

GIACOMO ROJAS ELGUETA*
BENEDETTA MAURO**

COVID-19 AS A SUPERVENING EVENT IN LEASES OF NON-RESIDENTIAL PROPERTY***

ABSTRACT. The outbreak of the Covid-19 pandemic has brought about a systemic interference with contractual performance, offering a unique opportunity for an empirical observation of the dynamics of contractual relationships. The first data are emerging in the context of leases of non-residential property. Following the business interruptions imposed by the pandemic and by its containment measures, tenants all over the world have suspended payment of rents, raising the legal question whether rent is payable even for time periods when the tenant was unable to operate its business from the leased premises due to circumstances out of its control. The objective of the present article is to describe the answers that have emerged from the courts of various jurisdictions.

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* Associate Professor of Private Law, Roma Tre University, School of Law.

** *J.D. equivalent* summa cum laude, Diploma di Laurea in Giurisprudenza, LUISS Guido Carli (2019). Tutor of the Certificate in International Commercial and Investment Arbitration, Roma Tre University – AIA.

*** Giacomo Rojas Elgueta authored paragraph 2, while Benedetta Mauro authored paragraphs 3 and 4. Paragraphs 1 and 5 were co-authored.

1. Introduction

The outbreak of the Covid-19 pandemic has brought about a systemic interference with contractual performance.

Unlike any historical precedent, the pandemic has affected – at the same moment in time and on a global scale – the various contracts that nurture both national economies and international commerce. Such simultaneous and global impact on contractual performance, in turn, offers a unique opportunity for an empirical observation of the dynamics of contractual relationships.

The first contracts from which these empirical data are emerging are lease agreements of non-residential property.

Following the business interruptions imposed by the pandemic and by its containment measures, tenants all over the world have suspended payment of rents. The question that has thus been raised is whether rent is payable under the lease even for time periods when the tenant was unable to operate its business from the leased premises due to circumstances out of its control.

The objective of this article is to describe and summarize the answers to this legal question that have emerged from various jurisdictions, belonging to both the civil law and the common law traditions.

2. Italy

In the past year, several Italian courts have been dealing with the legal question whether the landlord – in a commercial lease – was entitled to the full amount of the rent accrued during the period of time when the tenant's business was shut down (or was otherwise affected) by virtue of the measures imposed by the Italian Government in response to the Covid-19 pandemic.

This legal question has been raised mostly in the course of interim proceedings, either where the court was requested by the tenant to enjoin the landlord from enforcing the bank guarantees provided by the tenant, or in the context of summary eviction actions brought by the landlord against the tenant. However, more recently, merits judgments have started to be handed down by some Italian courts.

2.1. Partial temporary impossibility of the landlord's performance

A first line of judgments has relied on the general principles of Italian contract law to order a reduction in the rent due for the time period when the governmental restrictive measures were in force.

A good example of this approach is an opinion recently delivered by the Milan Tribunal on 18 May 2021.¹ The landlord had requested the court to declare the contract terminated as a consequence of the tenant's failure to timely pay the rent due for the second trimester of 2020. The court rejected the landlord's request, stating that the tenant's failure to pay the rent did not amount to a serious breach of contract.

While the Milan court reached this conclusion mainly relying on a factual circumstance specific to the instant case, it also stated that, in any case, the rent for the time period when the lockdown was in force would not be due in full amount.

Notably, the court took the view that the governmental measures had not impacted the performance of the tenant's obligation to pay rent, but rather that of the landlord's obligation to maintain the leased property in such condition as to serve the purpose agreed by the parties (pursuant to the regulation of lease agreements in the Italian Civil Code).²

With regard to such landlord's obligation, the court found that the instant case was one of both *temporary* (given that governmental restrictions were limited in time) and *partial* (because the landlord's performance was not impossible as to its obligation to leave the property in the tenant's availability) impossibility.

Under the Italian Civil Code, the remedy for partial impossibility is a proportionate reduction of the contractual price.³ The remedy for temporary impossibility is, instead, a suspension of performance and, correspondingly, an excuse

¹ Trib. Milano, sez. XIII civ., sent., 18 maggio 2021. A similar reasoning is found, among others, in Trib. Venezia, sez. I civ., sent., 30 settembre 2020; Trib. Venezia, sez. I civ., sent., 28 luglio 2020; Trib. Roma, sez. V civ., ord., 29 maggio 2020.

² See Article 1575 of the Italian Civil Code: "The landlord shall: (1) hand over the leased property in good conditions; (2) keep it in such condition as to serve the agreed purpose; (3) guarantee its undisturbed enjoyment during the lease" (free translation offered by the authors).

³ See Article 1464 of the Italian Civil Code: "When performance of a party's obligation has become impossible in part, the unaffected party is entitled to a reduction of its obligation [...]" (free translation offered by the authors).

from liability for delays (performance not being excused, but rather postponed in time).⁴ The court thus ruled that the remedy for a partial temporary impossibility should be a reduction of the rent limited to the time period when the lockdown was in force.⁵

2.2. The good-faith argument

Notably, an opinion served by the Rome Tribunal on 27 August 2020 reached the same conclusion (that the tenant was entitled to a reduction of the rent due for the time period when the lockdown was in force) based on a different argument.⁶

According to this decision, in light of the pandemic's impact on contractual performance, the parties had a legal obligation to renegotiate the rent with a view to restoring the original equilibrium of the contract, the source of such obligation lying in the principles of good faith and solidarity grounded in Article 2 of the Italian Constitution. Failing the parties' renegotiation, the court declared to have the authority to readjust the rent itself.⁷

2.3. Landlord-favorable decisions

This good-faith argument, which has been endorsed by the Italian Court of Cassation's office in charge of the case reports and of the roll (*Ufficio del massimario e*

⁴ See Article 1256, paragraph 2, of the Italian Civil Code: "If the impossibility is temporary, as long as it is present, the obligee is not liable for the delay in its performance. [...]" (free translation offered by the authors).

⁵ *Contra* A. GENTILI, *Una proposta sui contratti d'impresa al tempo del coronavirus*, in «giustiziacivile.com», 29 April 2020, p. 7.

⁶ Trib. Roma, sez. VI civ., ord., 27 agosto 2020. See also Trib. Milano, sez. contr., ord., 21 ottobre 2020.

⁷ This theory has been submitted in the Italian legal scholarship particularly by F. MACARIO, *Adeguamento e rinegoziazione nei contratti a lungo termine*, Napoli, Jovene 1996, p. 313; see also F.P. PATTI, *Collegamento negoziale e obbligo di rinegoziazione*, in «La nuova giurisprudenza civile commentata», n. 2, 2013, pp. 120-127; *contra* A. GENTILI, *La replica della stipula: riproduzione, rinnovazione, rinegoziazione del contratto*, in «Contratto e impresa», n. 2, 2003, pp. 667-724, pp. 710 ff. For the various positions taken by the Italian legal scholarship since the outbreak of the pandemic, see G. GRISI, *La quarantena dei contratti di durata*, in «Rivista critica del diritto privato», n. 1-2, 2020, pp. 45-74; A. GEMMA, *La rinegoziazione nell'emergenza covid-19 è modalità obbligata di attuazione in buona fede del contratto e l'esecuzione indiretta ex art. 614 bis c.p.c. ne è lo specifico rimedio*, in «Jus civile», n. 3, 2020, pp. 724-755; M. ZACCHEO, *Brevi riflessioni sulle sopravvenienze contrattuali alla luce della normativa sull'emergenza epidemiologica da covid-19*, in *giustiziacivile.com*, 21 April 2020; R. NATOLI, *L'impatto di Covid-19 sui contratti di locazione commerciale*, in U. Malvagna, A. Sciarrone Alibrandi (edited by), *Sistema produttivo e finanziario post COVID-19: dall'efficienza alla sostenibilità. Voci dal diritto dell'economia*, Pacini Giuridica, Pisa 2020.

del ruolo) in July 2020,⁸ has however been rejected in other cases, where it has been stated that a legal obligation to renegotiate (and, failing such renegotiation, the court's authority to readjust the contract's terms) simply does not exist in Italian private law.⁹

Some of the courts that have taken a stance more favorable to the landlord's position have also rejected the partial temporary impossibility argument, stating that the landlord's obligation is limited to guaranteeing the fitness of the leased unit for the agreed purpose, while not extending to guaranteeing the productivity of the tenant's business to be conducted therein.¹⁰

2.4. The courts' application of the emergency legislation

Further, it is worth noting that Italian courts have also drawn opposite conclusions from a reading of the various emergency measures that have been enacted by the Italian Parliament to support businesses throughout the pandemic waves.

On one hand, the fact that the legislator has provided for several specific reliefs, including a 50% reduction of the rent due from March through July 2020 in leases of gyms, swimming pools and sports facilities,¹¹ while remaining silent as to the possibility to reduce rent in leases of other non-residential property, has been read by the courts more favorable to the landlords as confirming that such possibility does not exist (pursuant to the principle *ubi lex voluit dixit*).

On the other hand, in its decision of 18 May 2021, the Court of Milan argued that a constitutional reading of the abovementioned rent relief mandated that it be applied, by way of analogy, to *all* leases of non-residential property, given that any different interpretation would result into an unreasonable discrimination and thus

⁸ Corte Suprema di Cassazione, Ufficio del Massimario e del Ruolo, *Novità normative sostanziali del diritto "emergenziale" anti-Covid 19 in ambito contrattuale e concorsuale. Relazione tematica n. 56*, 8 July 2020, available (in Italian) at <https://www.cortedicassazione.it/cassazione-resources/resources/cms/documents/Relazione_Tematica_Civile_056-2020.pdf>.

⁹ See Trib. Roma, sez. VI civ., sent., 11 maggio 2021; Trib. Roma, sez. VI civ., ord., 15 gennaio 2021; Trib. Roma, sez. VI civ., ord., 16 dicembre 2020.

¹⁰ See Trib. Roma, sez. VI civ., sent., 11 maggio 2021; Trib. Roma, sez. VI civ., sent., 23 marzo 2021. See also GENTILI, *Una proposta sui contratti d'impresa al tempo del coronavirus*, cit., p. 7.

¹¹ See Article 216, paragraph 3, of Decree-Law No. 34 of 19 May 2020, as amended by Law No. 77 of 17 July 2020 (so-called *Rilancio Decree*).

violate the constitutional principle of equality.

In this fragmented scenario, the Italian Legislator seemed to have taken a strong position, having adopted an emergency norm (in force from May 26, 2021) pursuant to which “in cases where the tenant has witnessed a significant decrease in its turnover, its earnings or its revenues as a consequence of the sanitary restrictions or of certain industries’ economic crisis or of the decrease in tourist flows linked to the current pandemic crisis [...] the tenant and the landlord shall collaborate to readjust the amount of rent” (free translation by the authors).¹²

To add confusion, this norm has been recently rewritten. Pursuant to its current version (in force as of July 25, 2021), the tenant and the landlord obligation to collaborate is subject to several, stringent requirements.¹³ In any case, it remains to be seen how these norms will be applied by the courts.

3. Latin America

Turning to the South American continent, it is worth focusing on the case law from two jurisdictions that have been greatly influenced by the Italian legal tradition: Argentina and Brazil.

3.1. Argentina

In the Argentine Republic, the pandemic has been the occasion to apply the regulation of unforeseen circumstances that was introduced with the new *Código civil y comercial de la Nación* that was approved on 1 October 2014 and entered into force on 1 August 2015.

In the Civil Code previously in force, the regulation of unforeseen circumstances was modeled after that of *eccessiva onerosità* in Article 1467 of the Italian Civil Code. Accordingly, the party whose performance had become excessively burdensome in consequence of an unforeseen event could only request the termination of the contract.

¹² See Article 6-*novies*, Decree-Law No. 41 of 22 March 2021, as amended by Law No. 69 of 21 May 2021 (so-called *Sostegni* Decree No. 1).

¹³ See Article 4-bis, Decree-Law No. 73 of 25 May 2021, as amended by Law No. 106 of 23 July 2021 (so-called *Sostegni* Decree No. 2).

The end of the contractual relationship could in turn be avoided by the unaffected party by offering a fair and reasonable variation of the terms of the contract.

The 2014 reform, however, introduced a different regulation of supervening circumstances – one more akin to that adopted by the German reform of the law of obligations in 2002¹⁴ or by the major European and international projects aimed to harmonizing private law¹⁵ –, aimed at allowing for the preservation of contracts. Pursuant to Article 1091 of the Argentine Civil Code (which is tellingly titled *Imprevisión*), not only can the disadvantaged party request the termination of the contract, but also its adaptation.

In at least one occasion, Article 1091 of the Argentine Civil Code has been applied by Argentine courts in the context of commercial leases and Covid-related business interruptions. Reference is being made, in particular, to a decision of 14 September 2020 from the *Cámara Nacional de Apelaciones en lo Civil*. In light of the extraordinary and unforeseeable nature of the pandemic and of its impact on the real estate sector, the appellate court in Buenos Aires confirmed a lower court's decision granting the tenant an interim measure, by which it ordered a reduction of the rent due for a defined time period.¹⁶

3.2. Brazil

As it is well known, a relatively recent reform of the law of obligations has also been adopted in Brazil.

Unlike their 2014 Argentine counterparts, the drafters of the current *Código civil* (that was enacted in 2002) closely followed the Italian regulation of supervening events, by providing as a general rule that – in case of an extraordinary and unforeseeable event, making a party's performance excessively onerous to the advantage of the other party – the disadvantaged party may request the termination of the contract. Like under

¹⁴ See § 313 of the German Civil Code (*Bürgerliches Gesetzbuch*).

¹⁵ See Article 6.2.3 of the UNIDROIT Principles of International Commercial Contracts; Article 6:111 of the Principles of European Contract Law ("PECL"); Article III – 1:110 of the Draft Common Frame of Reference ("DCFR").

¹⁶ Cámara Nacional de Apelaciones en lo Civil, sala J [CNCiv.][Sala], 14/09/2020, "H.B. de B.A. c. Z.S.A.s /Medidas precautorias", La Ley[L.L.] 28/10/2020, 3.

the Italian Civil Code, only the unaffected party may avoid the termination of the contract, by offering a fair readjustment of its terms.

Alongside this general rule, set forth in Articles 478 and 479, the 2002 reform of the Brazilian Civil Code introduced a special regulation of changed circumstances for pecuniary obligations (Article 317) and private procurement contracts (Article 620), both allowing for the preservation of contracts.

In particular, pursuant to Article 317 of the Brazilian Civil Code, any party may request the court to readjust the terms of the agreement, in case an unforeseeable event produces a patent disproportion between the value of a party's obligation at the date when the contract was executed and the value of such party's obligation at the date when performance is due.

The rationale for the introduction of Article 317 of the Brazilian Civil Code was to mitigate the nominalistic principle (set forth by Article 315) with a view to limiting the impact of large fluctuations in the rates of inflation, which had been experienced in the Brazilian economy in the previous years.

In other words, Article 317 was designed to grant the courts the authority to adapt pecuniary obligations to the *actual* value of money, rather than to restore the equilibrium between the contractual obligations of the parties.

This notwithstanding, some Brazilian courts have resorted to Article 317 to preserve commercial lease agreements in the context of Covid-19 and subsequent governmental restrictions. In particular, there are a significant number of decisions from the *Tribunal de Justiça* of the State of São Paulo, arising out of the appeals against lower courts' decisions granting (or denying) the tenant's requests for interim relief.

As mentioned above, some of these decisions have argued that the impact of the pandemic on the tenant's ability to generate revenue amounts to an unforeseeable circumstance capable of creating a patent disproportion between the value of the tenant's pecuniary obligation (i.e., the rent) at the date when the lease was entered into and its value at the date when the rent accrued, as required by Article 317 of the Brazilian Civil Code.

The remedies granted by these decisions, however, are not always consistent. The interim reliefs confirmed by the Tribunal of the State of São Paulo consist either of

a partial suspension of performance – and, correspondingly, an excuse from liability for delays (payment of the suspended portion of the rent not being excused, but only postponed in time)¹⁷ –, or of a straightforward reduction of the rent due for the relevant period of time.¹⁸

Further, in at least one decision, the Tribunal of the State of São Paulo has not deemed Article 317 applicable in the instant case, only taking into account Article 478 of the Brazilian Civil Code (which, as explained above, does not allow for the adaptation of contractual obligations, but only for the termination of the contract).¹⁹

4. The Common Law

4.1. The doctrine of frustration of contracts

As it is well known, the regulation of changed circumstances in common law systems is enlightened by the common law's strict approach to the principle of *pacta sunt servanda* (or, as it is called at common law, "sanctity of contracts").²⁰

Generally, under common law the exceptions to such principle are very limited. Further, they tend to be interpreted restrictively by the courts, thus leading to very different results than in civil law jurisdictions.

Under common law, the principle *pacta sunt servanda* is mitigated by the doctrine of frustration, whereby the occurrence of a supervening event may excuse the parties' performance and bring about the termination of the contract.²¹

The first type of event that may bring about discharge of the performance is its

¹⁷ See T.J.S.P., Agravo de Instrumento no. 2073789-03.2020.8.26.0000, Relator: Sá Moreira de Oliveira, 04.05.2020; T.J.S.P., Agravo de Instrumento no. 2079651-52.2020.8.26.0000, Relator: Arantes Theodoro, 20.05.2020.

¹⁸ See T.J.S.P., Agravo de Instrumento no. 2081753-47.2020.8.26.0000, Relator: Arantes Theodoro, 06.05.2020; T.J.S.P., Agravo de Instrumento no. 2084418-36.2020.8.26.0000, Relator: Luiz Eurico, 22.06.2020.

¹⁹ T.J.S.P., Agravo de Instrumento no. 2086776-71.2020.8.26.0000, Relator: Cesar Luiz de Almeida, 26.05.2020.

²⁰ See J. CARTWRIGHT, *Contract Law: An Introduction to English Law of Contract for the Civil Lawyer*, Hart Publishing, Oxford 2016³, p. 261. See also G.H. TREITEL, *Frustration and Force Majeure*, London, Sweet & Maxwell 2014³, p. 19 ff., where the Author describes the development of the doctrine of absolute contracts whose roots must be found in the well-known English case of *Paradine v. Jane*, [1647] EWHC KB J5.

²¹ See TREITEL, *Frustration and Force Majeure*, cit., p. 40, where the Author reminds that the roots of this doctrine must be found in the well-known case *Taylor v. Caldwell*, [1863] 3 B. & S. 826.

supervening impossibility. Impossibility is however only relevant when it is absolute and objective (e.g., in case of destruction or unavailability of the subject-matter or death or unavailability of the person where personal performance is required).²²

Second, a contract may be discharged if performance thereof becomes illegal (generally as a result of a change in the law).²³

Third, the contract may be discharged if the supervening event results in the frustration of the common purpose. This occurs where neither party's performance is impossible, but the purpose for which the contract has been made can no longer be achieved.²⁴

In the United States of America, a fourth scenario where a contract may be discharged as a result of unexpected supervening events is where the contract's performance, though remaining possible, has become impracticable (i.e., severely more burdensome for a party).²⁵ To the opposite, impracticability is regarded as irrelevant under English common law.²⁶

4.2. England and Wales

In the context of Covid-19 and commercial leases, there have been two reported judgments in England and Wales where the High Court had to decide on the legal question whether tenants of commercial premises have remained responsible to pay the rents due for time periods when they were subject to the enforced closure of, or inability to trade from, their premises. Both cases were decided in favor of the landlord.²⁷

In the second decision handed down by the High Court, which arose out of multiple lease agreements, Master Dagnall clarified why he considered that none of the

²² See TREITEL, *Frustration and Force Majeure*, cit., pp. 69 ff.

²³ See TREITEL, *Frustration and Force Majeure*, cit., pp. 345 ff.

²⁴ See TREITEL, *Frustration and Force Majeure*, cit., pp. 307 ff.

²⁵ See Restat. 2nd § 261: "Where, after a contract is made, a party's performance is made impracticable without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his duty to render that performance is discharged, unless the language or the circumstances indicate the contrary".

²⁶ See TREITEL, *Frustration and Force Majeure*, cit., pp. 255 ff.

²⁷ *Commerz Real Investmentgesellschaft mbH v. TFS Stores Ltd.*, [2021] EWHC 1013 and *Bank of New York Mellon (International) Ltd. v. Cine-UK Ltd. and other cases*, [2021] EWHC 1013.

leases had been frustrated as a consequence of the pandemic and its containment measures (although this argument had not been made by any of the parties).²⁸

While he accepted that the doctrine of frustration of purpose applies to commercial leases and that, in principle, Covid-19 and its containment measures could qualify as a supervening event capable of giving rise to frustration of commercial leases, he found that the narrow test for a supervening event to have such a consequence was not met.

According to the “radical change” test, as developed by English case law,²⁹ a contract is frustrated when a supervening event changes so significantly the nature of the outstanding contractual rights and obligations from what the parties could reasonably have contemplated at the time when the contract was executed, that it would be “unjust” for the contract to continue in such “radically different” situation.

Having conducted a factual analysis of the case – the relevant factors in this regard being the term of each lease, the likely period of disruption and the likely remaining period of the lease after the disruption ended –, Master Dagnall determined that the proportions of the periods when the enforced closures were in place and the contractual terms remaining thereafter were not such as to justify a “radical difference.”

Further, the High Court dealt with the argument that had been advanced by one tenant that there had been a “temporary frustration” over the periods of lockdown and enforced closures of the leased premises, resulting in rents not being payable in those periods.³⁰

This argument was rejected based on the reason that there is no such thing as a “temporary frustration” in law. Frustration does not have the effect of suspending the contract, but rather of discharging performance and ending it (this being the reason why a “radical difference” is required).

Master Dagnall’s reasoning and his conclusions are consistent with the

²⁸ Bank of New York Mellon (International) Ltd. v. Cine-UK Ltd. and other cases, [2021] EWHC 1013, [194]-[210].

²⁹ See CARTWRIGHT, *Contract Law*, cit., p. 264 ff., where the Author describes the application of the test for frustration of purpose as set out in the English case of Davis Contractors Ltd. v. Fareham Urban District Council, [1956] AC 696.

³⁰ Bank of New York Mellon (International) Ltd. v. Cine-UK Ltd. and other cases, [2021] EWHC 1013, [211]-[212].

traditionally strict approach adopted by English courts in dealing with supervening events and changed circumstances. This may signal that English courts are not going to adopt a more flexible attitude in the context of the pandemic, despite its unprecedented nature and proportions.

4.3. Ireland (Eire)

Also consistent with this takeaway is a decision from the High Court of Ireland, where the court – despite expressing sympathy for the tenant – established that there was no legal basis upon which it could hold that rent was not payable under the disputed lease for the periods when tenant could not operate from the premises due to the Covid emergency legislation.³¹

In that case, the tenant had (among other arguments) brought forward a “partial frustration” defense, arguing that its obligation to pay rent should have been regarded as having been temporarily suspended or partially frustrated due to the governmental measures, without the contract being terminated. In other words, it argued that its rent obligation was frustrated, while the other obligations under the lease remained valid.

The Irish High Court rejected this defense, relying on the principle that under common law there exists no such concept as partial or temporary frustration on account of partial or temporary impossibility. To the contrary, in case of partial impossibility, the contract is either terminated or remains in force.³²

As a consequence, the Irish High Court denied the tenant’s application requesting the court to enjoin the landlord from taking possession of the leased premises.

4.4. The United States of America

Turning to the United States of America, the landscape of judicial decisions rendered in the wake of Covid-19 shutdown orders seems to be both richer and more varied. Alongside a majority of landlord-favorable decisions, whereby courts have established that rent was payable including in relation to periods when enforced closures

³¹ *Oysters Shuckers Ltd. T/A Klaw v. Architecture Manufacture Support (EU) Ltd.*, [2020] IEHC 527, [99]-[101].

³² *Oysters Shuckers Ltd. T/A Klaw v. Architecture Manufacture Support (EU) Ltd.*, [2020] IEHC 527, [84]-[86].

were imposed upon tenants,³³ there are also a fair number of decisions where the tenant's defense of frustration of purpose and/or impossibility has been accepted.

Among the former line of judgments, it is worth focusing on a decision that was recently issued by the United States District Court for the Southern District of New York in a case where the tenant (the well-known fashion brand Gap) had advanced, and the court rejected, both a frustration of purpose and an impossibility argument in order to establish that it was excused from paying rent under the lease agreement.³⁴

As to frustration of purpose, the court found that the New York State's prohibition on non-essential businesses could not be deemed wholly unforeseeable, given that the contract defined a *force majeure* event to also mean "[...] governmental preemption of priorities or other controls in connection with a national or other public emergency." This indicated that the parties had indeed foreseen and made provision for such an event.³⁵

In addition, Gap failed to show that the Covid-19 pandemic completely frustrated the main purpose of the lease. This conclusion was largely fact specific, given that the court relied on the circumstance that, for periods of time since the outbreak of the pandemic, Gap had operated the leased premises for curbside pick-up, and had been able to open other retail locations in the same area as the leased premises.

The same arguments were held in relation to the tenant's impossibility defense. To the extent that tenant relied on the governmental measures, the court opposed that the parties had foreseen and allocated the risk of such event in their agreement. To the extent that it relied on the pandemic itself, the court referred to the evidence that Gap in fact operated its retail business at the leased premises by way of curbside pick-up and

³³ See, among others, *Bay Plaza Community Ctr. LLC v. Bronx Vistasite Eyecare Inc.*, 2021 N.Y. Misc. LEXIS 2395; *1140 Broadway LLC v. Bold Food LLC*, 2020 NY Slip. Op. 34017[U]; *35 E. 75th St. Corp. v. Christian Louboutin LLC*, 2020 NY Slip. Op. 34063[U]; *E. 16th St. Owner LLC v. Union 16 Parking LLC*, 2021 NY Slip. Op. 30151[U].

³⁴ *Gap Inc. v. Ponte Gadea N.Y. LLC*, 2021 U.S. Dist. LEXIS 42964.

³⁵ Although section 1.7(H) of the lease agreement laid down a definition of a "Force Majeure Event", the sole *force majeure* provision of the lease (i.e., Article 21) only prevented the tenant's failure to perform certain non-monetary obligations under the lease from triggering the landlord's right to terminate the lease. Therefore, there was no *force majeure* clause in the lease agreement based upon which the tenant could have argued that its rent obligation was excused.

in other locations on an in-person basis.

In conclusion, the lease's purpose (i.e., Gap operating a retail business at the premises) could not be regarded as having been frustrated, nor did Covid-19 render Gap's performance impossible under New York law.

Notably, a recent decision from the New York Supreme Court (citing *Gap*) reiterated that temporary restrictions on a commercial tenant's business do not warrant discharge of performance or abatement of rent based on either frustration of purpose or impossibility.³⁶

The opposite stance was taken by the Massachusetts Superior Court in the case of *UMNV 205-207 Newbury, LLC v. Caffé Nero Americas Inc.*.

Here, the court dismissed the plaintiff landlord's motion for summary judgment and instead granted partial summary judgment to the defendant tenant, finding that under the doctrine of frustration of purpose the tenant's obligation to pay rent under the lease agreement was discharged for any period when governmental measures barred it from serving customers on-premises.³⁷

The court applied the following test: first, whether the supervening event frustrated the main purpose of the contract, so that the value of continued performance has been destroyed; second, whether the non-occurrence of such event was a basic assumption made by the parties when the contract was executed; third, whether the contract allocated the risk of such event to the party seeking to be excused from performance.

Relying on a clause in the lease agreement limiting the permissible use of the leased premises to the operation of a Caffé Nero themed café, the court established that the government orders barring the tenant from serving customers on premises had completely frustrated the entire purpose of the lease.

Further, in the court's opinion this clause made it clear that the absence of such government orders, and the tenant's continued ability to serve customers indoors, was

³⁶ *A/R Retail LLC v. Hugo Boss Retail*, 2021 N.Y. Misc. LEXIS 2575. Notably, in setting out its decision the court commented: "A harsh result, to be sure, but so in its own way would be mass rescission of commercial leases, assigning all risk of the pandemic to property owners who face their own unrelenting expenses and economic burdened."

³⁷ *UMNV 205-207 Newbury, LLC v. Caffé Nero Americas Inc.*, 2021 Mass. Super. LEXIS 12.

a basic assumption underlying the lease.

Finally, the court moved on to consider whether the parties had allocated the risk of such event in the lease agreement. The lease contained a *force majeure* clause which, however, contemplated excusing a party from liability if its performance became impossible, while it did not address the distinct risk of the main purpose of the lease being frustrated, even while performance remained possible.

In other words, given that the risk of frustration of purpose had not been allocated in the lease agreement, the court found that the tenant's frustration of purpose defense was thus not barred from the contract's *force majeure* clause.

Therefore, the court declared that the tenant's obligation to pay rent under the disputed lease was discharged under the doctrine of frustration of purpose in relation to any period when tenant was barred by government orders from serving food or beverage within the leased premises, and that the notice of termination that had been issued by landlord in consequence of tenant's alleged breach was not effective.³⁸

In another case, the Supreme Court of New York has denied the landlord's motion for summary judgment and granted the tenant's cross-motion for summary judgment, having found that performance under the lease was made impossible due to the shutdown of tenant's business.³⁹

It must be noted that, unlike in civil law systems, tenant-favorable decisions in the United States have adopted a zero-sum solution, whereby the economic losses caused by the pandemic are entirely shifted onto the landlord, and the contract is ultimately ended (which may not be a desirable solution even from the tenant's perspective).

A different solution had been reached relatively early in the pandemic by the United States Bankruptcy Court for the District of Illinois in the case of *In re: Hitz Restaurant Group*.

Here, the court found that the executive orders adopted by the Governor of

³⁸ In other similar cases, due to the existence of a factual question as to whether Covid-19 pandemic supports a frustration of purpose and/or impossibility defense, the Supreme Court of New York has further denied the plaintiff landlord's motion for summary judgment or for an order of dismissal. See *Hwa 1290 III LLC v. Gkny 1*, 2021 N.Y. Misc. LEXIS 2527; *1877 Webster Ave. v. Tremont Ctr.*, 2021 N.Y. Misc. LEXIS 1968.

³⁹ *267 Dev. V. Brooklyn Babies & Toddlers*, 2021 N.Y. Misc. LEXIS 1079.

Illinois fell under the *force majeure* clause of the lease and that the tenant's liability was thus excused, being such measures the proximate cause of its non-performance.⁴⁰

The court however proceeded to take into account the fact that the governmental measures did not entirely shut down the tenant's business, allowing the latter to perform carry-out, curbside pick-up and delivery services, and deduced that, to the extent that the tenant was able to perform these activities, its obligation to pay rent was not excused.

The court thus concluded that the tenant's obligation to pay rent for the months when the governmental restrictions were in force should be reduced in proportion to its reduced ability to generate revenue, which was fixed at 75% of the rent. Therefore, the tenant was ordered to pay rent in the amount of 25% for April, May and June 2020.

This remedy, consisting of reduction of rent due for the time periods when the tenant's business was closed and reached by applying a *force majeure* clause governed by Illinois State law, is strikingly akin to those that are sometimes granted based on the Civil Codes of Italy, Argentina and Brazil. However, this initial convergence should not be overemphasized, as it does not seem to have been pursued by other courts in the United States.

5. Conclusions

The court decisions described in this article possibly show that Covid-19's interference with contractual performance has not prompted a convergence between the civil law and the common law approaches to supervening events.

On the one hand, in the civil law systems, some courts have affirmed their authority to adapt the content of the contract in order to restore its equilibrium and to equally distribute between the parties the losses resulting from the Covid-19 pandemic.

This has not only been done where the courts could rely on an express provision of the law (like in Argentina), but also through a more flexible interpretation of the law and the application of general contract principles (like in Italy and in Brazil).

These decisions are consistent with the trend of the civil law tradition to move

⁴⁰ In re: Hitz Rest. Grp., 68 Bankr. Ct. Dec. 221.

toward a broader acceptance of the idea that, in case of a fundamental change of circumstances, the content of a contract may be adapted by an adjudicator.⁴¹

On the other hand, the courts of common law systems – with few exceptions in the United States – tend to restate their traditional deference to the principle of sanctity of contracts and not to depart from their narrow interpretation of the doctrine of frustration.

As a consequence, the parties are generally held liable to the original terms of the contract, and their obligations are neither excused nor adjusted.

In light of the above, it is of paramount importance for the contractual parties – especially in cases where they have different nationalities – to be aware of the decisive role that the governing law will have in determining the remedies that may become available to them in case of a change of circumstances.

⁴¹ Notably, similar provisions have been introduced in the German Civil Code in 2002 (see § 313 of the *Bürgerliches Gesetzbuch*) and in the French Civil Code in 2016 (see Article 1195 of the *Code civil*). This trend is also confirmed by the European private law projects and other international harmonization instruments (see *supra* note 16).
