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UNIDROIT - INTERNATIONAL INSTITUTE FOR THE
UNIFICATION OF PRIVATE LAW

**THE IMPLICATIONS OF
INTERNATIONAL
CONTRACT
ENFORCEMENT AS IT
RELATES TO THE COVID-
19 GLOBAL PANDEMIC**

EXCEPTIONS TO NON-PERFORMANCE DUE TO UNFORESEEN OR
UNAVOIDABLE PROBLEMS

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I. INTRODUCTION

A. Coronavirus Disease 2019 (COVID-19)

1. **About the Name.** According to the Centers for Disease Control and Prevention (CDC), “On February 11, 2020, the World Health Organization (WHO) [announced](#)¹ an official name for the disease that is causing the 2019 novel coronavirus outbreak.”² “The new name of this disease is coronavirus disease 2019, abbreviated as COVID-19. In COVID-19, ‘CO’ stands for ‘corona,’ ‘VI’ for ‘virus,’ and ‘D’ for disease. Formerly, this disease was referred to as “2019 novel coronavirus” or “2019-nCoV.”” *Id.*

2. **Source of the Virus.** “Coronaviruses, named for the crown-like spikes on their surfaces, are a large family of viruses that are common in people and many different species of animals, including camels, cattle, cats, and bats. There are many [types of human coronaviruses](#)³, including some that commonly cause mild upper-respiratory tract illnesses. COVID-19 is a new disease, caused by a novel (or new) coronavirus that has not previously been seen in humans.” *Id.*, at n.2. “Animal coronaviruses rarely infect people and then spread between people. This occurred with two earlier coronaviruses, [MERS-CoV](#)⁴ and [SARS-CoV](#)⁵.” *Id.* “SARS-CoV-2 virus is a beta coronavirus, like MERS-CoV and SARS-CoV. These viruses have their origins in bats. Although we do not know the exact source of the current outbreak of COVID-19, we know that it originally came from an animal, likely a bat.” *Id.*

3. **The WHO-convened global study of origins of SARS-CoV-2: China Part.** According to the Joint WHO-China Study as to the Origins of SARS-CoV-2, based on the analysis of the data obtained and other surveillance data, it is considered unlikely that any substantial transmission of SARS-CoV-2 infection was occurring in Wuhan during October and November 2019.⁶ Based upon WHO’s findings, “a laboratory origin of the pandemic was considered to be extremely unlikely.” *Id.* Therefore, the origins as to the locality of COVID-19 remain unknown.

¹ Tedros Adhanom Ghebreyesus (@DrTedros), TWITTER (Feb. 11, 2020, 11:26 AM), <https://twitter.com/DrTedros/status/1227297754499764230>.

² U.S. Department of Health & Human Services, *About COVID-19*, CENTERS FOR DISEASE CONTROL AND PREVENTION (Apr. 17, 2021, 6:29 PM), <https://www.cdc.gov/coronavirus/2019-ncov/cdcresponse/about-COVID-19.html>.

³ U.S. Department of Health & Human Services, *Human Coronavirus Types*, CENTERS FOR DISEASE CONTROL AND PREVENTION (Apr. 17, 2021, 6:42 PM), <https://www.cdc.gov/coronavirus/types.html>.

⁴ U.S. Department of Health & Human Services, *Middle East Respiratory Syndrome (MERS)*, CENTERS FOR DISEASE CONTROL AND PREVENTION (Apr. 17, 2021, 6:58 PM), <https://www.cdc.gov/coronavirus/mers/index.html>.

⁵ U.S. Department of Health & Human Services, *Severe Acute Respiratory Syndrome (SARS)*, CENTERS FOR DISEASE CONTROL AND PREVENTION (Apr. 17, 2021, 7:02 PM), <https://www.cdc.gov/sars/index.html>.

⁶ World Health Organization, *WHO-convened global study of origins of SARS-CoV-2: China Part*, JOINT WHO-CHINA STUDY: 14 JANUARY - 10 FEBRUARY 2021 (Apr. 17, 2021, 7:26 PM), <https://www.who.int/publications/i/item/who-convened-global-study-of-origins-of-sars-cov-2-china-part>.

B. International Monetary Fund

4. **What is the impact of coronavirus on the global economy?** “As IMF Managing Director Kristalina Georgieva noted ahead of the [April 2021 IMF/World Bank Spring Meetings](#)⁷: “The global economy is on firmer footing as millions of people benefit from vaccines. But while the recovery is underway, too many countries are falling behind and economic inequality is worsening. Strong policy action is needed to give everyone a fair shot—a shot in the arm to end the pandemic everywhere, and a shot at a better future for vulnerable people and countries.” ([speech](#)⁸).”⁹ “In this trying time, the IMF continues to support countries on the path to recovery by providing policy advice, financial support, capacity development, and debt relief for the poorest.” *Id.* at n.9.

5. “Cumulative per capita income losses over 2020–22, compared to pre-pandemic projections, are equivalent to 20 percent of 2019 per capita GDP in emerging markets and developing economies (excluding China), while in advanced economies the losses are expected to be relatively smaller, at 11 percent.” *Id.* “This has reversed gains in poverty reduction, with an additional 95 million people expected to have entered the ranks of the extreme poor in 2020, and 80 million more undernourished than before.” *Id.* “The divergent recovery paths are likely to create significantly wider gaps in living standards between developing countries and others, compared to pre-pandemic expectations.” *Id.* “The adverse impact on low-income people will be particularly acute, imperiling the significant progress made in reducing extreme poverty in the world since the 1990s.” *Id.*

II. SUMMARY

6. **The forecast going forward due to COVID-19.** As the 2020 Fiscal Year began, the global economic forecast was on a trajectory for growth according to the IMF. The world could not appreciate that a single event could cause not only the catastrophic collapse of the global economy but also to be the primary contributing factor as to an unimaginable amount of carnage and loss of human life. According to Johns Hopkins University & Medicine, the global total number of deaths due to coronavirus has surpassed 3,000,000¹⁰. Even with the comprehensive rollout of the emergency authorized usage (EAU) and distribution of vaccines, vaccine passports, masking and the implementation of the social distancing guidelines, Pfizer Chairman and Chief

⁷ International Monetary Fund, *The Spring Meetings of the International Monetary Fund (IMF) and the Board of Governors of the World Bank Group (WBG)*, WORLD BANK GROUP (Apr. 18, 2021, 9:37 AM), <https://meetings.imf.org/en/2021/Spring>.

⁸ Kristalina Georgieva, *Giving People a Fair Shot—Policies to Secure the Recovery*, INTERNATIONAL MONETARY FUND (Apr. 18, 2021, 9:44 AM), <https://www.imf.org/en/News/Articles/2021/03/25/sp033021-SMs2021-Curtain-Raiser>.

⁹ International Monetary Fund, *What is the impact of coronavirus on the global economy?*, WORLD BANK GROUP (Apr. 18, 2021, 9:52 AM), <https://www.imf.org/en/About/FAQ/imf-response-to-covid-19#Q4>.

¹⁰ Johns Hopkins University & Medicine, *COVID-19 Dashboard by the Center for Systems Science and Engineering (CSSE) at Johns Hopkins University (JHU)*, BLOOMBERG PHILANTHROPIES AND THE STAVROS NIARCHOS FOUNDATION (SNF) (Apr. 18, 2021, 10:21 AM), <https://coronavirus.jhu.edu/map.html>.

Executive Officer, Albert Bourla, said, “that people will likely need a booster dose within 12 months of vaccination,”¹¹ signaling that the world’s recovery from COVID-19 will be a long-term endeavor. That is an astonishing number as it relates to the loss of human life due to a single event. The most COVID-19 attributed deaths have occurred in the United States, followed by Brazil, Mexico, India, the United Kingdom, and Italy. *Id.* at n.10. The human life loss consisted of Grandmothers and Grandfathers, Mothers and Fathers, Aunts and Uncles, Sisters and Brothers and Cousins. As a result of this mass casualty global event, individuals who have lost their lives as a result of COVID-19 contributed to the marketplace in various ways and were active participants in the global economy. Any individual and/or business who generates income, hires employees/contractors/vendors, pays taxes, monetarily borrows for interest, and purchases goods or services, amongst other things, are active participants in the global economy. But, what happens to the contractual obligations of an individual who gets furloughed, a reduction in work hours, or terminated? What happens when an individual loses their medical and dental insurance coverage due to their unemployment? What happens to the business primarily reliant upon in-person patronage reducing operations to a low to no in-person capacity? What happens when debtors suffer an adverse economic impact and are no longer able to meet their ongoing creditor obligations? What happens when domestic/international imports and exports are reduced or halted due to curfew and lockdown executive orders?

7. The individuals who have perished due to COVID-19 also had contractual obligations. They contracted with other individuals and businesses for goods and services. In most jurisdictions around the world, the law allows for contractual agreements to be terminated due to death because the performance of contractual duties and obligations are no longer available. What happens when individuals and businesses with contractual duties and obligations sustain life, and do not die as a result of COVID-19, but are adversely affected by the COVID-19 global pandemic and suffer economic harm due to loss of income, wages, or contractual nonperformance of another? Does the law allow for contractual agreements to be paused, renegotiated, or otherwise terminated without penalty? If the law allows any exceptions to nonperformance due to the inability to perform contractual obligations, what are those exceptions? Must those exceptions be fully integrated within the four corners of the contractual agreement, or otherwise to be fully enforceable? Who is liable for breach of contract for nonperformance due to an unforeseen or unavoidable global pandemic event as such COVID-19?

8. The legal research and findings articulated here attempt to address some of the issues proposed. It should be thoroughly noted that no comprehensive international caselaw currently exists for legal citation as to the issues raised primarily because the law is still unsettled and evolving in this area. This global legal research dissertation acts as a guide and gives the reader or legal practitioner a bird’s eye view of how some of the member states under UNIDROIT and the United Nations (UN) CISG are addressing some of the aforementioned issues in their local

¹¹ Cory Stieg, *Dr. Fauci: ‘We very well may need to get booster shots’ for Covid — here’s when*, CNBC Make It/CNBC LLC/NBC UNIVERSAL (Apr. 22, 2021, 1:20 PM), <https://www.cnbc.com/2021/04/15/dr-fauci-when-we-will-need-booster-shots-for-covid-vaccine-timeline.html>.

jurisdictions. The legal research findings will discuss the governing rules of force majeure and hardship under the UNIDROIT Principles and exemptions under the CISG.

9. The legal research findings will also show how local governments are providing financial assistance to individuals and businesses to mitigate damages and sustain their domesticated microeconomies in their countries. In addition, this dissertation will show how different sectors of the global macroeconomic have been adversely affected by the COVID-19 global pandemic and how the sectors affected address it.

III. UNIDROIT PRINCIPLES

A. Force Majeure

- (1) **Article 7.1.7.** Non-performance by a party is excused if that party proves that the non-performance was due to an impediment beyond its control and that it could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.¹²
- (2) When the impediment is only temporary, the excuse shall have effect for such period as is reasonable having regard to the effect of the impediment on the performance of the contract. Id.
- (3) The party who fails to perform must give notice to the other party of the impediment and its effect on its ability to perform. If the notice is not received by the other party within a reasonable time after the party who fails to perform knew or ought to have known of the impediment, it is liable for damages resulting from such non-receipt. Id.
- (4) Nothing in this Article prevents a party from exercising a right to terminate the contract or to withhold performance or request interest on money due. Id.

B. Hardship

Article 6.2.2 (Definition of hardship). There is hardship where the occurrence of events fundamentally alters the equilibrium of the contract either because the cost of a party's performance has increased or because the value of the performance a party receives has diminished, and

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

¹² Art. 7.1.7 UNIDROIT Principles 2016.

- (b) The events could not reasonably have been taken into account by the disadvantaged party at the time of the conclusion of the contract;
 - (c) The events are beyond the control of the disadvantaged party; and
 - (d) The risk of the events was not assumed by the disadvantaged party.¹³
- (1) **Article 6.2.3 (Effects of hardship)**. In case of hardship the disadvantaged party is entitled to request renegotiations. The request shall be made without undue delay and shall indicate the grounds on which it is based.¹⁴
- (2) The request for renegotiation does not in itself entitle the disadvantaged party to withhold performance. Id.
- (3) Upon failure to reach agreement within a reasonable time either party may resort to the court. Id.
- (4) If the court finds hardship it may, if reasonable,
- (a) Terminate the contract at a date and on terms to be fixed, or
 - (b) Adapt the contract with a view to restoring its equilibrium. Id.

IV. UN CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (CISG)

A. Article 79

- (1) **Section IV Exemptions - Article 79**. A party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it, or its consequences.¹⁵

¹³ Art. 6.2.2 UNIDROIT Principles 2016.

¹⁴ Art. 6.2.3 UNIDROIT Principles 2016.

¹⁵ Art. 79 United Nations Convention on Contracts for the International Sale of Goods 2010.

- (2) If the party's failure is due to the failure by a third person whom he has engaged to perform the whole or a part of the contract, that party is exempt from liability only if:
 - (a) he is exempt under the preceding paragraph; and
 - (b) the person whom he has so engaged would be so exempt if the provisions of that paragraph were applied to him. Id.
- (3) The exemption provided by this article has effect for the period during which the impediment exists. Id.
- (4) The party who fails to perform must give notice to the other party of the impediment and its effect on his ability to perform. If the notice is not received by the other party within a reasonable time after the party who fails to perform knew or ought to have known of the impediment, he is liable for damages resulting from such non-receipt. Id.
- (5) Nothing in this article prevents either party from exercising any right other than to claim damages under this Convention. Id.

V. EXCEPTIONS TO NON-PERFORMANCE DUE TO UNFORESEEN OR UNAVOIDABLE PROBLEMS

10. **Forced majeure exceptions.** As incorporated by reference above, exceptions to non-performance due to hardship, forced majeure, or impediment is available to the contracting parties within member states under UNIDROIT and the CISG. The application of hardship, forced majeure, or impediment as an excuse for non-performance is not automatic. Such a declaration by a non-performing party of a contract must be declared by notice pursuant to UNIDROIT Art. 7.1.7(3). If a non-performing party knows or has reason to know about the problem and fails to issue a notice about the problem to the other party or parties to the contract within a reasonable time frame, the non-performing party is liable for damages. In addition to notice, other elements must be satisfied. For example, for a notice declaration of forced majeure under Art. 7.1.7(1), a non-performing party can be excused if the non-performing party can show a problem beyond its control was the cause of its non-performance. Further, the non-performing party must show that a reasonable person similarly situated could not have expected for such a problem to occur after the execution of the contract. Also, the non-performing party must show that the problem was otherwise unforeseeable or unavoidable with an unknown result.

11. Under Art, 7.1.7(2), short-term problems shall be afforded short-term resolutions in

consideration of the effects of the non-performing party's contractual obligations. There is no prohibition or preclusion to termination, for withholding performance, or for requesting interest on outstanding balances due pursuant to the contractual agreement under Art. 7.1.7(4).

12. Hardship exceptions. Under Art. 6.2.2, a hardship occurs where the cost of a party's performance under the contract increases or where the party's compensation under the contract decreases. In addition, the problematic event occurs or becomes known to the affected party after the execution of the contractual agreement under Subsection (a). Under Subsections (b) through (d), similar to forced majeure under Art. 7.1.7, a non-performing party must show that a problem beyond its control was the cause of its non-performance under Subsection (c); the non-performing party must show that a reasonable person similarly situated could not have expected for such a problem to occur after the execution of the contract under Subsection (b); and the non-performing party must show that the problem was otherwise unforeseeable or unavoidable under Subsection (d).

13. Effects of hardship exceptions. Under Art. 6.2.3(1), as a result of a showing of hardship, the non-performing party will be entitled to request a renegotiation of the contractual terms and conditions. The request to renegotiate the contractual terms and conditions shall be made without undue delay and state the basis of the request. Renegotiations do not allow the non-performing party to withhold performance under Art. 6.2.3(2). Under Art. 6.2.3(3), if a mutual stipulation of agreement is not reached within a reasonable time frame, either party can seek relief in court. Under Art. 6.2.3(4), if the court finds hardship, the court may terminate the contract or restore the contract, if reasonable.

14. CISG Exemptions. It should be thoroughly noted that Article 79 does not provide force majeure nor hardship relief for non-performance. Instead, non-performance relief can be ascertained due to an impediment. Under Subsection (4), similar to forced majeure under Art. 7.1.7 and hardship under Art. 6.2.2, the invocation of an impediment declaration requires notice. Under Subsection (1), similar to forced majeure under Art. 7.1.7 and hardship under Art. 6.2.2, a non-performing party must show that a problem beyond its control was the cause of its non-performance under Subsection (1); the non-performing party must show that a reasonable person similarly situated could not have expected for such a problem to occur after the execution of the contract under Subsection (1); and the non-performing party must show that the problem was otherwise unforeseeable or unavoidable under Subsection (1). Under Subsection (3), similar to forced majeure under Art. 7.1.7(2), short-term problems shall be afforded short-term resolutions in consideration of the effects of the non-performing party's contractual obligations. Under Subsection (4), similar to forced majeure under Art. 7.1.7(3), if a non-performing party knows or has reason to know about the problem and fails to issue a notice about the problem to the other party or parties to the contract within a reasonable time frame, the non-performing party is liable for damages. Under Subsection (5), similar to hardship under Art. 6.2.3(3), if a mutual stipulation of agreement is not reached within a reasonable time frame, either party can seek relief in court, or any other relief available by law.

15. Bridging the international application of the UNIDROIT Principles and the CISG. “At a transnational level, a flexible and uniform approach is adopted by the UNIDROIT Principles, particularly in the provisions on Force majeure” (Article 7.1.7) and “Hardship” (Articles 6.2.2-6.2.4).”¹⁶ The treatment of [the exemptions available under Art.79 of the CISG], force majeure, and hardship in the Principles has been enormously influential in domestic and international contexts. “The relevant articles have been introduced, either literally or with only few modifications, in a number of national codifications, including those of the People’s Republic of China (only force majeure), the Russian Federation, France, Argentina, Estonia, Lithuania or Brazil.” *Id.* at n.16. “At the international level, the ICC Hardship Clause 2020 was inspired by Articles 6.2.1, 6.2.2 and 6.2.3 of the UNIDROIT Principles.”¹⁷ *Id.* at n.16. “Likewise, the ITC Contractual Joint Venture Model Agreements published in 2004 by the International Trade Centre UNCTAD/WTO expressly state that Articles 18 and 19, dealing with hardship and force majeure, respectively, were inspired by the corresponding provisions of the Principles.”¹⁸ *Id.* at n.16.

A. Exceptions Under Italian Law

16. Remarks on the Effects of the Pandemic on Long-Term Contracts (Italian Law). In Italian law, the events incorporated by reference above are considered “factum principis”, whose legal effects are similar to force majeure under Art. 7.1.7 of the UNIDROIT Principles.¹⁹ “Factum principis and force majeure affect long-term contracts, and may cause temporary supervening impossibility or supervening excessively onerous nature of the performances.” *Id.* “In the first case, the performance may be postponed, in the second the contract shall be terminated.” *Id.* “Italian Civil Code’s provisions suggest how the risk may be allocated between the parties in different situations submitted to the judge.” *Id.*

17. The diffusion of the Coronavirus as an event of force majeure and as a reason For Provisions that constitute factum principis (Italian Law). “The Coronavirus epidemic was defined as an *emergency* by decree-law no. 6 of 23 February 2020²⁰ and a *pandemic* by the World Health Organisation on 20 March 2020.” *Id.* at n.19. “The Organisation stated that

¹⁶ Michael Joachim Bonell, *Note of the Unidroit Secretariat ξ on the Unidroit Principles of International Commercial Contracts and the Covid-19 Health Crisis **, UNIDROIT – INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW (Apr. 22, 2021, 2:50 PM), <https://www.unidroit.org/english/news/2020/200721-principles-covid19-note/note-e.pdf>.

¹⁷ International Chamber of Commerce, *ICC Force Majeure and Hardship Clauses*, INTERNATIONAL CHAMBER OF COMMERCE (Apr. 22, 2021, 3:11 PM), <https://iccwbo.org/publication/icc-force-majeure-and-hardship-clauses/>.

¹⁸ International Trade Centre UNCTAD/WTO, *ITC Contractual joint venture model agreements*, INTERNATIONAL TRADE CENTRE (Apr. 22, 2021, 3:20 PM), <http://www.mid-as.it/wp-content/uploads/ITC-Contractual-Joint-Venture-Model-Agreements.pdf>.

¹⁹ Guido Alpa, *Remarks on the Effects of the Pandemic on Long-Term Contracts*, COMPARATIVE COVID LAW (Apr. 28, 2021, 1:50 PM), <https://www.comparativecovidlaw.it/2020/09/06/remarks-on-the-effects-of-the-pandemic-on-long-term-contracts/>.

²⁰ Containing «Urgent measures for the containment and management of the COVID-19 epidemic emergency», converted, with amendments, by law no. 13 of 5 March 2020, subsequently abrogated by decree-law no. 19 of 2020 with the exception of article 3, paragraph 6-bis, and art. 4.

“The COVID-19 emergency committee has agreed unanimously that the epidemic still constitutes an international public health emergency”²¹, and on 4 May it added that it is still a global public health emergency.”²². *Id.* “These declarations, formulated internationally, shape a situation that can certainly be considered an event of *force majeure*: it is unforeseeable, exceptional and uncertain in its duration.” *Id.*

18. “In Italy, the first provisions were adopted by the Government, in the form of Prime Minister's decrees and then in the form of Council of Ministers’ decrees, as well as by individual Ministers in the form of ministerial decrees; the Parliament was involved in the conversion of those decrees into statutes.” *Id.* “Support was given to the sanitary system, to businesses in the form of tax credits, to big firms in the form of guarantees, pursuant to the Law-decree n. 34/2020.” *Id.* “Many limits were introduced to individual freedoms, commercial businesses and professional activities.” *Id.*

19. Historically, the application of *factum principis* will not exonerate a debtor from contractual duty. For example, during the First World War, rental agreements were renegotiated, extended, or granted consideration as to pricing. In the current day, this translates to hardship exemption relief under Art. 6.2.2 and 6.2.3 of the UNIDROIT Principles as opposed to forced *majeure* relief. The influence of the resulting consequence of the Second World War can be found codified within the Italian Civil Code as to limitation and application of exceptions available including but not limited to confiscation and rationing. There is no general definitive rule under the Italian Civil Code as to hardship or forced *majeure* relief, but Article 3 of Law-decree n. 6/2020 provides for considerations for late or partial payments due to an epidemic event without penalty for the debtor. The condition precedent appears to be the unforeseeability of the epidemic event and/or the unavoidability of a result similar to forced *majeure* under Art. 7.1.7, and hardship under Art. 6.2.2(d) of the UNIDROIT Principles. The Supreme Court of Cassation (Italy) has held that the debtor cannot invoke *factum principis* and obtain hardship or forced *majeure* relief when the contractual agreement provides for the possibility of an unforeseeable event, holding that the debtor has assumed the risk of the unforeseeable event provided for under the terms and conditions of the agreement.

20. Personal performance and protection of fundamental rights (Italian Law). Under the Italian Civil Code, Articles 1175 and 1375 provide contractual nonperformance relief to debtor employees as a creditor cannot demand performance of its contractual terms and conditions by a debtor employee where: (1) the employer’s workplace is unsafe; (2) exposure to the virus is inevitable; or (3) life and health are in danger.

²¹ World Health Organization, *Statement on the third meeting of the International Health Regulations (2005) Emergency Committee regarding the outbreak of coronavirus disease (COVID-19)*, WORLD HEALTH ORGANIZATION (Apr. 28, 2021, 2:39 PM), [https://www.who.int/news/item/01-05-2020-statement-on-the-third-meeting-of-the-international-health-regulations-\(2005\)-emergency-committee-regarding-the-outbreak-of-coronavirus-disease-\(covid-19\)](https://www.who.int/news/item/01-05-2020-statement-on-the-third-meeting-of-the-international-health-regulations-(2005)-emergency-committee-regarding-the-outbreak-of-coronavirus-disease-(covid-19)).

²² According to the data distributed by the WHO, on 20 May 2020, there were 4,761,559 infections and 317,529 deaths (Health Emergency Dashboard).

21. Temporary supervening impossibility: suspension of contracts and withdrawal (Italian Law). “In order to ascertain that the debtor's breach does not imply any sanctions, the civil code requires that (i) the performance has become objectively impossible and that (ii) the debtor is not at fault.” *Id.* at n.19. “This result is reached by coordinating Articles 1218 and 1256, which provide the following:

‘Article 1218. Liability of debtor. The debtor who does not exactly render due performance is liable for damages unless he proves that the non-performance or delay was due to impossibility of performance for a cause not imputable to him’.

‘Article 1256. Definitive impossibility and temporary impossibility. An obligation is extinguished when its performance becomes impossible for a cause not imputable to the debtor.’” *Id.*

22. In short, to mitigate or terminate damages due to the creditor, the debtor must provide evidence to support a finding that performance of the contractual duties are no longer realistic, objectively as opposed to subjectively and that the debtor is not the cause of the event or hardship. Objective is defined as of, relating to, or based on externally verifiable phenomena, as opposed to an individual’s perceptions, feelings, or intentions.²³ Subjective is defined as based on an individual’s perceptions, feelings, or intentions, as opposed to externally verifiable phenomena <the subjective theory of contract – that the parties must have an actual meeting of the minds – is not favored by most courts>.²⁴ Think of objective as something tangible or intangible, but verifiable by another. Think of subjective as a person’s mental perception or point-of-view, but unverifiable by another. So, in the context of the debtor’s evidentiary testimony or proof presented before the court, the debtor’s event can be tangible or intangible, must something other than the debtor’s mental perception, but must be verifiable by someone other than the debtor. Under Article 1218 of the Italian Civil Code similar to Art. 7.1.7(1) of the UNIDROIT Principles, a debtor can abscond liability as to damages due to the creditor by an evidentiary showing that the debtor’s non-performance or delay was due to unforeseeability or unavailability as shown for forced majeure under Art. 7.1.7(1) and hardship under Art. 6.2.2(d) of the UNIDROIT Principles. Under Article 1256 of the Italian Civil Code similar to forced majeure under Art, 7.1.7(2) of the UNIDROIT Principles, short-term problems shall be afforded short-term resolutions in consideration of the effects of the non-performing party’s contractual obligations.

23. The supervening excessively onerous nature of the performance (Italian Law). “From a general perspective, the pandemic could raise costs and prices that could damage one party, or preclude its opportunity to make profits. In long-term contracts this implies a supervening imbalance between the performances: the performance due by one party becomes excessively onerous.” *Id.* at n.19.

²³ West Publishing, Co., Black’s Law Dictionary 528 (Bryan A. Gardner et al. eds., 4th Pocket ed. 2011).

²⁴ West Publishing, Co., Black’s Law Dictionary 722 (Bryan A. Gardner et al. eds., 4th Pocket ed. 2011).

“Concerning excessive onerousness, the Italian Civil Code provides:

‘Article 1467. Contract for mutual counter-performances. In contracts for continuous or periodic performance or for deferred performance, if extraordinary or unforeseeable events make the performance of one of the parties excessively onerous, the party who owes such performance can demand dissolution of the contract, with the effects set forth in article 1458.’ Id.

24. Under Article 1467 of the Italian Civil Code similar to hardship under Art. 6.2.2 of the UNIDROIT Principles, a hardship occurs where the cost of a party’s performance under the contract increases or where the party’s compensation under the contract decreases. Under Article 1467, if a debtor propounds evidentiary testimony or proof showing that the performance of its contractual duties is unduly burdensome due to an extraordinary or unforeseeable event, the debtor can demand the termination of the contractual agreement.

25. Lease agreements (Italian Law). “With regards non-residential lease agreements (both property leases and business leases), in general terms, many of the lessees/tenants have been deeply affected by the extraordinary restrictions adopted to contain Covid-19 (especially those operating in the retail and hospitality sectors) and are now facing the negative economic fallout of the pandemic.”²⁵ “The main consequence is that tenants have asked for reduction, suspension and/or postponement of rent and of the ancillary charges referred to the lockdown period (and often also for later periods). Tenants/lessees are also seeking protection through general remedies provided for by Italian law, such as supervened excessive onerousness (eccessiva onerosità sopravvenuta), impossibility of the performance and/or tenant's right of early termination for serious grounds (recesso per gravi motivi) pursuant to Italian tenancy law.” Id. “In such respect, tenants/lessees and landlords are currently renegotiating the terms and conditions of lease agreements, often through the execution of settlement agreements, for the purpose of rebalancing contractual obligations and allocating economic burdens and related risks among the parties.” Id.

26. “It is worth highlighting that the Italian courts have issued a number of precautionary measures (misura cautelari) with respect to landlords’ requests to enforce bank guarantees and/or deposits securing the tenants/lessees’ obligations to pay the rent.” Id. “In this regard, two main trends have been recorded so far: (1) a first initial trend, favourable to tenants, rejecting the landlords’ requests of enforcement of the bank guarantees and deposits; and (2) a more recent trend, favourable to landlords, endorsed by certain courts which stated, inter alia, that there are no regulations in force allowing a tenant to suspend or refuse the payment of the rent in the event of suspension of the activity carried out by the same tenant due to the emergency regulations.” Id.

²⁵ Paolo Fedele, *Impact of Covid-19 on real estate contracts in Italy*, INTERNATIONAL BAR ASSOCIATION (Apr. 29, 2021, 5:39 PM), <https://www.ibanet.org/Article/NewDetail.aspx?ArticleUid=b8e82f40-40f5-40d8-8be5-73cad12f53e5>.

B. Exceptions Under United States Law

27. **Actions Taken in Response to the Pandemic (United States Law).** In the United States of America, a variety of safeguards have been instituted in an attempt to circumvent damages suffered by individuals and businesses during the COVID-19 global pandemic. The first coronavirus case in the United States was discovered in Washington State after a patient returning from Wuhan, China on January 15, 2020, was hospitalized.²⁶ On February 3, 2020, similar to Italy *Id. at n.20*, the Trump Administration declares²⁷ a public health emergency due to the coronavirus outbreak.²⁸ The emergency declaration comes three days after the World Health Organization (WHO) declares a public health emergency. *Id.* On March 11, 2020, the WHO declares the coronavirus a pandemic. *Id.* On March 13, 2020, the Trump Administration declares coronavirus a national emergency, which unlocks billions of dollars in federal funding to fight the disease's spread. *Id.*

28. “Several states have taken specific action to address the pandemic problem. Some, like Germany²⁹, have introduced moratoria on consumer debts or, like South Africa³⁰, have introduced restrictions on the enforcement of debts.”³¹ “In the United Kingdom (UK)³², similar results have been achieved by the financial regulator, the Financial Conduct Authority (FCA), fine-tuning their rules.” *Id.* “The period of moratorium varies typically between three and six months.” *Id.* “However, there remains uncertainty about the consequences of the moratorium and what happens when it ends.” *Id.*

29. **Economic Stimulus (United States Law).** In the United States, *Social and Societal Forced Majeure* relief has taken shape in a variety of different ways. *Id. at n.31*. First, after the Trump Administration asked Congress to send Americans direct financial relief on March 17th, President Trump signed the CARES Act³³ into law on March 27, 2020. *Id. at n.28*. This provided Americans with a variety of stimulus provisions, economic, medical, and otherwise. One result was tax-free direct payments to Americans who filed taxes in the previous fiscal year or qualified for an exemption such as Social Security Beneficiaries. Individuals who had earned less than

²⁶ Centers for Disease Control and Prevention, *First Travel-related Case of 2019 Novel Coronavirus Detected in United States*, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES (Apr. 30, 2021, 5:21 AM), <https://www.cdc.gov/media/releases/2020/p0121-novel-coronavirus-travel-case.html>.

²⁷ The American Journal of Managed Care, *United States Declares a Public Health Emergency Over the Coronavirus*, AJMC (Apr. 30, 2021, 6:15 AM), <https://www.ajmc.com/view/what-were-reading-us-declares-coronavirus-a-public-health-emergency-fda-approves-peanut-allergy-drug-california-healthcare-tax-rejected>.

²⁸ The American Journal of Managed Care, *A Timeline of COVID-19 Developments in 2020*, AJMC (Apr. 30, 2021, 5:53 AM), <https://www.ajmc.com/view/a-timeline-of-covid19-developments-in-2020>.

²⁹ Act to Mitigate the Consequences of the COVID-19 Pandemic under Civil, Insolvency and Criminal Procedure Law of 27 March 2020.

³⁰ Consumer Protection Act 2008; and *S v Makwanyane* 1995 3 SA 391 (CC) para 224.

³¹ COVID-19- Consumer Law Research Group, *Consumer Law and Policy Relating to Change of Circumstances Due to the COVID-19 Pandemic*, UNIVERSITY OF WARWICK SCHOOL OF LAW (Apr. 29, 2021, 7:35 PM), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7397452/pdf/10603_2020_Article_9463.pdf.

³² Consumer Rights Act 2015; Coronavirus Act 2020; and Financial Services and Markets Act 2000.

³³ CARES Act, United States H.R.748, 116th Congress (2019–2020).

\$75,000 (USD) the previous fiscal year would qualify for a one-time payment of \$1,200 (USD).³⁴ Married couples who had earned less than \$150,000 the previous fiscal year would qualify for a one-time payment of \$2,400 (USD). *Id.* Each minor child, up to four, under the age of 17 would qualify for a one-time payment of \$500 (USD) per child. *Id.*

30. Also, in December 2020, the Trump Administration issued a second round of economic stimulus payments under the CARES Act. *Id.* This time individuals earning less than \$75,000 (USD) would qualify for a one-time payment of \$600 (USD). *Id.* Married couples earning less than \$150,000 would qualify for a one-time payment of \$1,200 (USD). Each child under the age of 17 would qualify for a one-time payment of \$600 (USD). *Id.* In addition, in March 2021 under the Biden Administration, President Biden signed *the American Rescue Plan Act of 2021* (American Rescue Plan). *Id.* Under the American Rescue Plan, individuals earning less than \$75,000 would qualify for a one-time payment of \$1,400 (USD). Married couples earning less than \$150,000 would qualify for a one-time payment of \$2,800 (USD). *Id.* Each child under the age of 17 would qualify for a one-time payment of \$1,400 (USD). *Id.* Moreover, economic stimulus relief under the CARES Act and the American Rescue Plan is available for businesses by and through federally backed Paycheck Protection Program (PPP) loans and COVID-19 Economic Injury Disaster Loan (EIDL) grants and loans through the U.S. Small Business Administration.³⁵ The Act and the Plan both provide a weekly unemployment benefit supplement, in addition to each State's weekly unemployment benefit issued and administered through each State's unemployment insurance policy. Additional economic relief for businesses was made available by the States for registered business entities.

31. Moratorium Relief (United States Law). The Centers for Disease Control and Prevention (CDC), by and through the Consolidated Appropriations Act, 2021. Section 502 of Title V of Division N of that Act, issued an Order titled, "Temporary Halt in Residential Evictions to Prevent the Spread of COVID-19" (85 Fed. Reg. 55292, September 4, 2020).³⁶ This resulted in the adoption of the federal executive by the States on the local level. The United States operates using Federal and State authorities. Federal authority is superior. State authority is inferior, but through the Bill of Rights, States are granted the sovereignty to create laws and to have the ability to tax within the State's borders. To that point, the enforcement of the CDC Moratorium on evictions can vary enormously from State to State. Throughout the United States, landlord-tenant eviction cases have rosed exponentially since March 2020. This is due in-part to the fact that States adopted the CDC Moratorium through the issuance of a State level Executive Order. The State's Executive Order would incorporate the legal language from the CDC

³⁴ U.S. DEPARTMENT OF THE TREASURY, *Assistance for American Families and Workers*, U.S. DEPARTMENT OF THE TREASURY (Apr. 30, 2021, 7:11 AM), <https://home.treasury.gov/policy-issues/coronavirus/assistance-for-American-families-and-workers>.

³⁵ U.S. SMALL BUSINESS ADMINISTRATION, *COVID-19 Economic Injury Disaster Loan*, U.S. SMALL BUSINESS ADMINISTRATION (Apr. 30, 2021, 8:13 AM), <https://www.sba.gov/funding-programs/loans/covid-19-relief-options/covid-19-economic-injury-disaster-loan>.

³⁶ Centers for Disease Control and Prevention, *HHS/CDC Temporary Halt in Residential Evictions to Prevent the Further Spread of Covid-19*, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES (Apr. 30, 2021, 11:36 AM), <https://www.cdc.gov/coronavirus/2019-ncov/downloads/eviction-moratoria-order-faqs.pdf>.

(Federal) Order but would be vague as to specific requirements and invocation of rights available to landlords and tenants on the local level. For example, as incorporated by reference for the declarations for hardship exceptions under Art. 6.2.2 and 6.2.3 of the UNIDROIT Principles, State/County/Local courts required tenants facing eviction to sign an attestation and declaration citing among other things that they had a qualifying event under the CDC/State Moratorium.

32. The Courts have allowed landlords to initiate eviction proceedings against tenants, adjudicate their claims, only allowing tenants to invoke the CDC/State Moratorium to halt the Constable from removing the tenant from the property. The invocation is not automatic and requires that the tenant knows about the relief available under the CDC/State Moratorium and would otherwise be removed from the property by the Constable, even if the tenant qualified for relief under the CDC/State Moratorium. This declaratory requirement is similar to forced majeure declaratory requirements under Art. 7.1.7(3) of the UNIDROIT Principles. States such as New Jersey³⁷ have issued Moratorium Orders disallowing the filing of a landlord-tenant action with the Court during the prohibition period, whereas States like Arizona³⁸ have issued Moratorium Orders allowing landlords to file removal actions with the Court. In either instance, tenancy rent arrearages and fees continue to accrue, and compound. States that allow landlord removal actions to proceed result in Court-Ordered Judgments, publicly recorded against the tenant, which adversely affects the tenant's tenancy record going forward. In addition, the Federal Housing Finance Agency (FHFA) has issued a Moratorium Order as to Fannie Mae and Freddie Mac (the Enterprises) extensions on the moratoriums regarding single-family foreclosures and real estate owned (REO) evictions.³⁹ Landlords receiving Moratorium relief for their federally backed mortgages are prohibited from evicting tenants for nonpayment of rent due to a qualifying Moratorium hardship. Some landlords proceed with eviction proceedings for the removal of the tenant regardless because the tenant must know about the relief available to landlords under the FHFA Moratorium to raise it as an affirmative defense to the landlord's removal action.

33. Consumer Cancellation and Rescheduling (United States Law). As incorporated by reference above, consumer finance is affected by the CDC/State Executive Orders. Car insurers were ordered to return the premium differentials to the insured to offset the cost of the non-usage of their vehicles during the pandemic. This decision is based upon the fact that the cost of auto insurance is primarily based upon the individual's daily commute to work. With the conversion from in-person to remote work, or otherwise, individual cars have remained parked

³⁷ Philip D. Murphy, *Executive Order No. 235*, GOVERNOR OF THE STATE OF NEW JERSEY (Apr. 30, 2021, 1:20 PM), <https://nj.gov/infobank/eo/056murphy/pdf/EO-235.pdf>.

³⁸ Robert Brutinel, *Disposition of Residential Eviction Cases Related to the Public Health Emergency*, THE SUPREME COURT OF THE STATE OF ARIZONA (Apr. 30, 2021, 1:09 PM), <https://www.azcourts.gov/Portals/22/admorder/Orders21/2021-53.pdf?ver=2021-04-15-171610-043>.

³⁹ Federal Housing Finance Agency, *FHFA Extends COVID-19 Forbearance Period and Foreclosure and REO Eviction Moratoriums*, FHFA (Apr. 30, 2021, 1:39 PM), <https://www.fhfa.gov/Media/PublicAffairs/Pages/FHFA-Extends-COVID-19-Forbearance-Period-and-Foreclosure-and-REO-Eviction-Moratoriums.aspx#:~:text=FHFA%20announced%20that%20Fannie%20Mac,%2C%20single%2Dfamily%20mortgages%20only.>

during the pandemic and account for less traffic on roadways. Travel cancellations have reached an impasse. Individuals with travel plans, primarily flights, have attempted to cancel or reschedule their itineraries. Some travel agencies, online or otherwise, have traditionally offered travel cancellation insurance for an additional cost in the case of a qualifying event. As incorporated by reference under Art. 7.1.7(3) of the UNIDROIT Principles, a notice of a qualifying event must be issued. The Federal government in the United States ordered airlines to either: (1) cancel and refund the money for the booking; or (2) reschedule the booking for a future date, without penalty due to the global pandemic, regardless of whether the individual purchased travel cancellation insurance or not.

34. As incorporated by reference above, creditors for credit cards, student loans, auto loans had to adhere and conform to the CDC/State Executive Orders. Similar to travel cancellation insurance, some credit card companies offer balance protection insurance for an additional cost in the case of a qualifying event. Some credit card companies have offered to waive monthly payments up to 6 months, on a monthly per diem basis as needed. This is similar to hardship relief under Art, 7.1.7(2) of the UNIDROIT Principles, short-term problems shall be afforded short-term resolutions in consideration of the effects of the non-performing party's contractual obligations. Some credit card companies proffered the solicitation of an application of hardship relief regardless of whether the individual had previously purchased balance protection insurance or not. Federally issued student loans were automatically rescheduled under the Act and the Plan, but for preexisting in-school deferment. Student loan borrowers have the option to continue to pay during the Moratorium period and reduce the principal amounts of their student loans while the interest is suspended. Auto loan lenders granted Moratorium relief, similar to mortgage lenders, for qualifying events by adding rescheduled payments to the principal amount of the auto loan. These efforts have reduced if not eliminated the creditor's ability to submit an adverse reporting to the consumer credit bureau because rescheduling payments for a qualifying event sustains the payment history on a consumer debtor's account.

VI. CONCLUSION

35. In closing, the resolution to enforcement of non-performance due to forced majeure, hardship, or impediment is the distribution and administration of vaccinations. It does not appear that COVID-19 will be a forever event. Slowly but surely, COVID-19 will hopefully lose its propensity to variate, even through the administration of annual booster shots. To that point, COVID-19 as a qualifying event to avoid or delay performance will be short lived. To date, a third of the adult population in the United States has been fully vaccinated. As a result, the CDC has begun easing restrictions. Even with the invocation of defenses to contract enforcement, there is no definitive or prearranged outcome for any issue.