solidarity, contractual relationships are no longer seen as a bargain to make as much profit as possible but as a small community in which everyone must work towards a common goal. Contrary to the school of autonomy of will, which assumes that only the contracting parties can judge the content of the contract, it is, moreover, up to the judge to ensure solidarity by being able to correct the contractual imbalance in cases of hardship by terminating or adapting the agreement. The reform is based on the idea that contractual fairness and legal certainty are compatible and aims to balance these objectives. Recognizing good faith as a fundamental principle reflects the consideration of contractual justice. The Report explains in its commentary on Article 1195 that the theory of imprévision aims to reconcile the principle of *pacta sunt servanda* and contractual fairness by combating significant contractual imbalances that arise in performance.More importantly, the reform seeks to keep the contract alive where it still has an economic and possibly social role. Article 1195 also addresses the concern of small and medium-sized enterprises regarding the absence of established rules on hardship in the Civil Code, particularly concerning contracts without hardship clauses.[442]

Together with the general objectives of the reform of the Civil Code, the inclusion of Article 1195 aims at legal modernization, legal certainty, and contractual fairness. As far as

[440] Montefusco, "Interpreting the Conditions for Imprévision: The Goals of the Reform Projects as a Decisive Tool for French and Belgian Courts," 195, 197.
[441] Montefusco, 231–32.
[442] Pedamon, "The Paradoxes of the Theory of Imprevision in the New French Law of Contract," 10.

modernization is concerned, French law is one of the few exceptions to the widespread tendency in Europe to recognize the doctrine of changed circumstances in contract law. Regarding legal certainty, introducing new hardship provisions prevents the courts from creating new rules to adapt to new circumstances. Finally, the theory of imprévision provides courts with an institute to promote contractual fairness by restoring serious contractual imbalances.[443]

Article 1195 of the Civil Code reads:

> If a change of circumstances that was unforeseeable at the time of the conclusion of the contract renders performance excessively onerous for a party who had not accepted the risk of such a change, that party may ask the other contracting party to renegotiate the contract. The first party must continue to perform his obligations during renegotiation.
>
> In the case of refusal or the failure of renegotiations, the parties may agree to terminate the contract from the date and on the conditions which they determine, or by a common agreement, ask the court to set about its adaptation. In the absence of an agreement within a reasonable time, the court may, on the request of a party, revise the contract or put an end to it, from a date and subject to such conditions as it shall determine.[444]

Article 1195 stipulates three prerequisites: (1) there must be a change of circumstances that was unforeseeable at the moment of the conclusion of the contract; (2) it must render the performance excessively onerous for one party; (3) this party must not have agreed to bear that risk.[445] Because this article contains unclear conditions, it leaves considerable leeway for courts and scholars to provide interpretation.[446]

The first problem is that Article 1195 does not link the unforeseeability test to the reasonableness standard. The PICC, PECL, and DCFR all mandate that parties could not have

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[443] Montefusco, "Interpreting the Conditions for Imprévision: The Goals of the Reform Projects as a Decisive Tool for French and Belgian Courts," 195, 197.

[444] The English translation by John Cartwright
Professor of the Law of Contract and Director of the Institute of European and Comparative Law, University of Oxford, and Tutor in Law, Christ Church, Oxford is available at https://www.justice.gouv.fr/sites/default/files/migrations/textes/art_pix/Translationrevised2018final.pdf.

[445] Catherine Pédamon, "The New French Contract Law and Its Impact on Commercial Law: Good Faith, Unfair Contract Terms and Hardship," in *The Future of the Commercial Contract in Scholarship and Law Reform: European and Comparative Perspectives*, ed. Maren Heidemann and Joseph Lee (Cham: Springer International Publishing, 2018), 99–126, https://doi.org/10.1007/978-3-319-95969-6_5.

[446] Rowan, "The New French Law of Contract," 829.

reasonably foreseen the event at the time of contract formation.[447] The absence of the adverb "reasonably" leads to questions of interpretation about how to assess unforeseeability, whether the change in circumstances should be objectively unforeseeable to any reasonable person in the same circumstances or whether it includes subjective unforeseeability, meaning that the parties did not contemplate the occurrence of the event. Many scholars believe that Article 1195 implies an objective assessment of unforeseeability. This interpretation aligns with Article 1218 of the French Civil Code on the principle of force majeure, which defines an unforeseeable event as an event that could not reasonably have been foreseen.[448] The absence of the reasonability standard does not necessarily lead to a subjective evaluation of unforeseeability, as the courts are granted a wide margin of discretion.[449]

Secondly, it is debatable whether the scope of unforeseeability includes both the occurrence and the extent of the change. Suppose Article 1195 only requires that the nature of the event is unforeseeable. In that case, the scope of this provision is limited because the increase in performance costs can, in principle, always be foreseen by the party.[450] This narrow scope might overlook that the change's scale might be unforeseeable or foreseeable.[451]

The third problem in interpreting the condition of unforeseeability is whether the theory of imprévision covers changes that already exist before the time of the conclusion of the contract

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[447] Article 6.2.2 section b of the PICC requires that the events "could not reasonably have been taken into account by the disadvantaged party;" Article 6:111 of the PECL stipulates that "the possibility of a change of circumstances was not one which could reasonably have been taken into account;" and Section III-1:110 of the DCFR requires that the debtor "could not reasonably be expected to have taken into account" the change. See more at Joseph M. Perillo, "Force Majeure and Hardship under the UNIDROIT Principles of International Commercial Contracts," *Tulane Journal of International and Comparative Law* 5 (1997): 5–28; Montefusco, "Interpreting the Conditions for Imprévision: The Goals of the Reform Projects as a Decisive Tool for French and Belgian Courts," 228.

[448] Article 1218 of the Civil Code provide that:"...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..." Pedamon, "The Paradoxes of the Theory of Imprevision in the New French Law of Contract," 14.

[449] Montefusco, "Interpreting the Conditions for Imprévision: The Goals of the Reform Projects as a Decisive Tool for French and Belgian Courts," 228–29; Pedamon, "The Paradoxes of the Theory of Imprevision in the New French Law of Contract," 14.

[450] Perillo, "Force Majeure and Hardship under the UNIDROIT Principles of International Commercial Contracts"; Montefusco, "Interpreting the Conditions for Imprévision: The Goals of the Reform Projects as a Decisive Tool for French and Belgian Courts," 228.

[451] Montefusco, "Interpreting the Conditions for Imprévision: The Goals of the Reform Projects as a Decisive Tool for French and Belgian Courts," 228–29.

but parties are not aware of its existence when they sign it.[452] Some scholars argue that Article 1195 does not cover events that already existed at the time of the conclusion of the contract but were ignored by the parties, as the doctrine of mistake covers these situations.[453] Article 1136 of the Civil Code states, "A mistake as to value is not a ground of nullity where, in the absence of a mistake about the essential qualities of the act of performance, a contracting party makes only an inaccurate valuation of it."[454] The mistaken party is entitled to claim the contract null if the mistake was decisive for its consent.[455] In contrast, others assert that Article 1195 should encompass pre- and post-contractual changes. Luigi Montefusco contends that the doctrine of mistake does not cover the mistake about the mere value of the performance unless it affects the act of performance. A mistake of value is the inaccurate monetary valuation of the performance in the sense that the purchase price could have been higher or higher compared to the value of the performance offered. An example of such a mistake is when the manufacturer in a construction contract sets the price without realizing that the cost of raw materials has recently increased. This situation may constitute a change of circumstances under Article 1195. Besides, Montefusco added that even where both hardship and mistake are relevant, it should be up to the parties to choose the institute that best suits their desire to continue or terminate the contractual relationship. While mistake only leads to the nullity of contracts, the theory of imprévision offers more flexible remedies. For instance, if a buyer purchases a piece of land with the assumption that construction is permissible, yet, in reality, it is legally prohibited to build on the property. The mistake about the value of the land becomes relevant as the possibility of building on the land is essential to the contract. Moreover, this situation may constitute an imprévision, as the value of the counter-performance received by the buyer is decreased. In this case, the doctrine of mistake seems more appropriate, as the mistaken party prefers to nullify the contract. However,

[452] Montefusco, 224.
[453] Montefusco, 228–29.
[454] Article 1136, French Civil Code, the English version is available at https://www.trans-lex.org/601101/_/french-civil-code-2016/.
[455] Montefusco, "Interpreting the Conditions for Imprévision: The Goals of the Reform Projects as a Decisive Tool for French and Belgian Courts," 237.

suppose the party decides to keep the property despite the impossibility of building on it. In that case, it will demand an adjustment of the price based on the theory of imprévision.[456]

Although Article 1195 does not specify that the event must be beyond the party's control, several authors have suggested that a claim for imprévision under this provision must be rejected if the event is attributable to the debtor. Montefusco contended that this interpretation is in line with the idea of contractual fairness, which is the aim of the reform. It is doubtful that French courts will protect self-inflicted hardship, as this would mean protecting incompetent or negligent parties. If Article 1195 were to cover cases where excessively onerous performance occurred due to a delay in performance by the aggrieved party, this would allow dishonest parties to escape the harmful consequences of their mistakes, thereby unfairly disadvantaging the other parties.[457]

The second condition in Article 1195 states that the change of circumstances must make the performance excessively onerous. This ambiguous condition leads to diverse interpretations of what constitutes and how to access excessively onerous performance. From the surface, excessively onerous performance only includes an increase in performance cost to the aggrieved parties.[458] It is undefined whether the drafter intended the scope of Article 1195 to be strictly limited to these absolute terms or to encompass the situation where the cost of performance remains unchanged, but the value of the counter-performance is undermined.[459] For example, in the case of a lease, the rent paid by the tenant may not have changed, but the relative value of the use of the leased property in return for the rent may have diminished.[460] Considering that the purpose of Article 1195 is to harmonize French law with international and foreign law, Montefusco applies comparative law to interpret and asserts that this provision covers the latter situation. Moreover, he noted that French law adopts the expression "excessively onerous" from

[456] Montefusco, 237.
[457] Montefusco, 241–42.
[458] Pedamon, “The Paradoxes of the Theory of Imprevision in the New French Law of Contract,” 15.
[459] Pedamon, 15; Tom Hick, “The Coronacrisis and Its Impact on Creditors: Frustration of Purpose,” *European Review of Private Law* 30, no. Issue 3 (September 1, 2022): 399, https://doi.org/10.54648/ERPL2022020.
[460] Hick, “The Coronacrisis and Its Impact on Creditors,” 399.

international and European instruments,[461] which cover both scenarios.[462] This interpretation aligns with the principle that French law regards imprévision as an exception to the principle of *pacta sunt servanda*, allowing its application solely in exceptional circumstances.[463]

Another problem is that there needs to be a clear test to measure the excessive financial burden. Two potential approaches are available: one involves assessing the objective imbalance between the aggrieved party's performance and the counter-performance, whereas the other entails evaluating the aggrieved party's performance against its financial circumstances.[464] The latter could cover situations where the event does not create a significant imbalance between the parties' performances; however, the fulfillment of the contract would lead to the financial ruin of the debtor.[465] The test of fundamental change in the balance of obligations is in line with the spirit of the reform, which is to correct the imbalance of contractual obligations to pursue contractual fairness.[466] Moreover, Montefusco argues that the subjective approach considers the inequality between the parties' conditions rather than their performance. This might lead to discrimination against the business parties based on their financial situation. In particular, a successful business with high profits might find it harder to invoke the imprévision theory simply because it could absorb the extraordinary costs. Conversely, a company on the verge of financial ruin would easily reach hardship prerequisites. Montefusco added that adjustment of the contract in this situation becomes a mercy mechanism. Given that hardship cases must be exceptional, they cannot include the indebtedness of the injured party, as everything could constitute a hardship for the debtor with a sensitive financial situation. Significantly, the economic situation of the injured party cannot be taken into account if the financial ruin is due to poor management

[461] Article 6:111 para.2 of the PECL requires the "performance of the contract becomes excessively onerous;" Section III.-1:110 of the DCFR para.2 mandates "performance …becomes so onerous."
[462] Montefusco, "Interpreting the Conditions for Imprévision: The Goals of the Reform Projects as a Decisive Tool for French and Belgian Courts," 226; Pedamon, "The Paradoxes of the Theory of Imprevision in the New French Law of Contract," 15 Pedamon founds that the formulation of Article 1195 CC reproduces Article 6:111 of the PECL that requires an "excessively onerous" performance.
[463] Montefusco, "Interpreting the Conditions for Imprévision: The Goals of the Reform Projects as a Decisive Tool for French and Belgian Courts," 226.
[464] Pédamon and Vassileva, "Contractual Performance in COVID-19 Times," 28.
[465] Montefusco, "Interpreting the Conditions for Imprévision: The Goals of the Reform Projects as a Decisive Tool for French and Belgian Courts," 242–44.
[466] Pédamon and Vassileva, "Contractual Performance in COVID-19 Times," 28; Montefusco, "Interpreting the Conditions for Imprévision: The Goals of the Reform Projects as a Decisive Tool for French and Belgian Courts," 242–44.

on the part of the injured party, as the change in circumstances must not be attributable to the debtor.[467] Other scholars adopt comparative law with corresponding hardship criteria in the PICC, namely "alternation of contractual equilibrium,"[468] and contend that the conditions should be as objective as possible to ensure legal security.[469] In a recent case, T.com. Paris, December 11, 2020, n°2020035120, the Commercial Court in Paris applied an absolute understanding of excessive onerous performance. The court rejected the the request to revise the rent on the basis of the doctrine of imprévision because "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.'"[470]

Article 1195 only applies if the associated risk does not lie with the aggrieved party. The requirement of risk allocation emphasizes respect for the autonomous will of the parties.[471] The allocation of risk in contract can by either expressly or implicitly. In the case of tacit risk allocation, this can be seen from the nature of the contract or the absence of a contractual provision. In Civ. 30 June 2004, RTDC 2004.845, the Cour de cassation ruled that: "as a professional who is familiar with the practices of international trade, it was for the buyer to provide contractual mechanisms of guarantee or revision of contract… In the absence of such provisions, it was for the buyer to bear the risk of non- performance."[472] Article 1195 does not apply if the debtor has entered a speculative contract.[473] For instance, the Paris Court of Appeal rejects the claim to adapt a contract based on the theory of imprévision in a case involving a loan agreement between a state institution and a bank. The state institution concluded a swap agreement with a bank, according to which the interest rate would be exchanged for foreign

[467] Montefusco, "Interpreting the Conditions for Imprévision: The Goals of the Reform Projects as a Decisive Tool for French and Belgian Courts," 242–44.
[468] Article 6.2.2 of the PICC defines 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."
[469] Girsberger and Zapolskis, "Fundamental Alteration of the Contractual Equilibrium Under Hardship Exemption," 125.
[470] This opinion of French court in the decision is translated by Hick, "The Coronacrisis and Its Impact on Creditors," 399.
[471] Chitashvili, "Substantive Legal Prerequisites of Hardship and Scale of Legitimate Intervention of the Court into the Private Autonomy," December 31, 2021, 77.
[472] Pedamon, "The Paradoxes of the Theory of Imprevision in the New French Law of Contract," 14.
[473] Natia Chitashvili, "Substantive Legal Prerequisites of Hardship and Scale of Legitimate Intervention of the Court into the Private Autonomy," *Journal of Law*, no. 2 (December 31, 2021): 77.

currency. After the interest rate on the foreign currency doubled, the state institution contended that the contract should be revised. The Court denied the claim as the parties had already allocated the risk in their contract.[474]

Article 1195 provides four steps the parties must follow in the event of hardship. In the first stage, the aggrieved party has the right to ask the other party to renegotiate. If the renegotiations fail, the next step is for both parties to terminate the contract jointly. If parties cannot achieve any agreement, both of them can, in a third step, jointly request the court to adjust the terms of the contract. As a last resort, either party has the right to ask the judge to adjust the contract terms or terminate the contract if no agreement is reached within a reasonable period.

The above four steps indicate a lengthy and rigorous procedure.[475] The strict process favors preserving the contractual relationship and emphasizes the benefits of renegotiation.[476] Moreover, this complex mechanism could discourage litigation for fear that the court will rewrite the contract.[477] This aligns with the reform's purpose of encouraging parties to settle disputes without judicial interference. The aim of Article 1195, as the Report states, is to "play a preventive role: the risk of destruction or adjustment of the contract by the court should encourage the parties to negotiate."[110] However, there are concerns about the realism of the two steps of the parties jointly terminating the contract itself and then jointly requesting the court to adjust the contract after failing to reach an agreement to adjust the contract. It is unlikely that the parties who failed to reach an agreement during the renegotiation will express their consent to terminate.[478]

As for the duty to renegotiate, it is doubtful whether Article 1195 includes it, as it only mentions the aggrieved party's right to request renegotiation - but says nothing about the other party's duty. While Article 1104 of the Civil Code requires renegotiation in good faith, there is no

[474] CA Paris, 16 February 2018, No 16/08968, cited at Vanessa Di Feo, "You've Got to Have (Good) Faith: Good Faith's Trajectory in Anglo-Canadian Contract Law Post-Wastech and the Potential for a Duty to Renegotiate," *Dalhousie Law Journal* 45, no. 1 (2022): 43.
[475] Pédamon and Vassileva, "Contractual Performance in COVID-19 Times," 29.
[476] Benatti, "The Imprevision in the Reformed Civil Code," 158.
[477] Benatti, 163.
[478] Benatti, 163.

obligation to reach an agreement.[479] In a recent case, however, the Paris Court of Appeal encouraged the parties to renegotiate. The court rejected the application of the theory of imprévision to review an electricity supply contract concluded in 2007. However, it recognized that "the obligation to perform the contract in good faith must encourage the parties to renegotiate the contract."[480] This case demonstrates the importance of contractual solidarity, emphasizing a cooperative and mutually supportive approach to contractual relationships.[481]

In terms of the scope of judicial intervention, on the one hand, the opportunities for judicial intervention have diminished in number, and, on the other hand, the court's authority extends significantly, encompassing the power to review contracts.[482] Nevertheless, Article 1195 seeks to limit the cases in which the courts use this power by requiring the parties to follow a lengthy procedure before turning to the courts. Furthermore, the parties may exclude the application of the theory of imprévision by their contractual clause.[483] It remains to be seen whether and to what extent the French courts will operate their newly granted broad judicial discretion to adjust the parties' contract.[484] Scholars anticipated the reluctance of courts to deviate from a longstanding tradition of dismissing hardship cases. Instead of rewriting the contract, courts might lean towards terminating the contract or returning the renegotiation process to the parties.[485]

3.3.5 Summary

In summary, the French law of imprévision is shaped by previous case law, legislative interventions in times of change, and the recent inclusion of Article 1195 in the Civil Code. Courts have traditionally been reluctant to accept hardship claims in civil and commercial cases. Temporary statutes encouraged parties to attempt renegotiation before resorting to litigation.

[479] Pédamon and Vassileva, "Contractual Performance in COVID-19 Times," 10.
[480] Cour d'appel Paris, Pole 5 – Ch. 11 17 janvier 2020, n°18/01078. Cited at Pédamon and Vassileva, 27.
[481] Pédamon and Vassileva, 27.
[482] Benatti, "The Imprevision in the Reformed Civil Code," 168.
[483] Chitashvili, "Substantive Legal Prerequisites of Hardship and Scale of Legitimate Intervention of the Court into the Private Autonomy," December 31, 2021, 77.
[484] Pédamon and Vassileva, "Contractual Performance in COVID-19 Times," 27.
[485] Berger and Behn, "Force Majeure and Hardship in the Age of Corona," 119–20.

Article 1195 embodies this idea, highlighting the importance of encouraging the parties to engage in renegotiation to seek solutions independently whenever possible.[486]

The incorporation of the theory of imprévision seeks to strengthen contractual fairness, harmonize the law and increase legal certainty. Nevertheless, there are several controversial issues relating to the substantive matters of this new provision, which is open to academic and judicial interpretation. Commentators base their understanding of Article 1195 on comparative law and historical approaches. There is a broad consensus among scholars that the court should objectively assess the threshold and emphasize the imbalance between the debtor's performance and the counter-performance rather than relying on the subjective financial conditions of the parties. Nevertheless, ambiguities remain regarding the scope of the theory of imprévision and the method to access the vague conditions. The law-maker deliberately refrains from defining or regulating the conditions in detail and leaves this task to the courts and academia since it is primarily concerned with formulating clear and general legal principles that are understandable to ordinary citizens.[487] Therefore, continued attention must be paid to judicial application.

The stipulation and formulation of the theory of imprévision in the reform civil code make it clear how complex and challenging it is to reconcile the objective of ensuring the binding nature of contracts with the pursuit of contractual justice. French legislators approach this task with great care and rigor. This is reflected in the comprehensive procedure of Article 1195, which includes the triage of renegotiation, adjustment, and termination.[488] This lengthy procedure would induce the parties to renegotiate or terminate contracts exhaustively. Interestingly, the new law grants the courts broad powers to adjust or terminate contracts, which is surprising because it departs from previous judicial approaches. However, the courts' likelihood of utilizing their new powers may be limited, as this law allows parties to exclude the effect of Article 1195 through a contractual term. Moreover, scholars foresee courts will not quickly switch their traditional

[486] Pédamon and Vassileva, "Contractual Performance in COVID-19 Times," 10.
[487] Montefusco, "Interpreting the Conditions for Imprévision: The Goals of the Reform Projects as a Decisive Tool for French and Belgian Courts," 228–29.
[488] Jentsch, "On the Need for Codification in European Contract Law," 5, 9.

reluctance to modify contracts. The early judicial application of Article 1195 confirms this scholarly prediction.

Chapter IV: Discussion and Recommendations

The thesis addresses the matters concerning implementing the new law on changed circumstances in Vietnam. The author argues that ensuring the proper application of this institution requires a wise balance between legal certainty and flexibility. The result of this comparative study indicates that the effective implementation of the doctrine of changed circumstances requires the collective contribution of legislators, the judiciary, and scholars. In particular, the consideration should be on fundamental legal formants with adequate attention paid to the limited level of detail that the code provision elaborates, the appropriate authority for interpreting ambiguous law, and the courts' discretion to a certain extent. This chapter interprets these findings and demonstrates how they are relevant to solving the problems of Vietnamese law.

4.1 Substance of the theory of changed circumstances: Commonalities and divergences in domestic approaches

This part presents the findings of the comparative study on the substantive matters of the doctrine of changed circumstances. It highlights the similarities and differences in the conditions and legal consequences of the doctrine in the three analyzed jurisdictions.

4.1.1 Conditions of the theory of changed circumstances

Drawing from the comparative law analysis, it is clear that, on a broader scale, various legal systems share common elements regarding the essence of the theory of changed circumstances. These commonalities encompass prerequisites such as the necessity for the change to be fundamental, beyond the control of the disadvantaged party, unforeseeable, and not falling within the realm of risks allocated to the disadvantaged party. Nevertheless, the detailed formulation of these requirements diverges among the different jurisdictions.

Regarding the first condition, which is that the change is beyond the control of the disadvantaged party, this condition implies that the effect of the change is not attributable to the

affected party. This condition does not consider the cause of the change: it can be natural disasters, catastrophic events, or man-made events such as changes in law, strikes of employees, or war.

All jurisdictions agree that to justify the doctrine of changed circumstances the change must be fundamental. This condition is essential because the risk of interference with the binding force of the contract requires a narrow application of such theory, and only in exceptional cases. However, there are different approaches as to what constitutes fundamental changes. Generally, there are two approaches: broad and narrow. The broad approach considers the basics of transactions, as in the cases of Germany and Japan. Accordingly, changed circumstances encompass three types of situations where the foundations of a transaction are disrupted: frustration of its purpose, imbalance of contractual obligations, and mutual mistakes regarding events that existed at the time of contract formation. The narrow view focuses only on the financial value of the obligation, as in the French case, where the theory of imprévision addresses the situation when the event renders the performance excessively onerous. Indeed, the provision in the French civil code only mentions an onerous performance. Scholars advocate the rational interpretation of this law to cover situations where the cost of performance remains the same, but there is a diminution in the value of counter-performance for a contracting party. These two situations constitute the so-called "fundamental alteration of the equilibrium of the contract," as the PICC formulates in Article 6.2.2.[489] The broad approach is better for pursuing the purpose of the theory of changed circumstances in correcting the injustice of contracts. The case involves common mistakes might overlap with the doctrine of mistake. However, this thesis advocates a functional method, as taken by the Japanese courts when they dealt with COVID-19-related cases, by focusing more on the relationship between the parties than on the strict separation of the applicable principle of contract law. Therefore, when a situation falls within the scope of both the

[489] Bortolotti and Ufot, *Hardship and Force Majeure in International Commercial Contracts*, para. 21; The Commission of European Contract Law, *Principles of European Contract Law: Parts I and II* (Kluwer Law International B.V., 2000), 325; Edited by Stefan Vogenauer, ed., *Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)*, Second Edition (Oxford, New York: Oxford University Press, 2015), 718.

concept of mistake and changed circumstances, it should be up to the parties to choose the regime that best fits their desires.

Another crucial element of the changed circumstances theory is how to assess the intensity of the change. The prevailing approach is to objectively measure the balance between the parties' obligations rather than the subjective financial conditions of the party concerned, as relying on subjective circumstances of parties would lead to discrimination between parties with good management and those with bad management. German law formulates a test of the hypothetical will of the parties to assess whether the change disrupts the parties' assumptions. This test requires courts to rely on the contract's circumstances and nature to analyze the parties' hypothetical intentions when the contract was made. Furthermore, both the German and the Japanese legal systems use the principle of good faith as one of the standards to measure the degree of change. Accordingly, one of the requirements of the PCC is that the performance of the contract without modification would be contrary to the principle of good faith.

The unforeseeability of a change is crucial in the theory of changed circumstances. It requires that the occurrence or magnitude of the change be unreasonably unforeseeable for the disadvantaged party at the time of contract conclusion. Although not all national laws expressly refer to the standard of unreasonability, the prevalent approach asserts that foreseeability must be evaluated from the perspective of a reasonable person, rather than relying on the subjective conditions of the parties. This objective evaluation method could lead to a more efficient and precise application of the unforseeability requirement.[490] As for the time factor, the prevailing approach is that the unforeseeable nature of the event should be restricted to events which did not exist when the contract was entered into. In German law, the contract's modification can be justified when the event already existed at the time of the contract's formation, but was not known by the parties. The Unidroit principles adopted this approach in Article 6.2.2 (a) encompassing cases where the event in question becomes known to the disadvantaged party after

[490] Mustapha Mekki and Martine Kloepfer Pelese, "Hardship and Modification (or 'Revision') of the Contract," SSRN Scholarly Paper (Rochester, NY, January 26, 2010), para. 28, https://doi.org/10.2139/ssrn.1542511.

the formation of the contract. This provision can transform a situation that is genuinely a mistake into a hardship claim.[491]

Another necessary condition that is present in all systems analyzed is the matter of risk allocation. The risk of the change must not have been allocated to either party by contract or law. Only unallocated risks can be considered under the theory of changed circumstances. After finding the disturbance of the equivalence of contractual obligations, the court will first examine whether a law or the contract has assigned such risk to one of the parties. Then, it will decide whether judicial interference is necessary to rebalance the contract fairly and equitably. The prevailing approach is that the assumption of risk does not necessarily need to be explicit; it can be inferred from the contract's circumstances or nature. For example, in the Arbitral Award 30 November 2006, Centro de Arbitraje de México, Unilex, the defendant committed to delivering specified quantities of squash and cucumbers to the claimant. The defendant failed to supply the agreed quantities and sought to rely on Elnino as a defense to the claim. The Centrao de Arbitraje de Mexico rejected the defendant's attempt to invoke hardship on the ground that in this distributorship contract, the risk of crop destruction by rainstorms and flooding typically belongs to the sphere of the vegetable grower. [492] By relying on the contractual allocation of risk, the court can avoid relying solely on vague equitable grounds when dealing with hardship claims.

4.1.2 Legal consequences: Primary involvement of parties and supplementary roles of courts

All jurisdictions considered in this thesis treat the theory of changed circumstance as a subsidiary to the contract. To find solutions to contracts affected by unforeseen events, the courts must first determine whether the parties have agreed on a solution in the contract terms, such as flexible price clauses. If the contract does provide an answer, the court must find possible

[491] Vogenauer, *Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)*, 720.
[492] Vogenauer, 721.

remedies in other provisions of contract law. The principle of changed circumstances can only be applied if neither the agreement nor contract law provide solutions.[493]

The design of legal consequences in the considered jurisdictions is similar in that they all first stress the importance of respecting the binding force of the contract, then start with the prior renegotiation process between parties, with the court intervention as the last resort to adapt or terminate the contract. Under the idea that modification in cases of hardship is one way to implement the binding force of the contract, if an unforeseeable event occurs, it is necessary to reestablish the economic balance that the parties may want. In this way, the parties' will remains at the heart of this construction.[494]

The compared legal systems agree on the importance of a prior renegotiation process between the parties. Since contract modification in cases of hardship is a means of respecting parties' wishes and legitimate expectations, the law should encourage renegotiation before resorting to the courts.[495] The German BGB does not expressly require prior renegotiation, and the legislature leaves the interpretation to the courts.[496] France is one step ahead of other national legal systems with the new Article 1195 of the Civil Code, which establishes the obligation to renegotiate.[497] After unsuccessful renegotiation, French law provides additional steps that the parties must consider before bringing the matter to court. These steps include joint efforts to terminate the contract and a joint application to the court to terminate the contract. These numerous steps show the legislator's intention to prioritize the parties in the search for solutions.[498] Although domestic law does not generally contain an express obligation for the requested party, this obligation can be derived from the duty to act in good faith.[499] Some scholars see the law granting the disadvantaged party the right to demand a renegotiation of the

[493] Sauveplanne Jean Georges, *Codified and Judge Made Law: The Role of Courts and Legislators in Civil and Common Law Systems*, 106.
[494] Mekki and Kloepfer Pelese, "Hardship and Modification (or 'Revision') of the Contract," 38.
[495] Mekki and Kloepfer Pelese, para. 36.
[496] Perriello, "Terminating or Renegotiating?," 100.
[497] Montefusco, "Interpreting the Conditions for Imprévision: The Goals of the Reform Projects as a Decisive Tool for French and Belgian Courts," 211.
[498] Bortolotti and Ufot, *Hardship and Force Majeure in International Commercial Contracts*, 52.
[499] Vogenauer, *Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)*, 722.

price as a manifestation of the duty to renegotiate.[500] However, parties do not need to reach an agreement. For example, Article 6.2.3 of the PICC stipulates that the parties do not have to reach an agreement before they can resort to the court. The reason for the failure to reach an agreement does not matter; they may have failed to reach an agreement because one party requested to renegotiate and the other party refused to do so, or the renegotiation may have taken place but not resulted in an agreement.[501]

Renegotiation has unquestionable advantages since it is more likely to be quicker and less costly than judicial adaptation, and it makes it possible to keep the contract alive. Trustworthiness in long-term contracts is an essential element in the business world. By renegotiating the contract, the parties themselves act as the best possible interpreters of the changed set of interests and rewrite their agreement, thereby saving their existing relationship. Moreover, by renegotiating the contract, the parties not only address current contingencies that require immediate adjustment, but also define a medium-to-long-term path, and consider the expected timeframe for a return to normality, the resumption of economic activities, and the stabilization of the market and the individual businesses involved. However, there is concern that the benefits of renegotiation are present only to the extent that the contracting parties voluntarily choose them. Consequently, imposing a legal duty to renegotiate all contracts that have become unbalanced due to changes in circumstances would infringe on freedom of contract.[502]

None of the analysed jurisdictions' law makes an explicit hierarchy between adaptation and termination of the contract, and the courts are given broad discretion to decide on a case-by-case basis. Nevertheless, the prevailing academic opinion is that adaptation should be given preference over termination, as the principles of contractual loyalty and economic security require the maintenance of contractual relations to the greatest extent possible.[503] Even if this hiarachy between termination and adaptation is not expressly stated, the wording of Article 313

[500] Anna Veneziano, "UNIDROIT Principles and CISG: Change of Circumstances and Duty to Renegotiate According to the Belgian Supreme Court," *Uniform Law Review* 15, no. 1 (2010): 144.
[501] Vogenauer, *Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)*, 723.
[502] Perriello, "Terminating or Renegotiating?," 101.
[503] Hay, "Frustration and Its Solution in German Law," 1961, 364.

BGB at least gives priority to the adaptation of the contract over termination, and the courts only grant termination if adaptation proves impossible. This technical distinction between the two remedies is noteworthy.[504] Concerning the scope of the court's discretion, the question arises whether the court can determine a solution without the parties' consent. While one approach suggests that a judicial adjustment should only be made with the parties' consent, it is more appropriate to authorize the judge to modify the contract without the parties' consensus. Otherwise, achieving the objective of preserving contractual continuity by the parties' intentions may prove challenging.[505]

4.2 Proportional roles of legislature and judiciary: Striking a balance between legal certainty and flexibility

In three analysed jurisdictions, the theory of changed circumstances has become a part of contract law. Before the emergence of this theory, courts had struggled to rely on the principle of good faith and the extent of the impossibility principle to justify the judiciary's interventions to modify contracts in exceptional cases. For example, the revalorization and the defense of ruination cases in Germany illustrate the limitations that might lead to an unjustifiable distinction between a wealthy debtor and an impecunious debtor.

In Germany, the civil code provision on changed circumstances is the codification of previous judicial elaborated rules on this doctrine. The French case is different because French courts rarely applied the doctrine in civil and commercial disputes, and the inclusion of Article 1195 on the theory of imprecision resulted from comparative law rather than codification. The draft of the provision on changed circumstances in the reform of the Japanese civil code shows the codification of judicial rules and comparative law. While the techniques of making new laws on changed circumstances can vary, the purpose is to strengthen legal certainty by narrowing the courts' discretion in applying uncodified theory or utilizing the existing principle of impossibility and good faith to handle cases of changed circumstances.

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[504] Bortolotti and Ufot, *Hardship and Force Majeure in International Commercial Contracts*, para. 48.
[505] Mekki and Kloepfer Pelese, "Hardship and Modification (or 'Revision') of the Contract," para. 39.

However, as mentioned in section 4.1.1 of this chapter, the laws and codification proposals remain abstract and ambiguous, and the legislature intentionally leaves certain leeway to the courts to interpret based on specific situations. In Japan, the legislative body opted not to introduce a new law on changed circumstances, signaling an intention to maintain the courts' authority to rule based on uncodified provisions. This context-dependent and vague nature of the changed circumstances doctrine requires the courts to apply it in concrete cases. This task requires the courts to strike a balance between the certainty of litigation, the binding nature of the contract, on the one hand, and the flexibility of resolution and the fairness of the contract on the other.

Before the advent of the changed circumstances theory, courts utilized the principle of impossibility and good faith to correct the unfairness of contracts affected by changing times, such as world wars and hyperinflation. In Germany and Japan, the courts had a wealth of experience developing rules for applying the changed circumstances theory long before the recent legal reforms. Confidence in the court's ability to effectively apply the uncodified changed circumstances rules was, among other reasons, why the Japanese legislature decided not to codify this doctrine when reforming the Civil Code. While the courts' discretion in applying the law on changed circumstances is indispensable to provide flexible solutions, a cautious approach is necessary to prevent the arbitrariness and uncertainty of litigation.[506]

Legislators made efforts to codify law to narrow the intense interpretative activity undertaken by the courts in the reform of the civil code to make contract law more efficient and predictable.[507] However, neither law quantifies the relevant threshold of hardship, which, if on the one hand, seems to hamper legal certainty, on the other, suits judgments more tailored to the circumstances of each particular case.[508] While the Civil Code is the primary source of contract law in civil law systems, the significance of case law in changed circumstances cases is evident, demonstrating the dynamic interaction between academia and jurisprudence in shaping substantive rules for applying the doctrine.

[506] Perriello, “Terminating or Renegotiating?,” 98.
[507] In France, see Perriello, 84.
[508] Perriello, 86.

4.3 Recommendations for amendment of Article 420 of the Civil Code on changed circumstances

This comparative analysis helps explain the weaknesses of conditions stipulated in Article 420 of the Civil Code on changed circumstances. Article 420 provides that there must be a fundamental change of circumstance which satisfies the following conditions: the cause of the change is objective, occurrence after the conclusion of the contract, and the change is so fundamental that if parties knew in advance, they would not have concluded the contract or would have concluded it with totally different conditions. These conditions also require that the execution of the contract without modification would cause severe damage to one of the parties and that the disadvantaged party has applied necessary methods to do what, but could not prevent the effects of the change.

Concerning the first prerequisite, understanding the cause of the change as objective implies that the change occurred for reasons beyond the control of the disadvantaged party. At first sight, this condition appears akin to the common requirement that the change should be beyond the control of the aggrieved party. Nevertheless, evaluating attributability based on the cause of the change rather than the change itself might neglect instances where the cause is objective, but the change is attributable to the aggrieved party. For instance, consider a scenario where land prices increase for objective reasons, like the new Shinkansen construction or inflation during a period when the party invoking the theory of changed circumstances is delaying its performance. Thus, the thesis advocates for a formulation that explicitly considers the disadvantaged party's lack of control over the change rather than relying solely on the objectivity of the cause of such change.

As regards to the time factor of the change, Article 420 limits the scope of application to changes that happen after the conclusion of the contract. Traditionally, most national contract laws deal with the issue of changes in circumstances that pre-exist but only become known to the parties after the conclusion of the contract under the concept of mistake. German law is an exception, where the concept of mistake does not cover this category. Instead, Article 313 BGB

covers the mutual mistake cases. The new provision on imprevision of the French Civil Code is silent on this issue, and there are two interpretative approaches: one holds that Article 1195 of the Civil code only addresses changes that arise after the signing of the contract, while the other holds that French law governs both situations. This study supports the latter approach and proposes that even when both the rule of mistake and changed circumstances are relevant to a specific dispute, the remedies are different, with the latter being more flexible in offering the possibility to adapt contracts. Furthermore, the doctrine of mistake does not encompass every form of mistake of pre-contractual facts.[509]

Since the theory of changed circumstances only applies in exceptional cases, Article 420 provides various accumulative thresholds. Article 420 adopts a criterion that corresponds precisely to that of Article 313 BGB, namely the examination of the hypothetical will of the parties at the time of the conclusion of the contract. In particular, the change is considered fundamental if the parties knew in advance that they would not have concluded the contract or would have concluded it on entirely different terms. This German condition arises from the fact that the German approach to hardship is from the perspective of the basis of the transaction. The basis of the transaction is the common presumption of the parties when concluding contracts, which is influenced by the existence of circumstances that condition the presumption of the parties.

Article 420 further clarifies the exceptional nature of the change of circumstances by requiring that the continuation of the original contract without modification would cause serious harm to one of the parties. This comparative study shows that this condition is problematic as it is based on the subjective financial situation of the disadvantaged party and not on the objective imbalance between the respective obligations. The reliance on financial ruin is unjustified and should not be encouraged as it could lead to discrimination between strong and weak parties. This thesis proposes to replace the subjective conditions of the PCC with the objective weight of the balance between contractual obligations, which is covered by the condition regarding the

[509] For detail discussion on the matter of mistake and changed circumstances, see more at part 3.3.4.2 Chapter 3 of this thesis.

equilibrium of contractual obligation. Thus, Article 420 of the Civil Code should elaborate the significance of the changes in circumstances in a more objective way, as follows: The change must either fundamentally alter the balance of the contract, including increasing the cost of performance or decreasing the value of the counter-performance, or frustrate the purpose of the contracts.

Another significant difference between Vietnamese law and other jurisdictions is that while all the systems analyzed in this study stress that the theory of changed circumstances only applies to changes that have not been allocated to the risk of the disadvantaged party either by contract or by law, Article 420 does not include this requirement. Noticeably, the condition of risk allocation was once included in the proposal of Article 420. However, the drafters decided to delete it from the final provision because of the presumption that the condition of foreseeability covers the matter of risk allocation. Yet, given that the parties are free to contract out the scope of risk and might accept the abnormal risks regardless of their foreseeability, not all unforeseeable and abnormal changes of circumstances justify the application of the theory of changed circumstances. Therefore, the court must define the scope of risk that parties have already allocated in the contracts after uncovering the existence of the change of circumstances. Hence, the author suggests that Article 420 should add the condition requiring that the changes of circumstances must not belong to the sphere of risks of the disadvantaged party according to the contract terms and contract law.

As for the legal consequences, Vietnamese law, like comparable legal systems, provides for the right of the aggrieved party to request renegotiation and is silent on the duty of the requested party to participate in the renegotiation. The comparative study in this thesis shows that the law should support the renegotiation process, and the principle of good faith implies the obligation to renegotiate in the event of changed circumstances. Considering the advantage of a renegotiation process that strengthens the parties' autonomy in finding solutions, this thesis proposes that Article 420 should explicitly state that the renegotiation process is mandatory before resorting to the court.

If the renegotiation fails, either party has the right to ask the court to adapt or terminate the contract. Article 420 contains a strange requirement that the court only amend the contract if the termination causes more significant damage than the implementation of the amended contract. This criterion is not applicable in practice and could discourage courts from adapting contracts. The comparative study suggests that legislators often refrain from establishing a clear-cut hierarchy between these remedies but leaves it to the courts to decide according to the circumstances. The primary approach is to preserve the contract whenever it is reasonable. Article 6.2.3 of the PICC also mentions termination before adaptation. However, the PICC commentary suggests that a court is likely to be reluctant to resort to termination, preferring to adapt the contract.[510] The criteria for weighing between adaption and termination of the contract should be deleted in Article 420.

4.4 Fundamental guidelines for the application of Article 420

Courts and scholars play a crucial role in developing rules for implementing and interpreting the vague elements of the changed circumstances theory. While there are no complete detailed rules, several basic standards are recognized in different national legal systems, and these standards are a valuable reference for Vietnam. Firstly, the court must consider all cumulative conditions, not just the mere factual effect of the changed circumstances on the performance of the contract, to grant relief based on the theory of changed circumstances. Secondly, the assessment of these conditions should be based on objective elements such as the nature of the contract and the imbalance of the contractual obligations, and not on the subjective financial circumstances of the aggrieved party. Thirdly, from the viewpoint of the principle of good faith, it is likely that the changed circumstances theory would not apply where the creditor has delayed its performance, and the changes that occur from that delay. Fourthly, having established the existence of changed circumstances, courts must carefully consider the scope of contractual risks to ensure that only unallocated risks require judicial intervention. Although the parties generally assume that performance and consideration are equivalent when entering a

[510] Vogenauer, *Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)*, 723–24.

contract, this principle does not apply if they delimit their risk scope. Finally, the unforeseeability of the change must be assessed in terms of its emergence, progress, and the scale of the change. For example, while inflation may be foreseeable, a sudden increase in inflation may not be foreseeable.[511] These rules would provide essential components of new guidelines for enforcing Article 420 of the Civil Code. These standards would increase the certainty and quality of the judicial application of the new law to changing circumstances.

Since the Vietnamese judiciary does not have the authority to develop rules for applying the provisions of the Civil Code as practiced by the courts in France, Germany, and Japan, this thesis proposes that the Supreme People's Court should set the basic standards for applying Article 420. The Supreme People's Court has the function to undertake this task as the 2013 Constitution stipulates that the Supreme People's Court is responsible for summarizing practical litigation and ensuring the uniform application of law in the courts.[512] As Vietnam borrowed the theory of changed circumstances from foreign laws, a comparison with foreign and international laws, especially those that inspired the introduction of provisions on the changed circumstances in the Civil Code, would be beneficial for understanding the essential parts of this theory. Nevertheless, reference to foreign laws in interpreting Article 420 should be made with a critical perspective and a comprehensive examination of the relevant legal formants, as comparative law has shown that various factors such as the relevant principles of contract law, the court's traditional inclination towards hardship, and the purpose of the reform guided and influenced judicial and scholarly interpretation of the theory of changed circumstances.

4.5 Adjustment of judicial function in legal interpretation

The comparative study has revealed that despite the differences in the scope of application and approaches to remedies of the doctrine of changed circumstances, there are significant similarities regarding the crucial position taken by courts in applying this legal

[511] Tokyo District Court, 19 August 1959, Hanrei Jihō 200: 22, and Kobe District Court, Itami Branch, 26 December 1988, Hanrei Jihō 1319: 139. These cases are cited at Ishikawa, "Contractual Crisis and the Doctrine of Change of Circumstances: The Results and Contexts of the Reform of Contract Law in Japan," 88.
[512] Article 104 (3) of the Vietnamese Constitution in 2013.

institution. For the purpose of legal certainty, legislators in the three systems have attempted to statutorize the contents of the doctrine. This codification process and its outcomes, even with the recognition by an implicit provision or leaving it to exist as a theory, reveal the limited degree of standardization and the indispensable ample room for courts to decide based on specific circumstances.

Although referencing extra-contractual norms in pursuit of contractual justice corresponds to the legal concept of good faith in Vietnamese contract law, the question is how can judges unpack ambiguous elements of the principle of changed circumstances without the power to interpret statutory law. Since the norm that statutory interpretation exclusively belongs to the National Assembly and its Standing Committee is an internal part of socialist ideology of state power construction, empowering courts with the power to interpret law would be a fundamental and systemic change in the Vietnamese legal system.

The matter of whether to provide judges the new function of statutory interpretation has recently been the subject of intense discussion among scholars, lawyers, and legislators. Vietnam is currently revising the Law on the Organization of People's Courts. The final draft published by the Supreme People's Court includes a new function of the courts: interpreting the law in the context of specific litigation. This proposal refers to legal reasonings justifying the application of specific law in individual cases, which is different from the normative legislative interpretation by the National Assembly.[513] However, there are opponents who fear that giving judges new authority to interpret the law would undermine the National Assembly's absolute legislative power. On the other hand, supporters of the draft argue that the new function is an inherent element of law application regardless of whether it is officially recognized and that legal interpretation is an activity that judges carry out on an ad hoc basis. The supporters contend that the legal interpretation activity of courts is aimed at interpreting legislation in order to provide a rationale for its application in specific cases and that judicial interpretation has no normative binding effect; therefore, the fact that law empowerss court with the function of law

[513] Article 3 (2) (dd) of the Fifth Draft of the Revised Law on the Organization of People's Court, available at the official Website of the Supreme People's Court: https://vbpq.toaan.gov.vn/webcenter/portal/htvb/chi-tiet-vbdt?dDocName=TAND314001

interpretation does not affect the absolute power of the National Assembly in law-making.[514] While the lack of judicial power to interpret law would hinder the efficient operation of the new law on changed circumstances, this transformation of legal formants would require a dynamic approach to the socialist ideology on central-state power and the concept of legal positivism.

4.6 Implications of the thesis

Legal institutions and doctrines vary in their reliance on specific legal formants within a legal system. Some legal institutions lean on essential components representing the characteristics of a legal system. Therefore, transplanting this kind of legal institution would necessitate considerable adaptation of the receiving country's legal formants. This thesis labels these crucial legal elements as distinctive foundational legal formants. In the context of the doctrine of changed circumstances, the importance of judicial statutory interpretation is one of the distinctive foundational legal formants because the doctrine of changed circumstances contains vague components, permitting judicial intervention in contractual terms.

This thesis assesses the feasibility of implementing a new law regarding changed circumstances in Vietnam from a pluralistic perspective on legal formants. The adoption of the doctrine of changed circumstances does not automatically transform the judiciary's authority or ability to interpret statutes. Identifying distinctive foundational legal formants of this doctrine could potentially stimulate ongoing discussions about empowering the courts with new functions in the legal application in this socialist legal system. Thus, the introduction of a new law, influenced by legal diffusion, could become a catalyst for the reevaluation and potential restructuring of the legal framework within the receiving jurisdiction.

[514] National Assembly, "Tổng Thuật Trực Tiếp Chiều 22/11: Quốc Hội Thảo Luận về Dự Án Luật Tổ Chức Tòa Án Nhân Dân (Sửa Đổi) [Comprehensive Summary Live on November 22: National Assembly Discusses the Draft Law on the Organization of People's Courts (Amended)]," November 22, 2023, https://quochoi.vn/tintuc/Pages/tin-hoat-dong-cua-quoc-hoi.aspx?ItemID=82400; For further discussion, see Ngo Cuong, "Thẩm Phán Với Việc Giải Thích Pháp Luật [Judges and Legal Interpretation]," *Electronic Magazine of People's Court*, December 24, 2018, https://tapchitoaan.vn/tham-phan-voi-viec-giai-thich-phap-luat.

Conclusion

This thesis employs the theory of legal formants to address the challenges in implementing the law on changing circumstances in Vietnam. The thesis suggests that courts need to be more cautious in granting hardship applications and pay more attention to the possibility of preserving the contractual relationship. The deficiencies in judicial application arise from the weaknesses of the legal provisions and the court's limited authority of law interpretation, which is essential to exercise its new power of rebalancing troubled contracts. Given the limited freedom of the courts in applying the law in Vietnam's socialist legal system, the law must determine the ambiguous elements of the doctrine. Nevertheless, some discretion of the courts in applying the law is indispensable. From both a legislative and academic perspective, there are indications that the courts may soon be granted interpretative powers. Although the implementation of the doctrine of changed circumstances in Vietnam is challenging, adapting the role of the courts to create an appropriate legal environment for its effective application is achievable.

This thesis is relevant in several respects. Firstly, it contributes to a better understanding of the history and development of the doctrine of changed circumstances and its influences in Vietnam. Secondly, it can further improve scholarship on the conducive and obstructive elements of the Vietnamese legal system for the implementation of judicial intervention in contractual relations. Finally, the findings of this study can lead to further reflection on the possibility of implementing the doctrine of changed circumstances in a socialist legal system where courts have limited powers in applying the law.

Bibliography

AG, anwalt de services. “Gewerberaummiete in Zeiten von Covid 19 (nach § 313 BGB) / Business space rent in times of Covid 19,” January 31, 2023. https://www.anwalt.de/rechtstipps/gewerberaummiete-in-zeiten-von-covid-19-nach-313-bgb-business-space-rent-in-times-of-covid-19-201437.html.

Bajpai, Rashika, and Mrinal Pandey. “Advocating Contract Adaptation in International Arbitration: A Necessity in the COVID-19 Era?” *NUALS Law Journal* 15, no. 1 (2020): 23–47.

Baranauskas, Egidijus, and Paulius Zapolskis. “The Effect of Change in Circumstances on the Performance of Contract.” *Jurisprudencija* 118, no. 4 (2009): 197–216.

Basil Markesinis, Hannes Unberth and Angus Johnston. *The German Law of Contract: A Comparative Treatise*. *The German Law of Contract : A Comparative Treatise*. Hart Publishing, 2006. https://doi.org/10.5040/9781472559814.

Beale, H. G. *Cases, Materials and Text on Contract Law*. Hart, 2010.

Benatti, Francesca. “The Imprevision in the Reformed Civil Code.” *Revista de La Facultad de Jurisprudencia (RFJ)* 10 (2021): 157–80.

Berger, Klaus Peter, and Daniel Behn. “Force Majeure and Hardship in the Age of Corona: A Historical and Comparative Study.” *McGill Journal of Dispute Resolution* 6 (2020 2019): [i]-130.

———. “Force Majeure and Hardship in the Age of Corona: A Historical and Comparative Study.” *McGill Journal of Dispute Resolution* 6, no. 4 (2020).

Bortolotti, Fabio, and Dorothy Ufot. *Hardship and Force Majeure in International Commercial Contracts: Dealing with Unforeseen Events in a Changing World*. Kluwer Law International B.V., 2019.

Bui, Ngoc Son. “The Socialist Precedent.” *Cornell International Law Journal* 52, no. 3 (2019): 421–74.

Cairns, John W. “Watson, Walton, and the History of Legal Transplants.” *Georgia Journal of International and Comparative Law* 41, no. 3 (2012): 637–96.

Cairns, John W. “Watson, Walton, and the History of Legal Transplants” 41 (n.d.).

“Changes in Circumstances and the Revision of Contracts in Some European Laws and in International Law In N. Horn (Hrsg.), Adaptation and Renegotiation of Contracts in International Trade and Finance, Studies in Transnational Economic (Law Vol. 3), 1985, S. 15–29.” In *Norbert Horn, Gesammelte Schriften*, 2016. https://doi.org/10.1515/9783110474183-025.

Chitashvili, Natia. “Substantive Legal Prerequisites of Hardship and Scale of Legitimate Intervention of the Court into the Private Autonomy.” *Journal of Law*, no. 2 (December 31, 2021): 67-112 (Eng).

———. “Substantive Legal Prerequisites of Hardship and Scale of Legitimate Intervention of the Court into the Private Autonomy.” *Journal of Law*, no. 2 (December 31, 2021): 67-112 (Eng).

Colombo, Giorgio Fabio. “Nomophilacy and Beyond: Comparative Reflections on Judicial Precedents by Supreme Jurisdictions in Italy and Japan.” *European Journal of Comparative Law and Governance* 2, no. 4 (November 11, 2015): 281–315. https://doi.org/10.1163/22134514-00204001.

Coppo, Letizia. “The Impact of Pandemics on the Landlord-Tenant Relationship: An Italian Reading of the German Federal Court’s Solution.” *European Review of Private Law* 31, no. 2–3 (2023).

Dalhuisen, Jan H. Hendrik. “What Does the Transnationalisation of the Commercial Contract Mean? Is There a New Model and Are There Minimum Standards? Is There a Law and Economics Perspective?” *SSRN Electronic Journal*, 2017. https://doi.org/10.2139/ssrn.3055808.

David, Rene. “Frustration of Contract in French Law The Treatment of Frustration of Contract in Foreign Legal Systems.” *Journal of Comparative Legislation and International Law* 28 (1946): 11–14.
David, René, and John E. C. Brierley. *Major Legal Systems in the World Today: An Introduction to the Comparative Study of Law*. Simon and Schuster, 1978.
Dawson, John P. “Effects of Inflation on Private Contracts: Germany, 1914-1924.” *Michigan Law Review* 33, no. 2 (1934). https://doi.org/10.2307/1280779.
Di Feo, Vanessa. “You’ve Got to Have (Good) Faith: Good Faith’s Trajectory in Anglo-Canadian Contract Law Post-Wastech and the Potential for a Duty to Renegotiate.” *Dalhousie Law Journal* 45, no. 1 (2022): 35–64.
Do Van Dai. *Commentary on the New Provisions of the Civil Code 2015 [Bình Luận Khoa Học Những Điểm Mới Của Bộ Luật Dân Sự 2015]*. Hong Duc Publisher (Nhà Xuất bản Hồng Đức), 2016.
Drachsler, Leo M. “Frustration of Contract: Comparative Law Aspects of Remedies in Cases of Supervening Illegality.” *N.Y.L. SCH. L. REV.* 3, no. 1 (1957).
Elena, Loriatti. “Comparative Law Method and Legal Formants as Catalysts of Normative Realities.” In *The Grand Strategy of Comparative Law: Themes, Methods, Developments*, edited by Luca Siliquini-Cinelli, Davide Gianti, and Mauro Balestrieri. Taylor & Francis, 2024.
Firoozmand Mahmoud Reza. “Changed Circumstances and Immutability of Contract: A Comparative Analysis of Force Majeure and Related Doctrines.” *Bus. L. Int’l* 8 (2007): 161–85.
Flechtner, Harry M. “The Exemption Provisions of the Sales Convention Including Comments on Hardship Doctrine and the 19 June 2009 Decision of the Belgian Cassation Court Uniform Sales Law.” *Annals of the Faculty of Law in Belgrade - International Edition* 2011 (2011): 84–101.
Fondrieschi, Alba F. “Dealing with the Unpredictable: The Impact of the Covid-19 Crisis on Lease Agreements in the Italian and Japanese Legal Systems.” *European Review of Private Law* 30, no. 5 (2022). https://doi.org/10.54648/erpl2022040.
———. “Dealing With the Unpredictable: The Impact of the Covid-19 Crisis on Lease Agreements in the Italian and Japanese Legal Systems.” *European Review of Private Law* 30, no. 5 (October 1, 2022). https://kluwerlawonline.com/api/Product/CitationPDFURL?file=Journals\ERPL\ERPL2022040.pdf.
Gambaro, Antonio, and Michele Graziadei. “Legal Formants.” In *Elgar Encyclopedia of Comparative Law*, 452–58. Edward Elgar Publishing Limited, 2023. https://www.elgaronline.com/display/book/9781839105609/b-9781839105609.formants.xml.
Gillespie, John. “Exploring the Limits of the Judicialization of Urban Land Disputes in Vietnam.” *Law and Society Review* 45, no. 2 (2011). https://doi.org/10.1111/j.1540-5893.2011.00434.x.
Girsberger, Daniel, and Paulius Zapolskis. “Fundamental Alteration of the Contractual Equilibrium under Hardship Exemption.” *Jurisprudencija* 19, no. 1 (2012): n/a.
———. “Fundamental Alteration of the Contractual Equilibrium Under Hardship Exemption.” *Jurisprudencija: Mokslo Darbu Žurnalas* 19, no. 1 (2012): 121–41.
Gorman, John J. “Commercial Hardship and the Discharge of Contractual Obligations under American and British Law Note.” *Vanderbilt Journal of Transnational Law* 13, no. 1 (1980): 107–40.
———. “Commercial Hardship and the Discharge of Contractual Obligations under American and British Law Note.” *Vanderbilt Journal of Transnational Law* 13, no. 1 (1980): 107–40.
Haley, John O. “Rethinking Contract Practice and Law in Japan.” *JE Asia & Int’l L.* 47 (2008).
———. “The Japanese Judiciary Maintaining Integrity, Autonomy, and the Public Trust.” In *Law in Japan: A Turning Point*, 2007.
Haley, John Owen. *The Spirit of Japanese Law*. Vol. 6. University of Georgia Press, 1998.

Hart, Danielle Kie. “If Past Is Prologue, Then the Future Is Bleak: Contracts, COVID-19, and the Changed Circumstances Doctrines.” *Texas A&M Law Review* 9, no. 2 (2021): 347–404.
Hay, Peter. “Frustration and Its Solution in German Law.” *The American Journal of Comparative Law* 10, no. 4 (1961): 345–73. https://doi.org/10.2307/838474.
———. “Frustration and Its Solution in German Law.” *The American Journal of Comparative Law* 10, no. 4 (1961). https://doi.org/10.2307/838474.
Heikki E. S. Mattila. “Cross-References in Court Decisions: A Study in Comparative Legal Linguistics.” *Lapland Law Review*, January 1, 2011.
Hick, Tom. “The Coronacrisis and Its Impact on Creditors: Frustration of Purpose.” *European Review of Private Law* 30, no. Issue 3 (September 1, 2022): 389–418. https://doi.org/10.54648/ERPL2022020.
Hondius, Ewoud, and Christoph Grigoleit, eds. *Unexpected Circumstances in European Contract Law*. The Common Core of European Private Law. Cambridge: Cambridge University Press, 2011. https://doi.org/10.1017/CBO9780511763335.
Igarashi, Kiyoshi and Luvern V. Rieke. “Impossibility and Frustration in Sales Contracts.” *Wash. L. Rev.* 42 (1966).
Ishida, Yasutoshi. “CISG Article 79: Exemption of Performance, and Adaptation of Contract through Interpretation of Reasonableness - Full of Sound and Fury, but Signifying Something.” *Pace International Law Review* 30, no. 2 (2018 2017): 331–82.
Ishikawa, Hiroyasu. “Contractual Crisis and the Doctrine of Change of Circumstances: The Results and Contexts of the Reform of Contract Law in Japan.” In *Dealing with Crisis: The Japanese Experience and Beyond*, 2023. https://doi.org/10.4337/9781035300662.00016.
Ishikawa Hiroyasu (石川博康). “Changes in Circumstances Due to the Pandemic and Contract Revisions [パンデミックによる事情変更と契約の改訂].” *Sakai Kagaku Kenkyū (社会科学研究)* 72.1 (2021): 29–30.
———. “Contractual Crisis and the Doctrine of Changed Circumstances [契約上の危機と事情変更の法理].” In *危機対応の社会科学 下 [Kiki taiō no shakai kagaku]*, 31–54. 東京大学出版会, 2020. https://www.utp.or.jp/book/b481716.html.
Jentsch, Valentin. “On the Need for Codification in European Contract Law : Adaption or Termination of Contractual Obligations in Times of Pandemic.” Working Paper. European University Institute, 2021. https://cadmus.eui.eu/handle/1814/72139.
Kahn-Freund, O. “On Uses and Misuses of Comparative Law.” *The Modern Law Review* 37, no. 1 (1974): 1–27.
Karampatzos, Antonios G. “Supervening Hardship as Subdivision of the General Frustration Rule: A Comparative Analysis with Reference to Anglo American, German, French and Greek Law.” *European Review of Private Law* 13, no. Issue 2 (2005). https://doi.org/10.54648/erpl2005009.
Kegel, Gerhard, Hans Rupp, and Konrad Zweigert. *Die Einwirkung Des Krieges Auf Verträge in Der Rechtsprechung Deutschlands, Frankreichs, Englands Und Der Vereinigten Staaten von Amerika*. *Die Einwirkung Des Krieges Auf Verträge in Der Rechtsprechung Deutschlands, Frankreichs, Englands Und Der Vereinigten Staaten von Amerika*, 2019. https://doi.org/10.1515/9783111414911.
K.M. Sharma. “From ‘Sanctity’ to ‘Fairness’: An Uneasy Transition in the Law of Contracts?” *NYLS Journal of International and Comparative Law* 18, no. 2 (1999).
Kovac, Mitja, and Cristina Poncibò. “Towards a Theory of Imprévision in the EU?” *European Review of Contract Law* 14, no. 4 (December 19, 2018): 344–73. https://doi.org/10.1515/ercl-2018-1021.
Larry A. DiMatteo. “Legal Tradition Bias in Interesting The CISG: Hardship as Case in Point.” In *The Transnational Sales Contract*, 124–59. Wolters Kluwer, 2022.
Legrand, Pierre Jr. “Judicial Revision of Contracts in French Law: A Case-Study.” *Tulane Law Review* 62, no. 5 (1988 1987): 963–1058.

Lookofsky, Joseph. “Impediments and Hardship in International Sales: A Commentary on Catherine Kessedjian’s ‘Competing Approaches to Force Majeure and Hardship.’” *International Review of Law and Economics*, Conference on Commercial Law Theory and the Convention on the International Sale Of Goods (CISG), 25, no. 3 (September 1, 2005): 434–45. https://doi.org/10.1016/j.irle.2006.02.008.

Lorenz, Werner. “Contract Modification as a Result of Change of Circumstances.” In *Good Faith and Fault in Contract Law*, 2012. https://doi.org/10.1093/acprof:oso/9780198265788.003.0014.

Lutzi, Tobias. “Introducing Imprévision into French Contract Law - A Paradigm Shift in Comparative Perspective.” In *The French Contract Law Reform: A Source of Inspiration?*, edited by Sanne Jansen and Sophie Stijns, 89–112. IUS Commune: European and Comparative Law Series. Intersentia, 2016. https://doi.org/10.1017/9781780685533.006.

———. “Introducing Imprévision into French Contract Law - A Paradigm Shift in Comparative Perspective.” In *The French Contract Law Reform: A Source of Inspiration?*, edited by Sophie Stijns and Sanne Jansen, 1st ed., 89–112. Intersentia, 2016. https://doi.org/10.1017/9781780685533.006.

Mazzacano, Peter J. “Force Majeure, Impossibility, Frustration & the Like: Excuses for Non-Performance; the Historical Origins and Development of an Autonomous Commercial Norm in the CISG.” *Nordic Journal of Commercial Law* 2011, no. 2 (2011): [i]-54.

Mekki, Mustapha, and Martine Kloepfer Pelese. “Hardship and Modification (or ’Revision’) of the Contract.” SSRN Scholarly Paper. Rochester, NY, January 26, 2010. https://doi.org/10.2139/ssrn.1542511.

Meyer, Olaf. “Obligation to Pay Rent for Commercial Premises During the Covid-19 Lockdown: The German Federal Court of Justice on the Distribution of Risk Between Tenants and Landlords.” *European Review of Private Law* 31, no. 2–3 (2023).

Montefusco, Luigi. “Interpreting the Conditions for Imprévision: The Goals of the Reform Projects as a Decisive Tool for French and Belgian Courts.” *J. Civ. L. Stud.* 13 (2020).

Nakamura Hajime (中村肇). “About Changed Circumstances and the Decision-Making Process [事情変更の顧慮とその判断過程について (1)(鳥居 (秋場) 淳子先生古稀記念号].” *Seijo Hoūgaku [成城法学]* 75 (2007).

———. “Regarding Recent Changes in the Theory of the Principle of Changing Circumstances [近時の 「事情変更の原則」 論の変容と 「事情変更の原則」 論の前提の変化について].” *Meiji Daigaku Hōka Daigakuin Ronshū [明治大学法科大学院論集]* 6 (2009): 113–55.

National Assembly. “Tổng Thuật Trực Tiếp Chiều 22/11: Quốc Hội Thảo Luận về Dự Án Luật Tổ Chức Tòa Án Nhân Dân (Sửa Đổi) [Comprehensive Summary Live on November 22: National Assembly Discusses the Draft Law on the Organization of People’s Courts (Amended)],” November 22, 2023. https://quochoi.vn/tintuc/Pages/tin-hoat-dong-cua-quoc-hoi.aspx?ItemID=82400.

Ngo Cuong. “Thẩm Phán Với Việc Giải Thích Pháp Luật [Judges and Legal Interpretation].” *Electronic Magazine of People’s Court*, December 24, 2018. https://tapchitoaan.vn/tham-phan-voi-viec-giai-thich-phap-luat.

Nivinski, SKW Schwarz-Justyna Lidia. “Contractual Adjustments Due to Disturbance of the Basis of the Contract.” Lexology, July 5, 2022. https://www.lexology.com/library/detail.aspx?g=7deec276-2b2f-4a72-b9bc-97dd7830f707.

Nottage. “Changing Contract Lenses: Unexpected Supervening Events in English, New Zealand, U.S., Japanese, and International Sales Law and Practice.” *Indiana Journal of Global Legal Studies* 14, no. 2 (2007). https://doi.org/10.2979/gls.2007.14.2.385.

Nottage, L. “Economic Dislocation and Contract Renegotiation in New Zealand and Japan: A Preliminary Empirical Study.” *Victoria University of Wellington Law Review* 27, no. 1 (1997). https://doi.org/10.26686/vuwlr.v27i1.6124.

Oda, Hiroshi. *Japanese Law*. Fourth Edition, Fourth Edition. Oxford, New York: Oxford University Press, 2021.

Osamu Saida (齋田統). “About the Principle of Changed Circumstances [事情変更の原則について].” *Atomigakuen Joshidaigaku Manejimento Gakubu Kiyō (跡見学園女子大学マネジメント学部紀要)* 21 (2016): 67–79.

Pédamon, Catherine. “The New French Contract Law and Its Impact on Commercial Law: Good Faith, Unfair Contract Terms and Hardship.” In *The Future of the Commercial Contract in Scholarship and Law Reform: European and Comparative Perspectives*, edited by Maren Heidemann and Joseph Lee, 99–126. Cham: Springer International Publishing, 2018. https://doi.org/10.1007/978-3-319-95969-6_5.

Pedamon, Catherine. “The Paradoxes of the Theory of Imprevision in the New French Law of Contract: A Judicial Deterrent?” *Amicus Curiae* 112 (2017): 10–17.

Pédamon, Catherine, and Radosveta Vassileva. “Contractual Performance in COVID-19 Times: Does Anglo-French Legal History Repeat Itself?” *European Review of Private Law* 29, no. 1 (March 1, 2021). https://kluwerlawonline.com/api/Product/CitationPDFURL?file=Journals\ERPL\ERPL2021002.pdf.

Perillo, Joseph M. “Force Majeure and Hardship under the UNIDROIT Principles of International Commercial Contracts.” *Tulane Journal of International and Comparative Law* 5 (1997): 5–28.

Perriello, Luca E. “Terminating or Renegotiating? The Aftermath of COVID-19 on Commercial Contracts.” *Comparative Law Review* 11, no. 2 (2020): 73–105.

Puelinckx, Alfons H. “Frustration, Hardship, Force Majeure, Imprévision, Wegfall Der Geschäftsgrundlage, Unmöglichkeit, Changed Circumstances.” *Journal of International Arbitration* 3, no. Issue 2 (1986). https://doi.org/10.54648/joia1986014.

Rimke, Joern. “Force Majeure and Hardship: Application in International Trade Practice with Specific Regard to the CISG and the UNIDROIT Principles of International Commercial Contracts,” 1999. https://www.cisg.law.pace.edu/cisg/biblio/rimke.html.

Rosler, Hannes. “Changed and Unforeseen Circumstances in German and International Contract Law.” *Slovenian L. Rev.* 5 (2008).

Rösler, Hannes. “Hardship in German Codified Private Law – In Comparative Perspective to English, French and International Contract Law.” *European Review of Private Law* 15, no. Issue 4 (August 1, 2007): 483–513. https://doi.org/10.54648/ERPL2007028.

———. “Hardship in German Codified Private Law – In Comparative Perspective to English, French and International Contract Law.” *European Review of Private Law* 15, no. 4 (August 1, 2007). https://kluwerlawonline.com/journalarticle/European+Review+of+Private+Law/15.4/ERPL2007028.

Rowan, Solene. “The New French Law of Contract.” *International and Comparative Law Quarterly* 66, no. 4 (2017): 805–32.

Sacco, Rodolfo. “Legal Formants: A Dynamic Approach to Comparative Law (Installment I of II).” *The American Journal of Comparative Law* 39, no. 1 (1991): 1–34. https://doi.org/10.2307/840669.

———. “Legal Formants: A Dynamic Approach to Comparative Law (Installment II of II).” *The American Journal of Comparative Law* 39, no. 2 (1991): 343–401. https://doi.org/10.2307/840784.

Sauveplanne, J. G. *Codified and Judge Made Law: The Role of Courts and Legislators in Civil and Common Law Systems*. Mededelingen Der Koninklijke Nederlandse Akademie van Wetenschappen, Afd. Letterkunde, Nieuwe reeks, d. 45, no. 4. Amsterdam ; New York: North-Holland, 1982.

Sauveplanne Jean Georges. *Codified and Judge Made Law: The Role of Courts and Legislators in Civil and Common Law Systems*. New York: Amsterdam, 1982.

Schlechtriem, Peter. “The German Act to Modernize the Law of Obligations in the Context of Common Principles and Structures of the Law of Obligations in Europe.” *German Law*

Archive, 2002. https://ouclf.law.ox.ac.uk/the-german-act-to-modernize-the-law-of-obligations-in-the-context-of-common-principles-and-structures-of-the-law-of-obligations-in-europe/.

Schramm Alexander. "The English and German Law on Change of Circumstances: An Examination of the English System and Potential Advantages of the German Model." *Anglo-Ger. LJ* 4 (2018).

Schramm, Alexander. "The English and German Law on Change of Circumstances: An Examination of the English System and Potential Advantages of the German Model." *Anglo-German Law Journal* 4 (2018): 25–55.

Schwenzer, Ingeborg. "Force Majeure and Hardship in International Sales Contracts." *Victoria University of Wellington Law Review* 39, no. 4 (2008). https://doi.org/10.26686/vuwlr.v39i4.5487.

———. "Force Majeure and Hardship in International Sales Contracts Wider Perspectives." *Victoria University of Wellington Law Review* 39, no. 4 (2009 2008): 709–26.

Schwenzer, Ingeborg, and Edgardo Muñoz. "Duty to Renegotiate and Contract Adaptation in Case of Hardship." *Uniform Law Review* 24, no. 1 (March 1, 2019): 149–74. https://doi.org/10.1093/ulr/unz009.

———. "Duty to Renegotiate and Contract Adaptation in Case of Hardship." *Uniform Law Review* 24, no. 1 (March 1, 2019): 149–74. https://doi.org/10.1093/ulr/unz009.

Schwenzer, Ingeborg, and Edgardo Muñoz Prof. "Duty to Renegotiate and Contract Adaptation in Case of Hardship." *Uniform Law Review* 24, no. 1 (2019). https://doi.org/10.1093/ulr/unz009.

Schwerin, Kurt. "Comparative Law Reflections: A Bibliographical Survey." *Northwestern University Law Review* 79, no. 5 & 6 (1985 1984): 1315–42.

Selden, Shannon Rose, Joshua B. Pickar, Samantha Lord Hill, Matei Purice, Lior Pinsky, Priscilla Villa Nova, Hanim Hamzah, et al. "Contract Enforceability in the Age of Covid-19 Roundtable." *Business Law International* 21, no. 3 (2020): 209–28.

Sharma, K M. "From 'Sanctity' to 'Fairness': An Uneasy Transition in the Law of Contracts?" 18 (n.d.).

Shimada Makoto (島田 真琴). "Termination of a Continuous Contract and Good Faith under Japanese and English Law." *Keio Daigaku (慶應法学)* 38 (2017): 13–49.

Shugo Kitayama (北山 修悟). "The Principle of Changed Circumstances [事情変更の原則]." *Jurisuto Zōkan (ジュリスト増刊)* 『民法の争点』 (September 2007): 225–27.

Takahiro Fujita. "Law of Property and Obligations." *Waseda Bulletin of Comparative Law* 18 (n.d.): 73–77.

Teubner, Gunther. "Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergencies." *The Modern Law Review* 61, no. 1 (1998): 11–32. https://doi.org/10.1111/1468-2230.00125.

The Commission of European Contract Law. *Principles of European Contract Law: Parts I and II*. Kluwer Law International B.V., 2000.

Tomohiro Yoshimasa (吉政 知広). "The Doctrine of Changed Circumstances [事情変更の法理]." In *債権法改正と民法学 II 債権総論・契約(1)*, by 安永正昭, 鎌田薫, and 能見善久. Tōkyō-to Chūō-ku: 商事法務, 2018.

Trần Chí Thành, Thành. "Áp Dụng Quy Định Pháp Luật về Sự Kiện Bất Khả Kháng và Thực Hiện Hợp Đồng Khi Hoàn Cảnh Thay Đổi Cơ Bản Trong Bối Cảnh Dịch COVID-19 Tại Việt Nam [Application of the Principles of Force Majeure and Changed Circumstances in Vietnam in COVID-19 Pandemic]." *Tạp Chí Pháp Luật và Thực Tiễn* 43 (2020).

Tran, Kien, Nam Ho Pham, and Quynh-Anh Lu Nguyen. "Negotiating Legal Reform through Reception of Law: The Missing Role of Mixed Legal Transplants." *Asian Journal of Comparative Law* 14, no. 2 (December 2019): 175–209. https://doi.org/10.1017/asjcl.2019.36.

Uchida, Takashi. “Contract Law Reform in Japan and the Unidroit Principles.” *Uniform Law Review* 16, no. 3 (2011). https://doi.org/10.1093/ulr/16.3.705.
Uribe, R. “The Effect of a Change of Circumstances on the Binding Force of Contracts. Comparative Perspectives,” January 1, 2011.
Uribe Rodrigo Momberg. “Change of Circumstances in International Instruments of Contract Law. The Approach of the CISG, PICC, PECL and DCFR.” *European Review of Private Law 479.8 (2011).* 479, no. 8 (2011).
Veneziano, Anna. “UNIDROIT Principles and CISG: Change of Circumstances and Duty to Renegotiate According to the Belgian Supreme Court.” *Uniform Law Review* 15, no. 1 (2010): 137–49.
Vogenauer, Edited by Stefan, ed. *Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)*. Second Edition. Oxford, New York: Oxford University Press, 2015.
Waer, Paul. “Frustration of Contracts in Japanese Law: The Doctrine of Changed Circumstances.” *Law in Japan* 20 (1987): 187–212.
———. “Frustration of Contracts in Japanese Law: The Doctrine of Changed Circumstances.” *Law Japan* 20 (1987).
Wagatsuma, Hiroshi, and Arthur Rosett. “Cultural Attitudes towards Contract Law: Japan and the United States Compared.” *UCLA Pacific Basin Law Journal* 2 (1983): 76–97.
Wahnschaffe Christian Johannes. “The Impact of Covid-19 in German Contract Law.” *Opinio Juris in Comparatione*, 2020.
Watson, Alan. “From Legal Transplants to Legal Formants.” *American Journal of Comparative Law* 43, no. 3 (1995): 469–76.
Yoshimasa, Tomohiro. “The Effects of the Corona Crisis on Contractual Obligations under Japanese Law.” *Zeitschrift Für Japanisches Recht* 26.51 (2021): 21–32.
———. “The Principle of Pacta Sunt Servanda and Its Exceptions under Japanese Contract Law.” In *Contract Law in Changing Times: Asian Perspectives on Pacta Sunt Servanda*, 2022. https://doi.org/10.4324/9781003358305-6.
Zimmermann, Reinhard. “Remedies for Non-Performance.” *Edinburgh Law Review* 6, no. 3 (2002). https://doi.org/10.3366/elr.2002.6.3.271.
———. *The New German Law of Obligations: Historical and Comparative Perspectives*. Oxford University Press, 2005.
Zimmermann, Reinhard, and Simon Whittaker. *Good Faith in European Contract Law*. Cambridge University Press, 2000.
Zivkovic Velimir. “Hardship in French, English and German Law.” *Strani Pravni Zivot*, 2012, 240–60.
Zweigert, Konrad, and Hein Kötz. *Introduction to Comparative Law*. Clarendon Press, 1992.