RELAÇÕES INTERNACIONAIS NO MUNDO ATUAL

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PENDAMIC IMPACT OF ON INTERNATIONAL CONTRACTS EXPLORATION

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ABSTRACT

This article is current because it examines how the COVID-19 epidemic and the legal reactions to it have affected contractual responsibility. We examine the applicability of national lockdown measures as "overriding obligatory requirements" and how COVID-19 events relate to the defense of force majeure and hardship in various countries using a comparative legal approach. Our study scope is global, covering agreements made on a global scale as well as those made within national borders.

Keywords: *COVID-19, contractual liabilities, legislative measures, national lockdown measures, domestic contracts, international contracts, comparative analysis, overriding mandatory provisions*

I. INTRODUCTION

This research looks at both local and global business agreements. Every legal system has provisions for dealing with such situations, and the applicable legal structure is built with the intention of upholding the pacta sunt servanda rule's binding force. Thus, [1] the supervening event must satisfy certain requirements in all judicial systems; the contractual party is not released from culpability simply because performing the contractual obligation is becoming more challenging, time-consuming, or expensive. Hardship occurs when an event profoundly alters the equilibrium of a contract due to a rise in the cost of a party's performance or a decrease in the value of that party's performance, whereas force majeure occurs when an outside factor makes it impossible or extremely difficult to carry out the performance (permanently or temporarily, in whole or in part). [2]

The global community is now coping with the fallout of the COVID-19 epidemic and the repercussions of government provisions designed to limit the spread of the virus, such as lockdown and containment measures. International contracts, and especially those involving businesses, are

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impacted by this occurrence.[3] In fact, everyone agrees that COVID-19 is a divine intervention, and they also agree that the government's response by enacting restrictions to stop its spread is a royal decree (or factum principis). Thus, [1] the supervening event must satisfy certain requirements in all judicial systems; the contractual party is not released from culpability simply because performing the contractual obligation is becoming more challenging, time-consuming, or expensive. In India, the supply chain has been affected by the COVID-19 pandemic, according to an official memo from the Indian Finance ministry dated February 19, 2020. In particular, COVID-19 is designated as "a instance of natural tragedy" in the Memorandum. Creditors in Italy are unable to execute the offered collateral due to the lockdown measures, therefore debtors who have defaulted on their commercial lease payments have been granted temporary injunctions by Italian judges of first instance.

However, the author of this article argues that, particularly in a setting of international commerce, this is not a sufficient reason to absolve the non-performing party or modify the terms of the contract. Concerning this area in particular, COVID-19 and associated governmental provisions raise a problem: in contrast to national contracts, where both parties are subject to the same domestic legal and economic order, the likelihood of unforeseen events affecting a party's performance occurring is much higher. [4] This is due to the increased dangers inherent in contract execution on a global scale, as well as the less reliable legal and political environment in which international commercial agreements are negotiated and carried out. [5]

Therefore, it is crucial to understand the three pillars of every international contract in order to appropriately analyse the legal impact of COVID-19 and the corresponding legislative requirements:

- the content of the contract, its clauses and their wording;
- The governing legislation; and
- person has the right to settle a disagreement.

The third pillar brings up a problem that must be addressed before referring to the other two pillars from an operational standpoint. This topic will be covered in the article's Section II, although the first and second pillars that make up international contract law will be the subject of Section III. In Section III, we contrast how national legal systems, standard agreements, and international contract law are affected by intervening events like COVID-19 and associated legislative initiatives (either binding or "soft law"). Comparing the two systems indicates that at their heart, they share comparable rules and concerns despite their unique characteristics. The focus of Part IV of this series is on a particular aspect of international contracts, namely, whether or not national legislative provisions relieving non-performing parties of their contractual obligations as a result of the COVID-19 epidemic qualify as "overriding mandatory provisions" that must be applied to the international contract despite a difference in the governing law. This information must be assessed due to the potential legal

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repercussions of national certifications or public regulations designating COVID-19 and shutdown procedures as force majeure events.

II. THE IMPORTANCE OF WHO IS ELIGIBLE TO RESOLVE A CONFLICT

It is crucial for international commercial contracts to specify whether a national court or an arbitral tribunal would have had jurisdiction in the event of a dispute for three key reasons.

It may be informative to ascertain which law, if any, would be applicable to the foreign transaction in the event that the participants were unable to come to an agreement as a first step. If the case went to arbitration, the arbitral tribunal would be able to select the applicable law in accordance with Article 28(2) of the UNCITRAL Model Law on International Commercial Arbitration[7] and Article 21(1) of the ICC Arbitration Rules 2017[8]. This will be done in two stages in the first scenario: first, the arbitral tribunal will determine which rules of conflict of law are most applicable to the circumstances of this contract, and then, based on those rules, it will specify which law will be used to interpret and enforce this agreement. The new Lex Mercatoria [9] in combination with the UNIDROIT Principles may be the applicable law for an international transaction under the second scenario, and the arbitral tribunal will have the ability to make that determination without delay. In the absence of a choice of law provision in an international contract, a national judge will apply the lex fori (i.e., conflict of law rules) of the forum in which the dispute arose to establish the applicable law in the event of litigation.[10] As a result, the analysis at issue may be crucial to the resolution of the dispute in arbitration or court. [11]

Second, understand cultural matrix of the judge or adjudicator) is essential for understanding how the rules controlling supervening actions will be interpreted and used in the context of the case. [12] The way people feel about the law and how it's enforced may be shaped by a variety of variables, including culture. [13] These include, but are not limited to:

- the common law's historical aversion to the obligation of good faith and precontractual responsibilities, in contrast to the civil law's emphasis on good faith and its uses, [14]
- The English legal system has a demonstrated bias against consumer accusations of deceptive advertisement.[15]

The two opposing trends remained even after Directive 97/55/EC against deceptive and misleading advertising was passed and the "reasonable consumer" test was adopted. In reality, English courts frequently rejected them based on the "wise consumer" standard, whereas French courts clearly took a paternalistic stance to protect the uninformed and uneducated customer.[16]

The United Nations Convention on Contracts for the International Sale of Goods has been interpreted and used in a variety of contexts, and one of the primary problems is the cultural matrix's

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continued relevance in these situations (CISG). By its own terms, the Convention insists that its provisions be given a single, consistent interpretation.[17] As there is no international court with this function, it is left to national courts, arbitrators, and the doctrinal formant to guarantee that the CISG is interpreted similarly among signatory states (like to the European Court of Justice with EU law). [18] Despite the fact that academics and business entities (such as the CISG Advisory Council) play a crucial role in promoting a unified understanding of the CISG, certain discrepancies persist because of the impact of national circumstances.[20]

The chance that the so-called "overriding needed requirements" of a certain legal system would apply to the international contract, independent of the domestic law, is the third element. In Section IV, this issue is discussed in further depth.

III. THE "COMMON CORE" OF THE LEGAL CONSEQUENCES OF COVID-19 AND ASSOCIATED GOVERNMENTAL PROVISIONS

In international economic interactions, contractual parties' independence plays a crucial role. Using specific language and careful writing, parties can create new contracts that meet their purposes and modify the substance of existing contracts that are not conventional. However, while analysing the legal ramifications of such a legal framework, it is important to take into account the prevailing law of the international contract, [21] as declared by the parties or indicated by the methods described in Part II above. Therefore, the contract's provisions and the applicable law are entangled to determine the foreign transaction's substantive law. It is important to identify whether the parties have specifically addressed the legal ramifications of a supervening event through a force majeure clause, a "hardship" clause, or both, before discussing COVID-19 and the corresponding governmental measures. Every legal system recognises the autonomy of the parties to choose the applicable legal framework and the consequences of their conduct. If one of the aforementioned terms is included in the contract, it must be carefully read to determine if and how much an occurrence like COVID-19 and its repercussions were taken into account. [22]

The legal implications of intervening occurrences on contracts have been addressed by all legal systems, which is important to keep in mind while discussing the contract's governing law. [23] In certain cases, providing for a unitarian theory; in others, distinguishing impossibility of performance (force majeure) from conditions greatly influencing the contractual equilibrium even though performance is still feasible ("hardship"). [23] In some cases, providing a unitarian theory that ignores the distinction between inability to execute (force majeure) and factors that significantly influence the contractual equilibrium despite the fact that execution is still feasible ("hardship"). Furthermore, the

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interaction between legal systems, international legal organisations, and model clauses exhibits a similar propensity toward particular solutions [24].

Under earlier common law, once a contract was made, the parties were wholly obligated and continued to be committed even if one party's situation changed and compliance became very challenging or even impossible. The rule was softened in the middle of the 19th century when the concept of "impossibility of performance" was recognised in law. The notion was initially relatively limited, as the English case Taylor v. Caldwell [26] illustrates. If either party could have reasonably foreseen that the performance of their obligations under the contract was contingent on the continued existence of a person or an object, then the death of that person or the destruction of that object (which did not occur as a result of the actions of the party seeking relief) would relieve that party from its obligations under the contract and terminate it without breach. [27] Thus, the doctrine's first application was restricted to cases where an objectively impossible to execute contract had arisen due to a change in circumstances. Later, in the infamous "Coronation case," Krell v. Henry, the English courts used the impossible defence to create the theory of frustration.[28]

However, it's important to keep in mind that common law courts have traditionally been very cautious when interpreting the doctrine of frustration. Legal precedents show a bias for the pacta sunt servanda norm and judicial disfavour of methods that would release the party from contractual responsibilities and responsibility.[29] This is especially true for rental contracts.[30] The Hong Kong District Court issued a decision in 2004 that provides an example of this technique that is relevant to the present problem of COVID-19. The Court determined that the SARS pandemic did not render a landlord-tenant agreement null and void [31]. The tenant's building had a verified case of SARS at the time. Tenant said that the 10-day isolation order imposed against the property rendered the agreement null and unenforceable. The court decided that the intervening occurrence did not fundamentally affect the parties' contractual responsibilities since the delay of 10 days was negligible in light of the two-year length of the contract. Although SARS met the criteria for a "unforeseeable incident" that may have an impact on the contract, the Court found that in the case at hand, it had not damaged the contractual connection. So, the court ruled against the tenant and told them to follow the contract as written.[32]

According to Uniform Commercial Code 2-615, a party's failure to perform may be justified by subsequent impracticability if the affected party can demonstrate that the following conditions were met: the parties entered the contract under the fundamental premise that an event wouldn't occur; the event did occur; the event made performance impossible (rather than just more expensive); the affected party wasn't at fault for the impracticability; and the same party didn't agree to p. However, the Reiteration (Second) of the Contract law does discuss frustration (in sections 261 and then after for impracticability and also in section 265 for frustration). The UCC does not discuss irritation. The

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aggrieved party may assert that the other party is exempt from liability if it can demonstrate that the parties entered into the contract under the fundamental premise that an event would not occur, that the event did occur, that the event significantly frustrated the affected party's primary reason for entering the contract, that the affected party was not at fault for the frustration, and that the party did not agree to perform despite the occurrence of the event. Furthermore, the obligation to perform is suspended, but not automatically discharged, in the event of temporary impracticability or frustration. [33] If substantial performance is still conceivable or if the other states agree to perform in full while obtaining only partial performance, then the impracticability of performing only a portion of the agreement does not relieve effectiveness of additional responsibilities.[34]

It is important to note that the seller is the focus of UCC §2-615. However, the Restatement is seen as expressing the conventional common law concept with regard to contracts in general. The notion of impracticability, as outlined in Restatement sections §261 and subsequent, can therefore be applied.

Commercial impracticability and frustration have been applied broadly in the UK, but not so much in the US. [35] This view is in line with the Restatement's affirmation of the binding power of contracts, as set forth in the Introductory Note to Chapter 11:

Strict responsibility in contracts is a legal concept. The dictum that "pacta sunt servanda," or "contracts are to be served in their whole," is universally acknowledged. As a result, the obligor always is responsible in punitive damages, regardless of whether or not he is at fault and regardless of whether or not the obligor now finds the contract to be more burdensome or less appealing than was initially envisioned. This is true even if the obligor is at fault.

Italian law makes a distinction between the impossibility of performance (articles 1463–1466) and the circumstance where performance becomes excessively onerous (eccessiva onerosità sopravvenuta), which is addressed in articles 1467–1468 of the Italian Civil Code. Although the latter is not entirely consistent with the concept of hardship, both theories aim to give the wronged party a remedy if performance becomes unreasonably difficult after contract has been entered into. To qualify under art. 1467 cc, at least one of performance must not have been completed, the performance must be excessively difficult (compared to the usual range of risk), [37] and the difficulty must be attributable to unexpected and unforeseen circumstances. The aggrieved party may request that the contract be dissolved if the conditions listed above are satisfied. The other party may suggest (but is under no obligation to pursue) changes to the terms of the contract in an effort to restore the fairness of the agreement and avert termination. However, the court lacks the power to alter the terms of the agreement, and the party that was wronged cannot ask for a renegotiation.

However, if performance is rendered impossible owing to force majeure, the non-defaulting party is excused from responsibility. As of the date of termination, neither party has any unfulfilled

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obligations under the agreement (had one party performed, the performance must be returned). If one party is unable to perform in whole, the other party has the option of accepting partial performance instead; if this occurs, the other party's obligation to perform is lowered in kind. When completing an obligation becomes temporarily impossible, the person concerned is excused from responsibility for the delay. The contract is dissolved, however, if the impossibility persists and the affected party cannot be considered to still be under a duty to fulfil due to the nature of the performance or the legal basis of the obligation, or because the counterparty is no longer interested in receiving it.[38]

However, the parties' intentions will be respected and the court's review will be limited if the contract contains ad hoc hardship and/or force majeure clauses. In the absence of these other factors, the preceding legal framework shall apply.

In their decisions concerning commercial leases, Italian courts of first instance have made several intriguing rulings in light of COVID-19. The obligation to continue paying rent at the previously agreed upon rate while the lockdown measures are in place is a particularly prevalent concern in such circumstances. The Tribunal of Venice made a decision in favour of the lessees of a clothing store in a mall that was shut down due to the epidemic and the ensuing lockdown procedures in the first instance, finding that they owed 50,000 € in overdue rent. In this case, the lessee argued that the lessor lacked the legal standing to collect on the bank's collateral. For the benefit of the debtor, the Tribunal granted an interim order prohibiting enforcement of the collateral. A complete hearing was requested to determine whether or not the breach of contract was excusable. However, the interim respite being granted to the lessee is noteworthy in light of the current circumstances. The Tribunal of Bologna has already ruled on this identical topic [39]. Lessee in this instance was the proprietor of a beauty parlour that was closed during the lockdown; she had pledged collateral with the bank to ensure that she would always pay her rent on time. [40] The provisional ruling came to the same conclusion as the one in Venice. The proprietor of a discotheque who had given a promissory note to the landlord as security for the rent but was unable to pay the rent because of the lockdown has had his case heard by the Tribunal of Genova.[41] As in the previous instance, the Tribunal sided with the debtor and blocked the lessor's attempts to collect on the promissory notes. [42] COVID-19 and the ensuing lockdown procedures were seen as events that, in the three cases listed, had the potential to legally alter the normal course of the contractual relationship.[43]

Even if there is no clause in the contract to that effect, force majeure can be used to suspend or terminate the agreement under Article 1218 of the French Civil Code. An incident meets the definition of force majeure if it satisfies the following three criteria: it is unforeseeable by the parties at the time they entered into the contract; it is beyond the debtor's control; and the debtor is unable to prevent its occurrence. Performance of the duty is only deferred if the inability to do so is transitory, unless the delay causes the contract to be unworkable. The contract and the parties' duties under it

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cease automatically and for good if the event is permanent. Furthermore, a party to a contract concluded on or after October 1, 2016 may request that the other party renegotiate the contract if a change in circumstances, unforeseeable at the time of the conclusion of the contract, renders performance excessively onerous and if the other party did not agree to bear the risks of such a change in circumstances. Article 1195 of the French Civil Code (Imprévision) governs this. [44] In the event that one party refuses to budge or negotiations break down, the other party or parties may terminate the contract on terms mutually agreed upon by both parties or may petition the court to modify the terms of the contract to reflect the altered circumstances. In the event that the parties are unable to come to an agreement within a reasonable period of time, each party may request that the court modify the contract or even cancel it entirely, at a time and under conditions that the judge will determine. The parties are required to continue fulfilling their obligations under the contract during the negotiating period. [45] As a result, the French legal system reflects the development seen in the model laws and principles for international contracts, with legislation favouring renegotiation by the parties and judicial participation. [46]

Likewise, the "basis of transaction" (Lehre aus der Geschäftsgrundlage) notion has been explicitly recognised by German law since a revision of the law of duties in 2002. Thus, the German Civil Code (Bürgerliches Gesetzbuch, or BGB) now addresses both the inability of performance (275 BGB) and the impact of unforeseeable events on the contractual balance (313 BGB). [47][48]

Differentiating between the inability of performance and a change in circumstances ("intervening contingencies"), the legislative provisions of several Islamic nations allow for the legal repercussions of supervening occurrences. As an added bonus, Islamic scholars have determined that situations of extreme difficulty or force majeure do not contradict Sharia law. [49]

If one of the parties fails to fulfil its responsibilities under the contract, the other party will be held responsible for the breach unless the party can show that the failure was caused by circumstances beyond its control. [50] A force majeure incident is one that neither party could have reasonably foreseen, [51] was able to prevent, and hence rendered performance impossible. [52] In addition, parties are free to negotiate an alternative allocation of obligations and to ignore or amend the statutory provisions through special terms in their contract, as the provisions regarding the inability of performance are not mandatory. While the idea of intervening circumstances and the impossibility of performance have certain things in common, they are not the same thing. Force majeure, on the other hand, can affect even one contracting party, whereas an intervening contingency will only be considered such if it affects a large number of people (i.e., if it is general); (2) force majeure renders the performance of the contractual obligation impossible; (3) an intervening contingency will only cause severe hardship if performance is permitted in its original form; and (4) force majeure results in the failure to perform the contractual obligation. [54] Any party may argue that they are immune from

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liability for failure to perform as a result of a supervening event if the event did not make performance impossible but instead made the duty excessively burdensome. While this is the case, the legislative provisions must be adhered to in order to avoid legal repercussions. Examples of such codes include those of the United Arab Emirates and Kuwait, which require that the event in question be both sudden and of public interest. [55] Any agreement to the contrary shall be unlawful and of no force or effect. If all of these requirements are satisfied, the court may reduce the onerous duty to a reasonable level, taking into account all pertinent facts and weighing the interests of both parties. [56] In addition, the Syrian Supreme Court has ruled that, in cases of unusual and unforeseen circumstances, concerns of justice must take precedence over the enforceability of the contract. In addition, the Iraqi Supreme Court has clarified the following: [57]

The theory of intervening circumstances exists to let the wronged party continue to fulfil his contractual obligation and to lessen the consequences of the supervening occurrence. The party that was wounded had to have been and must still be doing his duties in good faith and in line with the terms of the contract.

The CISG chooses to handle international contracts from a functional standpoint, thus it avoids using any national legal theories' terms or making any specific allusions to force majeure and/or hardship [58]. Article 79 of Section IV, which deals with exemptions, specifically outlines the circumstances in which the non-performing party is excluded from duty. The wording of the provision is based on the notion of a "impediment" outside the control of the non-performing party, and the onus of evidence rests on that party. [59] Article 79's contentious drafting has been a major point of contention. [60] During the CISG's working sessions, there was a lot of debate on whether or not financial constraints (i.e. hardship) should justify an exemption. [61] The Norwegian delegation's proposal to explicitly allow the debtor to be released from obligation in the event of a material adverse change in circumstances was rejected. [62] As a result, there have been divergent interpretations of art. 79 due to its language. Minority opinion suggests looking to the subsidiary law selected by the parties or indicated by the appropriate conflict of laws, even though this might result in a wide range of conflicting legal principles. However, the consensus holds that Article 79 (or Article 7(2) of the Convention's gap filling approach) should be applied if the incident causing the hardship or force majeure satisfies its standards. However, the consensus holds that Article 79 (or Article 7(2) of the Convention's gap filling approach) should be applied if the incident causing the hardship or force majeure satisfies its standards. Opposing views have been voiced even on such provisions. Some writers argue that in light of modern commercial practise and alternative conflict resolution mechanisms, remedies such as the need to renegotiate, as well as the remedies of contract modification and/or termination by a court or an arbitral tribunal, are neither essential nor desirable. The interests of the parties to a contract may be better served by the customary remedies of

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exemption from damages, the obligation to alleviate loss, and/or the avoidance of the contract by a party's declaration of its invalidity in the event of a hardship. It follows that the language of article 79 and the remedies provided in the CISG would be adequate to address hardship concerns. [65] A counterargument to this perspective claims that the remedies in article 79 of the CISG are designed to address force majeure situations, but not hardship, and that the provision's scope cannot be enlarged to include such circumstances. As a result, supporters of this viewpoint assert that contractual practise, the creation of numerous model clauses, and the adoption of international standards like the UNIDROIT Principles all demonstrate the need for distinct regimes for force majeure and hardship.[66]

However, the clause would take precedent over the CISG's interpretation of Article 6 if the parties have a clause in their contract addressing force majeure and/or hardship.

Under the UNIDROIT Principles, the concepts of force majeure and hardship are each taken into account separately. Ch. 6, S. 2, specifically addresses hardship in its three paragraphs (arts. 6.2.1-6.2.3). The requirement stated in article 6.2.1 ("[c]ontract to be followed") is essential for our purposes as it emphasises the significance of the pacta sunt servanda maxim and the exceptional nature of hardship:

Where the execution of a contract becomes more onerous for one of the parties, that party is nonetheless required to execute its duties subject to the following restrictions on hardship.

However, according to Official Comment 2 of the article, in order for hardship to be considered, the intervening circumstances must materially alter the contract's overall balance. On the other side, the "[n]on-performance" chapter of the UNIDROIT Principles contains art. 7.1.7, which addresses force majeure. The UNIDROIT Principles employ a functional approach to take into consideration the reality that it is not always easy to distinguish between hardship and force majeure, as emphasised in an Official Comment: [67]

A given set of facts may qualify as both a case of hardship and a case of force majeure under the Principles. In such a circumstance, the person that has suffered damages is free to choose from the available options for redress. Invoking the concept of force majeure is an attempt to get out of performing the obligation. However, if a party does use hardship, it is usually to renegotiate the terms of the contract in order to keep the contract alive, although with different conditions.

Therefore, it is up to the non-performing party to make the case that, in light of any relevant circumstances, the requested remedy is too onerous or impractical to undertake. In the event of a force majeure occurrence, any contract may be deemed void and unenforceable (or its effects suspended in case of temporary impossibility to perform). [68] Contrarily, the UNIDROIT Principles provide three options for dealing with a challenging situation: the parties may renegotiate the terms

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of the contract (which is not required), the contract may be cancelled, or the contract may be modified by a court. When the hardship requirements are met, as stated in article 6.2.3:

(1) The less advantageous party has the right to request new discussions in the event of a hardship. The request must be made without unnecessary delay and state the basis for the request. (2) The disadvantaged party is not entitled to a suspension of performance only because the requesting party wants to renegotiate. (3) If the parties are unable to settle their differences within a reasonable amount of time, they may individually file a lawsuit. (4) If an injustice occurs, the court may (a) void the agreement at a later date and under specified terms, or (b) amend the agreement to restore harmony, providing that both choices are reasonable.

The last sentence, on the other hand, is the outcome of a conscious choice taken by the UNIDROIT Principles' drafters and does not just reiterate the accepted norms of the global business community. Indeed, the ability of the courts to change the terms of a contract after it has already been signed is contentious [69]. Therefore, when selecting the UNIDROIT Principles as the relevant law for an international contract, it is usual practise for the parties to exclude certain articles, particularly those addressing hardship (and specifically art 6.2.3). In its place, the parties may include an agreement they've drafted themselves or the ICC's model language on hardship (see footnote [58]). (again, with the tendency to exclude the option entitling the judge or the arbitrator to adapt the contract). Based on the presumption that judicial intervention will be highly contentious, the ICC model language on hardship provides the parties with three options. [58] Should renegotiation fail, any party may (a)terminate the agreement on the basis of hardship, (b)ask a judge or an arbitrator to modify the agreement, or (c)declare the agreement null and void.

The International Chamber of Commerce (ICC) produced the force majeure clause, which comprises a comprehensive definition and a list of instances that are frequently categorised as force majeure. The broad definition is based on the idea of "reasonability," which means that the affected party's failure to perform must be the result of events outside of that party's control, that the events in question could not reasonably have been anticipated at the time the contract was signed, and that the consequences of the events in question could not reasonably have been avoided or mitigated.[59]

While each model has its own quirks, they all seem to follow the same basic principles when compared. To begin, we must give the pacta sunt servanda principle its due importance in order to safeguard the reliability of contractual commitments. Second, the occurrence (or its consequences) must follow the agreement's inception. Third, it must be an unanticipated [60] incident that neither side could have prevented. The fourth condition is that the party that would be impacted is not in default. Lastly, the triggered event must have caused the non-performance or disruption of the contractual balance in some way (this relationship might be direct or indirect). When performance becomes impossible (or unworkable), and all other conditions are satisfied, the contract is terminated

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and the obligations are discharged, and the affected party incurs no further liability as a result. However, in cases of hardship, other recourses apply. However, two possibilities stand out: I a preference for renegotiation of the contract's terms (albeit this is neither mandatory nor enforceable) or (ii) the cancellation of the relationship altogether. Due to the contentious nature of allowing a court or arbitrator to change the terms of a contract, model clauses typically allow the parties to waive the clause if they so choose.

The UNIDROIT Principles' clauses and the ICC's hardship provision are not the only examples of how revising the terms of contracts is preferred. For instance, a series of procedures to stop the COVID-19 virus's propagation have been suggested by the European Law Institute (ELI). [60] Principle 13(2) proposes, for example:

States should make sure that, in accordance with the hardship principle, parties enter into renegotiations even if this is not specifically stated in a contract or in existing law because the COVID-19 crisis and the measures implemented during the pandemic have made performance excessively difficult (hardship principle). This includes situations where the cost of performance has significantly increased.

One last shared characteristic emerges from the comparison: the elevated status accorded to party autonomy. Ad hoc terms allowing parties to allocate risk due to supervening circumstances are permissible under all legal systems and model contracts. Should this occur, [61] the agreed-upon legal framework would take precedence. Parties shouldn't undervalue this phenomenon's importance in the context of global economic partnerships. Indeed, as has previously been emphasised, such clauses require special care in their construction and language since they would be subject to judicial review in light of the legislation that governs the contract in question.[62]

Under any applicable framework, the emergence of COVID-19 would be considered a natural disaster. COVID-19 as a sickness and health emergency, however, must be distinguished from government restrictions enacted to limit the spread of the epidemic by containment and lockdown measures, which are more appropriately classified as an Act of King, or factum principis.[63]

For example, the China Council for the Promotion of International Trade has prepared more than 5600 certifications certifying "force majeure" on behalf of businesses that have broken the terms of international contracts, ostensibly due to the COVID-19, since January 2020. The COVID-19 outbreak has been deemed a force majeure event, impacting the nation's supply chain, according to an office memo published by India's Ministry of Finance on February 19, 2020. In particular, COVID-19 is designated as "a instance of natural tragedy" in the Memorandum. The end result is the same even though the method is different. In China, the CCPIT has provided certifications to all qualified businesses, whereas in India, a unified public declaration has been published on behalf of all companies operating within a certain economic sector. Without further proof that the non-performance

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was caused by the event in question, official declarations and certifications attesting to the occurrence of a particular event would not be sufficient to satisfy the criteria of a force majeure provision. While in theory both COVID-19 and the associated government rules might be considered force majeure or an intervening circumstance able to disrupt the equilibrium of the deal, all legal systems require that further constitutive criteria be satisfied. Therefore, the non-performing party cannot be absolved of responsibility simply because of the existence of COVID19 or the existence of government legislation designed to restrict the spread of the illness [64]. An additional example of this is the notice given by the First Civil Division of the Higher People's Court of Zhejiang Province, which states that force majeure can be claimed in the following situations: I the failure to perform is directly attributable to the administrative measures taken by the Public Authorities to stop the COVID-19 outbreak; or (ii) the party was unable to fulfil their contractual obligations because they were directly impacted by the COVID-19 disease. The party that is not performing has the burden of evidence in both situations [65]. A similar set of opinions, titled "Guiding Opinions (I) on Several Issues Concerning the Proper Trial of Civil Cases Related to the Novel Coronavirus Pneumonia," was issued by the Supreme People's Court of China on April 16, 2020. (COVID-19). The Court emphasises a number of significant factors when evaluating whether or not to invoke force majeure and related notions to exempt contracting parties from responsibility for performance where performance is impacted by either the COVID-19 pandemic or government activities designed to control it. In order to be exempt from a civil obligation due to force majeure, a party must demonstrate two things in particular: (a) a causal relationship (including the degree of a relationship) between the pandemic or related control measures and the party's inability to comply; and (b) prompt notification to the other party. In addition, the party claiming force majeure must take legal responsibility for its own actions if they contributed to the other party's inability to comply or the severity of any damages. [66] The described comparison situation fits well with this method.

According to the Iraq Business News, Iraq signed several international contracts with foreign companies in various sectors, including oil and gas, infrastructure, and services. Some of the significant contracts signed by Iraq.

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TABLE I. THE FINANCIAL AMOUNT OF INTERNATIONAL CONTRACTS IN IRAQ FROM 2015 TO 2022.

No	The financial amount of international contracts in Iraq	Year
1.	12 billion US dolor	2015
2.	3.319 billion US dolor	2016
3.	3.68 billion US dolor	2017
4.	6.4 billion US dolor	2018
5.	56.3 billion US dolor	2019
6.	22.7 billion US dolor	2020
7.	36.38 billion US dolor	2021
8.	41.52 billion US dolor	2022

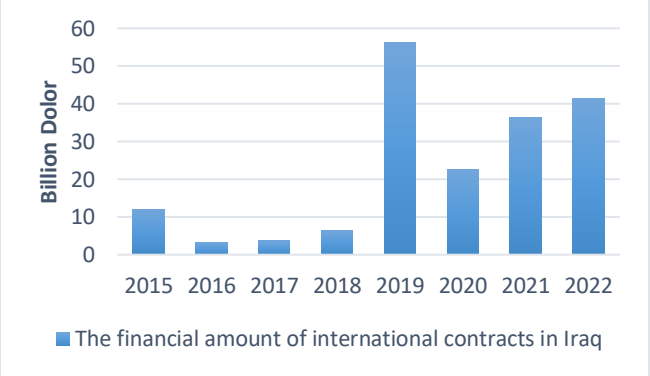

Fig. 1. The financial amount of international contracts in Iraq from 2015 to 2022.

According to data from the US Bureau of Economic Analysis, the United States received a foreign direct investment (FDI) from abroad, which indicates a significant amount of international business contracts.

TABLE II. THE FINANCIAL AMOUNT OF INTERNATIONAL CONTRACTS IN THE USA FROM 2015 TO 2022.

No	The financial amount of international contracts in the USA	Year
9.	397.8 billion US dolor	2015
10.	399.4 billion US dolor	2016
11.	292.8 billion US dolor	2017
12.	279.2 billion US dolor	2018
13.	4.212 trillion US dolor	2019
14.	3.425 trillion US dolor	2020
15.	4.453 trillion US dolor	2021
16.	5.138 billion US dolor	2022

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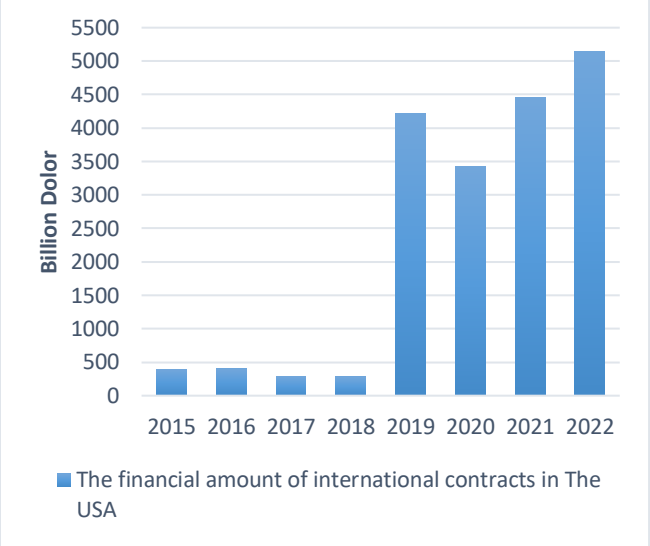

Fig. 2. The financial amount of international contracts in the USA from 2015 to 2022.

Finally, it should be noted that the above-described legal ramifications of COVID-19 and associated government requirements for foreign contracts apply to transactions that are still in progress. On the other hand, the requirement of the event's unexpected nature could not be legitimately asserted with regard to international treaties signed after such events or those that have not yet been made. It will thus be up to the parties to the contracts, taking into account the particulars of the contracts and the relevant legal framework, to establish suitable arrangements for such scenarios.

IV. CONCERNING "OVERRIDEING MANDATORY PROVISIONS"

Whether or not the laws passed by the governments of COVID-19-affected nations to curb the virus's transmission may be considered "overriding obligatory requirements" (also known as "international mandatory provisions") for the purposes of private international law is a hotly contested issue. When an international contract is subject to the legislation of a foreign country, "overriding obligatory clauses" apply notwithstanding. Their justification in law is in a country's desire to have all foreign contracts having ties to its own law enforced in accordance with those laws. Their ultimate binding character is usually confirmed either explicitly or implicitly by the law. In the absence of such a declaration, the judge must determine whether or not the provisions have mandatory effect.

Article 9 of the European Union's (EU) Council Regulation (EC) No 593/2008 on the law applicable to contractual commitments (Rome I Regulation) explains the notion and attempts to define such rules: [67]

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The law "overriding required provisions" refers to clauses that, independent of the other laws that would otherwise apply to the contract under this Regulation, a nation deems essential to protecting its public interests, such as its political, social, or economic organisation.

Article 7 of Directive 80/934/EEC (the 1980 Rome Convention) provides more clarification on the law applicable to commercial obligations: [68]

The mandatory rules of the law of another country to which the situation has a close connection may be given effect when applying that country's law under this Convention, if and to the extent that such rules must be applied under the law of the latter country regardless of the law applicable to the contract. The regulations' intended purpose and the potential outcomes under or outside of their application must be taken into account when deciding whether or not to give effect to them.

There are laws in place in nations like Belgium and Finland that must be adhered to at all costs. Examples include laws that establish a system to protect the agent's interests in an agency agreement and provide the agent with a specific financial indemnity in the event that the contract is terminated.[69]

In the case of Unamar v. Navigation Maritime Bulgare, the European Court of Justice discussed the ability of a state to declare some principles of its own legal system as superseding obligatory requirements for the purposes of international private law and their legal implications in a global context. The ECJ specifically affirmed that, despite the applicable law, the Belgian standards governing agency contracts must be enforced as overriding elements in the international contract. However, the Belgian courts were to settle the dispute in that particular case.

In fact, some nations have made provisions for the legal ramifications of the national lockdown measures, including requiring that the non-performance of a contractual obligation due to such regulations and the COVID-19 outbreak quantities to a case of force majeure, releasing the affected party from their obligations under the contract and from any associated liabilities. Or, alternatively, the national legislative rules lay out an obligatory legal framework for the effects of COVID-19, stipulating things like the injured party's entitlement to some contractual remedies while prohibiting the injured party from benefiting from others. [90] The issue is whether or not these domestic regulations have any force or effect with respect to international transactions regulated by a foreign law. To put it another way, the extent to which private international law would recognise these national measures as required override provisions is up to debate.

There are two distinct scenarios that must be identified while addressing the current situation. First, if a court from the jurisdiction with the purportedly required overriding requirements is to rule on the international contract dispute. Second, whether an arbitral tribunal or a judge from a separate nation has jurisdiction to settle the conflict.[91]

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In the first scenario, the national judge will almost certainly uphold the required legal implications of the laws of their national legal system, however in the second scenario, this seems less likely to occur. In the latter scenario, the judge or arbitrator will have the discretion to decide whether or not to apply the law that governs the contract regardless of the asserted required clauses. The application of such restrictions only becomes a difficulty when an international contract has a specific connection to that legal system [70]. Because of this, [71] the dispute shall be decided in accordance with the law applicable to the international contract if this requirement is not satisfied or if the judge or arbitral tribunal elects not to apply the alleged overriding compulsory provisions for any other reason. The holding or the arbitral award may be recognised and enforced in the country with the requisite overriding laws, but another question may come up in this situation because of the possible conflict with the public order of that nation. [72]

Given these assertions, it appears that domestic and international commercial contracts—possibly even domestic ones—will be exempt from the COVID-19-related laws established by concerned nations, even if such laws explicitly qualify them as such for the purposes of international private law. Even though the law of another state or country is theoretically meant to apply, if the dispute is brought before a court in that country, the judge will almost probably apply such criteria to the contract. The judge or arbitrator will have the authority to decide whether or not the provisions apply in the event that the dispute is heard in court or through arbitration in a nation other than the one in which the parties are situated, depending on the particular facts and circumstances of the case and the parties' choice of law as set forth in their international business contract.

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