

Impact of Radical Changes of Circumstances on Contractual Relationships Under Swiss Law and English Law: Tomato-Tomato?

Caroline dos Santos & Robert Denison*

SUMMARY

When circumstances change radically after a contract has been concluded, parties may try to seek relief from performance. If the terms of the contract itself do not assist, the underlying governing law may offer a remedy, depending on the supervening events in question and their effect on the contract. The authors examine the legal mechanisms that Swiss and English contract law provide to address such situations and compare how they each would approach some of the recent unprecedented global events that have affected international commerce.

Both systems are reticent to intervene except where the changes affecting the contract are extreme; therefore, parties will often prefer to try to allocate risk of supervening events by including appropriate contractual terms. In the absence of such terms, both Swiss and English law may relieve a party's liability if performance has become impossible. English law goes further, also offering respite where the purpose of the contract has been frustrated, but will not intervene solely to protect a party from a bad economic outcome. In contrast, Swiss law does permit a judge or arbitrator to intervene and amend the parties' contract in cases of extreme economic imbalance.

KEYWORDS:

Contracts, governing law, supervening events, impossibility, Clausula rebus sic stantibus, frustration

1 INTRODUCTION

Swiss and English law are among the most popular governing laws chosen by parties for international contracts. One of the main reasons is the importance that both attribute to the principle of 'freedom of contract'. Both legal systems recognize that – subject to the constraints of mandatory law – parties should be free to organize their contractual relationship as they wish, with minimum intervention from the state.

Another interrelated principle of paramount importance is '*pacta sunt servanda*', according to which parties should be held to their agreements despite changes that may take place in the course of their contractual relationships. However, as examined herein, both English and Swiss law place limits on the strictness of this doctrine.

* Caroline dos Santos is a Swiss attorney in the arbitration and litigation department at Baker & McKenzie in Geneva. She specializes in international arbitration and advises on contract and commercial matters. Robert Denison is an English solicitor and works in the arbitration department at LALIVE in London. He specializes in international commercial and investment treaty arbitration, as well as public international law.

When entering into a contract, parties necessarily rely on basic postulates that they believe will remain constant throughout their relationship. However, the last few years have demonstrated how those expectations can be shattered. Years of pandemic giving rise to lockdowns have caught the world off guard, crippling supply chains, slowing down global activities and more generally challenging the way we used to conduct international business. The sudden invasion of Ukraine by Russia in early 2022 brought war to the old continent after decades of peace. The resulting unprecedented sanctions regime targeting Russia and Belarus, the general increase in commodities prices, rapidly growing inflation and the threat of a severe energy crisis have wreaked havoc on international contracts, especially those of long duration.

In circumstances such as these, parties to such contracts may wish to tell their counterparty, 'Let's call the whole thing off'.¹ Whether they can do so will depend on the remedies available to them, if any, under the terms of their contract. If there are not, they may look to the governing law of the contract for respite. Although both Swiss and English law broach radical changes of circumstances from different standpoints, one element remains common: a court or arbitral tribunal's intervention will remain rare and rather limited.

The present contribution focuses on the remedies available under Swiss and English contract law assuming the parties' contract does not address the change of circumstances that has occurred. It will first introduce the main principles applicable where there is a change of circumstances under contracts governed by Swiss law – in particular, principles relating to a subsequent and lasting impossibility to perform in the absence of the debtor's fault (see section 2.1 below) and the '*clausula rebus sic stantibus*' doctrine (see section 2.2 below). It also addresses how these doctrines interact with the parties' right to contractually allocate risk as a matter of Swiss law (see section 2.3 below). It will then turn to the applicable doctrine under English contract law – frustration of contract – where the parties have not allocated the risk of the change of circumstances in their contract (see section 3.1 below). It then addresses frustration's interplay with contractual allocation of risk, usually labelled 'force majeure' clauses (see section 3.2 below).

Finally, the authors examine the types of radical changes of circumstances we are seeing in the world today and assess how Swiss and English law may address the impact those changes can have on existing contractual relationships (see section 4 below):

2 THE TREATMENT OF RADICAL CHANGES OF CIRCUMSTANCES UNDER SWISS LAW

The Swiss Supreme Court has developed a rich jurisprudence recognizing that, subject to stringent requirements, subsequent changes of circumstances may sometimes justify not holding parties strictly to their obligations. Two such circumstances are where a party faces a lasting impossibility to perform (see section 2.1 below) and/or in cases where an unforeseeable event severely impacts the equilibrium of the contract (see section 2.2 below). In any event, parties remain free to allocate risk in their contract (see section 2.3 below).

¹ Song by George & Ira Gershwin (1937), 'You like potato and I like potato, You like tomato and I like tomato, Potato, potato, tomato, tomato, Let's call the whole thing off.'

2.1 Subsequent and Lasting Impossibility to Perform in the Absence of the Debtor's Fault Under Swiss Law

Article 97 of the Swiss Code of Obligations (SCO) is the general provision dealing with contractual liability and entitlement to damages in case of breach of contract, as a matter of Swiss law. Pursuant to this provision, a breach of contract can take place if the debtor's obligation was improperly performed (mis-performance), or if the debtor's obligation has subsequently become impossible to perform (in a lasting manner), as a result of the debtor's fault (non-performance).²

What about cases where the debtor's obligation subsequently becomes impossible to perform (in a lasting manner) without the debtor's fault? In those cases, Article 119 SCO applies to determine the fate of the parties' obligations.³ Except as otherwise indicated, the following section focuses on impossibility to perform in the absence of the debtor's fault and the legal regime of Article 119 SCO.

2.1.1 Notion of Impossibility and Requirements for Its Application

Article 119 (1) SCO stipulates that '[a]n obligation is deemed extinguished where its performance is made impossible by circumstances not attributable to the obligor'.

As a matter of Swiss law, it is irrelevant what causes the impossibility; the impossibility may be 'material' (e.g., the object at hand is destroyed or dies) or 'legal' (e.g., an official ban on exportations).⁴

The circumstances leading to impossibility within Article 119 SCO may, for instance, result from so-called 'force majeure' events. Although Swiss statutory law does not provide a definition of 'force majeure', case law defines it as an 'unforeseeable and extraordinary event that occurs with violence that cannot be resisted'.⁵

Determining whether performance is impossible is subject to strict review by tribunals and courts and stringent requirements have to be demonstrated.

First, it is generally required that the debtor's performance be objectively impossible.⁶ That is to say, the obligation can neither be performed by the debtor nor by any third party.⁷

² Article 97(1) SCO states, 'When the creditor cannot obtain performance of the obligation or can only obtain it imperfectly, the debtor shall repair the damage resulting from it, unless it proves that it was not at fault'.

³ CR CO I, Luc Thévenoz et al., *Commentaire Romand du Code des Obligations* (3d ed. 2021), Art. 119, paras 1 et seq.; Cyrill Chevalley, *The Impacts of Foreign Sanctions on Commercial Contracts*, 7 PJA 728, 747 (2022).

⁴ Swiss Supreme Court Decision 4C.344/2002 of 12 Nov. 2003, para. 4.2. See also Peter Gauch, Walter R. Schlupe, Jörg Schmid & Susan Emmenegger, *Schweizerisches Obligationenrecht Allgemeiner Teil – Band I und Band II* 100, para. 2560 (2020).

⁵ Swiss Supreme Court Decision 111 II 429 of 19 Dec. 1985, para. 1b (free translation). See also Swiss Supreme Court Decision 4C.45/2005 of 18 May 2005, para. 4.2.3.

⁶ Grégoire Geissbühler, *Le droit des obligations Volume 1: partie générale* 452, para. 1078 (2020).

⁷ It however remains debated whether a 'subjective' impossibility to perform without the debtor's fault would be deemed sufficient. See Swiss Supreme Court Decision 4C.344/2002, *supra* n. 4, para. 4.2 (free translation): 'some also distinguish between objective impossibility, i.e., neither the debtor nor third parties are able to perform the contractual obligation ... or subjective, when performance becomes impossible because it comes up against an insurmountable obstacle for the debtor ... The Supreme Court takes a rather

Second, the impossibility must arise from circumstances for which the invoking party is not responsible. In other words, the invoking party must not be at fault with regard to the occurrence of the impossibility.⁸ This has proven a high threshold to meet in the past, the Swiss Supreme Court having considered in one of its decisions that failing to anticipate and prevent the impossibility could constitute fault of the party unable to perform. Indeed, the Swiss Supreme Court dismissed a Swiss company's claim that its contractual obligation to deliver a 'Mini 8067' nuclear installation to Pakistan was rendered impossible pursuant to Article 119 SCO following a ban by the Swiss authorities of exporting 'Makro 8062' installations. First, the Swiss Supreme Court stated that the export ban only applied to the 'Makro 8062' such that delivering the 'Mini 8067' would not have been impossible. More importantly, it ruled that, even assuming the 'Mini 8067' had been banned as well, impossibility would have been denied given that export prohibitions in the nuclear sector could have been 'foreseeable' by the contractor, who specialized in the field of nuclear technology and was thus aware of the relevant legislation and the enforcement measures that the federal authorities could take. The Swiss Supreme Court concluded that the Swiss company 'had to take [this] into account ... in its contract negotiations and, if necessary, make corresponding reservations regarding deliveries'.⁹ By failing to do so, the Swiss company was held responsible.¹⁰

Third, the impossibility cannot result from a cause that already existed when the parties entered into the contract; it must be 'subsequent'.¹¹

Fourth, impossibility must be definitive or lasting – as opposed to only temporary. Only where performance is definitively or permanently impossible will the regime under Article 119 SCO apply. If, on the contrary, performance of the contract is only temporarily impossible, the liability regime applicable to the debtor's delay applies, rather than Article 119 SCO.¹²

Despite the façade of simplicity of this last requirement, assessing whether impossibility to perform is definitive or only temporary has at times proven challenging in practice. Temporary impossibility may, sometimes, equate to definitive impossibility. In particular, this is the case where the contract was to be performed at a given time that overlaps with the event causing the impossibility. In such cases, even though the event is temporary in nature, Article 119 SCO may still apply (e.g., a concert having to take place at a specific time and place, the performance of which becomes impossible due to a volcanic eruption at that moment and location).¹³ This is

broad view'. See also BSK OR I, Corinne Widmer Lüchinger et al., *Basler Kommentar Obligationenrecht I* (7th ed. 2020), Art. 119, para. 1.

⁸ Geissbühler, *supra* n. 6, at 452, para. 1080. See also Ivan Cherpillod, *La fin des contrats de durée* 55, para. 95 (1988).

⁹ See Swiss Supreme Court Decision 111 II 352 of 3 Sep. 1985, para. 2b (free translation).

¹⁰ For more details on the interrelation between international sanctions and Art. 119 SCO, see Chevalley, *supra* n. 3.

¹¹ Geissbühler, *supra* n. 6, at 452, para. 1076. In cases where the impossibility is initial, Art. 20(1) SCO applies and states, 'A contract is void [ex tunc] if its terms are impossible, unlawful or immoral'.

¹² In such cases the rules applicable to debtors' delay apply, i.e., Art. 102 et seq. SCO. See Geissbühler, *supra* n. 6, at 1077; Gauch, Schlupe, Schmid & Emmenegger, *supra* n. 4, at 102, para. 2563.

¹³ See Cherpillod, *supra* n. 8, at 57, para. 101.

also the case where performance under a fixed-term contract will not be possible again before the end of the contract.¹⁴

In the last century, case law has sometimes blurred the lines as to what should be deemed ‘definitive’. For example, in its decision 42 II 379 dated 16 July 1916, the Swiss Supreme Court did not dwell on the ‘definitive or lasting’ requirement and considered that the export ban on certain eggs issued by Austria in the context of the First World War, was deemed a ‘force majeure’ event that resulted in impossibility within the meaning of Article 119 SCO.¹⁵ However, in a recent case, the Supreme Court recalled that temporary impossibility can be considered lasting if its duration is at least ‘unforeseeable to the point that it is comparable to a lasting impediment’, without providing further examples.¹⁶

2.1.2 Effect of Impossibility

Provided the impossibility was not caused by the debtor’s fault, the consequences on the parties’ obligations are governed by Article 119 SCO.

On the invoking party’s side (i.e., the debtor), Article 119 (1) SCO releases it from performing; the obligation is deemed ‘extinguished’. The co-contracting party (i.e., the creditor) thus bears the risk of not receiving what it was promised. With regard to the creditor’s obligation, Article 119(2) SCO also releases the creditor from performing. The debtor therefore bears the risk of not receiving performance of the creditor’s obligation.¹⁷ In cases where, before the impossibility takes place, the creditor performed its own obligation (or performed it in part) – for instance by paying advance sums – it is entitled to a refund.¹⁸

Accordingly, assuming the requirements of Article 119(1) SCO are met, no damages pursuant to Article 97(1) SCO are to be paid to the creditor. By contrast, if the impossibility arises due to the debtor’s fault, it will be contractually liable pursuant to Article 97 SCO (provided the other requirements of said provision are met as well).¹⁹

2.2 The Clausula Rebus Sic Stantibus Doctrine

In cases where, following unexpected events, performance of a contract remains *technically* possible, but instead becomes extremely costly, the *clausula rebus sic stantibus* doctrine may come into play to help the debtor.

2.2.1 Notion of Clausula and Requirements for Its Application

Pursuant to the *clausula rebus sic stantibus* doctrine (hereafter ‘*clausula*’ doctrine) – a court or tribunal may consider adapting a contract where a change of circumstances significantly disturbs the equilibrium of a contract, to the extent that it would

be abusive for one party to insist on performance despite the new circumstances.²⁰

As compelling as this doctrine may sound, not just *any* change of circumstances will give rise to the *clausula* doctrine. To the contrary, the Swiss Supreme Court has set a very high threshold, leading to only scarce instances of cases confirming the *clausula* doctrine. To summarize, two requirements should be demonstrated by the invoking party.

A first requirement relates to the change of circumstances, which must be new (i.e., subsequent to the conclusion of the contract), not result from any fault of the invoking party, and unforeseeable.²¹ In particular, a change of circumstances that was foreseeable, the risks of which could have been addressed by the parties, cannot give rise to the *clausula* doctrine. In the words of a prominent scholar, ‘it is today known that a variation in the course of steel [prices] can take place, but around 2007, it was a surprise. Today one can no longer reasonably invoke the unpredictable character [of such a change], at least when the modification of the patterns remain within what has existed’.²² Only time will tell whether the same will apply to the current variation in energy prices, which are likely to impact current contractual relationships.

Second, the change of circumstances must render the transaction significantly disproportionate. Swiss case law does not adopt too rigid of an approach when determining this element: each case will be analysed from a fairness standpoint, on a case-by-case basis. While the Supreme Court has sometimes indicated that the debtor must be ‘threatened by ruin’,²³ a review of the Swiss Supreme Court’s decisions made by Pascal Pichonnaz shows that cost increases or losses ranging from 24% to 60% were deemed sufficient for the disproportionality requirement to be met.²⁴

In any event, one constant remains: admitting the *clausula* doctrine in practice remains rare in Swiss case law,²⁵ meaning it will not allow a party to elude its obligations just because it entered into a bad bargain, resulting in a loss.²⁶

2.2.2 Effect of Clausula Doctrine

A judge requested to apply the *clausula* doctrine will first review whether parties anticipated a potential change of circumstances in their agreement by including a specific provision, and interpret it based on Swiss rules on contract interpretation, if necessary.²⁷

¹⁴ Gauch, Schluep, Schmid & Emmenegger, *supra* n. 4, at 101, para. 2564.

¹⁵ Swiss Supreme Court Decision 42 II 379 of 16 Jul. 1916, 381.

¹⁶ Swiss Supreme Court Decision 4C.344/2002, *supra* n. 4, para. 4.2. See also Gauch, Schluep, Schmid & Emmenegger, *supra* n. 4, at 101, para. 2564.

¹⁷ Pierre Tercier & Pascal Pichonnaz, *Le droit des obligations* 365 et seq. (6th ed. 2019), paras 1582 et seq.

¹⁸ CR CO I, Thévenoz et al., *supra* n. 3, Art. 119, paras 23 et seq.

¹⁹ For more details on the interrelationship between Art. 97 SCO and Art. 119 SCO, see Oliver Kälin, *Entlastung und Exkulpation nach Art. 97 Abs. 1 OR*, 11 PJA 1339, 1339 (2007).

²⁰ See BSK ZGB I, Thomas Geiser et al., *Basler Kommentar Zivilgesetzbuch I* (7th ed. 2022), Art. 2, para. 19 and decisions cited therein; Geissbühler, *supra* n. 6, at 458, para. 1091.

²¹ Swiss Supreme Court Decision 127 III 300 of 24 Apr. 2001, para. 5b. See also BSK ZGB I, Geiser et al., *supra* n. 20, Art. 2, para. 19.

²² Pascal Pichonnaz, *La modification des circonstances et l’adaptation du contrat*, *La pratique contractuelle* 2 21, 27 et seq. (2011) (free translation).

²³ Supreme Court Decision 54 II 257 of 23 May 1928.

²⁴ Pichonnaz, *supra* n. 22, at 28.

²⁵ Geissbühler, *supra* n. 6, at 458, para. 1091.

²⁶ Cherpillod, *supra* n. 8, at 52, para. 88.

²⁷ Swiss Supreme Court Decision 127 III 300, *supra* n. 21, para. 6.a. Only in exceptional circumstances, there may be cases where the parties *did* include a provision governing a change of circumstances that a judge may be called to ‘correct’, i.e., if enforcing such provision would result in an abuse of rights. See Pichonnaz, *supra* n. 22, at 28; Pierre Tercier, *La ‘clausula rebus sic stantibus’ en droit suisse des obligations*, JdT 1979 I 194, 206 (1979).

In the absence of an applicable and enforceable clause, the judge may have to intervene to terminate or adapt the contract, based on the parties' intent. In such a case, the judge will first rely on any specific default rule governing the matter at hand (if any) provided by Swiss legislation and, in the absence of any, 'reconstitute' the parties' hypothetical intent, based on the circumstances surrounding execution of the contract (e.g., the nature of the contract, the context in which it was entered into, each party's interests, etc.). The judge's intervention will then usually take two forms: either annulling the contract or amending it.²⁸

In any event, as scholarly writing indicates, it should be expected from the parties first to try to renegotiate the terms of their agreement; the intervention of a judge being only the last resort.²⁹ Parties are, indeed, usually best placed to decide on how to best adjust their agreement (and are often incentivized to do so when they fear a decision, that a judge may arrive at a decision that will not satisfy any of them).

2.3 Contractual Allocation of Risks

The above shows that Swiss law is well equipped to address significant changes in circumstances, where they make it impossible for the debtor to perform (without its own fault), or where they otherwise significantly impact the equilibrium of their contract.

Notwithstanding the above, parties to a contract are always free, within the limits of mandatory law, to allocate risk as they please in their contract. This principle is well summarized by a Swiss scholar: '*in the mud of legal rules there is one pure diamond: the parties' agreement*'.³⁰

Although pursuant to Article 119(1) SCO, subsequent lasting impossibility in the absence of the debtor's fault has the effect of extinguishing the obligation,³¹ parties are free to decide otherwise by allocating risks differently in their contract. For instance, they may agree that the debtor will remain liable in case of impossibility of performance, including where such impossibility does not result from its own fault (Article 119(3) SCO).³²

Equally, parties are free to provide for a specific legal regime in case a significant change of circumstances impacts performance of their contract.

One practical example of how parties can manage risks is including a force majeure clause. Although they are not technically necessary in a contract governed by Swiss law because of the above-described doctrines, it is quite common, probably due to common law influences, to encounter such force majeure clauses in international commercial contracts subject to Swiss law. By including them, parties can circumscribe more precisely the scope of what they deem to be force majeure (e.g., for circumstances that have not yet been

addressed by case law) and the specific regime and remedies they want to apply *in casu*.³³

It is also not uncommon to find 'hardship' clauses in international agreements subject to Swiss law. Traditionally, hardship clauses allow the adaptation of the agreement where an unforeseeable change in circumstances significantly impacts the balance of the agreement. Again, by including such a clause, parties can define what will constitute 'hardship' for them, as well as define the legal regime that best suits their relationship.³⁴

3 THE TREATMENT OF RADICAL CHANGES OF CIRCUMSTANCES UNDER ENGLISH CONTRACT LAW

Relative to other legal systems, English contract law tends to be recognized for the importance it places on the principle of 'freedom of contract'. The starting point when reviewing how English law treats a change of circumstances is, therefore, the principle of *pacta sunt servanda*.

Modern English contract law has departed from this starting position, albeit not far. In general, English contract law holds parties exactly to what they contracted to do.³⁵ Contractual liability is, in this sense, strict; unlike Swiss law, it is no defence for a debtor to argue that they are not at fault for their inability to perform. However, like Swiss law (*see* section 2 above) English law does acknowledge that there are situations where it may be inappropriate to hold parties strictly to their contractual bargains.

The doctrine of 'frustration' may assist parties in such situations (*see* section 3.1 below). However, its heavy dependence on the facts of each case means that it remains a nebulous concept, and it is limited in application to extreme circumstances. For these reasons, parties electing English law to govern their contracts often include clauses expressly addressing force majeure-type situations and the consequences they will have on the parties' respective obligations (*see* section 3.2 below).

3.1 Frustration

Historically, English courts applied the principle of *pacta sunt servanda* strictly. In its English language incarnation, 'absolute contracts', the courts held parties strictly to their contractual obligations, notwithstanding subsequent changes of circumstances. The strictness of the rule was justified on the basis that, had the parties wished to do so, they could have made provision for such changed circumstances in the contract.³⁶

³³ Marchand, *supra* n. 30, at 206.

³⁴ *Ibid.*, at 208 et seq.

³⁵ *See* H. Beale, *Chitty on Contracts*, 34th ed. (2021), para. 24–001, explaining that in general parties must perform exactly what they contracted to do. If there is a question as to the sufficiency of performance, first, one must interpret the contract to ascertain the nature of the obligation, and then ascertain whether the actual performance measures up to that obligation.

³⁶ In *Paradine v. Jane* (1646) Al. 26; 82 E.R. 897, decided in 1646, a tenant was sued for non-payment of rent under his lease. In his defence, the tenant pleaded that a hostile army led by Prince Rupert of Germany had expelled him from the land for two years of the tenancy. The Court of King's Bench dismissed his plea, ruling that: '*when the party by his own contract creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract*'.

²⁸ Swiss Supreme Court Decision 127 III 300, *supra* n. 21, para. 6.a. *See also* Geissbühler, *supra* n. 6, at 459, para. 1097. *See also* BSK OR I, Lüchinger et al., *supra* n. 7, Art. 18, para. 118.

²⁹ Pascal Pichonnaz, *Un droit contractuel extraordinaire ou comment régler les problèmes contractuels en temps de pandémie*, special issue RDS/ZSR 137, 144 (2020).

³⁰ Sylvain Marchand, *Clauses contractuelles: Du bon usage de la liberté contractuelle* 1 (2008) (free translation).

³¹ *See* s. 2.1.2 above.

³² Article 119(3) SCO states, '*This does not apply to cases in which, by law or contractual agreement, the risk passes to the obligee prior to performance*'.

Applying the doctrine of ‘absolute contracts’ assumes that it is reasonable to expect the parties to have provided for unforeseen events in their contract at the time and in the circumstances it was agreed. English law does, however, acknowledge that there are some post-agreement changes of circumstances that make it unreasonable to hold parties strictly to the terms of their contracts.

Its solution is the doctrine of frustration. Frustration operates to discharge the parties to a contract from performing their further obligations. As explained in further detail in the following sections, it applies only in limited circumstances: where something occurs that renders performance of the contract legally, physically or commercially impossible, or radically different.³⁷

3.1.1 Notion of Frustration and Requirements for Its Application

The origins of the doctrine of frustration are frequently credited to the case of *Taylor v. Caldwell*, decided by the Court of King’s Bench in 1863.³⁸ In that case, a music hall was destroyed by an accidental fire before it was due to be let to the plaintiffs. The plaintiffs sued the owners for breach of contract, but the court dismissed the plaintiffs’ claim. It reasoned that, ‘in contracts in which the performance depends on the continued existence of a given person or thing, a condition is implied that the impossibility of performance arising from the perishing of the person or thing shall excuse the performance’.³⁹

Thus, it was established that, in cases where the subject matter of the contract was physically destroyed, a contract may be discharged, relieving the debtor of its remaining obligations. Even before *Taylor v. Caldwell*, contracts for personal performance would be considered discharged by the death or incapacitation of the obligor, such that performance was made impossible.⁴⁰ Earlier authorities had also established an exception to the doctrine of absolute contracts in cases where performance of the contract became illegal after its formation.⁴¹

A third exception was later added, where performance was not necessarily impossible or illegal, but the commercial ‘adventure’ envisaged by the parties under their contract had been frustrated. In the 1874 case of *Jackson v. Union Marine Insurance Co Ltd*, a ship had been chartered but ran aground shortly after leaving port. It took six weeks to refloat and six

months to repair.⁴² The court held that this implied ‘a voyage undertaken after the ship was sufficiently repaired would have been a different voyage ... different as a different adventure, – a voyage for which at the time of the charter the plaintiff had not in intention engaged the ship, nor the charterers the cargo’.⁴³

Although frustration was originally characterized as operating by way of an implied term of the contract,⁴⁴ more recent case law explains, rather, that it arises from the nature of the obligation to perform the obligations affected by the frustrating event.⁴⁵ In *Davis Contractors v. Fareham Urban District Council*, Lord Radcliffe elucidated the modern theory of frustration:

*Frustration occurs whenever the law recognises that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract. Non haec in foedera veni. It was not this that I promised to do.*⁴⁶

Recent judgments have also stressed that applying the doctrine requires a ‘multi-factorial approach’, taking into account the following:

*[t]he terms of the contract itself, its matrix or context, the parties’ knowledge, expectations, assumptions and contemplations, in particular as to risk, as at the time of the contract, ... and then the nature of the supervening event and the parties’ reasonable and objectively ascertainable calculation as to the possibilities of future performance in the new circumstances.*⁴⁷

Applying this ‘multi-factorial approach’ necessarily means that cases of frustration are very fact dependent. Nevertheless, a high-level ‘test’ for frustration under modern English law can be broken down as follows⁴⁸:

- there must be a supervening event, the consequences of which are not already dealt with by a term of the contract itself;
- the event must not result from the default of either party;
- it must fundamentally change the nature of the outstanding contractual rights and/or obligations; and
- it must, as a result, become unjust to hold the parties to their obligations in their literal sense.

The doctrine is narrow in scope.⁴⁹ It does not operate to relieve a contracting party from what turns out to be a bad

³⁷ See generally E. Peel, *Treitel on Frustration and Force Majeure*, 4th ed. (2021); Beale, *supra* n. 35, Ch. 26.

³⁸ (1863) 3 B. & S. 826.

³⁹ *Ibid.*, at 826, 839.

⁴⁰ *Isabella Hall v. George Wright* (1858) El. Bl. & El. 746, 749: ‘Where a contract depends upon personal skill, and the act of God renders it impossible, as, for instance, in the case of a painter employed to paint a picture who is struck blind, it may be that the performance might be excused, and his death might also have the same effect’.

⁴¹ *Brewster v. Kitchell* (1697) 1 Salk. 198: ‘[W]here H. covenants not to do an act or thing which was lawful to do, and an Act of Parliament comes after and compels him to do it, the statute repeals the covenant: so if H. covenants to do a thing which is lawful, and an Act of Parliament comes in and hinders him from doing it, the covenant is repealed’; *Atkinson v. Ritchie* (1809) 10 East 530, 534: ‘That no contract can properly be carried into effect, which was originally made contrary to the provisions of law; or which, being made consistently with the rules of law at the time, has become illegal in virtue of some subsequent law; are propositions which admit of no doubt’.

⁴² (1874–75) L.R. 10 C.P. 125.

⁴³ *Jackson v. Union Marine Insurance Co Ltd* (1874–75) L.R. 10 C.P. 125, 141.

⁴⁴ See also *F.A. Tamplin S.S. Co Ltd v. Anglo-Mexican Petroleum Products Co Ltd* [1916] 2 A.C. 397, 403–404: ‘no court has an absolving power, but it can infer from the nature of the contract and the surrounding circumstances that a condition which was not expressed was a foundation on which the parties contracted ... Were the altered conditions such that, had they thought of them, the parties would have taken their chance of them, or such that as sensible men they would have said, “if that happens, of course, it is all over between us?”’.

⁴⁵ See *Canary Wharf (BP4) T1 Ltd v. European Medicines Agency* [2019] EWHC 335 (Ch), at 26(5).

⁴⁶ [1956] A.C. 696, 729.

⁴⁷ *The Sea Angel* [2007] EWCA Civ 547, at 111. See also *Canary Wharf (BP4) T1 Ltd*, *supra* n. 45, at 39–40.

⁴⁸ See *National Carriers Ltd v. Panalpina (Northern) Ltd* [1981] 1 AC 675, 700.

⁴⁹ See *The Super Servant Two* [1990] 1 Lloyd’s Rep. 1, per Bingham LJ: ‘Since the effect of frustration is to kill the contract and discharge the parties from further liability under it, the doctrine is not to be lightly

bargain.⁵⁰ Parties to English law governed contracts are, therefore, likely to be held to their contracts when supervening events do not change the nature of the outstanding obligations, but merely make performance more expensive or onerous.⁵¹

3.1.2 Effect of Frustration on the Contract

Where a contract is frustrated, the effect is to ‘kill the contract’.⁵² This is distinct from rescission of the contract *ab initio*. The contract is not unwound; rather, the parties are discharged from all further obligations under the contract. There is no doctrine of ‘temporary frustration’.⁵³ Therefore, it cannot be used to suspend obligations under a contract if the supervening events disrupting the contract are only temporary.

Frustration occurs automatically upon the happening of the frustrating event.⁵⁴ There is no need for either party to serve notice on the other that the contract has come to an end. It does so by operation of law.

At common law (i.e., the law as developed by the courts), a court or tribunal does not have any power to adjust the terms of the contract to new circumstances. This situation led to harsh results in cases where one party had performed already but the other had not. For example, if one party had paid an advance for services or goods and subsequently the contract was frustrated before the other party supplied those services or goods, the supplier would be excused from performing with no obligation to repay the advance.

This situation was partly remedied by intervention of Parliament by way of the Law Reform (Frustrated Contracts) Act 1943.⁵⁵ Section 1(2) of the Act entitles a party that has paid sums under a contract that becomes frustrated to a refund. If the other party has incurred expenses in the performance of the contract, the court (or tribunal) has discretion to allow the retention of some or all of the sums paid (or contracted to be payable), up to the amount of the expenses incurred.

However, unlike the *clausula* doctrine under Swiss law, courts and arbitral tribunals applying English law have no general power to supplement the contract or to ‘reconstitute’ the parties’ hypothetical intent, so that the contract may continue on more balanced terms. Rather, the outcome is

invoked, must be kept within very narrow limits and ought not to be extended’.

⁵⁰ *Pioneer Shipping Limited v. BTP Tioxide Limited (The Nema)* [1982] AC 724, at 752: ‘[frustration is] not likely to be invoked to relieve contracting parties of the normal consequences of imprudent commercial bargains’.

⁵¹ *National Carriers Ltd*, *supra* n. 48, at 700.

⁵² *The Super Servant Two*, *supra* n. 49. See also *Hirji Mulji v. Cheong Yue SS Co Ltd* [1926] A.C. 497, 505.

⁵³ *Bank of New York Mellon (International) Ltd v. Cine-UK Ltd* [2021] EWHC 1013, at 211.

⁵⁴ There may be limited circumstances where a ‘self-induced’ frustrating event, brought about by one party, gives rise to an option for the other party to elect to frustrate the contract. See E. Peel, *Treitel on The Law of Contract*, 15th ed. (2020), para. 19–099. See also the analysis of the arbitral tribunal in *Vale S.A. v. BSG Resources Limited*, LCIA Case No. 142683, Award dated 4 Apr. 2019, at 842.

⁵⁵ Note that under s. 2(5)(c) of the Law Reform (Frustrated Contracts) Act 1943, s. 1(2) does not apply to contracts to which s. 7 of the Sale of Goods Act 1979 applies (see s. 3.1.2 above).

much closer to the effects of impossibility in Swiss law, under Article 119 SCO, which has the effect of ‘extinguishing’ the obligation (see section 2.1.2 above). Frustration is, therefore, a blunt and inflexible tool, which will not necessarily result in an outcome that either party would have expected to apply in such circumstances.

3.2 Contractual Allocation of Risk: The Overlap Between Frustration and a Force Majeure Clause

As explained above, the doctrine of frustration is narrow in scope and difficult to pin down with precision. There is no other doctrine of general application – such as Swiss law’s *clausula* doctrine – for parties to fall back on if the circumstances in which they contracted change severely. Therefore, under contracts governed by English law, parties often include provisions to allocate the risk of changes of circumstances expressly.

Such clauses are often given the label ‘force majeure’, but that phrase derives from French law and is not a term of art under English law.⁵⁶ The scope and effect of a force majeure-type clause will depend on its meaning according to the usual rules of interpretation of contract prescribed by English contract law.⁵⁷

Force majeure clauses governed by English law typically include a list of specific events that will trigger the contractually agreed consequences of the force majeure situation.⁵⁸ They usually require that the triggering event caused the non-performance. Therefore, the party seeking to rely on the clause bears the burden of proving that they did not perform because of the triggering event. The consequences may be, for example, that the parties are discharged from performance, that they may terminate on notice, or they may be given more time to perform.

Although it applies by operation of contract law, frustration is still subject to the parties’ freedom of contract. Accordingly, where the contract itself already provides for the supervening event in question, whether by way of a force majeure clause or otherwise, the contract is not frustrated and the parties’ agreement applies, provided the contract makes ‘full and complete’ provision for the consequences on the parties’ remaining obligations.⁵⁹

However, English courts have tended to interpret force majeure clauses narrowly – in other words, holding that frustration is not excluded – where the supervening events could not reasonably have been foreseen at the time of the contract.

⁵⁶ See K. Lewison, *The Interpretation of Contracts*, 7th ed. (2020), para. 13.01.

⁵⁷ See *Investors Compensation Scheme Ltd v. West Bromwich Building Society (No. 1)* [1997] UKHL 28; [1998] 1 W.L.R. 896, at 912. See also generally Lewison, *supra* n. 56, Ch. 13.

⁵⁸ See e.g., FIDIC, *FIDIC Conditions of Contract for Construction (Red Book)*, 2d ed., at 90: ‘(a) war, hostilities ... , invasion, act of foreign enemies; (b) rebellion, terrorism, revolution, insurrection, military or usurped power, or civil war; (c) riot, commotion or disorder ... ; (d) strike or lockout ... ; (e) encountering munitions of war, explosive materials, ionising radiation or contamination by radio-activity, except as may be attributable to the Contractor’s use of such munitions, explosives, radiation or radio-activity; or (f) natural catastrophes such as earthquake, tsunami, volcanic activity, hurricane or typhoon’.

⁵⁹ *Joseph Constantine SS Line Ltd v. Imperial Smelting Corp Ltd* [1942] A.C. 154, 163; *Bunge SA v. Kyra Shipping Co Ltd*. [2012] EWHC 3522 (Comm); [2012] 2 C.L.C. 998, 1024, at 79.

This may be the case even where the literal wording of the clause appears to cover the events in question. For example, in *Metropolitan Water Board v. Dick, Kerr & Co Ltd*,⁶⁰ the contract for the construction of a reservoir included a broadly worded clause whereby the engineer could grant an extension of time for delays caused by ‘difficulties, impediments, obstructions, oppositions, doubts, disputes, or differences, whatsoever and howsoever occasioned’. Nevertheless, the House of Lords held that the clause was not engaged by the circumstances (a government order to cease work). It did not apply where ‘the interruption is of such a character and duration that it vitally and fundamentally changes the conditions of the contract, and could not possibly have been in the contemplation of the parties to the contract when it was made’.⁶¹ Since the clause was held not to apply, frustration was not precluded and it applied to discharge the parties’ obligations.

On the other hand, if the intervening change of circumstances was foreseeable at the time of the contract, there is a presumption that the parties factored those risks into their bargain. In that case, generally, frustration will not intervene.⁶² The consequences flowing from the change of circumstances will fall in accordance with the contract’s terms.

4 SWISS AND ENGLISH LAW: TOMATO-TOMATO?

The events of the last three years have, unfortunately, provided ample examples of radical changes of circumstances. The authors examine below how Swiss and English law may deal with potential impacts on contracts arising from the pandemic (see section 4.1 below), war and its aftermath (see section 4.2 below) and radical economic changes (see section 4.3 below). Although each case is fact-specific – and particularly reliant on the contractual regime defined by the parties (if any) – the below aims at providing the reader with an overview of certain solutions found by both Swiss and English courts, in particular if the parties’ contract does include such a contractual regime.

4.1 Pandemic

The pandemic, for obvious reasons, wreaked havoc on commercial relationships of all kinds throughout the globe. Due to government-imposed lockdowns and bans, many businesses were forced to close.

Switzerland was no exception: as from mid-March 2020, many businesses, including restaurants and bars, were forced to temporarily close for health and sanitary reasons. While scholars from all legal fields discussed the impact of COVID-19 in their respective area of practice, one issue of particular interest has been to determine whether said measures could render obligations impossible to perform within the meaning of Article 119 SCO – with the consequences this regime entails (see section 2.1.2 above) – and/or whether they

could give rise to the *clausula* doctrine, opening the door to adjustment or termination of the agreement (see section 2.2.2 above).

In this regard, an apparent trend has emerged from some lower court decisions addressing commercial leases contracts in the context of the pandemic. According to these decisions,⁶³ bans on opening certain businesses were not sufficient to amount to impossibility since they were usually only temporary in nature (i.e., bars and restaurants being expected to reopen).⁶⁴

One decision further recalled, without going into detail, that impossibility within the meaning of Article 119 SCO, does not encompass ‘uselessness’ of obtaining performance, i. e., when the landlord’s performance remains objectively possible but becomes useless for the tenant. For instance, if a tenant is prohibited by authorities from using a rented object as it expected, such that it becomes ‘useless’ to them, Article 119 SCO should not apply.⁶⁵

However, this decision also held that the general closure of public bars and restaurants, ordered in the context of COVID-19 in 2020, constituted a significant and unforeseeable change in circumstances that *could* leave room for the *clausula* doctrine. However, the tribunal eventually dismissed the claimants’ claim as it considered that the circumstances at hand did not render the transaction disproportionate.⁶⁶ In a similar case, a decision rendered in the canton of Zurich, held that *in casu*, the change in circumstances did not lead to a serious and unavoidable disproportion within the meaning of case law – notably because the party did not prove it and did

⁶³ See Geneva Lease and Rental Tribunal Decision JTBL/565/202 of 28 Jun. 2021, para. 5c (free translation): ‘Moreover, these measures are not of a lasting nature within the meaning of the above-mentioned case law ... The conditions for a release in the sense of article 119 CO are thus not fulfilled’. See also Zurich Lease Tribunal Decision BG/ZH MJ210008-L of 2 Aug. 2021, para. IV.3.2 and Neuchâtel Cantonal Tribunal Decision RJN 2021 260, para. 12.3 d.

⁶⁴ As a side note, the outcome may have been different if the contract was to be performed at a given time that overlapped with the ban (e.g., a live concert supposed to take place at a bar closed during bans), see s. 2.1.1 above.

⁶⁵ See Geneva Lease and Rental Tribunal Decision JTBL/565/202, *supra* n. 63, para. 5a, which recalls the ‘dentist Emrich case’ (Supreme Court Decision 57 II 532 of 10 Nov. 1931). In this case, a ‘special use’ of the rented space had been agreed by the parties. The lease contract at hand between Mrs Emrich, a dentist, and the landlord, himself, also a dentist, was coupled with a takeover by Mrs Emrich of the landlord’s installations and clientele. When, following a change in the law, she could no longer exercise her profession, it was considered that the very purpose of the contract had disappeared, such that she was released from her obligation to pay rent based on Art. 119 SCO (provided return of the premises). However, the ‘dentist Emrich case’ being very specific, it is unlikely to result in a generalized applicability in the context of COVID-19 bans.

⁶⁶ Geneva Lease and Rental Tribunal Decision JTBL/565/202, *supra* n. 63, para. 5d (free translation): ‘[T]he general closure of establishments ordered as part of the health crisis related to the COVID-19 epidemic constitutes a significant and unforeseeable change in circumstances that could leave room for a readjustment of the contract by the judge within the meaning of the *clausula rebus sic stantibus*. ... In view of the foregoing, the fact that the landlord proposed payment arrangements, in particular by accepting deferred payment of the rent, a proposal which was not accepted by the plaintiffs, and that he was prepared, without acknowledging any defect, to concede a reduction in rent up to a maximum of 80% as he had done for other tenants, the existence of an imbalance likely to lead to the ruin of the tenants has not been demonstrated, nor has an abuse of the landlord’s right to demand payment of the rent in full in the proceedings. Therefore, there is no justification for the contract to be readjusted’.

⁶⁰ *Metropolitan Water Board v. Dick Kerr & Co Ltd* [1918] A.C. 119.

⁶¹ *Ibid.*, at 126.

⁶² *Walton Harvey Ltd v. Walker & Homfrays Ltd* [1931] 1 Ch. 274, at 282: ‘They could have provided against that risk, but they did not. The Court is not very ready to imply subsidiary additions to an agreement made between parties and, in the absence of such implication, the law as stated in *Paradine v. Jane* still applies. The parties must, if they desire to be safeguarded against subsequent contingencies, provide for them in their agreement’. See also Peel, *supra* n. 54, paras 19–083–9–088.

not engage with the landlords' negotiation offers. Thus, it refused to apply the *clausula* doctrine.⁶⁷

The potential applicability of the *clausula* doctrine in such cases seems to be a view shared by at least some scholars.⁶⁸ Depending on the circumstances, there is therefore room for claimants to argue that bans could engage the *clausula* doctrine. The party raising the *clausula* doctrine would however be well advised to explain *in detail* and *prove* how concretely any measure impacted its business⁶⁹; the Supreme Court's case law indeed has shown that scrutiny is applied when reviewing the disproportion resulting from the change,⁷⁰ and so did lower courts' decisions so far.⁷¹ Further, it is recommended that parties negotiate before resorting to a judge; the parties will usually be in a better place to decide what is best suited for their situation.⁷²

Just like Switzerland, England and Wales also saw a series of government-imposed lockdowns and bans throughout the pandemic. The lockdowns, varying in severity and length, likely rendered the performance of many contracts illegal. As explained above in section 3.1.1 above, under English law, where the performance of a party's obligations becomes illegal subsequent to the contract's formation, it is likely to be frustrated. By way of example, as explained above, in *Metropolitan Water Board v. Dick*, a construction contract was frustrated when, upon the outbreak of the First World War, the government used wartime powers to order the contractor to cease work.⁷³ A similar conclusion might be reached if, in the context of a pandemic, government restrictions made performance entirely illegal.

However, the restrictions imposed to combat the pandemic were only ever temporary in nature. Similar to Swiss law's doctrine of impossibility under Article 119 SCO, where impossibility or illegality of performance is only temporary, this alone is unlikely to suffice to engage frustration. Whether the contract is frustrated in such circumstances would depend on whether such temporary disruption frustrates the purpose of the contract as a whole. Broadly speaking, in the context of temporary COVID-19 lockdowns, longer-term contracts are less likely to have been frustrated than short-term contracts.⁷⁴

Although each case depends heavily on its particular facts, this conclusion is corroborated by the first instance decision in *Bank of New York Mellon (International) Ltd v. Cine-UK Ltd*, where it was held that a commercial lease for fifteen years was not frustrated by an eighteen-month forced closure due to

COVID-19 restrictions.⁷⁵ Therefore, the case law to date under both English and Swiss law indicates that long-term commercial leases will not be discharged by temporary lockdowns arising from pandemic-type situations. However, in such situations, Swiss law may offer respite in the form of the *clausula* doctrine; English law contains no such remedy.

Under shorter-term contracts, the effect on the overall commercial adventure is likely to be greater. For instance, contracts relating to specific events (sporting fixtures, concerts, conferences, etc.) may have become entirely moot, thereby frustrating their purpose, where the pandemic caused the cancellation of the event. The old case of *Krell v. Henry* may bear some resemblance to such situations.⁷⁶ The coronation of King Edward VII was due to take place in June 1902. There were processions planned through London to celebrate, and the defendant contracted to hire rooms in the claimant's flat to view the processions. However, King Edward VII fell ill and the processions were postponed, so the defendant refused to pay for the hire. The Court of Appeal held that the contract had been frustrated because the processions were the foundation of the contract and the fact that they were no longer happening on the dates in question prevented performance.

As explained above, Article 119 SCO under Swiss law does not extend beyond impossibility of performance to cases where performance becomes 'useless'. In this regard, frustration goes beyond Swiss law, to cover cases where the purpose of the contract is frustrated. However, Swiss law also has the tool of *clausula* at its disposal to deal with severe economic imbalances, and which may apply to contracts affected by COVID-19; whereas English law does not. Therefore, both Swiss and English legal systems are equipped to address events as the pandemic, although via different legal mechanisms. As a result, the effects of a court or tribunal's intervention are likely to differ. Even if a contract is frustrated under English law, the effect will be to discharge the parties from further performance entirely. Unlike Swiss law, there is no mechanism for adjusting the terms to the new circumstances.

4.2 Armed Conflicts and Their Aftermath

Although, sadly, military conflict is no new phenomenon in parts of the world, Russia's war in Ukraine has reminded the West of its devastating impact, including on international commercial relationships.

As a matter of Swiss law, there is little doubt that Article 119(1) SCO would apply, where the object of the contract is destroyed in the context of an armed conflict (e.g., a master painting owed is destroyed due to a bomb shelling).⁷⁷ However, for an obligation the performance of which is prevented due to war (e.g., delivery of goods to a warzone), it is questionable whether it would be deemed impossible 'in a lasting manner' as required under Article 119 SCO. While relatively recent case law has stated that this could be the case if duration of the event is at least 'unforeseeable' to the point that it is comparable to a lasting impediment,⁷⁸ it is not yet decided whether war can have such character.

⁶⁷ See Zurich Lease Tribunal Decision BG/ZH MJ210008-L, *supra* n. 63, paras IV.5.2.5 et seq.

⁶⁸ CR CO I, Thévenoz et al., *supra* n. 3, Art. 119, para. 5; F. Bohnet, *Bail à loyer pour locaux commerciaux et Ordonnance 2 COVID-19*, in *Cahiers du bail*, vol. 2, 43 (2020).

⁶⁹ See Zurich Lease Tribunal Decision BG/ZH MJ210008-L, *supra* n. 63, paras IV.5.2.5 et seq.

⁷⁰ See s. 2.2 above.

⁷¹ See Zurich Lease Tribunal Decision BG/ZH MJ210008-L, *supra* n. 63, paras IV.5.2.5 et seq.

⁷² Pichonnaz, *supra* n. 29, at 137, 144.

⁷³ [1918] A.C. 119, 127, 130, 135–136, 140–141.

⁷⁴ By way of demonstration, on the one hand, a delay of four months to a twelve-month time charter amounted to frustration in *Bank Line Ltd v. Arthur Capel & Co* [1919] A.C. 435. On the other hand, a months-long delay did not frustrate a five-year time charter in *F.A. Tamplin S.S. Co Ltd v. Anglo-American Petroleum Products Co Ltd* [1916] 2 A.C. 397. The distinction can be explained by the difference in impact on the overall time charter in each case: see Beale, *supra* n. 35, para. 26–043.

⁷⁵ [2021] EWHC 1013.

⁷⁶ [1903] 2 K.B. 740.

⁷⁷ See s. 1.1.1.

⁷⁸ Swiss Supreme Court Decision 4C.344/2002, *supra* n. 4, para. 4.2.

Notwithstanding the above, wars and their consequences can have severe impacts on contracts, which could give rise to the *clausula* doctrine. Case law in this regard mainly consists of Swiss Supreme Court decisions in the first half of the twentieth century. It nevertheless remains of interest in the present context as it shows that, in the past, the Supreme Court has, *sometimes*, applied the *clausula* doctrine in contexts that could be of relevance in the future, for instance, should the war in Ukraine drag on:

In 1912, a contract for the supply of beer was concluded for a ten-year period between a brewery and the operator of an establishment. When, as result of the war, the price of raw materials increased, the operator insisted on being delivered beer at the price agreed in their contract, despite the supplier's request for an increased price (from CHF 25 per hectolitre, as agreed in their contract, to CHF 31 per hectolitre, i.e., an increase of 24%). The Swiss Supreme Court decided that it would be contrary to the rules of good faith for the operator to demand delivery at the original price despite the general increase in price of raw materials resulting from the war. Pursuant to the *clausula* doctrine, it ordered that each party be entitled to withdraw from the contract without any compensation.⁷⁹

In 1922, the Supreme Court applied the *clausula* doctrine in a case where a shipping company granted to an individual the right to operate a restaurant on the company's boats cruising on a Swiss lake. As a result of the First World War, which led to a significant drop in the number of passengers and circulating boats (and thus revenue of the restaurant's operation), a reduction of the restaurant operator's rent due to the shipping company was ordered.⁸⁰

Following the First World War, the Swiss Supreme Court ruled on a dispute between a landlord and its tenant bound by a nine-year lease agreement, under which the rent included the price of heating. Due to the severe increase of the price of coal, the Court granted the landlord either an increase of the rent or the termination of the contract.⁸¹

Like Swiss law, as explained in section 3.1.1 above, English law also intervenes where the subject matter of the contract is destroyed: such as where the music hall burned down in *Taylor v. Caldwell*.⁸² Where the subject matter is not destroyed, whether performance has been prevented will be a question of interpreting the contract and reviewing all the surrounding circumstances, following English law's 'multi-factorial approach' to frustration. Given the unforeseeability of war and its devastating impact, courts and tribunals may be more willing to find that performance of the contract has been frustrated. For instance, a contract for delivery of goods to a warzone could be frustrated notwithstanding that it remains technically possible. In this regard, English law may take a more nuanced approach than the Swiss law doctrine of impossibility of performance under Article 119 SCO.

Conflict and wars also frequently give rise to government restrictions or prohibitions, which may potentially make performance of a contract illegal. As explained above (see section 3.1.1) English law will usually refuse to enforce a contract, performance of which has become illegal subsequent to its

formation. The case of *Metropolitan Water Board v. Dick*, mentioned above, is again illustrative.

Under which law must performance become illegal for frustration to be engaged? If, under an English law governed contract, performance becomes illegal under English law, it will frustrate the contract. Importantly for international commerce, English law governed contracts will also be frustrated if performance becomes illegal in the place it is due to occur – the *lex loci solutionis*.⁸³

Aside from the strict prohibition of performance, other public policy concerns may be engaged where armed conflicts arise. Performance of a contract in times of war may also involve international commerce with parties operating in an 'enemy' state. Under English law, contracts that involve trading with the enemy during times of war will likely be frustrated. In the *Fibrosa* case, a contract of sale of machinery to be shipped to Gdynia was frustrated when it was occupied by Germany during the Second World War. The contract was discharged because of the strong public interest in ensuring that no aid should be given to the economy of Britain's enemy in time of war.⁸⁴

However, where war makes performance of a contract merely more burdensome, as opposed to impossible or illegal, frustration is unlikely to intervene – in contrast to Swiss law's *clausula*.

In sum, in cases where, due to war, a contract is deemed impossible pursuant to Article 119 SCO under Swiss law or is frustrated under English law, parties will be released from performance in both systems (see sections 2.1.2 and 3.1.2 above). In such situations, both systems offer mechanisms to refund a party that has already made an advance payment for instance (see sections 2.3 and 3.2.3 above). Swiss law, however, goes one step further by allowing – although only in extreme circumstances – the intervention of a judge to adjust or terminate an agreement where the equilibrium of the contract is heavily impacted by the aftermath of a conflict.

4.3 Radical Economic Change

Dramatic economic change can significantly impact contractual relationships. As an example, in the current context, the war in Ukraine has had the effect of raising energy prices, causing in turn inflation and rises in interest rates as governments try to react. Traditionally stable currencies, such as the British pound, have fluctuated significantly against the US Dollar.

From a Swiss law perspective, economic changes are traditionally regarded as having the potential to impact the equilibrium of contract rather than rendering performance impossible within the meaning of Article 119 SCO. Hence, depending on the extent of the economic change arising, a Swiss judge or arbitrator may intervene via the *clausula* doctrine.

⁸³ *The Nile Co for the Export of Agricultural Crops v. H. & J.M. Bennett (Commodities) Ltd* [1986] 1 Lloyd's Rep. 555, 581–582.

⁸⁴ [1943] A.C. 32. Notably, where it would be against public policy to enforce a contract (e.g., the cases of trading with the enemy in times of war) the intervening illegality of performance will frustrate the contract despite an express term purporting to exclude the application of frustration in those circumstances, thereby constituting an exception to the rule that freedom of contract prevails over frustration (*Ertel Bieber & Co v. Rio Tinto Co Ltd* [1918] A.C. 260).

⁷⁹ Swiss Supreme Court Decision 45 II 351 of 19 Mar. 1919.

⁸⁰ Swiss Supreme Court Decision 48 II 249 of 4 May 1922.

⁸¹ Swiss Supreme Court Decision 47 II 314 of 14 Jul. 1921.

⁸² (1863) 3 B. & S. 826.

In particular, with regard to inflation, foreseeability of the fluctuation plays a particular role: the Swiss Supreme Court has considered in the past that ‘normal’ inflation should be encompassed within the realm of foreseeability that ought to be taken into account by the parties, thus not giving rise to the *clausula* doctrine.⁸⁵ By contrast, hyperinflation, and in particular the economic upheaval and hyperinflation which followed World War, would not be predictable, and indeed the Supreme Court applied the *clausula* doctrine in some such cases.⁸⁶

On the other hand, English law is unlikely to intervene in such circumstances. Case law has made clear that financial hardship alone is not sufficient to frustrate a contract. In *Davis Contractors*, Lord Radcliffe explained, ‘[i]t is not hardship or inconvenience or material loss itself which calls for the principle of frustration into play. There must be as well such a change in the significance of the obligation that the thing undertaken would, if performed, be a different thing from that contracted for’.⁸⁷ English courts have previously determined inflation and foreign exchange fluctuations both to be insufficient to amount to frustration.⁸⁸

A stark example of English law’s reluctance to remedy economic imbalance is *Tsakiroglou & Co Ltd v. Nolee Thorl GmbH*.⁸⁹ The sellers had agreed to sell goods for shipment from Port Sudan to Hamburg in November–December 1956. When the Suez Canal closed subsequently, the sellers argued the contract had been frustrated. The House of Lords disagreed, ruling that the goods could still have been shipped by sailing around the Cape of Good Hope, a route three times longer and far more costly than via the Suez Canal. However, this was not such a fundamental change to the nature of the obligations undertaken as to frustrate the contract.

Therefore, when it comes to radical economic change, Swiss and English law take different approaches. Neither the Swiss law doctrine of impossibility under Article 119 SCO, nor English law’s frustration are likely to apply to discharge the parties’ obligations. However, Swiss law’s *clausula* may come to a party’s aid where the economic imbalance has become particularly severe. In contrast, English law will hold parties in such situations to their bargains, applying *pacta sunt servanda* strictly.

5 CONCLUSION

History, just like the events that have taken place in the last few years, shows that parties cannot always account for radical changes in their contracts. Looking ahead, between climate change, geopolitical events and economic downturn, there is no end in sight to this era of uncertainty. Parties to existing commercial contracts will be considering how future unforeseen events may affect their existing commercial relationships. Parties negotiating new contracts will be keen to avoid

uncertainty or commercial loss being caused by such events. The choice of governing law can be a key consideration.

Between English and Swiss law, both will, first and foremost, respect the parties’ allocations of risk if they have included in the contract express provisions dealing with the intervening events in question. In the absence of such clauses, under both Swiss and English law, parties may, in certain circumstances, be relieved from their obligations in accordance with the above-mentioned principles (see sections 2 and 3 above). Nevertheless, parties are usually well advised to anticipate the recurrence of such events by allocating the risk of such events expressly in their contracts. In this regard, contract interpretation will be decisive to establish the parties’ intentions at the time they entered into the contract. Such considerations may also have impacts on other provisions of the contract, including, for instance, the parties’ dispute resolution clause. Indeed, arbitral tribunals may be more inclined to find a commercially viable solution, and in this sense approach radical change in a more pragmatic way than courts might.

When it comes to addressing radical changes of circumstances in the absence of an express contractual regime, Swiss and English contract law contain some key similarities. Both will only depart from the principle of *pacta sunt servanda* in extreme cases of change of circumstances after the contract was concluded.

However, they are not ‘tomato-tomato’. They offer different solutions to the same problem: Swiss law offers a codified and fairly defined doctrine of impossibility under Article 119 SCO; whereas English law offers a more nebulous doctrine of frustration, developed by the courts in cases since the nineteenth century. Whilst English law’s frustration goes beyond mere impossibility to cover frustration of the contract’s purpose, it remains very narrow in scope and will not intervene merely to remedy unfair imbalance caused by unexpected events. In contrast, Swiss law offers the respite of its *clausula* doctrine in such situations – although that doctrine is also narrow in scope.

Parties less inclined to include detailed clauses allocating risks between them may prefer Swiss law, given that it may intervene via the *clausula* doctrine to relieve a party from disproportionate economic imbalance following a change of circumstances. However, the fact that only few cases admitted the *clausula* doctrine indicates that the *pacta sunt servanda* principle may only be bypassed in extreme circumstances. In other words, it is not a blank cheque. Although, the fact that it is available and provides the possibility that a judge might terminate or adapt the contract means parties may be inclined to renegotiate between themselves in such situations.

Alternatively, parties may decide they would rather ‘call the whole thing off’⁹⁰ rather than have a judge intervene in their contractual relationship to impose new terms. If so, they may prefer to choose the less interventionist approach of English law and its doctrine of frustration, which – where it applies – only operates to discharge, and not alter, the contract. Further, parties contracting on complex and heavily negotiated terms may prefer the certainty provided by English law, given it is more reticent to intervene at all. In that case, where such contracts are for long-term arrangements or projects, such parties are well advised to contemplate potential disruptive changes of circumstances and address the

⁸⁵ See BSK ZGB I, Geiser et al., *supra* n. 20, Art. 2, para. 19 and decisions cited therein; BSK OR I, Lüchinger et al., *supra* n. 7, Art. 18, para. 102.

⁸⁶ See s. 4.2 above and in particular Swiss Supreme Court Decision 48 II 249 of 4 May 1922 and Swiss Supreme Court Decision 47 II 314 of 14 Jul. 1921.

⁸⁷ [1956] A.C. 696, 729.

⁸⁸ *British Movietonews v. London and District Cinemas, Ltd.* [1952] AC 166, 185; *Multiservice Bookbinding Ltd v. Marden* [1979] Ch. 84.

⁸⁹ [1962] A.C. 93.

⁹⁰ See footnote 2 above.

desired consequences expressly in the contract; the remedies provided by frustration in unforeseen circumstances are relatively blunt.

Parties deciding the law best suited for their specific relationship should, therefore, consider how these two legal

systems balance contractual certainty with the need for the law (or a judge or arbitrator) to intervene upon radical changes in circumstances and, where such intervention may be warranted, the outcomes each legal system may produce in the specific commercial context.